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ANTITRUST PROCEDURAL ACT OF 1979, S. 390

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 390

FEBRUARY 20 AND 26, 1979

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ANTITRUST PROCEDURAL IMPROVEMENTS ACT, S. 390

TUESDAY, FEBRUARY 20, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLY,
AND BUSINESS RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., in room 5110, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (subcommittee chairman) presiding.

Present: Senator METZENBAUM.

Staff present: David Boies, chief counsel and staff director of the Judiciary Committee; Barry Drenfeld, chief counsel and staff director of the Antitrust Subcommittee; Mike Cooper, counsel, and Marilyn Falksen, staff assistant.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The committee will come to order, starting only 25 hours late, but under the circumstances we are pleased to be starting at all.

Last year in testimony before the Judiciary Committee, Attorney General Griffin Bell pointed out that one of the main reasons for the growing concentration that we find in so many American industries today is the fact that our antitrust laws are exceedingly difficult to enforce.

"The weakness in the antitrust system," the Attorney General said, "is that it is so easy to beat the system. The court processes are so complicated, and so slow, that once a case starts, it never seems to end. All you do is just stay in court. You can go on for years in court without anything being done."

The record clearly attests to the truth of what the Attorney General said. On the average, a complaint brought under section 2 of the Sherman Act will take 5 years to settle.

And many cases take much longer. The IBM case, for example, was filed in 1969—10 years ago—and it still may be years before that case is finally resolved. GAF's private suit against Kodak is now well into its 6 year and is still at the pretrial stage.

These cases are costly—costly to the Government and costly to the defendant companies. But above all, these endless delays in enforcing the law are costly to the American people. When the antitrust laws are not enforced, the consumers of this country are deprived of the lower prices and higher quality that free competition brings. When the antitrust laws are not enforced, independent

businessmen are driven from the market. When the antitrust laws are not enforced, inflationary pricing becomes the rule, not the exception, in many parts of our economy. For that reason, President Carter has made more effective enforcement of the antitrust laws a central part of this administration's strategy for fighting inflation.

And when the antitrust laws are not enforced, concentrated economic, social, and political power threatens our democratic institutions and our free enterprise system.

Today, the Subcommittee on Antitrust and Monopoly begins hearings on S. 390, the Antitrust Procedural Improvements Act of 1979. This legislation, which I introduced and which is cosponsored by Senators Kennedy, Bayh, Leahy, Morgan, DeConcini, and Baucus, is designed to streamline antitrust litigation and thereby to make the law enforceable. It has the administration's strong endorsement. The statutory changes made by the Antitrust Procedural Improvements Act of 1979 will discourage counsel from engaging in dilatory litigation practices. In addition, it will eliminate certain duplicative pretrial and trial activity, with the result that antitrust cases will be shorter and far less costly. These procedural changes were recommended to the President and the Attorney General by the President's National Commission for the Review of Antitrust Laws and Procedures in its report submitted on January 22, 1979.

All too often, recommendations of national commissions go unheeded. But I assure you that the recommendations of this Commission will not be ignored. They have been incorporated into S. 390, and this subcommittee will give S. 390 its highest priority and attention.

I had the honor of serving on the Commission with three of our witnesses today: Assistant Attorney General Shenefield, who chaired the Commission with notable skill and diligence; Professor Fox, and Professor Sullivan. These witnesses, together with Judge Renfrew and Professor Gerhart, will describe the problems of delay and excess cost in complex antitrust cases and will explain how S. 390 deals with these problems.

Senate bill 390 also addresses the jurisdiction of the Department of Justice to challenge anticompetitive mergers under section 7 of the Clayton Act. The FTC now enjoys broader statutory authority than does the Antitrust Division to challenge mergers. Senate bill 390 eliminates this anomaly in existing law. Today's witnesses will also provide us with their views on these changes in section 7.

John Shenefield, the Assistant Attorney General in charge of the Antitrust Division, is the first witness.

I would also like to commend Assistant Attorney General Shenefield for his able leadership in chairing the President's Commission, which moved forward with dispatch and came up with some extremely meaningful recommendations in addition to the ones, incorporated in S. 390. This committee will certainly be giving its attention to these other recommendations. We are happy to have you with us, and pleased to have your views.

Mr. CHUMBRIS. Senator Thurmond is at the Armed Services Committee. They are having a hearing, and he will be here. He does have an opening statement, which he would like in the record.

Senator METZENBAUM. Without objection, so ordered. There will be no problem.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. This Subcommittee on Antitrust and Monopoly is moving into new areas on issues which stem from some of this subcommittee's previous hearings in the 95th Congress and from the hearings by the National Commission for the Review of Antitrust Laws and Procedures. As chairman, it is your responsibility to hold such hearings. But, before embarking on hit and run hearings, including those by the President's Antitrust Review Commission, I believe we should have extensive discussion and much careful deliberation so that we can obtain the best evidence, and not necessarily just theories. I feel very strongly that this must be done before we approve new legislation, such as the pending bill.

This great Nation of ours—considered for the past 60 years since World War I as the greatest Nation on Earth—has suddenly come to the realization that its economic strength is now being severely tested. Our economic problems, both domestic and international, are many and diverse. They are large and they are extremely complex. They are difficult to solve as separate major issues, and even more troublesome because they are so interrelated.

For example, our standard of living depends on our productivity—that is to say, on output per worker. Our productivity rise in 1978 over 1977 was only four-tenths of 1 percent, the smallest increase since the recession year of 1974. But this low productivity is not only a domestic concern for us, it is also critical with respect to our present and future economic relationships with other nations around the world. The rate of increase in productivity of the United States has been much lower than that of other developed nations over the 15-year period of 1962-77. During that time, Japan's rate was triple ours and France and Germany double ours.

This disappointing productivity performance has contributed to other problems of the U.S. economy, particularly to our one most overriding major problem—inflation. The 9 percent rate of inflation that we experienced in 1978 has caused tragic consequences for many of our American people and the inflation rate, even now, appears headed higher and higher. Our Nation's rate of growth is slowing to the extent that our real GNP this year will probably be only equal, or at best slightly higher, than in 1978. Our unemployment rate is expected to rise from about 6 percent to around 7 percent at the end of this year. Interest rates continue at unacceptably high levels. Our U.S. trade deficit and trade balance problems are greatly alarming. The value of the dollar continues to slide downward, adversely affecting consumer prices here in the United States and also affecting the dollar trading value in the international money market.

We in this Congress must give the most careful consideration to the legislative options and alternatives that are available to us. Then we must act positively and with determination to provide the leadership and to open the avenues toward solving these grave economic problems.

Many experts reveal that our Nation's problems have been created by too many new laws and rules and regulations that have

been passed since 1960 when a new thrust was emphasized by the Government in its attempt to solve social problems. These type problems are difficult to solve and still maintain the stability that we need in our economic system. The result now is that we find "our backs to the wall" in numerous areas, both social and economic. Many of these areas are directly involved with the subject area responsibility of this subcommittee, and also of these hearings that we begin today.

With reference to the severe inflationary problems of this country, we hear claims that the proposed legislation would reduce inflation. But we must make certain that we don't overlook the fact that, at the same time, there are still major segments of our economy—for example, the labor unions—that remain exempt from our antitrust laws. The long-term contracts and agreements of these large industrial unions might well exert significantly more inflationary pressure on our overall economy than can be offset by the legislation that we are considering here today.

Certainly we want to discuss and create beneficial legislation, and, if we are to do this properly, we need to be sure our priorities are in order. The task we face will not be easy, and it will not be popular to some groups and segments of our society. We must, however, meet head-on these forces and issues that are slowly, but surely, chipping away at the foundations upon which this great Nation was built.

Perhaps we need new experts to testify before this subcommittee who are experts in the areas I have mentioned; those areas where this Nation's longstanding and basic economic strengths have fallen to a significant degree. We have been listening to too many witnesses of one philosophy and limited areas of expertise. But we have not had enough of the several other philosophies or broader areas of expertise that could put the Senators on this subcommittee and the Judiciary Committee on notice of the dangers of some of the proposed subjects and bills that have come before this committee and its Antitrust Subcommittee in the past 15 to 20 years.

The bill before us and a further extension of recently enacted laws may seem minor, but before we amend our antitrust laws further, let us have the best evidence possible and make sure we take the necessary time to consider adequately such legislation in subcommittee and committee. Historically, once a bill gets to the Senate Chamber, it is too difficult to get the full attention of the 100 Members, who generally rely on the action taken in committee and subcommittee.

Hence, let us fulfill our responsibilities in this subcommittee by being sure that our actions reflect our consideration of the full breadth and depth of these issues that are so crucial in our economy and to the American people.

Senator METZENBAUM. Mr. Shenefield.

STATEMENT OF THE HON. JOHN H. SHENEFIELD, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. SHENEFIELD. I was delighted I was able to get in, because I would have hated to miss the opportunity to lead off the parade of distinguished witnesses that have assembled this morning to testify on this important legislation.

[The prepared statement of Mr. Shenefield follows:]

PREPARED STATEMENT OF JOHN H. SHENEFIELD

Mr. Chairman and members of this subcommittee, I am pleased to be here this morning to present the views of the Department of Justice on S. 390, the Antitrust Procedural Improvements Act of 1979. This legislation would implement several important recommendations recently made by the President's National Commission for the Review of Antitrust Laws and Procedures designed to expedite antitrust litigation and reduce its costs.

As we are all too painfully aware in this country, our court dockets are jammed with cases that await resolution. In particular, we have come to view antitrust cases as mammoth, unmanageable, never-ending battles requiring unlimited financial war chests. We have heard much talk about the need to reduce complex litigation to manageable and affordable levels. It is time to stop talking and start doing something constructive to achieve this goal. We simply can no longer afford to sit by while antitrust cases continue to simmer on the "back burners" of our justice system.

I am therefore pleased to express the administration's strong and enthusiastic support for this bill. I would like to underscore the observation made by Chairman Metzenbaum in introducing this legislation that we have a critical need for effective antitrust laws and expeditious enforcement of them. This bill will significantly improve the effectiveness of our antitrust laws and enhance the Antitrust Division's ability to enforce them in an efficient manner. As any prosecutor can attest, effective law enforcement deters future violations and helps to instill public confidence in our laws and our system of justice. S. 390 should also help conserve scarce judicial resources and provide timely compensation to parties injured by antitrust violations.

I also welcome this opportunity as Chairman of the National Commission for the Review of Antitrust Laws and Procedures to speak in support of those recommendations of the Commission that would be implemented by this bill. The Commission was fortunate to receive the service of three members of this subcommittee: Chairman Metzenbaum and Senators Kennedy and Hatch. Senators Javits and Morgan also served on the Commission and are well aware of the effort that went into its report.¹ I would, however, briefly like to describe for the benefit of all the nature and depth of the Commission's study of some of the procedural and management problems that protract complex antitrust cases.

In our study of problems associated with "big case" antitrust litigation, the Commission held 7 separate days of hearings and received testimony from more than 60 witnesses—including practicing lawyers, judges, and law professors. We heard from representatives of the Federal and State governments, from the section on antitrust law of the American Bar Association, and other interested groups. Several lawyers from the private bar submitted valuable research projects on a volunteer basis. A questionnaire on causes of delay in complex antitrust cases was sent to experienced Government and private litigators, and written submissions were invited from organizations working on the same or related issues as well as from the general public. The Commission received and reviewed more than 100 lengthy submissions by antitrust practitioners, scholars, and experts.

The Commission also enlisted the assistance of Professor Peter Gerhart of the Ohio State University School of Law to conduct an empirical study of complex antitrust cases. This study analyzed 32 protracted cases and collected the experience of approximately 40 lawyers and judges who had recently been involved in these cases. We also established an Advisory Panel on Ethical Issues in Complex Litigation to study the ethical considerations that might be applicable to help reduce unwarranted delay. Throughout the life of the Commission, the staff contributed extensive research and briefing, memoranda to focus our attention on specific issues, to discuss applicable law and to provide a series of alternative recommendations for our consideration.

The Commission met on several occasions to discuss the problems we had studied and to reach a consensus on the contents of our final report. Our findings and recommendations regarding ways to expedite complex litigation are contained in the first six chapters of our report, which have already been printed in the Record.²

I believe our study reflects a thorough and reasoned analysis of the problems encountered in complex litigation and that our report provides practical and respon-

¹ "Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures" (Jan. 22, 1979) (hereafter cited as "Antitrust Commission Report").

² 125 Cong. Rec. S. 1343-68 (Feb. 8, 1979).

sible ways in which they can be addressed. Four specific recommendations contained in that report are embodied in this bill. They are: (1) That the Government have access to discovery materials produced during private antitrust litigation; (2) that meaningful sanctions be imposed upon attorneys who unreasonably delay litigation; (3) that prejudgment interest upon the untrebled portion of a damage award be available to a successful plaintiff; and (4) that collateral estoppel be available in antitrust cases to avoid duplicative litigation in appropriate circumstances.

In addition, the bill contains a proposal that would expedite and increase the effectiveness of the Antitrust Division's civil investigative demand investigations by clarifying our ability to contract for independent support services. Finally, the bill would expand the jurisdiction of section 7 of the Clayton Act to reach mergers or acquisitions involving unincorporated associations and those involving firms whose activities affect commerce. These important proposals would eliminate arbitrary jurisdictional limitations on our ability to prevent some potentially anticompetitive mergers.

AMENDMENTS TO THE ANTITRUST CIVIL PROCESS ACT

In its review of the causes contributing to delay of antitrust litigation, the Commission became aware of situations where the government expended considerable time and resources duplicating efforts already completed by private parties during discovery in similar litigation. In some instances, private attorneys offered to turn over discovery materials to us, but were precluded from doing so by protective orders that had been issued to prevent disclosure of information to persons not parties to the action.

The availability of such materials would obviously expedite our investigations and reduce their costs. As recognized by the Commission: "Potential defendants have no legitimate interest in wasting the government's time and taxpayers' money in the interest of gamesmanship."³ While we believe present law authorizes us to obtain such materials, all of the issues have not finally been resolved and should be clarified through legislation.

In one recent instance, we sought to obtain discovery materials obtained by one party in litigation against another party whom we were investigating by issuing a civil investigative demand (CID) for them. While recognizing that time and expense would be saved if we were given access to such materials, the court ruled that we could not have them, in large part because it believed that the absence of specific procedures in the Antitrust Civil Process Act⁴ for protecting their confidentiality indicated that Congress did not intend such materials to be obtainable through use of CIDs.⁵ The Second Circuit Court of Appeals has recently reversed this decision and upheld our position that discovery materials can be obtained through use of the CID process. However, the court of appeals remanded the case to the district court for consideration of objections to production of specific documents and of any need to safeguard the confidentiality of whatever materials are ultimately produced.

While this appellate decision is encouraging, I believe that the amendments that would be made by the legislation we are considering today would be most useful. This bill will confirm the holding of the second circuit, and fill gaps left by the second circuit's opinion by providing specific procedures for seeing to the interests of all parties in the confidentiality of discovery materials and by preserving any rights and privileges with respect to such materials.

Permit me to summarize the amendments this bill would make to the Antitrust Civil Process Act. That statute authorizes the Department of Justice to obtain information by issuing a CID for, among other things, documentary materials we believe relevant to determine whether an antitrust violation has occurred or may be about to occur. Section 2 of the bill would amend the term "documentary materials" as defined in the act⁶ to clarify that such materials may include the products of discovery obtained by a party in a judicial or administrative proceeding. This provision would clearly enable us to obtain the actual documents produced during discovery, as well as any analyses, summaries, and indices to such documents.

The savings that can result when the Government is afforded access to significant documents identified by litigants as well as summaries and analyses of them can be very great. We could issue a CID for raw documents from the target of one of our investigations, and might obtain hundreds of thousands of documents. In the GAF litigation, however, we have been primarily interested in obtaining but a relatively small number of the approximately 400,000 documents produced by Kodak.

³ "Antitrust Commission Report" at 50.

⁴ 15 U.S.C. § 1311 et seq.

⁵ *United States v. GAF Corp.* 449 F. Supp. 351 (S.D. N.Y. 1978), rev'd—F. 2d—, (2d Cir. Feb. 9, 1979.)

⁶ 15 U.S.C. § 1311(g).

The practical value of this proposal is apparent. It would clarify the Government's right to have access to those crucial documents culled out by private counsel from the mass of discovery materials they may have obtained—the literary “wheat” taken from the voluminous chaff of all the documents that have been provided. Our independent and objective analysis of the merits of an investigation would not be compromised by access to such materials.

Section 3 of the bill would establish specific procedures by which the Department of Justice would be required to notify persons who had produced discovery of the fact that it was attempting to obtain such materials. That section would also establish a mechanism for challenging such requests before any materials could be submitted to the Department. These provisions would be triggered when a demand was made expressly for products of discovery.

In light of the protection otherwise afforded to parties who originally produced discovery materials, section 3 of the bill also provided that CID's for products of discovery would supersede protective orders issued in the course of private litigation. This provision would provide clear authority for us to obtain products of discovery that may be subject to such orders. Products of discovery received by the Division pursuant to a CID would, of course, be treated confidentially. They could be used by the Department only as provided in the act unless disclosure was expressly approved by the persons who originally produced such documents and those from whom they were obtained. The bill also expressly states that producing such materials would not waive any right or privilege.

These amendments are essentially designed to overcome objections to government access to discovery materials subject to a protective order. These orders are sometimes entered by courts with the mutual consent of private litigants and are often intended to prevent disclosure of sensitive business information to competitors. However, such orders should not serve as barriers to Government investigatory efforts. The Commission concluded that Government investigations would be significantly expedited and facilitated by amending the Antitrust Civil Process Act to clarify the ability of the Government to attain access to information developed in related antitrust litigation.⁷ Such amendments make sense from the standpoints of effective antitrust enforcement and conservation of the limited resources of the Antitrust Division, both of which inure to the benefit of the economy and the taxpayers.

S. 390 contains another important amendment to the Antitrust Civil Process Act. Section 3(e) of the bill would eliminate an uncertainty in the act by clearly authorizing the Department to utilize modern document analysis techniques and to consult with experts as may be necessary for the effective progress of a civil antitrust investigation. Specifically, this amendment would add the term “agent” to sections 4(c)(2) and 4(c)(3) of the act⁸ to clarify the Department's authority to contract for automated document analysis and expert consultant services. Enactment of this proposal would further the policy objectives of the act by providing the Division with up-to-date support services necessary for the effective and expeditious enforcement of the antitrust laws.

This amendment does not require extended discussion. With increasing frequency, litigants in complex antitrust cases retain outside firms to perform a variety of functions, including automated data processing analysis. They also frequently consult with experts in order to interpret complicated data and to assess the strengths and weaknesses of their position.

This amendment would merely clarify that the Antitrust Division may make similar use of such resources in conducting its investigations. We have concluded that it is often preferable to utilize contractors to perform such services in our major antitrust investigations rather than to utilize Department employees for these purposes. The costs associated with contracting for such services should generally be less than the costs of hiring, training and maintaining a staff to provide them. Contracting for such services would be more flexible than utilizing Government employees, and would enable us to adjust changing work schedules quickly, accurately and efficiently to meet our needs with a minimum of delay and loss of resources. Moreover, it may not always be practical, or even feasible, to hire personnel necessary to perform such tasks, especially experts having particular knowledge or experience in specialized fields.

I want to emphasize that this proposal would not vitiate existing protection for the confidential treatment of sensitive business information. Persons or firms retained by the Department to assist its investigations would be subject to the prohibitions against unauthorized disclosure of such information presently contained in the

⁷ “Antitrust Commission Report” at 50.

⁸ 15 U.S.C. § 1313 (c)(2) and (c)(3).

act. Further, the Department will impose appropriate conditions in its service contracts and take necessary steps to ensure that the security of CID materials is maintained.

SANCTIONS FOR ATTORNEY DELAY

I would like to turn now to another problem that contributes to the seemingly endless nature of antitrust litigation—attorney delay. The National Commission concluded that dilatory and abusive conduct by attorneys occurs far too frequently in complex antitrust cases.⁹ Such unjustified behavior delays the adjudication of legitimate claims and defenses, unnecessarily increases costs to the litigants, and squanders limited judicial resources. Sometimes it may coerce parties to settle litigation simply to escape needless expenses and frustration. This potential for abuse makes it difficult for the less wealthy to protect their interests through the courts and thereby creates public cynicism towards the judicial system.

The Commission emphasized the value of sanctions to deter and punish such conduct. Sanctions are an important judicial management technique that can greatly expedite litigation. One statutory sanction authorizes the court to impose costs personally on an attorney whose tactics unnecessarily protract the proceedings so as to increase their costs "unreasonably and vexatiously".¹⁰ Unfortunately, this statute has been underutilized and has received varying restrictive interpretations in the courts. For example, one circuit court limited its applicability to situations involving unusually egregious conduct.¹¹ Other courts have narrowly construed the word "costs" to mean only "taxable costs" rather than the actual expenses resulting from improper, dilatory conduct.¹²

Section 4 of the bill adopts a recommendation by the Commission that would strengthen existing law in two ways. First, it would substitute for the uncertain and restrictive intent requirement of "vexatiousness" an easily understood standard authorizing imposition of sanctions whenever unreasonable conduct has been undertaken "primarily for the purpose of delaying or increasing the cost of the litigation."

Second, the amendment would authorize the court to impose a more effective and appropriate sanction than does existing law by expressly allowing imposition of all excess expenses and attorney's fees reasonably incurred because of the delaying conduct.

I believe this amendment would provide a meaningful disincentive to unreasonable delay in complex litigation. At the same time, the amendment would not alter the existing, proper scheme in which the decision to impose a sanction in any particular situation would remain subject to the sound discretion of the court.

PREJUDGMENT INTEREST

Another way in which to encourage defendants to reach the merits of litigation expeditiously is to make delay more costly. I am certain it will not surprise this subcommittee to hear that there are few significant incentives to expedite antitrust litigation and that, in fact, there exist strong economic incentives to delay. In studying possible ways to expedite litigation, the Commission focused on the use of prejudgment interest as a means for reducing or eliminating the potential financial benefit that a litigant might receive by trying to postpone final resolution of the action.

Existing statutes and case law do not provide clear authority for an award of prejudgment interest in antitrust litigation. Accordingly, section 5 of the bill would amend sections 4, 4A and 4C of the Clayton Act to establish clear authority for such an award. Prejudgment interest would be based only on the successful plaintiff's actual damages, not upon the trebled amount. However, to be an effective disincentive to delay, interest would be awarded at the commercial rate at the time the judgment is entered.¹³ Additionally, the award must operate nearly automatically if it is to have any practical effect so that the prevailing party is not required to prove to the court that the opponent's conduct warranted such an award; rather, the burden should be on that party to demonstrate it would be inappropriate. Under the proposed amendments, courts would be permitted to adjust, by raising, lowering, or disallowing, prejudgment interest where an award might be unjust as, for example, where the plaintiff engaged in dilatory conduct.

In my view, the potential threat of a prejudgment interest award will greatly assist in making antitrust litigants get to the merits of their cases as quickly as

⁹ "Antitrust Commission Report" at 82.

¹⁰ 28 U.S.C. § 1927.

¹¹ *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F. 2d 1163, 1167 (7th Cir. 1968), cert. denied, 395 U.S. 908 (1969).

¹² See, e.g., *United States v. Ross*, 535 F. 2d 346, 350 (6th Cir. 1976).

¹³ See "Antitrust Commission Report" at 96 n.28.

possible. By the same token this proposal, and the proposed amendment to curtail unreasonable attorney delay, could also materially assist in deterring antitrust law violations as law violators come to realize that their actions will more quickly be judged by the courts.

COLLATERAL ESTOPPEL

I would like to turn now to yet another aspect of the problem of "big case" litigation. Nearly everyone recognizes the need to streamline and expedite antitrust litigation. It is equally important to recognize that once antitrust issues have been resolved on their merits, they should not needlessly be relitigated in subsequent related actions. Section 6 of this bill would address this problem by amending the Clayton Act to clarify that courts are authorized to give collateral estoppel effect to litigated antitrust issues. This proposal, if enacted, would significantly assist in reducing unnecessary repetitive litigation.

Section 5(a) of the Clayton Act¹⁴ provides that final judgments or decrees entered in most civil or criminal antitrust proceedings brought by the United States that establish a violation of the antitrust laws may be used as prima facie evidence of an antitrust violation against that defendant in a subsequent antitrust action brought by a private plaintiff. Prima facie effect does not attach to consent decrees or decrees entered in actions brought by the United States to recover its own monetary damages. When prima facie effect is given, the plaintiff in the second action is not required to reestablish the same facts proven in the prior proceeding in order to meet its burden of proof. However, the defendant is still entitled to assert all of its defenses notwithstanding their rejection in the prior action. This feature of the prima facie rule often forces relitigation of some or all the disputed issues that had been previously resolved, and accordingly, largely undercuts its value.

In many situations, antitrust litigation could be significantly expedited if prior judgments were given greater weight and afforded collateral estoppel, rather than prima facie, effect. Collateral estoppel is a common law doctrine that precludes a party to a prior action from relitigating in a second action those issues fairly litigated, decided and necessary to the result in the first action. Collateral estoppel has several decided advantages over prima facie effect. First, it achieves finality and certainty in litigation; issues once fully and fairly decided cannot be relitigated continually in subsequent actions. Second, by eliminating needless relitigation, it promotes economical utilization of resources of litigants and the courts. Third, it avoids the possibility that similar issues will be resolved inconsistently by different courts.

I should stress that collateral estoppel is an equitable doctrine. Under long-established judicial rules, it is applied only after the judge presiding over the second action has determined, in light of all relevant circumstances, that the party who would be estopped from further litigation has had an opportunity fully and fairly to litigate the issue in the prior proceeding, and that it would not be unfair to preclude further litigation on the point.

Collateral estoppel is becoming increasingly utilized by the courts. Once governed by set rules, its application now follows a case-by-case approach in which judges determine whether or not it is fair to give estoppel effect to a particular action. Judges have real flexibility in deciding when collateral estoppel would be fair, and there is real opportunity to reduce needless relitigation of issues that have been resolved fully and fairly in prior litigation.

Although collateral estoppel is increasingly available in litigation generally, there is considerable concern that it may ultimately be held to be unavailable in antitrust cases because of the prima facie standards in section 5(a) of the Clayton Act. Very recently, the Seventh Circuit Court of Appeals reversed a Federal district court which had applied the doctrine in an antitrust case and held that a prior Government decree could not be given preclusive effect in a subsequent private action.¹⁵ In reaching this result, the appeals court reasoned that the adoption of a prima facie standard in Clayton Act 5(a) precluded application of greater collateral estoppel effect. In its opinion, the court stated: "If the *prima facie* evidence standard of section 5(a) is to be changed, it is for Congress to do so."

I strongly urge this Congress to accept that invitation and to amend section 5(a) so as to authorize unambiguously collateral estoppel effect in antitrust cases. Section 6(3) of this bill would accomplish that important objective by expressly stating that prima facie effect is not intended as a limitation on the application of collateral estoppel. Such an amendment would permit, but not require, a court to apply the

¹⁴ 15 U.S.C. § 16(a).

¹⁵ *State of Illinois v. General Paving Co.*, — F. 2d — (7th Cir., Jan. 11, 1979).

doctrine in appropriate instances. Where it was not applied to Government decrees, the lesser *prima facie* effect would be retained.

In addition, the bill would make related amendments to section 5(a) to clarify the availability of collateral estoppel in damage actions brought by the United States and to give such actions preclusive effect comparable to other government actions.

No logical justifications exist today for denying collateral estoppel effect to antitrust judgments in subsequent actions where the issues have been fully and fairly litigated. The National Commission for the Review of Laws and Procedures recognized that collateral estoppel is widely available in other types of actions, and that its application in antitrust cases would provide substantial potential benefits that outweigh any possible objections. That Commission expressly recommended its use in such cases.¹⁶ This result would materially assist in expediting antitrust litigation and in reducing its cost by eliminating any need for wasteful relitigation.

MERGERS AND ACQUISITIONS

S. 390 would also make two appropriate amendments to section 7 of the Clayton Act.¹⁷ Section 7 is one of the most important of the antitrust laws; it reflects intense congressional concern about mergers and acquisitions in American industry that affect competition and economic concentration. The direct relationship between increasing concentration in an industry and the likelihood that activities in restraint of trade may develop emphasizes the importance of using section 7 to challenge mergers before such restraints can develop. Section 7 ranks with the Sherman Act as a major defense of our competitive, free enterprise economic system.

Unfortunately, section 7 contains two jurisdictional limitations that unreasonably restrict the Antitrust Division's ability to challenge mergers that are clearly in conflict with its purposes. These shortcomings would be remedied by S. 390.

Under present law, a merger, acquisition, joint venture or other transaction can be challenged under section 7 only if it involves corporations. Transactions involving partnerships, associations or other unincorporated entities escape scrutiny, regardless of their size or potential anticompetitive effect, simply by reason of the limited reach of section 7.

Substantial anticompetitive economic concentration could occur through acquisitions of and by unincorporated entities. In the accounting profession, for example—a profession traditionally practiced by partnerships—1977 revenues of the “Big Eight” accounting firms reportedly ranged from \$350 million to \$516 million. In 1975, these partnerships reportedly audited 5,769 publicly held firms having total sales in excess of \$1.5 trillion. It is apparent that a merger between major firms in this profession could significantly affect the national economy and such a transaction should clearly be subject to section 7. The legality of such a transaction should not be determined under section 7 by the legal form chosen by the firms involved, but rather by the substantive effect on competition likely to result from such a transaction.

Section 7 of this bill would make the provisions of section 7 of the Clayton Act clearly applicable to all business entities. In light of the fact that the Sherman Act applies fully to unincorporated associations and other business organizations, it makes little sense to retain the jurisdictional anomaly contained in section 7.

S. 390 also addresses another arbitrary jurisdictional limitation on the use of section 7. Under current law, only potentially anticompetitive mergers or acquisitions by or of corporations engaged directly in commerce are subject to challenge. In 1975, the Supreme Court in *United States v. American Building Maintenance Industries*¹⁸ held that section 7's use of the phrase “engaged in commerce” means that its remedial provisions may not be extended to acquisitions of companies whose activities, while clearly affecting interstate commerce, are basically intrastate in nature. Under such an interpretation, major firms may be able to obtain virtual nationwide monopolies by acquiring one local firm after another, notwithstanding that each separate transaction might itself violate the substantive standards of section 7, but be beyond its jurisdictional reach.

Section 7 of this bill would reverse that unduly restrictive interpretation and permit a challenge to transactions involving firms whose activities affect commerce if their result would violate the substantive standards of section 7. This amendment would make the jurisdictional reach of section 7 with respect to the “commerce” requirement coextensive with that of the Sherman Act and section 5 of the Federal Trade Commission Act. This result is necessary if the essential goal of section 7—to

¹⁶ “Antitrust Commission Report” at 104.

¹⁷ 15 U.S.C. § 18.

¹⁸ 422 U.S. 271 (1975).

provide a means for preventing incipient anticompetitive situations before they develop into actual restraints of trade and monopolies—is to be fully realized. In short, this statute's central objective may seriously be undercut if it is not applicable to acquisitions of firms having a localized business, however large or dominant those firms may be in their local markets.

I should also point out that the "in commerce" limitation placed upon on section 7 creates an illogical internal inconsistency in the statute. Although its fundamental purpose is to prevent acquisitions having certain predictable effects on competition, it may not, as presently construed, be used to prevent some transactions involving firms whose activities do, in fact, affect commerce. Clearly, legislation is necessary to eliminate such an unacceptable situation and to harmonize the jurisdictional scope of section 7 with its overall objective of prohibiting anticompetitive mergers and acquisitions whenever they threaten to occur.

In conclusion, I wish to express my appreciation to the subcommittee for carrying forward the work of the Commission. I have been greatly concerned by the warnings of many that the reports of Presidential commissions have a way of gathering dust on the shelves of remote storage rooms. This concern has been intensified by my belief that we can and must take steps to expedite and economize antitrust enforcement. The current pressures of inflation are still another reason for prompt action.

This bill constitutes an important first step in the right direction. Free competition is our fundamental national economic policy. Competitive markets offer the greatest incentive for innovation, efficiency, productivity and reduced prices. Antitrust enforcement serves to preserve and promote those goals. But antitrust enforcement must be expeditious and efficient if it is to be effective. We can make substantial progress in expediting antitrust litigation and reducing its costs through the kinds of changes offered by this bill.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or other members of the subcommittee may have.

Mr. SHENEFIELD [continuing]. Before I address myself directly to the legislation, I understand this is the first meeting of this subcommittee to deal with an antitrust matter. I would like, if I may, to offer the help and assistance of the Division of the Department of Justice to this committee, to continue the constructive partnership that I think we have worked out and have managed to engage in, at least while I was in the Department.

This subcommittee has a proud history. I predict that the subcommittee will look forward to a new eminence under your leadership. I was proud to serve with you as a member of the National Commission, and to have worked with you before when you were a member of the subcommittee. I believe that you and the other members adhere to the same first principle, that competition is the governor of our economic life in this country, as motivates the Division. I look forward to working with you and your staff toward that end.

Senator METZENBAUM. We look forward to a long and fruitful relationship.

Mr. SHENEFIELD. Yes, I too. I look forward particularly to presenting my views on S. 390, the Antitrust Procedural Improvements Act of 1979, which, as you pointed out, would implement several recommendations of the National Commission for the Review of Antitrust Laws and Procedures. As we are all too painfully aware in this country, our court dockets are jammed with cases that await resolution. In particular, we have come to view antitrust cases as mammoth, unmanageable, never-ending battles requiring unlimited financial war chests. We have heard much talk about the need to reduce complex litigation to manageable and affordable levels.

I am therefore pleased to express the administration's strong and enthusiastic support for this bill. I would like to underscore the

observation made by you, Chairman Metzenbaum, in introducing this legislation, that we have a critical need for effective antitrust laws and expeditious enforcement of them. This bill will significantly improve the effectiveness of our antitrust laws and will enhance the Antitrust Division's ability to enforce them in an effective and efficient manner.

I would like to take a brief moment to comment on a number of the Commission's recommendations. The Commission of which you spoke had the honor of having on it Professor Fox and Professor Sullivan who will later this morning speak in support of those recommendations that will be implemented by this bill. The Commission was fortunate to receive the services of three members of this subcommittee: Chairman Metzenbaum and Senators Kennedy and Hatch. Senators Javits and Morgan also served on the Commission and are well aware of the effort that went into its report. I would, however, like to describe briefly for the benefit of all the nature and depth of the Commission's study of the procedural and management problems that protract complex antitrust cases.

In our study of problems associated with "big case" antitrust litigation, the Commission held 7 separate days of hearings and received testimony from more than 60 witnesses, including practicing lawyers, judges, and law professors. We heard from representatives of the Federal and State governments, the section on antitrust law of the American Bar Association, and other interested groups. Several lawyers from the private bar submitted valuable research projects on a volunteer basis. A questionnaire on causes of delay in complex antitrust cases was sent to experienced Government and private litigators, and written submissions were invited from organizations working on the same or related issues, as well as from the general public. The Commission received and reviewed more than 100 lengthy submissions by antitrust practitioners, scholars, and experts.

The Commission also enlisted the assistance of Prof. Peter Gerhart of the Ohio State University School of Law to conduct an empirical study of complex antitrust cases. This study analyzed 32 protracted cases and collected the experience of approximately 40 lawyers and judges who had recently been involved in these cases. There are a variety of other matters considered by the Commission. Our findings are contained in the first six chapters, which you asked be printed in the Congressional Record on February 8.

Four specific recommendations contained in that report are embodied in this bill. They are: (1) that the Government have access to discovery materials produced during private antitrust litigation; (2) that meaningful sanctions be imposed upon attorneys who unreasonably delay litigation; (3) that prejudgment interest upon the untrebled portion of a damage award be available to a successful plaintiff; and (4) that collateral estoppel be available in antitrust cases to avoid duplicative litigation in appropriate circumstances.

There are also the amendments relating to section 7 of the Clayton Act. If I may, and if it would be helpful, I would like to briefly address each of those points.

Mr. CHUMBRIS. Before you do that, could you put in the record the entire report with minority views on each of the issues the

Commission decided upon, so it would benefit the public and the Senators?

Mr. SHENEFIELD. I would be happy to do that.

First, with respect to the amendment to the Antitrust Civil Process Act, in its review of the causes contributing to delay of anti-trust litigation, the Commission became aware of situations where the Government expended considerable time and resources duplicating efforts already completed by private parties during discovery in similar litigation. In some instances, private attorneys offered to turn over discovery materials to us, but were precluded from doing so by protective orders that had been issued to prevent disclosure of information to persons not parties to the action. The availability of such materials would obviously expedite our investigations and reduce their costs.

I have in mind particularly one occasion in which we wished to have access to 52 documents and 1 memorandum. Had we not obtained the reversal of the district court opinion by the Second Circuit Court of Appeals, we would have been offered half a million documents and required to plow through them in order to have access to 52 documents. We had been offered those 52 documents by one of the parties. Fortunately, the situation is now that we will be——

Senator METZENBAUM. You said 52 as against half a million?

Mr. SHENEFIELD. Yes. The importance of that case is not so much to demonstrate that this statute is not needed, but to affirm that it is seriously needed because we cannot hope in each case to pursue litigation that complex through the district court level and the appellate court level in order to have access to such materials.

Senator METZENBAUM. Let me ask you, if you can use the procedures provided for under this act in this manner, rather than to require the company to produce the half a million documents, in that case, would that not also reduce very substantially the cost to the defendants in those particular cases? Would that not be a major economy for American business?

Mr. SHENEFIELD. There is no question but that it would be much more efficient for everybody concerned to have access to the narrow number of documents that were actually requested. The expense in which companies have to engage, in order to process huge numbers of documents, is considerable and goes a long way to make up part of the enormous litigation burden with which companies involved in antitrust cases are confronted. This statute would very clearly help in relieving the defendants and the plaintiffs in any private action of that burden, would be efficient, and would save time and expenses. That does not mean they will be in favor of this legislation, Senator, as I am sure you understand.

Senator METZENBAUM. I want to interrupt the hearing for just a moment.

[Discussion off the record.]

Mr. SHENEFIELD. I just briefly mentioned the Second Circuit Court of Appeals decision in the *GAF* case. This bill will affirm that court's holding, and will fill gaps left by previous law. While this appellate decision is encouraging, I believe that the amendments that would be made by the legislation we are considering today would be most useful.

Senate bill 390 contains another important amendment to the Antitrust Civil Process Act. Section 3(e) of the bill would eliminate an uncertainty in the act by clearly authorizing the Department to utilize modern document analysis techniques and to consult with experts as may be necessary for the effective progress of a civil antitrust investigation. This amendment does not require extended discussion. With increasing frequency, litigants in complex antitrust cases retain outside firms to perform a variety of functions, including automated data processing analysis. They also frequently consult with experts in order to interpret complicated data and to assess the strengths and weaknesses of their position. This amendment would merely clarify that the Antitrust Division may make similar use of such resources in conducting its investigations. We have concluded that it is often preferable to utilize contractors to perform such services in our major antitrust investigations rather than to utilize Department employees for these purposes.

I would like to turn now to another problem that contributes to this seemingly endless nature of antitrust litigation—attorney delay. The National Commission concluded that dilatory and abusive conduct by attorneys occurs far too frequently in complex antitrust cases. Such unjustified behavior delays the adjudication of legitimate claims and defenses, increases costs to the litigants and squanders limited judicial resources. The Commission emphasized the value of sanctions to deter and punish such conduct. Sanctions are an important judicial management technique that can greatly expedite litigation. One statutory sanction authorizes the court to impose costs personally on an attorney whose tactics unnecessarily protract the proceedings so as to increase their costs “unreasonably and vexatiously.” Unfortunately, this statute has been underutilized and has received varying restrictive interpretations in the courts.

Section 4 of the bill adopts a recommendation by the Commission that would strengthen existing law in two ways. First, it would substitute for the uncertain and restrictive intent requirement of “vexatiousness” an easily understood standard authorizing imposition of sanctions whenever unreasonable conduct has been undertaken “primarily for the purpose of delaying or increasing the cost of the litigation.” Second, the amendment would authorize the court to impose a more effective and appropriate sanction than does existing law by expressly allowing imposition of all excess expenses and attorney’s fees reasonably incurred because of the delaying conduct.

I believe this amendment would provide a meaningful disincentive to unreasonable delay in complex litigation. At the same time, the amendment would not alter the existing, proper scheme in which the decision to impose a sanction in any particular situation would remain subject to the sound discretion of the court.

Senator METZENBAUM. May I inquire? Let’s assume that the litigant says to the lawyer: “Stall this case; I just want to drag it out as long as you possibly can.” The lawyer uses dilatory tactics. The court then imposes a \$250,000 fine—not fine, penalty, under these provisions. A, would it be proper for the company, under those circumstances, to reimburse the lawyer, and, B, if it were proper, would it be a taxable deduction?

Mr. SHENEFIELD. I can well imagine a company thinking along those lines, and a lawyer discussing matters with a client along those lines. First, if a lawyer received an instruction like that from a client, my strong advice to the lawyer would be to resign the representation, because it would not be consistent with his oath to the court and his position as an officer of the court.

Second, assuming that he is a regular participant before the court, he would very quickly, it seems to me, destroy his credibility with a judge if he were engaging in tactics solely for the purpose of delaying a piece of litigation.

Third, I think a judge can properly require that the penalty be paid by the lawyer and not be reimbursed by the client, although I would refer that question to the Honorable Charles Renfrew, who will be testifying later. My guess is, it can be.

As to whether it is a taxable deduction, I have to plead ignorance. But I will consult my brethren in the Tax Division.

Senator METZENBAUM. I was thinking of a taxable deduction for the lawyer, as well as for the company in the event the penalty is reimbursed. I don't mean to hold you to any answer at this time.

Mr. SHENEFIELD. I will try to find out.

Another way in which to encourage defendants to reach the merits of litigation expeditiously is to make delays more costly. If you will, consider conduct that was highly profitable to a particular defendant, perhaps along the lines you just described: the client suggests that while delay is not the sole purpose, it would be helpful if the resolution of the litigation were delayed substantially. The benefits of that to the litigant are that the profitable conduct would continue, and, particularly in a section 2 case where the remedy may well be divestiture, an important structural change in the business of the litigant is held at bay.

Existing statutes and case law do not provide clear authority for an award of prejudgment interest in antitrust litigation. Accordingly, section 5 of the bill would amend sections 4, 4A, and 4C of the Clayton Act to establish clear authority for such an award. Prejudgment interest would be based solely on the successful plaintiff's actual damages, not upon the trebled amount.

However, to be an effective disincentive to delay, interest would be awarded at the commercial rate at the time the judgment is entered. Additionally, the award must operate nearly automatically if it is to have any practical effect, so that the prevailing party is not required to prove to the court that the opponent's conduct warranted such an award. Rather, the burden should be on that party to demonstrate it would be inappropriate. Under the proposed amendments, courts would be permitted to adjust, by raising, lowering, or disallowing prejudgment interest where an award might be unjust, as, for example, where the plaintiff engaged in dilatory conduct.

Senator METZENBAUM. Was there any discussion relative to the time element; that is, the time at which the rate of interest should be determined? For example, when the IBM case started, interest was probably 3 or 4 percent; today it is 10 or 11 percent. It seems to me that it might be a fairer method to use the prime rate that was in effect at the major bank in the community in which the company is headquartered, over the period that the lawsuit was

proceeding. It might be 6 percent at one point, maybe 9 at other times.

Was there any discussion as to making it as of the particular date when the judgment was entered?

Mr. SHENEFIELD. Yes, sir, there was. My recollection is that the Commission came out in the same way as the bill did, which was in favor of the prevailing commercial rate at the time that judgment is entered. That is a fixed time, and precisely at a definable rate, presumably in the community. That is what the bill orders, and that seemed to be probably the preferable way to proceed. You could have some sort of an average or some sort of survey and derived rate of interest. But it seems to me, if you can precisely fix the point in time at which the interest will be calculated, that is the better way to do it.

I would like to turn now to yet another aspect of the problem of "big case" litigation. Collateral estoppel is an equitable doctrine recognized by lawyers, highly technical, puzzling in its development by the court, and not altogether satisfying in its logical and historical development.

Section 6 of this bill would address this problem by amending the Clayton Act to clarify that courts are authorized to give collateral estoppel effect to litigated antitrust issues. This proposal, if enacted, would significantly assist in reducing unnecessary repetitive litigation by assuring that issues that have been fairly tried once are not repeatedly litigated and relitigated over and over.

Although collateral estoppel is increasingly available in litigation generally, there is considerable concern that it may ultimately be held to be unavailable in antitrust cases, because of the prima facie standard in section 5(a) of the Clayton Act. Very recently, the Seventh Circuit Court of Appeals reversed a Federal district court that had applied the doctrine in an antitrust case and held that a prior Government decree could not be given preclusive effect in a subsequent private action. In reaching this result, the appeals court reasoned that the adoption of a prima facie standard in Clayton Act 5(a) precluded application of greater collateral estoppel effect. In its opinion, the court stated, "If the prima facie evidence standard of section 5(a) is to be changed, it is for Congress to do so."

I strongly urge this Congress to accept that invitation and to amend section 5(a) so as to authorize unambiguously collateral estoppel effect in antitrust cases. Section 6(3) of this bill would accomplish that important objective by expressly stating that prima facie effect is not intended as a limitation on the application of collateral estoppel. Such an amendment would permit, but not require, a court to apply the doctrine in appropriate instances. Where it was not applied to Government decrees, the lesser prima facie effect would be retained.

I would like to turn to two proposed amendments to section 7 of the Clayton Act that I hope will receive the favorable treatment of this subcommittee and of the entire Congress. They would redress distinct disadvantages in enforcement of section 7 by the Antitrust Division.

Section 7, of course, Mr. Chairman and Senator Thurmond, is one of the most important of the antitrust laws because it deals

with the whole question of mergers. Mergers are increasingly viewed with antitrust concern. Mergers, particularly in the year 1979, in my view, will gain even greater attention because they are becoming larger and larger, and they will affect competition and economic concentration in ways we can only dimly foresee at this point. Unfortunately, section 7 contains two jurisdictional limitations that unreasonably restrict the Antitrust Division's ability to challenge mergers that are clearly in conflict with its purposes. These shortcomings should be remedied by S. 390.

Under present law, a merger, acquisition, joint venture, or other transaction can be challenged under section 7 only if it involves a corporation. Transactions involving partnerships, associations, or other unincorporated entities escape scrutiny, regardless of their size or potential anticompetitive effect, simply by reason of the limited reach of section 7. That can be a very important defect, particularly as the economy increasingly turns from manufacturing to the service industries, and we all know that the service sector of the economy is characterized by partnerships and other unincorporated entities. If there are mergers in that sector among partnerships, section 7, as of now, simply would not reach them.

Senate bill 390 also addresses another arbitrary jurisdictional limitation on the use of section 7. Under current law, only potentially anticompetitive mergers or acquisitions by or of corporations engaged directly in commerce are subject to challenge. In 1975, the Supreme Court, in the *American Building Maintenance Industries* case, held that section 7's use of the phrase "engaged in commerce" means that its remedial provisions may not be extended to acquisitions of companies whose activities, while clearly affecting interstate commerce, are basically intrastate in nature. Under such an interpretation, major firms may be able to obtain virtual nationwide monopolies by acquiring one local firm after another, notwithstanding that each separate transaction might itself violate the substantive standards of section 7, but be beyond its jurisdictional reach.

Section 7 of this bill would reverse that unduly restrictive interpretation and permit a challenge to transactions involving firms whose activities affect commerce, if their result would violate the substantive standards of section 7.

In conclusion, I wish to express my appreciation to the subcommittee for carrying forward the work of the Commission. As you pointed out, many reports and recommendations of national commissions gather dust on shelves of remote storage rooms. We have all been concerned throughout the debate, in the meetings of this Commission, that a similar fate not befall the recommendations of this particular Commission, at a time particularly when antitrust laws need to be pursued with new enthusiasm and new vigor to achieve acceptance in the country.

This bill constitutes an important first step in the right direction of implementing some of the Commission's recommendations. I congratulate you for carrying that work forward.

That concludes my prepared remarks. I have summarized my statement, and I hope the full statement will be incorporated into the record.

Senator METZENBAUM. Without objection, the entire statement will be placed in the record.

As I said to you in my opening statement, this subcommittee intends to look at this and move with dispatch in connection with the recommendations of the President's Commission. We certainly intend to move this particular piece of legislation along with dispatch, and hereby give notice to anyone who wants to be heard or has a point of view, either favorable or unfavorable, that the time for hearings will be concluded in the relatively near future, although we will find time to hear all those who want to be heard.

Senator THURMOND, would you like to go forward?

Senator THURMOND. Assistant Attorney General Shenefield, I just have a few questions here. Where do you draw the line as to what is dilatory and what is conscientious effort to obtain the best and most thorough defense in a difficult treble damages case, especially the so-called big cases?

Mr. SHENEFIELD. It is not a bright line, and my own view, if I were a sitting judge, would be that in cases of conduct close to that line, I would be rather conservative. I think that is entirely appropriate, but where I became convinced in my own mind that a particular piece of conduct, first, was unreasonable, and second, was engaged in primarily for the purpose of either delay or increasing the burden on the other litigants, I would then not have any hesitation in applying the sanctions that are encompassed by this bill. But you are quite right, the implication of the question is that there is some ambiguous conduct. This bill looks to the unambiguous. I will leave it to the judges, from whom you will hear later, for a more elaborate discussion of that issue. But I think there is sufficient evidence that makes this bill very worthwhile in that connection.

Senator THURMOND. What assurance does counsel have that each presiding judge will react the same as to what is dilatory and what is a thorough defense of the issues presented?

Mr. SHENEFIELD. I guess there is never any assurance that all judges will see all problems the same way. I think this is a sufficiently clear standard, and the problems it addresses are sufficiently clear that there will be a generally clear and generally unified approach to the jurisprudence as it is resolved under this standard.

One important point of which litigants ought to be aware is that a motion for application of these sanctions that was clearly unreasonable could itself result in some possibility of the standard being applied to the party that made the motion. Thus, parties themselves would not move without serious consideration, as they in fact ought not to move, and judges would be properly cautious in applying the standards.

Senator THURMOND. The Antitrust and Monopoly Subcommittee have held hearings on expediting litigation in antitrust cases, specifically the so-called big cases. Many of its members stressed a great concern regarding this problem when questioning fellow judges and other witnesses on the issue. However, the present bill, S. 390, is it the real answer?

Mr. SHENEFIELD. It is not the whole answer, but it is an important first step. There is much that remains to be done, even after this bill is passed, which I fervently hope it will be. Part of that work that must be done must be done by me and other prosecutors

in the Government, to make sure our side of the cases are handled expeditiously and that our lawyers are moving with dispatch. Part of the problem has to be handled by the members of the private bar who have the same oaths and obligations as Government employees.

Finally, if I might put it delicately, part of the problem will remain for the judges who preside over these cases. It is important, as the National Commission found, for judges to seize control of these cases at an early date and to help the lawyers organize the cases, rather than simply sitting back and letting the gladiators before them join issue and seek decision only when nothing else remains but to address a judge. Judges can be a tremendous part of solutions to the problems. But this bill is a big help, and while it is not the whole answer, it is a good step towards it.

Senator THURMOND. The Supreme Court in the 1950's ruled that the courts are reluctant to challenge the jurisdiction of the legislative committees of the Congress, in their questioning the witnesses in investigations. Now, do you believe that Congress should pass laws which may inhibit Federal judges, and that freedom of trying a case, including an antitrust case, in the manner that judges believe to be in the best interest of the judicial system and the people?

Mr. SHENEFIELD. I believe, from being an inhibition, this would be a tool of enormous assistance to judges. It does not, however, closely circumscribe their options for action. But it does give them tools to help formulate and focus their supervisory role and to help move protracted antitrust cases. It seems to be entirely appropriate for the Congress, as representative of the public and the taxpayers who are supporting this judicial system, to indicate directions that we wish judges to go. It seems to me this bill, indeed, in a rather modest but an important way, moves in that important direction.

Senator THURMOND. Assistant Attorney General Shenefield, isn't it true that S. 390 actually amends a number of existing laws which more properly should be amended by separate bills, rather than in one complicated bill? I believe we had the same problem in S. 1284, the *parens patriae* bill, 1975-76. Even if the bill should be passed, even if it is appropriate, even if all of its provisions are proper, then, of course, it may turn out that some considered proper by the committee and the Senate, and some will not be. But for the sake of discussion, even if it is considered that all of the different facets of the bill are proper, since it does attempt to amend so many existing laws, wouldn't it be preferable if this was done by separate bills rather than one complicated bill?

Mr. SHENEFIELD. I will leave, of course, to the Senate the way in which it wishes to put together components, essentially similar components of a single idea; that is, moving forward to try to assist courts in expediting protracted litigation. I am not a member of the Senate and am without experience, so I won't comment on it. But it seems to me that the bill as presently constructed is quite clear. The number of laws it amends is very limited, and if it were a question of would it be confusing to lawyers or helpful to judges, it seems to me that this bill is entirely adequate to satisfy everybody's needs. That does not directly answer your question, Senator, which in my view I am not the best person to answer.

Senator THURMOND. I was thinking as far as implementing the bill, and that is your job.

Mr. SHENEFIELD. Implementing this bill would be no problem at all.

Senator THURMOND. Since it is so complicated, and amends so many different laws, it would be simpler from the standpoint of administering justice, from the standpoint of the Justice Department itself. It would be simple, if the different amendments were placed in different bills.

Mr. SHENEFIELD. I have no problem with the bill as written. It is sufficiently limited that it seems to me to be a neat and rather clear way to address a limited number of problems.

Senator THURMOND. Thank you.

Senator METZENBAUM. How does the length and cost of an antitrust case impair effective enforcement of the antitrust laws?

Mr. SHENEFIELD. In a variety of different ways. First, and I guess most obviously, to the extent that a piece of litigation continues on without resolution, assuming that the conduct is in fact a violation, you have illegal conduct continuing. The Government is unable, or private plaintiffs are unable to reach the point of resolution.

Second, to the extent that private plaintiffs' treble damage cases are part of the deterrent or arsenal in the antitrust world, the prospect in effect of having to be in court year after year is a disincentive to plaintiffs to ever try to enter court.

I suppose, third, the enormous waste of judicial resources comes to mind. If you have cases that linger on and clutter up dockets, you have—at least as an exlitigator, I have the sense of—judges—sufficiently caught up in those cases that they are unable to do other things that are also important. So there are a variety of ways.

Senator METZENBAUM. Of all of the cases of litigation with which you are familiar by having been a practicing lawyer and Assistant Attorney General of the Justice Department, do you know of any one area where litigation is more protracted than in the antitrust field?

Mr. SHENEFIELD. I do not, I am embarrassed to say. I think perhaps along with some securities laws and some unfair competition cases, antitrust cases are almost certainly the most protracted cases of litigation.

Senator METZENBAUM. I have the feeling that the American people, when they learn of delays in for instance, the *IBM* case or any one of a number of other cases going over years and years, gain a sort of contempt both for the judicial system and for the processes of Government themselves, and say that they feel Government doesn't work.

Do you have an opinion on that subject?

Mr. SHENEFIELD. I couldn't agree with you more, Senator. It seems to me as lawyers, as judges, as legislators, as prosecutors, all of us ought to be concerned about the prospect that the justice system in this country will lose the respect of the people who must be treated by it, and seek it out if they are being treated unjustly. It seems to me nothing, and I use that word advisedly, is more likely to discourage the private citizen of this country of availing himself of the processes of justice than the notion that cases simply

will never end, that wealthy defendants can prolong litigation so they are never brought to account, that Government attorneys, as has happened, are sufficiently inexperienced that they are no match for competent counsel outside, or that judges cannot get to specifics because they are involved in some mammoth case. It seems to me we all have an obligation to deal with that problem, or the perception of that problem, because we will all be losing if we fail to solve the problem.

Senator METZENBAUM. Could you briefly explain to us what a civil investigative demand is, which is addressed by sections 2 and 3 of the bill?

Mr. SHENEFIELD. Yes, sir. The Department of Justice has the power, before it files a civil case, to direct compulsory process either to the target of the litigation or third parties, and through that compulsory process can require either documents to be submitted, answers to written questions to be forwarded, or depositions to be taken. It is, in effect, a process of prelitigation discovery. It was very seldom used before the passage of the Improvements Act in 1974. It is now very commonly used and a very important tool for the Antitrust Division.

Senator METZENBAUM. Would you also briefly describe for the record what collateral estoppel means?

Mr. SHENEFIELD. Collateral estoppel is simply the procedure whereby a litigant that has had an opportunity, fully and fairly, to litigate an issue that was necessary for a decision cannot in some subsequent case relitigate that issue. That is a very general explanation of the doctrine. It is increasingly used in litigation in order not to prolong cases but rather confine and compress them. It is an important tool, one that is developing slowly, but it is a very important tool indeed. We would like to have the possibility of its application built into the antitrust laws, as the present bill would do, rather than see its apparent exclusion from application to the antitrust area by a narrow interpretation of existing section 5(a) of the Clayton Act.

Senator METZENBAUM. If there is an administrative determination of the Government, can there be collateral estoppel in such a case?

Mr. SHENEFIELD. That is a difficult question. The Supreme Court has just decided a case which suggests that the answer to that question is "Yes."

Senator METZENBAUM. When parties produce documents to the other side of a lawsuit, the judge issues protective orders to prevent proprietary information from being leaked to the public or competitors. How is the confidentiality of this protected by S. 390, after information has been produced pursuant to a civil investigation demand?

Mr. SHENEFIELD. In two ways: The CID statute specifies very clearly the confidentiality protections that govern. Those protections would not be changed.

No. 2, a judge could issue protective orders that, while permitting the fruits of discovery, nevertheless circumscribed the Government's options in handling discovered materials thereafter. So there would be those lines of defense, in effect.

Senator METZENBAUM. Do private attorneys oftentimes contract with business organizations specializing in document analysis and organization of documents?

Mr. SHENEFIELD. Indeed they do. No law firm worth its salt, of which I am aware, would consider having its own lawyers and its own staff go through literally hundreds of thousands of documents. At least in my own former firm, every time there was a case of 15,000 or 20,000 documents or more, automatically one went outside for the copying, coding, indexing and summarizing of documents that has to be done.

Senator METZENBAUM. You feel this is an economy, both of time and money, for the Government in obtaining this?

Mr. SHENEFIELD. It is an enormous economy, and it is also more efficient. This proposal amounts to putting the Government on the same footing as a private litigant. [107 Senator METZENBAUM. Does the award of treble damages in an antitrust case encourage defendants to expedite cases?

Mr. SHENEFIELD. No. I think, in effect, it provides a very good reason why in some circumstances they prefer not to get to the point of ascertaining damages.

Senator METZENBAUM. Is the question of jurisdiction relative to the Sherman Antitrust Act and the Clayton Act identical, or pretty much identical, and was there much opposition in the Commission's hearings to making the jurisdiction quite identical?

Mr. SHENEFIELD. That issue is one of the few issues in this bill that was not taken up by the Commission itself. The two provisions of the bill that deal with section 7 of the Clayton Act were not within the Commission's mandate. I am not aware of major opposition to the notion that the Department of Justice, in enforcing section 7, should have the same jurisdictional reach as the Federal Trade Commission does under section 5 of the FTC Act. It indeed seems to be a rather unobjectionable notion. I think there were some witnesses who were heard in opposition last year before the House committee, but I am not aware that there was substantial opposition.

Senator METZENBAUM. I noticed that you talked about unincorporated associations, and you specifically pointed out accounting firms would be subject to provisions of the act if we change the definition with respect to persons. Does that also include law firms?

Mr. SHENEFIELD. I certainly hope so.

Senator METZENBAUM. I hope so, because I wouldn't want it to appear that a group of lawyers were thinking about including others, and not including lawyers.

Mr. SHENEFIELD. I think they ought to be subject to the Clayton Act, just like everybody else.

Senator METZENBAUM. Senator Kennedy has indicated he will introduce a bill that in some circumstances permits private parties to secure judicial review in order to assure compliance with antitrust consent decrees. Do you have a reaction to that proposal?

Mr. SHENEFIELD. I have not read his bill. I prefer not to comment on it in detail, but I would raise a couple of concerns that I do have.

Let me preface few concerns by saying that in its broad and general aspects the idea of private enforcement of antitrust decrees does not seem to me overly harmful, but there are certain things to be said in framing the legislation about which I would like to think out loud.

First: Consent decrees are an important way for the Government to have antitrust policies implemented and effectuated throughout the economy. To the extent that consent decrees become more difficult to negotiate by virtue of the prospect of some different scheme of enforcement, to that extent the Government's lawyers will be affected. I would raise that question.

Second: I certainly hope that any legislation dealing with this issue would provide notice to the Government and an opportunity for the Government to come into court in a proceeding in which private parties are seeking to enforce decrees, and to make some sort of statement. If that statement is to be responsible, and is to be comprehensive and helpful to the court, it will have to be preceded by investigation, and it will have to entail the use of Government attorneys' time. The concern I raise here is that, in effect, the Antitrust Division will be responding to a variety of proceedings over which it has very little control, but will be required to invest substantial resources in order to inform the court.

Third: I guess the problem all of us have, and I would think it is necessarily an important problem, is that private enforcement of the decrees can become, if we were not careful, a way of making the marketplace less competitive than it now is. Let me give you a couple of examples. Let's imagine a decree that was negotiated by the Government with defendants in the year 1925, and let's assume that over the course of the intervening 53 years the characteristics of the marketplace have changed markedly, and strict enforcement of the decree now would be anticompetitive. The Government has the obligation to consider that possibility, and it may well reach the conclusion that it makes little sense to enforce that decree. A competitor of the company subject to the decree may decide that it is a terrific idea that that decree be enforced, and may determine that it will maneuver the Government into a situation in which it will have to respond one way or the other. If the Government is not interested, the private party presumably could go forward. In this situation, there seems to me some danger that what was intended to be a procompetitive result would turn out to be an anticompetitive effect. It seems to me this legislation must take into account this possibility that none of us would like to see.

Having said that, however, it seems to me it is an idea that needs serious consideration, and I would like to look at the legislation and study it, and then furnish the subcommittee my views.

Senator METZENBAUM. We appreciate your testimony, and look forward to working together with you.

Senator THURMOND. I have another question. Assistant Attorney General Shenefield, much of the attention has been given to the length of time it takes to try a case like the *IBM* case, the *Xerox* case, the *A.T. & T.* case. The history of antitrust subcommittees shows that Antitrust Division and the FTC have prolonged a prospective case within its agency for 4 years or more before filing suit. You are probably familiar with the *IBM* case. It was held for

4 years, 1965 to 1969. Will you comment on the Government's delay in taking action, and how the Government can improve its part in the early action from beginning to end?

Mr. SHENEFIELD. I would be happy to. You have two major periods that have to be given consideration. You have the period which you are questioning, before the complaint is filed, if a complaint is going to be filed. Then you have the period after the complaint, through the litigation, until a judgment one way or the other is obtained.

My own personal preference is for doing our investigation in a thorough and responsible way, even if it takes a long time before filing a complaint, so that once the complaint is filed, there is no need to delay going to court and being engaged in the litigation. I become very concerned, however, when the delay takes place after the complaint is filed.

It seems to me that that is where the major part of the problem has existed up to now. I would suggest that it is not a problem that we ought to be concerned about when the Government takes a long time to do its investigation, because at least one hopes that we are doing a careful, comprehensive, responsible job before subjecting a company to a complaint in the Federal district court. This bill will help the Government to be more efficient in that precomplaint phase in a couple of respects.

The Government also has the obligation to be efficient after the complaint is filed. This bill will help in that task, to some extent, by making our investigations more efficient. This is something that I have given significant attention to since I arrived. I will be candid with you, and say that the problem is never going to be eradicated, however. Our staff and the staff of the FTC have always had this responsibility to move cases efficiently and to keep it uppermost in their minds. But it is something that I think is the heart of the problem, rather than delay before a complaint is filed.

Senator THURMOND. The case is filed in January 1969. It is quite some time before something was done. You were not there then, but have you had a chance to find out what was first done after that?

Mr. SHENEFIELD. I am aware that there was a substantial delay. Part of it, I am sure, was the fault of the Government. However, I would be willing to guess that blame for part of it can be laid at other doors. For instance, I am aware that the Government wished to rely on an important data base that was then in existence, one that involved document retrieval, which was destroyed without prior notice to the Government pursuant to a settlement by IBM and other plaintiffs. That occurrence obviously was a setback to the Government in its pretrial preparation. I think it is safe to say that in the cases in which we are now engaged, that is to say, cases we have filed in the last 2 years and have moved to trial, I would include the A.T. & T. case, even though it was filed before I got there, because the procedures we set up, with the consent of the court, are such as to move those cases forward efficiently.

I would hope that I never see an Antitrust Division case take 6 years to get from the point of complaint to the courtroom door for trial.

Senator THURMOND. From your testimony, it is clear that you feel this bill as a whole is a good bill. Are there any parts of it that you feel you could improve, and have you made such recommendations, or would you care to submit those for the record?

Mr. SHENEFIELD. I think there may be one or two points where the language can be slightly improved. I think there is a typographical error in one portion of the bill. I would like to try to submit that for the record if necessary. It is where the word "only" has been left in the prejudgment interest part of the bill. That is in the section 5(c)(1) in my printing of the bill, on page 6, at the very top. The word "only" is in the bill at that point. But it is not in any of the prior sections. My concern is simply that a court may decide that the word "only" would preclude it from also granting interest after the judgment is entered. My guess is that it is probably an oversight and can easily be corrected.

In general, I think the bill is in very good shape indeed.

Senator THURMOND. Thank you.

Senator METZENBAUM. Assistant Attorney General Shenefield, if you have suggestions as to changes, we would appreciate hearing from you very promptly. As I indicated, we want to move this particular piece of legislation with some dispatch; and I would say to you, Senator Thurmond, that we have hearings scheduled and have extended invitations to the NAM, the Business Round Table, U.S. Chamber of Commerce. If you have any witnesses that you want to have us hear, I certainly want to make the time to do so. But I don't want to drag out the hearings.

Senator THURMOND. I am openminded on the bill. I am not here to oppose it. I just wanted to get the facts and give all the sides an opportunity to be heard. I think counsel may have been in touch with some witnesses, and I would like to ask him how soon he thinks they would be ready to testify?

Mr. CHUMBRIS. As I mentioned to Barry Dierenfeld, Senator Metzenbaum, we immediately contacted some when Terry Lytle first called me, and we asked the three major trade associations—told them that these hearings were being held, and for them to submit witnesses for us to have for the hearings. We got no definite reaction. I think Barry called 3 or 4 days later. What was the result?

Mr. DIRENFELD. They have been invited to testify next Monday. They have not gotten back to us. We should hear by first thing tomorrow morning.

Senator METZENBAUM. The Chair wants to be very fair but does not want to permit dilatory tactics in the legislative procedure to affect the bill concerning dilatory tactics in the judiciary system.

Senator THURMOND. I like for people to have a reasonable amount of time. I think next Monday is too soon. If they want 2 or 3 days more—

Senator METZENBAUM. No problem.

Mr. CHUMBRIS. As I mentioned to Barry, this is a problem we face in many of our bills. We may contact the Chamber and the Round Table and NAM because they are the three large trade associations. But then we get a call from someone out in a different part of the country that may be a State group, and they may be very vigorously opposed to it. It may be a banking group or an

agricultural group, small businessmen's group, so forth. They don't even get word that the bill is introduced. It is a difficult thing. No one knows of the bill until too much time later, so it is hard to put a time limit.

Senator METZENBAUM. We have also advised the American Bar Association, the antitrust subsection. They will be testifying.

Thank you very much.

Our next witness is Judge Renfrew. I am very pleased to have you with us. You came all the way from California. We have three other witnesses, and we would like to move the hearing along.

**STATEMENT OF HON. CHARLES B. RENFREW, JUDGE, U.S.
DISTRICT COURT, SAN FRANCISCO, CALIF.**

Judge RENFREW. I, too, am very glad to be here, having spent a little over 2 hours walking to the Dirksen Building today. But I think I would walk even further to speak in support of the bill, which I think substantially advances the cause of justice in this country. I think we have the most extraordinary system of justice in this country. As Senator Thurmond has pointed out, we have been under attack because of some delays that have been incurred in connection with prosecution of major antitrust cases, and I think that the Antitrust Procedural Improvements Act of 1979, as well as the recommendations of the National Commission for Review of Antitrust Laws and Procedures, stresses the problems presented in causing these delays, and I am just delighted that the Antitrust Subcommittee, under your chairmanship, and Senator Thurmond and the other Members, is moving so quickly in this area.

[The prepared statement of Judge Renfrew follows:]

PREPARED STATEMENT OF HON. CHARLES B. RENFREW

I am pleased to appear before the Senate Judiciary Subcommittee on Antitrust and Monopoly and to share with you my views on S. 390, the Antitrust Procedural Improvements Act of 1979. The views I am about to express are of course my personal views. I do not intend for them to be interpreted as representative of the views of my colleagues on the Federal bench. However, even though these views cannot be specifically attributed to any of my colleagues, I must point out that the problems addressed by S. 390, particularly those involving discovery abuse and the use of dilatory tactics in antitrust litigation, are problems that cause great concern to almost every member of the Federal judiciary. In recent years and months, many able minds have devoted considerable time and attention to studying the problems arising from the continued abuse of judicial procedures occurring not only in antitrust cases, but in other types of complex litigation as well. I believe that the innovations contained in S. 390, and the recommendations contained in the report of the National Commission for the Review of Antitrust Laws and Procedures are well-considered proposals that will help the courts to confront and to eliminate some of these abuses.

My comments today are based on my present perspective as a district court judge and on my past experience as an attorney in a major law firm whose practice centered on antitrust litigation. In addition, I was recently the Chairman of the Federal Judicial Center Committee to Study the Problems of Discovery. It is these perspectives and these experiences that I bring before you in my comments on proposed Senate bill 390.

Except for section 7 of the proposed bill, which expands the jurisdictional reach of section 7 of the Clayton Act, the Antitrust Procedural Improvements Act of 1979 is aimed at expediting and reducing the costs of antitrust litigation. It seeks to achieve this goal by introducing some innovations in current procedures and by offering some clarifications of others. I am in full support of these goals, as my comments will indicate. Although I have some reservations about one section of the proposed legislation, section 5, my overall impression is that the bill is workable and well focused. Viewed in conjunction with the recommendations of the National Commis-

sion for the Review of Antitrust Laws and Procedures, the proposed legislation should become an effective tool for cutting down on the delays and wasted expenditures that hamper so much of the antitrust enforcement in the Federal courts.

ANTITRUST CIVIL PROCESS AMENDMENTS

Sections 2 and 3 of the proposed legislation clarify and extend existing law to permit the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to issue a Civil Investigative Demand for any "product of discovery," including the materials obtained through the traditional processes of discovery and any indices, digests, analyses or compilations of the materials. This is a welcome amendment. By permitting the Government, in effect, to "piggyback" its discovery requests onto the previous efforts of a private party plaintiff, the proposed legislation eliminates the necessity of the Government having to duplicate the entire discovery process. Instead of requiring the Government to file a discovery request that is identical to one previously filed, and to have resolution of its case delayed pending the court's consideration of the various motions to compel, to extend time, to issue protective orders, to impose sanctions, et cetera, this amendment will permit the Government to obtain the end product of the preceding discovery request without delay. The savings to the parties and the taxpayers should be considerable. Only the lawyers who specialize in extending discovery proceedings can be expected to suffer.

Of course, this savings of time and money would not be desirable if it came at the expense of the procedural and substantive rights of the parties to the initial discovery request. By permitting those parties to challenge the Civil Investigative Demand in the district court in which the discovery was originally obtained, however, and by preserving the confidential nature of the material discovered, the amendment overcomes any objection I might have that the rights of the original parties to the discovery would be diminished by the expansion of the government's power to issue Civil Investigative Demands.

Finally, I note my agreement with the decision to permit Government "agents" access to the material obtained by a Civil Investigative Demand. The complexity of much of the current governmental antitrust litigation makes it imperative that the Government be able to obtain consultants to analyze, process, and evaluate discovery materials.

In light of the procedural protections this amendment affords to both parties to the initial discovery request, and because of the time and expense that will be saved by permitting the Government to avoid instituting duplicative and wasteful discovery procedures, I endorse sections 2 and 3 of the proposed legislation.

SANCTIONS FOR ATTORNEY DELAY

Section 4 of the proposed legislation amends 28 U.S.C. section 1927 in two respects. First, it clarifies existing law by providing that attorneys who engage "in conduct unreasonable and primarily for the purpose of delaying or increasing the cost of the litigation" may be sanctioned by the court. (Emphasis added). Thus, it overrides previous court decisions that refused to impose sanctions unless the attorney's conduct were interposed solely for the purpose of delay. See, e.g., *United States v. Ross*, 535 F. 2d 346 (6 Cir. 1976); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F. 2d 1163 (7 Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). Second, it permits the court to award "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct," rather than merely the taxable costs incurred by such conduct. I endorse both changes.

One of the great threats to our legal system today is the widespread, almost commonplace, tactic of using the discovery machinery of the Federal Rules to delay the time of judgment, harass the other party, obfuscate the issues, and clog the court's calendar with unnecessary and wasteful motions and discovery requests. Whether these tactics take the form of filing abusive or excessive discovery demands, unreasonably resisting discovery requests that bear directly on the issues before the court, or giving answers that are either unresponsive or so detailed and accompanied by so much extraneous documentation that they are virtually unintelligible, this unwarranted and unacceptable abuse of the rules has become one of the greatest of litigation's nightmares to judge and client alike.

There are certainly strong financial incentives motivating the attorneys who engage in such dilatory practices. Some of the motivations are based on the client's interest. For example, because the stakes are extremely high in complex antitrust litigation, it is important for counsel to be extremely thorough. In addition, plaintiffs sometimes hope that the high cost of litigation will force an early settlement, while defendants recognize that they can continue their challenged business prac-

tices and their investment of the money that might later have to be paid as treble damages throughout the pendency of the litigation. From the attorney's perspective, there is often a lack of personal economic incentive to shortcut or to expedite discovery and trial. With large law firms often on both sides of a case, each on a retainer and each being paid its monthly statements for services, or where there are experienced and successful plaintiffs' antitrust counsel aware that in large part their fee will be based upon the hours spent on the case, the individual incentive is often toward increasing the hours spent rather than on seeking the most expeditious resolution of the issues.

However, as significant as these incentives may be to the parties and their counsel, the incentive to the public and the courts not to permit such practices is equally as great. Not only do these types of tactics wreak havoc in a court system that is already perilously overburdened by new filings and current litigation; not only do they cause a further backlog of work and frustration for the judge; but, as evidenced by the recent publicity attendant to the *IBM*, *Xerox*, and *A. T. & T.* cases, they are among the foremost reasons why our court system is the subject of such widespread public disenchantment and lack of confidence today.

The amendment to 28 U.S.C. section 1927 is a progressive step affording the court a method for dealing with counsel who have unfairly and improperly abused the discovery process. In the past, section 1927 has been infrequently used. In great part, this is because courts have interpreted it to require a higher degree of intent to delay than could often be shown. By requiring the attorney's conduct to have been undertaken solely for delay, they have made it unlikely that section 1927 would ever be effectively employed. The amendment of the statute to permit imposition of sanctions where the challenged conduct was undertaken primarily for delay goes a long way toward rectifying this situation.

The second part of the amendment, which expands the categories of allowable costs, is also a sensible innovation. Because section 1927 has been limited to awards of taxable costs, a party could engage in delaying conduct, have taxable costs awarded against him, and still cause burdensome expense to the opposing party. By permitting the oppressed party to receive all of its costs, including attorneys' fees, the amendment at least places him in the position he would have been in if the delaying tactics had not been employed.

Although I applaud the efforts of the subcommittee to deal with the problems of abuse of judicial processes as they have done with the Antitrust Procedural Improvements Act of 1979, I must strike a few cautionary notes. The first, unfortunately, must focus on some of the failings of the judiciary, for the congressional grant of an increased arsenal of sanctions is valueless unless the courts are willing to impose these sanctions where appropriate. And, at least until recently, one of the most underutilized powers of the courts has been the power to impose sanctions. See, e.g., *United States v. Ross*, 535 F. 2d 346 (6 Cir. 1976); *West Virginia v. Chas. Pfizer & Co.*, 440 F. 2d 1079 (2 Cir.), *cert. denied*, 404 U.S. 871 (1971).

Even without section 1927, the courts possess broad powers to impose sanctions on attorneys who abuse the judicial process through deceit and delay. The contempt power and Federal Rule 37 are only two examples of this authority. Rule 37(a)(4), for example, permits the court to award reasonable expense, including attorneys' fees, to the prevailing party after a hearing on a discovery motion unless the position of the losing party was substantially justified or unless other circumstances make the award unjust. Moreover, this sanction can be imposed on parties or their attorneys who make unreasonable demands as well as on those who oppose reasonable demands. Despite the availability of these and other sanction powers, however, courts have in the past been notoriously hesitant to invoke them.

There are a number of reasons for this. First is the fact that attorneys do not often move for sanctions. A recent study conducted by the Federal Judicial Center found that attorneys move for the imposition of sanctions in less than one percent of the instances in which discovery requests are made. In part, this is because attorneys hesitate to seek sanctions against their colleagues, fearing that in the next case, or the next document request, they might find sanctions being sought against themselves. Another reason is that less than half of those one in a hundred motions were actually ruled upon. (However, three-fourths of those ruled upon were granted.) Nevertheless, the failure of attorneys to seek sanctions should not hamper the efforts of the judiciary to employ amended section 1927 effectively, because there is nothing in the statute that prevents the court from imposing sanctions *sua sponte*, so long as the offending party's due process rights are protected.

The second reason why courts have hesitated to impose sanctions is their perception that often courts of appeals discourage such measures. Trial judges cannot deal effectively with abuses of the judicial process unless appellate tribunals are willing

to back them up, and to date the necessary support has not always been found. However, that trend may now be changing, see, e.g., *G-K Properties v. Redevelopment Agency, Etc.*, 577 F. 2d 645, 647 (9 Cir. 1978), and, if so, we should expect to see a greater utilization by the district courts of sanctions such as those provided in section 1927.

A third reason why courts have hesitated to impose sanctions in the past is their concern about whether a sanction could be imposed for its deterrent effect as well as for punishment. Courts too often felt that the available sanctions were too severe, or that the parties would "mend their ways" if given one more chance. But now that the Supreme Court has expressly approved the use of sanctions as a deterrent to others, see *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), courts have become more willing to invoke their sanctioning powers.

In keeping with the goal of deterrence, however, I must stress that although the subcommittee has taken the initiative in presenting the courts with a workable sanction tool in section 1927, the ultimate burden still rests on the courts. The judiciary must heed the recommendations of the National Commission with respect to the imposition of sanctions. Word travels fast in the legal community. The dilatory tactics we are concerned with are the product of deliberate decisionmaking processes. Deterrence can be achieved, but only if the courts impose sanctions whenever they are appropriate, and only if they memorialize these decisions in written memoranda that state the reasons why the court felt sanctions to be appropriate. It is only through this type of judicial cooperation that your legislative efforts will be successful.

One potential criticism that might be levied against the amendment of section 1927, in addition to the point that the courts have not used the resources they presently possess, is that the increased availability of sanctions will naturally lead to an increased filing of motions seeking such sanctions, thus clogging the courts even more than before. I do not consider this a convincing argument.

First, the increased filing of motions under section 1927 and the other sanction provisions would suggest that attorneys were becoming increasingly aware of the availability of sanctions and of the courts' inclination to impose them where appropriate. This would indicate that the deterrent effect described earlier is actually succeeding. My prediction is that any time spent on section 1927 motions would be more than compensated for by the time saved in not having to consider discovery requests and responses that would otherwise fall under the category "engaged in primarily for delay."

Second, I suggest that application of the National Commission's recommendation that district judges take a greater managerial control over these cases would cut down on this wasted time considerably. Judges should continue their efforts to institute informal methods of dispute resolution in their courts in order to cut down on time spent and motions filed. In my court, for example, I often tell attorneys that I expect to have most discovery disputes resolved informally. Instead of their filing motions for protective orders, motions to compel, motions to quash, et cetera, all calendared for a hearing weeks in advance as the Local Rules provide, and requiring the preparation of affidavits and lengthy memoranda, I suggest that they telephone my chambers whenever they are in disagreement. That way we can usually dispose of their problems with a conference call or, if necessary, with a short meeting in my chambers.

Because I believe the amendment of section 1927 is a realistic change that will increase the likelihood that courts will impose sanctions, and because I believe that increased imposition of sanctions on attorneys who unreasonably delay court proceedings is in the best interest of justice, I endorse this proposal to amend section 1927.

PREJUDGMENT INTEREST

Section 5 of the proposed bill allows successful plaintiffs to receive interest on the amount of their actual damages, measured from the time they served their complaint until the time of judgment, and based on the commercial rate prevailing at the time of judgment. If the court finds that an award of all or part of this interest would be unjust; for example, if the delay was caused by plaintiff's own conduct, the court could scale down the interest award accordingly.

I cannot endorse this proposal as written. Plaintiffs who are awarded treble damages for defendant's violation of the antitrust laws, in my opinion, already receive more than adequate compensation for their losses. An automatic grant of prejudgment interest, often based on a considerable damages award, would result in a windfall bonus to successful plaintiffs which I believe to be unwarranted. This is a particularly undesirable result in those cases in which defendant's conduct falls

within the "gray area" of antitrust enforcement, that is, conduct that defendant engaged in in good faith, believing that its actions were within the permissible bounds of the law.

Moreover, the proposal does not adequately remedy the problem to which it is directed. Section 5 is intended to punish defendants whose trial tactics are based on the theory that any delay is in their best interests. It assumes that all defendants institute dilatory tactics in order to retain the use until the last possible moment of the money that might ultimately be awarded as damages. But the proposal requires defendants to pay interest on this amount even if there has been no finding that they contributed to the delay of the trial in any way. As a result, it penalizes the defendant which aids the court in its speedy resolution of the case as well as the defendant which drags its feet throughout the proceedings. Moreover, it makes no allowance for the fact that many defendants are able to invest their capital at a rate that exceeds the commercial rate; for these defendants, it would still be in their interest to delay, despite the new provision, because they would continue to profit from their use of the money.

In addition, this provision does not take into account the fact that for many defendants, the prime motivation for delay is not their continued ability to use the money during the pendency of the litigation. Rather, they would delay as long as possible whether or not this provision were in effect in order to continue their allegedly illegal practices for the longest period possible. The money to be earned by price-fixing, by exploitation of a monopoly, et cetera, would far exceed the interest value of the potential damage award. Because the proposed statutory amendment would not therefore be much of a motivation for these defendants to curtail their delaying tactics, and because an award of prejudgment interest, even on the amount of actual damages, would result in a windfall to plaintiffs, I believe that it should not be enacted into legislation.

I do not reject this proposal completely, however. Instead of making the award of prejudgment interest virtually automatic, with the court empowered to scale down the award in the interest of justice, perhaps it would make sense to reverse the presumption. That is, the amendment could be worded to allow the court, in its discretion, to make an award of prejudgment interest if it found that defendant has been engaging in dilatory tactics. This change would achieve the purposes that the proposal set out to achieve—preventing the defendants from profiting by their delay—but it would ensure that only those defendants who actually did seek to delay the proceedings would be deprived of the investment value of the money to be awarded.

COLLATERAL ESTOPPEL

Section 6 of the proposed legislation clarifies section 5(a) of the Clayton Act by providing that a final judgment or decree rendered in a civil or criminal proceeding brought by the United States can have collateral estoppel effect in a subsequent proceeding. Although there will certainly be many instances where the courts do not find the collateral estoppel doctrine should be applied—for example, where the issues has not been fully and fairly litigated earlier—this amendment should have the effect of conserving precious judicial resources in those instances where application of the doctrine would be appropriate.¹ The judge still would make the decision whether the doctrine should be applied. But in those cases where the judge did find application of the doctrine to be appropriate, the defendant would be precluded from offering rebuttal evidence after plaintiff introduced the earlier judgment as prima facie proof of a violation. Issues which had been fully and fairly litigated would not have to be relitigated; there would be no need to incur the considerable delay that would be caused by the reappearance of the full range of trial witnesses, exhibits, and arguments; nor would there be a danger of inconsistent adjudications. For these reasons, I support this proposal.

MERGER JURISDICTION

Section 7 of the proposed bill amends section 7 of the Clayton Act in two respects; first, it extends the jurisdictional reach of the statute to include "persons," not just corporations; second, it extends the jurisdictional reach to activities that are "affecting commerce," not just those that are in commerce. Thus, it makes the jurisdictional scope of section 7 of the Clayton Act coextensive with the scope of the Sherman Act. I endorse this proposal as well.

I know of no reason why the jurisdictional scope of section 7 of the Clayton Act should not be coextensive with that of the Sherman Act. The commentators agree

¹ For a valuable discussion of the current state of the collateral estoppel doctrine, see Justice Stewart's opinion in *Parklane Hosiery Co., Inc. v. Shore*, No. 77-1305 (Jan. 9, 1979).

that the distinction is "anomalous." See, e.g., Sullivan, "Handbook of the Law of Antitrust," section 233, at 714 (1977); Areeda & Turner, I "Antitrust Law," section 233a, at 241 (1978). The Supreme Court has enforced the distinction, without offering any justification for it, because of its reading of congressional intent. See, e.g., *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). Now is the time for Congress to clarify its intention to make the acts coextensive in scope.

For the same reasons that section 7 should be amended to extend the jurisdictional scope of the Clayton Act to the limits established by the Sherman Act, I suggest that the subcommittee also consider a similar amendment with respect to section 3 of the Clayton Act. There does not appear to be any reason why the jurisdictional scope of that section should not be extended to persons engaged in activity that affects commerce as well.

Judge RENFREW [continuing]. I do have a statement, which has been submitted. I would just like to say that I am in favor of the recommendations, although I have one question about section 5 in that particular bill. Let me say, initially, that, sections 2 and 3 of the act, which permit the Government in effect to piggyback the results of prior discovery, I think are very welcome additions to avoid unnecessary duplication and waste, in order to expedite the prosecution of Government antitrust cases. I think that I would not favor such piggybacking provisions if they had all come at the expense of the procedural or substantive rights of the parties to the initial discovery requests.

I think your bill very fairly preserved the confidential nature of the material discovered. It preserves the rights of the individual parties to discovery, because it permits parties to file any objections or motions with the court in the district in which the discovery was initially obtained. I think it is also very important that this part of the bill, sections 2 and 3, permits the Government the same advantage of using outside consultants in order to summarize and collate documents as private litigants have. I think that is very good.

Section 4 of the legislation dealing with sanctions, involves an area in which I have a great deal of interest. I have written an article to be published in the *University of California Law Review* dealing with sanctions. I think that sanctions are an important tool for the courts. I think that what you have done here in amending section 1927 is very important, because I think that we have to realize that dilatory tactics are often pursued in antitrust cases, and sometimes in other complex litigation, because there are strong incentives for so doing.

For example, a company that feels its very well-being is being threatened by a section 2 action has a strong incentive to resist such litigation, and properly so. When you have attorneys—and now the word is out that the "old schoolboy network" is gone—one large corporation will sue another large corporation. So we may have large law firms on both sides, where each is on a retainer, where each submits a monthly statement for services and receives a bill, and where successful antitrust lawyers know their fees in large part may be determined by the number of hours spent. They don't have an economic incentive for expediting and streamlining cases. I think however that the public does have an incentive and an interest in having these cases expeditiously prepared and tried. I think that the fact that in some cases this has perhaps not

occurred has led to some public concern and disenchantment with our procedures.

I think your proposed amendment in section 4 is very progressive, and a fair step in dealing with counsel who have unfairly and improperly abused the discovery process. It deals with this problem in two ways: First of all, there are prior court decisions which say that sanctions can be imposed upon a lawyer for a violation of a section 1927 only in a case where the conduct had been undertaken solely for the purposes of delay, whereas here you provide that if it is done primarily for the purposes of delay, such conduct may be attacked.

Second, section 1927, unlike the other sanction provisions in rule 37 of the Federal Rules of Civil Procedure, does not restrict itself simply to the taxable cost, but also to actual costs, expenses, and attorneys' fees. I think this is very important, because it puts the party that is in a position where it has been unfairly and improperly delayed or hindered by dilatory tactics, at least in a position where it would have been, but for the exercise of these tactics.

I must say in all candor, Senator Metzenbaum and Senator Thurmond, that through this section I think you have given the judiciary a tool which it may use. But the history of the use of sanctions does not show that the judiciary has always availed itself of existing tools it has. I think this is very important. I think perhaps this legislation will show a congressional interest in the use of sanctions, where appropriate. I think we cannot ignore, however, that courts in the past have been hesitant to use the available sanction remedies. A number of reasons: One, attorneys don't move for sanctions because sanctions are indeed a two-edged sword. If I use dilatory tactics in this case and someone moves for sanctions against me, my opponent in another case, where he may feel it be in a client's interest, and I move against him—

Senator METZENBAUM. Does the court have jurisdiction to impose sanctions without a motion?

Judge RENFREW. I see nothing to prevent them from doing so. I think the authority which gave the court the right to protect the integrity of the procedures in cases before it, I think would afford such a remedy.

Let me just share with the committee an experience. I was the chairman of a committee studying the abuses of discovery for the Federal Judicial Center. We had on our committee some very distinguished practitioners. We were at a meeting of the metropolitan chief justices, which are the major district courts in this country. The private practitioners confessed that for their clients' purposes, in some cases, they indeed had used delaying and dilatory tactics. These were among the most distinguished antitrust practitioners in the country.

Another reason for the limited use of sanctions, in addition to the attorneys' hesitation, is that the courts often have not used the sanctions because of their relationship to the appellate judges. Many cases in which sanctions were imposed have not been backed by the appellate tribunals. I am very pleased that in a case which I had, the court of appeals for my circuit not only affirmed the imposition of a sanction I gave—the sanction of a dismissal of a

case—but urged in its opinion that similar sanctions be imposed in cases where improper tactics were being followed.

Senator METZENBAUM. Judge Renfrew, so that the record is clear, as I see what you are saying, the imposition of sanctions is a two-edged sword. It does not work really for plaintiffs against defendants, nor defendants against plaintiffs. What we are talking about is in the public interest generally. It is not a pro-plaintiffs kind of procedure, as such?

Judge RENFREW. I think exactly so, sir.

Senator METZENBAUM. As a matter of fact, the case to which you just referred was the dismissal of a plaintiff's action?

Judge RENFREW. That is correct, sir.

Senator METZENBAUM. I believe that point has to be emphasized, because I think too often it is suggested that the only people who have sanctions imposed against them are defendants' lawyers. I think your testimony is very helpful to us in that regard.

Judge RENFREW. I think another reason sanctions have not been used as much is because sanctions have been thought to be appropriate only as a means for punishing a particular party. But the deterrent effect of sanctions has been ignored. I think the Supreme Court in the *National Hockey League* case made it very clear that one of the important purposes of sanctions is the deterrent effect that the imposition of sanctions may have on other litigants, so they will not engage in such conduct. I think that is an important thing to keep in mind. As I say, I am completely in support of what you have done.

I think, however, we in the judiciary have been remiss in not fully utilizing all the tools available to us. I hope we will do so.

I might say that, in addition to this particular bill, S. 390, we also have the recommendations of the National Commission for Review of Antitrust Laws and Procedures. I think we may not have as great a need for the sanctions, if the recommendations of that Commission are fully implemented by the judiciary and the judiciary takes control of the major antitrust cases, because I think that greater control and more proper management of cases can really cut down abuses of discovery and the need for sanctions.

For example, in my court, rather than require the parties to file extensive motions to compel and other discovery motions to seek compliance with discovery requests, my practice is to urge them either to place a conference call in which counsel from around the country can participate or to suggest that they come into my court after a trial so that I may see them on an informal basis, find out what their problems are and try to resolve their disputes and differences as expeditiously as possible.

The only part of S. 390 to which I have some question is section 5, regarding prejudgment interest. I don't disagree with what I perceive to be the basic philosophy of that section, which is to eliminate any interest in delay or protraction defense counsel may have. But I am not sure that this is always the case with all defendants, nor does the particular proposal completely address the problems presented.

For example, it may well be that the commercial rate of interest at the time of the judgment may be substantially less than the defendant is able to obtain, by pursuing this unlawful conduct. It

may well be that a plaintiff has been pursuing some dilatory and delaying tactics for its own advantage. What I would do, rather than have the award of the prejudgment interest made automatically with the court empowered to reduce the amount of the interest, in the interest of justice, would be to reverse the presumption. I would say that the court in its discretion may award prejudgment interest as you propose, where it is found that a defendant has engaged primarily in delaying and dilatory tactics.

Senator METZENBAUM. What if the defendant's lawyer has not engaged in dilatory tactics, but that the case just takes 5 years to be concluded? I take it the plaintiff would be awarded prejudgment interest on his actual damages from the time the case is filed?

Judge RENFREW. Putting aside the question of whether there has been fraudulent concealment, the antitrust statutes permits an award of damages for 4 years prior to the filing of the complaint, and in many cases for damages after the filing of the complaint. You are talking about substantial sums of money. So to award a prejudgment interest, where a party has not in any way acted wrongly, I don't think would be fair to the defendant.

As far as the collateral estoppel in section 6, I think that certainly is very fair, because all the amendment does is eliminate the rule that there can never be collateral estoppel. Collateral estoppel should be imposed in those cases where it appears appropriate. I think this clarifies an area in which the law has been confused. I think with the *Parklane Hosiery* decision of the Supreme Court, it is very clear where collateral estoppel may well be appropriate.

Finally, the merger jurisdiction in section 7, I think is most appropriate because we now have, as we did in the Sherman Act, not just corporations but persons covered, and also we eliminate the necessity that they be acting in commerce, but extend the jurisdiction to activities that affect commerce. We have a subsequent witness, Professor Sullivan, and in his antitrust treatise he notes that the distinction between the jurisdiction of section 7 of the Clayton Act and the jurisdiction of the Sherman Act is an anomaly. I would suggest from my perspective, I don't see any reason for not having section 3 of the Clayton Act also amended to include the same extensive coverage of that that you propose under section 7. These are my general remarks, Senator Metzenbaum.

I do have a prepared statement, which I will submit.

Senator METZENBAUM. Your entire statement will be included in the record.

I have a few questions. You went on the Federal bench in 1972?

Judge RENFREW. Yes.

Senator METZENBAUM. And before that time, you were a member of a law firm, partner in the firm Pillsbury, Madison, & Sutro?

Judge RENFREW. Yes.

Senator METZENBAUM. Would that be considered a corporate law firm?

Judge RENFREW. That would be a very large corporate law firm, primarily engaged in antitrust defense work.

Senator METZENBAUM. Defense work?

Judge RENFREW. Yes.

Senator METZENBAUM. As a matter of fact, isn't it one of the largest, if not the largest, law firm in San Francisco?

Judge RENFREW. It is the largest law firm in San Francisco. It has approximately 250 lawyers, which is very large.

Senator METZENBAUM. At what stage of the litigation are delaying tactics most likely to occur?

Judge RENFREW. I find, Senator Metzenbaum, that they start at the very beginning' and that is why I think the recommendations of the national commission are particularly important, that the judge takes control at the outset, that dates be established, efforts be made to delineate issues. I think there is no single time at which delay can be prevented better than the outset of a litigation if the judge makes it clear to the parties that he intends the case to be prepared and tried as fairly as possible.

Senator METZENBAUM. Do you have any concern that clients might be penalized for dilatory tactics of their attorneys? Does that concern you at all?

Judge RENFREW. I had some concern. I had an early question whether an attorney could pass onto his client the sanction that might be imposed against him under 1927. I think the court could, in its order, preclude that from happening. But essentially we come down to equity, Senator Metzenbaum. If we are going to penalize one of two parties because of delaying tactics, is it fair that the party that had nothing to do with the delay pay the penalty, rather than the party that has hired the lawyer? Of course, that party has some remedy against the lawyer for improper conduct. Perhaps it may even rise to the level of a malpractice, or some sort of a tortious action.

Mr. CHUMBRIS. What was that last point?

Judge RENFREW. The last point is that the determination of which of two litigants must be penalized because of the cost incurred due to the delaying tactics of attorneys is an equitable matter. Who would be most appropriately penalized? Would it be the party who had no connection with the attorney or the party whose attorney this particular counsel happened to be? It seems to me, if I am forced into that decision, that it would clearly be the latter.

Senator METZENBAUM. Do you see any problem for the parties who produce documents, if the Department of Justice is permitted to obtain it through a CID?

Judge RENFREW. I don't, because that party is afforded protection by being able to enter into the court in which the discovery was produced, and seek whatever protective order was available, or whatever action might be appropriate.

Senator METZENBAUM. Section 6 amends section 5(a) of the Clayton Act, to permit judges to give, collateral estoppel effect in anti-trust cases. Apart from section 5(a) of the Clayton Act, do you see any reason not to apply the same principles of collateral estoppel to Government antitrust judgments as are applied to Government securities law judgments?

Judge RENFREW. I do not. I think the considerations that were so clearly articulated by Mr. Justice Stewart in the *Parklane Hosiery* case would be equally appropriate here. Where a matter has been fairly and fully litigated, I see no reason for litigating again.

Senator METZENBAUM. Senator Thurmond?

Senator THURMOND. We are glad to have you with us, Judge Renfrew.

Judge RENFREW. Thank you, sir.

Senator THURMOND. On the matter of punishing, that could be done under present law, punishing attorneys?

Judge RENFREW. It could. It is restricted, however, just to costs and costs have a very restrictive meaning. This would be filing fees, and would not be a very significant or a meaningful sanction. Interestingly, under the Federal rules of civil procedure, rule 37, you may award not just costs but attorneys' fees as well even against an attorney. The existing law does provide a number of methods for the courts to penalize lawyers and litigants who abuse the processes. Unfortunately, they have not availed themselves of these methods to date. THURMOND. [T1 WOULD LEGAL PROTECTION FROM A MULTIMILLION-DOLLAR SUIT AGAINST A DEFENDANT'S COUNSEL, OR PROBABLY PLAINTIFF'S ATTORNEY%IS THERE ANY DEFENSE IF COUNSEL WITHHELD CERTAIN LEGAL MANEUVERS OR DEFENSES BECAUSE HE FELT THAT THOSE MANEUVERS WERE TRULY PROPER?

Judge RENFREW. Let me say I think that the record of imposition of sanctions to date has shown that the courts have been most reluctant to enter this arena, and understandably so. I don't think any attorney should be penalized, nor should his client, because he has tried fully and fairly to present his client's position and all the appropriate defenses. I think one thing should be understood, Senator Thurmond. If all of the recommendations of the national commission were implemented, if Senate bill S. 390 were enacted, this will not make the trial of antitrust cases easy, or not difficult, complex, or lengthy. What we want to do is make sure that they are not any longer or more difficult than need be. I think there has to be some evidence that an attorney is not simply ascertaining a defense on behalf of his client, but is engaging in a tactic or unfair advantage.

Senator THURMOND. That is a good answer. For instance, suppose you had a corporation that is being sued, and the attorneys follow a course of action, and attorneys for the defendants feel that if he goes any further, that he might be liable himself and then the case is lost; and the corporation takes the position that if he had gone further that he would not have lost the case, maybe; but the attorney was afraid to go further, because he was afraid of personal liability. It is a pretty delicate field.

Judge RENFREW. It is delicate, Senator Thurmond, but it seems to me that we should make it clear. The judiciary should articulate the reasons in cases in which we impose sanctions, and should not impose sanctions without fully setting forth the reasons that led to the imposition of those sanctions. I don't think there is anything I see in Senate bill S. 390, or in the report of the national commission, which should give any lawyer any reason to hesitate or be reluctant to vigorously present the best and fairest defense for his client, nor do I ever want that to occur.

Senator THURMOND. Where do you draw the line as to what is dilatory and what is a conscientious effort to obtain the best and most fair defense in a difficult treble damages case, especially the so-called big cases?

Judge RENFREW. It is awfully hard to define. It is somewhat like obscenity. Let me give you an example. I have seen cases where there has been a request for production of documents, and they are maintained in particular files with file headings in the normal course of business. In this one case, it happened to be an antitrust plaintiff. Counsel took the files, which had been carefully segregated and set up according to a rational method, simply emptied the files, turned them upside down into several large transfer cases, picked them up and turned them over. I felt that was dilatory. I felt that was inappropriate. It is that type of conduct which we are speaking of, not the vigorous and fair representation of a case.

Senator THURMOND. You have to leave considerable discretion to a trial judge.

Judge RENFREW. Yes, you do.

Senator THURMOND. For someone reading a record, he would not be able to judge unless he saw the reactions of the witnesses of the trial. You feel that it is just, or what suggestions do you have?

Judge RENFREW. I think that discretion in many areas is present today. I think S. 390 simply affords some additional tools that, in the exercise of that discretion, the courts may be able to use to expedite some of these cases, which I believe is in the interest of the public. I think it is in the interest of the defendants as well as the plaintiffs. I think there is a great overall public interest.

Senator METZENBAUM. Not wishing to interrupt, but how did that come to your attention? Was that in the record? How did you learn that the defendant's counsel had treated the files in that manner?

Judge RENFREW. It came out in a deposition, when one of the officers of the plaintiff's company was asked about their method of keeping files, and he explained how they kept the files, and then the difference between the rational method of keeping the files and the condition they were turned over to counsel in.

Senator METZENBAUM. Was this plaintiff's counsel?

Judge RENFREW. Plaintiff's counsel had done this, yes. The sanction was imposed. I didn't impose it, but the sanction was imposed, and that counsel was told he may no longer practice before that court. This was a district within my circuit. They had to get another lawyer there immediately. It cost some delay, but the judge made it very clear that he would not tolerate that. I think the New York State bar has recommended some procedures which would preclude that type of conduct from reoccurring.

Senator THURMOND. Now, turning to the next point that I wanted to raise, what was your suggestion for amending the bill?

Judge RENFREW. My suggestion would be to reverse the prejudgment interest presumption. It has not been my experience that most lawyers are dilatory. I would prefer that we be permitted to award prejudgment interest only in cases in which we found that a party has deliberately been dilatory in the prosecution of an action. In that case, and in that case only, should there be an award of a prejudgment interest.

Senator THURMOND. Judge Renfrew, some judges use magistrates and others do not, in discovery proceedings. How do you feel about that?

Judge RENFREW. I feel strongly. I do not use magistrates, because I find that in order for me to familiarize myself with the case, I think the time I spend with the attorneys in discovery matters, in establishing the issues, and scheduling a number of pretrial procedures and motions and so forth, in the long term saves me trial time. I value the elimination of unnecessary trial time so highly that I am perfectly willing to spend the time in discovery and management of the case.

Senator THURMOND. It provides more background for you?

Judge RENFREW. Yes, sir, it surely does.

Senator THURMOND. I think you have one of the best jobs in the world. I was a State judge, and it was one of the nicest jobs I ever had.

Senator METZENBAUM. You imposed a sanction on a plaintiff's counsel in an antitrust case. Have you ever seen fit to impose sanctions on defense counsel?

Judge RENFREW. I have not, Senator Metzenbaum. My experience has been that where you take control of a case, where you establish certain guidelines for the completion of certain types of discovery and consideration of certain controlling legal issues with the advice of counsel and their input, they simply don't have time to engage in dilatory tactics or delaying tactics. Where you have firm judicial control you find far fewer delaying tactics than in a case where the case is simply filed and ignored.

Senator METZENBAUM. Thank you very much. Your article, an advance copy of which I think we have, would you care to have that inserted?

[The article referred to above appears in the appendix.]

Judge RENFREW. I would be pleased, and, could I add one thing? You put a question about a bill that Senator Kennedy has, something about consent judgments and private actions in consent actions. I have not seen that bill and don't know anything about it, but I would like to share one experience with you, because I think all of us are concerned that consent judgments are implemented and carried out. I have followed a process, which I hope the Antitrust Division would consider and include in all consent judgments. I require each of the defendants to establish procedures, antitrust compliance programs, which would insure that all persons dealing with the public and with their competitors would be aware of the existence of the consent judgment, sign a declaration that they have seen it and read it and understood it; that they would have these programs where they advise all of their personnel about the impact and the nature of the antitrust laws. They would submit an annual written report, and also annually some corporate officer, who was in charge of these programs, comes out to my court and is subjected to questions from Government counsel and from the court with respect to what this company has done in its antitrust compliance program. I don't know of the use of this method anywhere else, but I share the concern that the authors of that bill do, that we see that these consent decrees be implemented, be carried out. I find this way of doing so very effective.

Senator METZENBAUM. Thank you.

Senator THURMOND. I just wondered, Judge Renfrew, how you feel about the judges with less than 5 years' experience being assigned to these complex antitrust cases?

Judge RENFREW. Within 2 months after I went on the bench, Senator Thurmond, I tried a multidistrict panel case involving the validity of a permanent patent and antitrust.

It went about 12,000 pages of transcript, and about 50 lawyers. All I can say is, it can be done. If we are careful in the selection of our judges, and if they follow the procedures that the national commission has recommended, and have the tools available that S. 390 provides, they can do it.

Senator THURMOND. Thank you.

Senator METZENBAUM. Thank you.

Our next witnesses are Professor Lawrence Sullivan of the University of California School of Law and Professor Eleanor Fox of the New York University School of Law.

We are happy to welcome both of you here this morning as a panel. Obviously, the hour is running late and I think what we will do is to bring Professor Gerhart up at the same time and ask all of you if you can confine your oral statements to the area of 5 or 7 minutes.

Your statements will be placed in the record.

I am happy to welcome Professor Sullivan, Professor Fox and Professor Gerhart this morning.

Professor Sullivan, do you want to proceed?

PANEL OF LAW PROFESSORS

STATEMENTS OF PROF. LAWRENCE A. SULLIVAN, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIF.; PROF. ELEANOR FOX, SCHOOL OF LAW, NEW YORK UNIVERSITY, NEW YORK, N.Y.; AND PROF. PETER M. GERHART, COLLEGE OF LAW, OHIO STATE UNIVERSITY, COLUMBUS, OHIO

Professor SULLIVAN. Thank you, Senator Metzenbaum.

[The prepared statement of Professor Sullivan follows:]

PREPARED STATEMENT OF LAWRENCE ANTHONY SULLIVAN

The antitrust laws play a unique role in American economic life. To the extent these laws succeed in preserving competition, they achieve complementary policy goals. They inhibit monopoly pricing, thus they assure prices closely related to cost and preclude transfers of wealth from consumers to persons wielding economic power. In addition, they encourage cost-reducing production, distribution and service efficiencies and product and service innovation. Beyond this, they tend to reduce discretionary power in private hands which is subject to no political constraint, and tend to assure wider freedom of economic opportunity. Thus, they bring the Nation's economic life into greater consonance with American social and political values and reduce pressures for more intrusive governmental interventions.

Like other social policies, antitrust is an imperfect instrument. It falls short of assuring competitive conditions throughout the economy, and thus does not fully attain any of these goals. There are difficulties and deficiencies in the antitrust enforcement effort, as well as reasons for satisfaction and even pride. The record and the report of the National Commission for the Review of Antitrust Law and Procedure ("Shenefield Commission") show that undue protraction in the investigation and trial of major antitrust cases is one of the things that reduces the efficacy of antitrust. As the Shenefield Commission report shows, to significantly reduce undue protraction will require a serious response from the courts, the Congress, the enforcement agencies and the bar. In my own opinion and that of several other members of the Commission, important substantive law changes, as well as proce-

dural changes, are needed. The Antitrust Procedural Improvement Act of 1979 (S. 390), while it does not address any of the substantive issues which call for attention, does deal with some of the procedural problems of the big antitrust case. Therefore, the bill deserves support. I will review the changes the bill makes and comment briefly on each of them.

I. Government discovery of material obtained in the course of discovery in private litigation (amendments to the Antitrust Civil Process Act)

One of the most wasteful of human activities is to redo with one battery of lawyers and paraprofessionals investigatory tasks already completed by another battery of lawyers and paraprofessionals. This goes on all too often in antitrust. Sometimes a private antitrust plaintiff has to start from scratch in gathering through expensive, time-consuming procedures material the Government has obtained by a grand jury investigation. Sometimes it is the Government which is frustrated in its effort to obtain the product of prior discovery in private litigation and which is forced to start over to gather from myriad sources data which has already been obtained by a private party. Issues related to the first of these problems, discovery of grand jury evidence, are now pending before the Supreme Court. *Douglas Oil Co. of California v. Petrol Stops Northwest*, U.S. Sup. Ct. Dkt. No. 77-1547, cert. granted, June 19, 1978, argued, December 5, 1978. S. 390 addresses the related problem concerning discovery by the Government of the product of a private antitrust investigation.

Under present law, there is serious doubt about the Government's power to obtain by civil investigation demand material previously discovered by private parties. In *United States v. GAF Corp.*, 449 F. Supp. 351 (S.D. N.Y. 1978), appeal docketed, No. 78-6102 (2d Cir. June 13, 1978), the Court observed that the Antitrust Civil Process Act (15 U.S.C. §§ 1311 et seq.), which authorizes civil investigation demands, does not explicitly provide procedures for discovery of material obtained by private discovery and held subject to a protective order entered in the private proceedings. Because of this, the Court concluded that the Antitrust Civil Process Act does not require a response to a civil investigation demand for disclosure of such material. In consequence, to discover the material readily available in the hands of a private litigant, the Government would be forced to duplicate the same time-consuming and expensive discovery procedures which the private litigant had already completed.

On the face of it, the decision in *GAF* which multiplies the time and cost of discovery seems doubtful; there is no obvious reason why a court which entered an order to protect material discovered in private litigation could not in that proceeding hear any issue relevant to discovery of that material by the Government, including any issues concerning confidentiality. Be that as it may, S. 390 would clarify the law and end the risk that the Government will be needlessly put to the task of wasteful rediscovery.

Section 2 of S. 390 amends section 2(3) of the Antitrust Civil Process Act to identify and broadly define products of discovery. Section 3 of the bill amends section 3 of that act to establish a procedure for discovery of such materials. The procedure includes provision for notice to the party from whom the materials were originally discovered, gives that party a right to challenge the civil investigation demand, and places an obligation of confidentiality upon the government covering all of the materials thus obtained. These provisions seem eminently fair. They should reduce the time and cost of antitrust litigation while adequately protecting all interests involved.

Section 3 of S. 390 would also amend section 4(c) of the Antitrust Civil Process Act to make clear that the Government may use contractor services in analyzing and evaluating material discovered on civil investigation demands. The present wording of section 4(c) makes discovered material available for official use by an "official or employee" of the Department of Justice. The bill would broaden this phrase to read "official, employee or agent." While the history of the act and its purposes would seem even under the present wording to warrant the inference that contractors working under the supervision of Justice Department officials or employees may be given access to such materials for official purposes, the possibility of a more limiting construction makes the change desirable. Quite obviously, the efficient conduct of major antitrust litigation makes it necessary that the Antitrust Division be able to hire competent specialists for analyzing, evaluating, organizing, classifying and facilitating recall of documents and other discovered material. Leaving the Division to founder with inadequate assistance could only damage antitrust administration.

II. Sanctions for delaying tactics by attorneys (amendment of section 1927 of title 28 of the United States Code)

Dilatory tactics by attorneys are a serious source of delay and inefficiency in complex antitrust litigation. This problem will not be solved unless courts stop tolerating such conduct and take vigorous steps to identify and punish it. Congress cannot do that job. But Congress can facilitate the doing of that judicial task and can point in the right direction. S. 390 does both.

One of the most under-utilized provisions of the United States Code is section 1927, which authorizes courts to discipline attorneys who unreasonably and vexatiously delay proceedings and increase their costs. The section states that courts may sanction such conduct by imposing the resulting cost increases on the dilatory attorneys. However, the section has been construed to allow only costs of the limited kinds which are taxable to the losing party in the litigation to be assessed against a dilatory attorney. The amount by which such taxable costs are likely to be increased by dilatory tactics will typically be only a small percentage of the full costs unnecessarily imposed on the other side by delaying tactics. Section 4 of S. 390 would amend the statute to make clear that all "excess costs, expenses and attorney's fees" caused by the offending tactics can be assessed against the attorney being disciplined. Section 4 would also amend the present language of the statute to make clearer the kind of tactics it is intended to discourage. The present language speaks of an attorney who "multiplies the proceedings . . . as to increase costs unreasonably and vexatiously." As amended, the statute would apply to an attorney who "engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation." By specifically requiring that the conduct be purposeful, this change would blunt any claim that the statute is overboard or unfair, and hopefully will encourage courts to use the statute where evidence is available that warrants an inference of a purpose to delay.

III. Prejudgment interest (amendment of section 4 of the Clayton Act)

It is widely recognized that an antitrust defendant facing the risk of a divestiture of a profitable unit or an injunction putting an end to a practice which yield or protects monopoly returns has an incentive to delay. In private and government damage actions, there are often similar incentives. In the first place, the longer a defendant can hold off the day when damages must be paid, the longer it has the use of what is, as a matter of ultimate right, someone else's money. In the second place, when an adverse decision comes, even though in a damage action, it may effectively oblige the defendant to change its conduct in ways that reduce or eliminate monopoly returns.

Section 5 of S. 390 would amend sections 4, 4A and 4C of the Clayton Act to reduce defendants' incentive to delay in damage actions. The bill would authorize the award of prejudgment interest at commercial rates on the amount of single damages awarded in any such damage action, but would allow the court to reduce or deny the award to avoid any injustice. This disposition is fair, in the sense that it compensates the successful plaintiff at market rates for defendant's use of funds which the court has adjudicated should be paid to compensate plaintiff's loss and charges defendant at market rates for the use of those funds. So doing, it reduces an incentive to defendants to delay.

Moreover, since section 4, as amended, would allow the court to deny an award of such interest to a successful plaintiff if the plaintiff itself had acted in dilatory ways (or if justice otherwise required), this change in the law also gives courts a new and potentially useful sanction against delay caused by plaintiffs.

IV. Collateral estoppel (amendments to section 5(a) of the Clayton Act)

Section 5(a) of the Clayton Act provides, in effect, that final judgments or decrees in antitrust cases brought by the Government be given a limited effect in later actions brought by private parties. The section provides, in effect, that such judgments, when they establish that the defendant has violated the antitrust laws, be given prima facie effect to establish any matter as to which the judgment would estop the defendant in another action by the Government. In order to reduce complexity and delay and the relitigation of issues earlier litigated, the section thus creates a partial estoppel against a defendant in a Government action which is given effect in a later action in which the Government is not a party.

As an historical matter, section 5(a) constituted a liberalization of the judge-made law of collateral estoppel; at the time the statute was passed, the accepted judicial doctrine allowed a party to be estopped by findings or rulings in a prior litigation only at the behest of persons who would also be estopped to the same degree, that is, only by other parties to the prior litigation or persons in privity with them. By giving prima facie effect to the prior litigation even at the behest of a party not

itself bound, Congress in 1914 extended the estoppel concept further than courts had yet done. (See *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111 (1912), which discloses the state of the law at the time the Clayton Act was passed.) However, in the years since 1914, the courts have become increasingly concerned about the wasteful burden of repetitive litigation and have come to recognize that even a full and complete estoppel can in some circumstances be made available to an unbound stranger to the prior litigation without unfairness to the party bound. *Parklane Hosiery Company v. Shore*,—U.S.—, 99 S. Ct. 645 (1979), involved a company that had, in a proceeding brought by the Securities and Exchange Commission, been found to have violated the Securities and Exchange Act. A private party, not a party to that litigation, in a suit alleging the same violation sought to estop the company from denying the violation found in the action brought by the SEC. The court held that inasmuch as the company had had a full and fair opportunity to litigate the liability issues in the action brought by the SEC, it was estopped in the private proceedings from relitigating them.

The potential applicability of *Parklane Hosiery* in the antitrust context is obvious. If in a government proceeding affording a full and fair opportunity to defend, a defendant were found guilty of violating section 1 or 2 of the Sherman Act, that adjudication would be binding against the defendant in a later action brought by a private party alleging the same violation. Section 5(a), however, may preclude this result, for by stating that the adjudication in the government action is to be given prima facie effect in the private suit, it may preclude the conclusive estoppel that would apply outside of the antitrust context.

There is no reason why an antitrust plaintiff to whom Congress sought in 1914 to give a special advantage should now uniquely suffer a disadvantage as compared with parties seeking damages for previously adjudicated violations of other statutes. Moreover, when one focuses on the social purpose of the collateral estoppel doctrine to reduce socially wasteful, repetitive litigation, it is manifest that the need for the doctrine in its most copious form is, in the antitrust field, as high as or higher than it is in any other field. To rectify the anomaly that now exists, section 6(3) of S. 390 would amend section 4 of the Clayton Act. As amended, the statute would make clear that the statutory prima facie rule (which would continue to apply where a more complete estoppel warranted) is not intended to preclude a broader estoppel where, as in a case similar to *Parklane Hosiery*, one is warranted under the nonstatutory doctrine of collateral estoppel.

Section 6(1) of S. 390 deals with a related problem. It amends section 5(a) of Clayton to make clear that judgments or decrees in Government antitrust actions are given full estoppel effect in Government damage actions. There is no plausible reason why the Government, which is a party both to an earlier enforcement proceeding and to a later damage action, should not receive the same benefit from estoppel doctrine as would a private litigant in like circumstance. The bill would change section 5(a) of Clayton to assure this result.

For the above reasons, I urge the enactment of S. 390. I also urge the committee to hold hearings at an early date on the impact of the substantive law of antitrust on the protraction, inefficiency and cost of antitrust litigation. The report of the Shenefield commission marks out two significant areas were simplifying legislation is called for, persistent monopoly and attempts to monopolize. I hope that the momentum started by that report will be carried forward in this congressional session.

Professor SULLIVAN [continuing]. I would like not to repeat what is in my statement. I would like to comment on some of the things on which the earlier witnesses have been asked questions.

The first concerns the nature of the harm caused by delay in antitrust litigation.

I would agree with Mr. Shenefield's answer as to the cost in resources of a time lapse, and as to the cost in public respect for the law. I would add, when a case has been going on for 10 years, a major structural case, and a litigation record has been made during that period of time, it becomes exceedingly difficult for the court at the end of the case to design effective relief.

The nature of the industry embodied in that record and the nature of the industry out there in the real world, when there has been that kind of delay, may differ substantially. That is a very

significant cost; ultimately what is done by the court may be ill-informed because of delays that have taken place in the trial of the case.

I think this problem of protraction is a serious one from all of those respects. I think this bill addresses it in a very constructive way with regard to Government discovery of material obtained in the course of private litigation. I would affirm what other witnesses have said about the need to amend the Antitrust Civil Process Act.

One of the most wasteful human activities one can picture is sending a battery of lawyers and a battery of economists, accountants and paraprofessionals wandering through half a million documents when another battery of lawyers, economists, accountants, and paraprofessionals have already done that. This happens all too often; and the bill provides a needed response.

I would add that I gravely doubt that we should allow the winnowing and analysis of such documents to be protected under the work-product defense, which may ultimately lie behind some of the claims for protection against discovery of the product or prior discovery. The bill doesn't address that.

Senator THURMOND. If you don't mind, Mr. Sullivan, could you talk into the microphone? We cannot all hear you.

Professor SULLIVAN. Surely.

In many of these cases, there may be a work product defense. For example, the analysis of the documents done by a private party. The bill doesn't address that problem. I am not prepared to suggest to you that I think it should; but I do think this committee should monitor what happens in these cases in the future. It seems to me that the conception that because a lawyer has done some analysis on some material that it is necessarily protected from discovery is perhaps a little obsolete when you are talking about problems of this nature and the kinds of costs you get into and the delays that can occur.

Senator METZENBAUM. Professor Sullivan, let me clarify this in my own mind.

Were you a practicing lawyer before?

Professor SULLIVAN. Yes, I was. I practiced law with the firm of Foley, Hoag & Eliot.

Senator METZENBAUM. Would that be considered a corporate law firm?

Professor SULLIVAN. Yes, Boston, Mass.

Senator METZENBAUM. It is a pretty good-sized law firm?

Professor SULLIVAN. I guess about 60 or 65 lawyers now. A little smaller than when I left it.

Senator METZENBAUM. Were they involved in antitrust litigation?

Professor SULLIVAN. Yes, sir.

Senator METZENBAUM. Which side?

Professor SULLIVAN. Mostly defendants, but not entirely.

Senator METZENBAUM. Do you have an opinion on the question of prejudgment interest? Do you have any thoughts on that subject?

Professor SULLIVAN. I do.

I would disagree with Judge Renfrew's suggestion. I think that the bill, the provisions in S. 390 are correct. There are two things involved. One is the incentive and possible sanction for delaying

tactics; but the other is simply the incentive to get on with the litigation and get it done. I think that provision for interest on the single-damage portion of an award would give an additional incentive which is needed to facilitate the prompt handling of these cases.

We have heard other witnesses discuss the difficulty in identifying what kind of conduct is dilatory. I don't think we can rely solely on the assumption that we will be able to identify every case where somebody has been dragging their feet in prosecuting the case or delaying it from the defense side. So I think additional incentives to handle these cases more promptly and efficiently are very necessary. I would also point out that in some States, except in cases where the award is penal, it is quite routine to pay interest from the date of the suit rather than simply from the date of the judgment.

Senator METZENBAUM. Professor Fox, may we hear from you for a minute?

Professor Fox. Yes. Thank you very much.

[The prepared statement of Professor Fox follows:]

PREPARED STATEMENT OF ELEANOR M. FOX

My name is Eleanor Fox. I am a professor of Law at New York University School of Law.

I am pleased to accept the invitation of the subcommittee to testify on S. 390. I view S. 390 as a significant step toward improving and expediting antitrust enforcement in this country. Provisions of the bill would plug loopholes in existing law and procedure which invite unreasonable delays by antitrust defendants and impose unnecessary costs on antitrust plaintiffs and on the litigation process.

Efficiency in antitrust litigation must be increased, and this bill, if enacted, should increase it. While efficiency in the litigation process is a good in itself, it also serves a broader purpose. It should improve the competitive process at large. This is so for two reasons. If antitrust violations are quickly cured, (1) the competitive process, when impaired, will be rapidly restored, and (2) the would-be violator will be readily deterred. On the other hand, if antitrust litigation is so inefficient that we can no longer see its beginning or its end, competitive harms will go unrepaired from year to year and decade to decade, and business will be somewhat free to cross the limits of the law not only with relative impunity, but also with expectation of large returns. In short, inefficient antitrust enforcement is bad for competition, bad for the economy, and bad for the consumer, and, as well, a costly imposition on the court system and on those who are deprived of access to the courts.

Unfortunately, the inefficiencies of the antitrust litigation process have become so pronounced that the matter has become one of serious concern. Cases run on for 10 to 15 years. They cost the litigants millions of dollars, to say nothing of the costs on the courts, on the economy, and on all of us as consumers. There is a consensus that something must be done. S. 390 is an affirmative bill that directly addresses the problem.

S. 390 properly recognizes that Government litigation will be expedited if the Government has access to documents of prospective defendants already selected from millions of immaterial documents by plaintiffs in private actions. Similarly, it recognizes that private litigation will be expedited if the private party could benefit from the collateral estoppel effect of a Government victory. The bill implicitly recognizes that all too often attorneys use delay strategically, and it would add teeth to section 1927 of title 28, U.S.C., in dealing with unethical tactics.

Further, the bill wisely recognizes that parties having the financial incentive to expedite litigation will do so, while parties who perceive the financial benefits of delay will have no concern for speed. The bill attempts to deal with this problem by providing for prejudgment interest. I suggest that further thought be given to the problem, including the problem as it relates to injunctive (nondamage) actions. Consideration might be given to tax incentives to expedite, such as a provision disallowing deduction for expenses of litigation that has continued past a stated number of years.

Finally, the bill would plug two substantive loopholes in our merger law, section 7 of the Clayton Act. It would extend jurisdiction to "persons" as well as corporations, and to merger partners "affecting commerce" as well as those operating in commerce. There is no good basis in reason or policy to justify the jurisdictional narrowness of our existing merger law. This was recognized by Congress when it adopted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title II (Premerger Notification) (section 7A of the Clayton Act). The jurisdictional provisions of section 7A incorporate both changes reflected in the merger law portion of the bill, and so the bill would bring section 7 into parity with section 7A.

Attached is a copy of my testimony on June 16, 1977 on H.R. 6001, which bill would have revised section 7 of the Clayton Act to include mergers of corporations engaged in activities "affecting commerce."

I support S. 390, because I believe that it will help to expedite antitrust enforcement and thus to help preserve our competitive economy.

Professor Fox [continuing]. I believe that S. 390 is a very positive bill which should increase the efficiency of antitrust litigation. Efficiency in antitrust litigation is good in itself and, further, as Mr. Shenefield suggested, it serves a broader purpose. If antitrust violations are quickly cured, the competitive process will be more rapidly restored and also would-be violators would be more readily deterred. On the other hand, if antitrust litigation is so inefficient that we can no longer see its beginning or its end, competitive harms will go unremedied from year to year and business will be somewhat free to cross the limits of the law, not only with relative impunity, but also with expectation of large returns.

In short, inefficient antitrust litigation is bad for competition, bad for the economy, and bad for the consumer. Unfortunately, the inefficiencies in our antitrust litigation process have become so pronounced that the problem calls out for a remedy. Cases run on for 10 to 15 years. They cost the litigants and they cost us, as taxpayers and consumers, millions of dollars. There is a consensus that something must be done.

S. 390 is an affirmative bill that addresses the problem. S. 390 properly recognizes that Government litigation will be expedited if the Government has access to documents of prospective defendants already selected by plaintiffs in private actions. Similarly, it recognizes that private litigation will be expedited if the private party can have the usual benefits from the collateral estoppel doctrine effect of a Government victory.

The bill recognizes that attorney delay can frustrate the smooth course of litigation and it would add teeth to section 1927 of title 28, United States Code, in dealing with unethical delay tactics. The bill wisely recognizes that parties having the financial incentive to expedite litigation will do so, while parties who perceive the financial benefits of delay will have no concern for speed. The bill deals with this problem by providing for prejudgment interest. I hope that further thought will be given to alternative means of dealing with an even broader problem, including the problem that there are financial incentives that encourage defendants to delay injunctive actions. The injunctive actions will not be affected by the prejudgment interest provision of this bill.

Consideration might be given to tax incentives to expedite, such as disallowing deduction for expenses of a litigation that has continued past a stated number of years, perhaps with the power of the judge to relax the disallowance of the tax deduction if the parties are expediting the case. Under our existing tax law, the

Government actually subsidizes our mammoth litigation, and if the subsidy should disappear, perhaps the size of the case would shrink.

Another possible alternative to consider would be a penalty related to profits earned from illegal activities during the pendency of the suit. Again, this could be imposed after a reasonable number of years have elapsed—for example, 5—with the right of the judge to relax the penalty if the judge believes that the parties are actively expediting the litigation.

In my remaining time, I would like to comment on the benefits of assuring the Government the right to seek the fruits of discovery from the private party.

Section 2 of the bill would make clear that the Government has the right to get a target's documents from the private plaintiff. I think this is a very important right and should be expressly granted. Typically, the target has produced to the private plaintiff, and will produce to the Government, millions of documents, and only a relatively few are material. The private plaintiff has typically selected those few and put them together in a coherent order, often at the cost of millions of dollars and hundreds of hours of effort and enormous personal effort of teams of lawyers.

Why should a target want to deny the Government the benefit of the plaintiff's selection? To me, it is very clear that the target wants the Government to reinvent the wheel. It will be costly and tedious and the Government may have problems of resource allocation. Perhaps the Government won't have the money to spend or the people to commit or perhaps the Government lawyer will miss, in the haystack of documents, a key document or a document that links together and makes sense out of the other documents produced. The very reason that targets resist the right is the reason Congress should grant the right: It saves time and money.

The recent Justice Department victory in *United States v. GAF* does not lay the matter to rest definitively. A different panel of the same circuit handed down *Martindell v. ITT* in the same week. *Martindell*, which is easily distinguishable on its facts, reflects a philosophy on the sanctity of protective orders diametrically opposed to the philosophy of the panel that decided *GAF*. It is possible that there will be an en banc rehearing of the issues in *GAF* and *Martindell*. Also, other circuits have yet to rule.

I think Congress should act to make it clear that the Government has the right to the fruits of discovery.

Thus far, I have been talking about the problem as it relates to the private plaintiff in the course of litigation. When a private plaintiff is in the course of litigation against a certain defendant, it usually wants to put the Government in as advanced a position as possible with regard to the facts about that target's possible violations.

There is a complement to this problem, that is, the settling private plaintiff. The settling private plaintiff soon learns that the power to suppress its work product from the Government is of enormous value to the defendant, and I refer here to a case mentioned by Mr. Shenefield, *Control Data v. IBM*.

Control Data sued IBM for monopolization. It spent an enormous number of dollars and hours and great personal efforts preparing

what was probably an extraordinary index of the IBM documents and practices. It settled the case with IBM and, pursuant to settlement, destroyed its valuable index. I suggest that thought be given to a law that would make it clear that it is against public policy to bargain, as a term of settlement, to deprive the Government of work product. \$107 One wonders if *United States v. IBM* would still be pending today if the law were clear that Control Data did not have the right to sell its promise to destroy the index.

In conclusion, I support S. 390. I think it is a very fine effort to improve the efficiency of antitrust litigation.

Senator METZENBAUM. I am not certain when I asked Professor Fox a question that I did not cut you off, Professor Sullivan. I didn't mean to do that.

Professor Fox. I beg your pardon, Senator. I am terribly sorry. I misunderstood you.

Senator METZENBAUM. No, no. It wasn't your fault at all. Quite the contrary. If anything, it was my fault. We are trying to shorten the testimony, but I would not want to shut anyone off.

Professor SULLIVAN. I would like to comment very quickly, if I may, on one or two other points.

One of them concerns identifying dilatory tactics. I would agree that is a difficult problem. I would add simply that if judges, in trying these mammoth cases, follow the other recommendations of the National Commission, I think drawing the line between what is dilatory and what is not will be simplified considerably in the process. The Commission's other recommendations invite the sitting judge to take a very active part in designing the discovery process and in monitoring what goes on in that process; and if the sitting judge is doing that, I think the existent dilatory conduct when it occurs will be much clearer. Moreover, the judge's active presence will deter it a good deal.

The judge will know it more readily when he sees it, and when it happens, he is going to see it more often. So I don't think that the problem of identifying dilatory conduct needs to be quite as difficult as perhaps it used to be.

With regard to prejudgment interest, I have already commented.

With regard to collateral estoppel, it seems to me that the bill makes an important change, not only in what it does for efficiency in litigation, but also in what it does for fair and equal treatment of antitrust plaintiffs.

Under the law as it now stands, an antitrust plaintiff may be treated differently and less favorably than a plaintiff who is enforcing other Federal legislation and, indeed, less favorably than an antitrust defendant. The new and increasing scope of collateral estoppel may be available to antitrust defendants, despite the language of section 5(a). But that section may well deprive antitrust plaintiffs of the benefit of general collateral estoppel law.

So I think fairness as well as efficiency in litigation call for the change this bill makes in section 5(a) of Clayton.

Senator METZENBAUM. Thank you very much, Professor Sullivan.

The procedure that we will use is that we will hear all three witnesses, and then Senator Thurmond and I will inquire of you rather briefly. I have one question of you, Professor Fox, before we

proceed. As I understand, you work 1 day a week at Simpson, Thatcher & Bartlett?

Professor FOX. Yes. I am counsel to that law firm, which is my own law firm.

Senator METZENBAUM. How long were you with them?

Professor FOX. Fourteen years.

Senator METZENBAUM. Would you say that is primarily a corporate law firm?

Professor FOX. Yes, sir, it is.

Senator METZENBAUM. It is the firm from which our Secretary of State has come, Cyrus Vance.

Professor FOX. Yes.

Senator METZENBAUM. How many lawyers are there?

Professor FOX. About 180.

Senator METZENBAUM. Well, in the main, when there is antitrust litigation, would they be mainly on the defendant's side or the plaintiff's side?

Professor FOX. For the law firm, it is generally on the defendant's side. But the firm has a mixture, and I have generally worked on the plaintiff's side.

Senator METZENBAUM. Professor Gerhart?

Professor GERHART. Thank you very much, Mr. Chairman.

I have recently had the good fortune to be a consultant to the National Commission to Review Antitrust Laws and Procedures, and, in that capacity, I have completed an empirical study of the causes of complexity and protraction in antitrust litigation and possible solutions to perceived problems.

Senator METZENBAUM. Would you say the college with which you are associated, because I have a particular interest in that.

Professor GERHART. Yes, sir. Ohio State University College of Law.

Senator METZENBAUM. It graduates only excellent lawyers. I know that from my personal experience.

Professor GERHART. I agree. We are very proud of our alumni. We are doing as much as we can to keep standards growing.

Senator METZENBAUM. Thank you.

Professor GERHART. I would like to briefly acquaint you with the nature of my study and the conclusions I reached in a report I submitted to the Commission, because I think the matters that I reported in my study support the legislation we are discussing today.

[The prepared statement of Professor Gerhart follows:]

PREPARED STATEMENT OF PETER M. GERHART

It is a pleasure to be with you this morning to present my views on S. 390, the Antitrust Procedural Improvements Act of 1979.

I am appearing today to acquaint you with the results of an empirical study I undertook for the National Commission for the Review of Antitrust Laws and Procedures concerning the causes of protracted antitrust litigation, and to discuss the findings of my study that relate to the Antitrust Procedural Improvement Act of 1979. My views concerning S. 390 are also influenced by my experiences as a practicing antitrust attorney and my teaching experience in the fields of antitrust, unfair trade practices, and regulated industries.

Let me state at the outset that I support the provisions of the Antitrust Procedural Improvements Act of 1979; that I believe the provisions would reduce unnecessary waste and protraction in antitrust litigation; and that the arguments you may

hear to the legislation are misguided. To put these comments in context, let me outline for you my report to the National Antitrust Commission and discuss how it relates to this bill.

My study for the National Antitrust Commission was a study of the litigation histories of selected cases, undertaken by interviewing the lawyers and judges involved and reading documents filed in the cases, to determine the causes of complexity and protraction and possible solutions to existing problems. My report to the Commission attempts to synthesize the views of those I interviewed and to present my own views based on my analysis of the cases. During the project I interviewed 12 judges and almost 40 lawyers.

I can summarize briefly the broad conclusions of my report. First, there is no doubt that unnecessary protraction is a significant problem in some antitrust litigation, and that lawyers and judges involved in antitrust litigation perceive undue delay to be relatively common. Even recognizing that some litigation is truly technical and complex in scope (factors that account for much of the length of some cases), most attorneys and judges I interviewed believe the cases they litigated could have been litigated more quickly. Second, even aside from undue protraction, the amount of resources invested in some litigation is staggering, raising the risk that litigation costs will be either prohibitive for a plaintiff or punitive for a defendant, regardless of the outcome. Third, the issue of efficient antitrust litigation is neither a plaintiff's nor a defendant's issue—both plaintiffs and defendants sometimes have an incentive to avoid expedition, and both perceive their adversary to engage sometimes in abusive or unreasonable conduct. Because both plaintiffs and defendants have an interest in more rational and efficient antitrust adjudication, there is likely to be broad support for procedural changes that are neither antiplaintiff nor antidefendant.

Finally, it is clear that the costs of unnecessary litigation activity and unreasonable delay include more than just losses to individual litigants in particular cases. The burden on judges is great, unnecessarily diverting important and scarce judicial resources from important matters. More importantly, public faith in the ability of the judicial system to effectively form and enforce antitrust policy is shaken. The evolution of meaningful antitrust policy, which depends so much on judicial pronouncements, is deterred.

My report identifies many causes of unnecessary delay and protraction in antitrust litigation, no one of which is predominant. Because of the large stakes involved, lawyers have a tendency to overlitigate cases. Protraction may result because defendants sometimes have an incentive to delay a case, or no incentive to expedite it; plaintiffs sometimes are unwilling to face the weaknesses in their case or deliberately delay to obfuscate the weaknesses and take advantage of coercive settlement possibilities. Cases are sometimes delayed as motions remain undecided. Discovery, which under normal circumstances is time-consuming and burdensome, is especially susceptible to protraction and abuse. Although I was not able to document the extent to which discovery procedures are abused, few of those I interviewed doubt that discovery problems can be, and often are, significant.

Against this background, many steps are necessary to reduce delay and protraction in antitrust litigation. Not all solutions are susceptible to legislative action—in my view the most important changes will come through refined techniques of judicial craftsmanship, techniques that will evolve and mature over time as judicial experiences are shared and compared. Other solutions may come through changes in the attitudes of litigants or the Federal Rules of Civil Procedure. It is clear that no single solution to problems of protraction is available. Nonetheless, the important legislative changes that would be made by the Antitrust Procedural Improvements Act of 1979 would be a significant supplement to other solutions.

Let me briefly outline my reasons for supporting this legislation.

1. Sanctions for attorney delay

Judicial authority to impose meaningful sanctions is an important component of judicial control of litigation. Although my report points out the limitations in the usefulness of sanctions—resulting primarily from the difficulty of identifying and defining prohibited conduct—meaningful sanctions, or the threat of sanctions, can nonetheless be used effectively to preclude unreasonable conduct. The proposed amendment to section 1927 of title 28 would strengthen sanctioning authority by articulating a standard that is easier to apply, and comply with, than the present standard, and by increasing the sanction that can be imposed. This amendment would permit judges to control protracted litigation more effectively.

Amendment of section 1927 is a particularly suitable way of increasing the sanctioning power of judges. The section is neutral—it applies with equal force to both plaintiffs and defendants who unreasonably delay a case; Congressional amend-

ment should be understood to be neither antidefendant nor antiplaintiff and should therefore receive wide support. Moreover, the imposition of sanctions under section 1927 is not dependent on a request for sanctions from one of the litigants, a feature that is especially important in view of my finding that attorneys are often reluctant to seek sanctions, even when they believe the conduct of their adversary to be dilatory and unreasonable. As my report states, if judges are to control complex litigation, they must be willing to themselves question the litigation tactics of the parties and impose sanctions where appropriate.

I would make one slight suggestion, however. Because section 1927 applies to all Federal litigation, it might be desirable to enact this legislation under a title other than the "Antitrust Procedural Improvements Act" so that all who might be affected by it understand its significance and have an opportunity to comment on it.

2. Prejudgment interest

In my view, the justification for this amendment is not necessarily that awarding prejudgment interest will deter dilatory conduct by defendants. Where the violation is a continuing one, as in a monopolization case, the fact that additional treble damage exposure is being incurred continually should, if any monetary penalty could, deter dilatory conduct. In other cases, awarding prejudgment interest at most merely neutralizes the monetary gains from delay and does nothing to deter delay that is otherwise motivated. The true justification for this amendment, it seems to me, is that when a defendant injures a plaintiff monetarily, the plaintiff is deprived of the use of money and thus of the interest he could have earned. This lost interest is a real an injury to the plaintiff as any other loss, and the plaintiff should be allowed to recover that loss, at least as of the day he stakes a claim to it by filing a complaint.

No doubt some will argue that plaintiffs are already compensated for the loss of prejudgment interest because they receive treble damage awards. But treble damage awards are designed not as compensation for plaintiffs but to deter defendant's conducts. To the extent that treble damages can be paid for from the prejudgment interest the defendant earns on plaintiff's money, the deterrent impact of the treble damage feature of antitrust is lost. Therefore, prevent dilution of the deterrent impact of treble damages, Congress could reasonably decide that defendants should be separately accountable for prejudgment interest.

3. Government access to products of discovery

When a Government action or investigation follows private antitrust litigation, permitting the Government to obtain discovery materials generated in the private litigation saves time and expense, and thus facilitates enforcement of the antitrust laws. In many of the cases included in my study, shared discovery, either between private plaintiffs or between private plaintiffs and the Antitrust Division, worked well, without apparent prejudice to, or even objection from, the party from whom the discovery was obtained. Indeed, sharing discovery material is common among defendants with a common interest, and coordinated discovery—including the exchange of discovery material—is essential if complex litigation is to be expedited. As long as the legitimate claims of confidentiality made by the party producing the material are protected, no significant prejudice can be claimed from a system of shared discovery.

Occasionally it is argued that giving the Antitrust Division access to discovery materials from private litigation will impede discovery in the private litigation by inducing litigants to assert claims of privilege that might not otherwise be asserted. I find this argument to be unpersuasive. Private litigation is virtually always significant enough so that parties will make all legitimate claims of privilege, even without the threat that those materials will be made available to the Antitrust Division. Moreover, material sought by the Antitrust Division is likely to be "sensitive" material as to which a privilege claim would have been made if one were available. Shared discovery is therefore unlikely to impede private litigation.

4. Collateral estoppel

This amendment has a relatively simple purpose; namely, to permit the courts to work out fair and realistic rules for applying developing principles of collateral estoppel in all antitrust cases, including government damage actions as well as government enforcement actions. Even without the amendment, principles of collateral estoppel will no doubt be developed to be applied from one private antitrust case to another, and from a private case to a government case, a development that will not be hindered by confusion concerning the intent of section 5 of the Clayton Act.

I see no reason why similar development should not be allowed when a private case follows a government case. It should also be noted that principles of collateral estoppel operate both for and against defendants. A plaintiff who sues some, but not all, members of an alleged conspiracy may, if he loses the first suit, be precluded from suing the other alleged conspirators in a second suit. Conceivably, principles of collateral estoppel might preclude the Department of Justice from challenging conduct that the Federal Trade Commission had previously challenged unsuccessfully. Thus, this amendment should not necessarily be viewed as antidefendant.

In sum, the study I did for the National Antitrust Commission demonstrates the need for passage of the Antitrust Procedural Improvements Act of 1979 and supports each of its provisions that would expedite antitrust litigation.

Professor GERHART [continuing]. The National Commission asked me to undertake an empirical study. I was asked to select a sample of cases and review the litigation history of those cases by reading documents from the cases and by interviewing the lawyers and judges involved. From the study I was to get a feeling concerning what happened in the cases, why they were delayed, and what solutions might be found for the problem of delay.

Some of the cases that I selected for the study were complex and protracted. Others were simple; some were expedited. The cases covered the gamut from monopoly to price fixing to rule-of-reason cases, so I got a fairly good selection. In my report, I tried to summarize the views of those I interviewed and my own views based on my reading of the cases and my analyses of the documents. In total, I interviewed 12 judges and 1 magistrate and over 40 lawyers, including some of the most respected lawyers in the antitrust bar. I will briefly describe for you the conclusions that I reached.

First, many people perceive that delay is a substantial problem in some antitrust litigation and the most antitrust cases could be litigated much more expeditiously. That is not to say that people admit that they are abusing the system intentionally, but people recognize that there are institutional factors that lead to over preparation, and that things can be done to streamline the cases and make them more expeditious without losing justice or fairness. Thus my report supports the need for action to try to make antitrust litigation more rational and expeditious.

My report also makes it clear that the issue of expeditious or rational antitrust litigation is neither a plaintiff's nor a defendant's issue. Both plaintiffs and defendants feel that the other side abuses the system or engages in activity that is not necessary for a just outcome. Both have an interest in making sure that antitrust litigation is more rational. So the issue of how to streamline antitrust litigation and make it more effective is an issue that bears interest and support from both plaintiff's and defendant's lawyers.

It is also clear from my study that, even aside from the question of undue delay, the amount of resources devoted to these litigations is extraordinary and that the system is in danger of creating a very serious problem. It became apparent in my interviews that the ability of plaintiffs to utilize the courts to correct perceived wrongs or to challenge business conduct of others is clearly in jeopardy because of the high cost of litigation. Likewise, defendants often feel that they are brought into court unnecessarily, and that they are unable to extricate themselves, from suits that are unjustified or that could otherwise be settled easily.

I sensed in my interviews strong public support to streamline antitrust litigation and strong concern that undue protraction of antitrust cases causes significant losses even beyond the losses to litigants in individual cases. People are sensitive to the fact that the ability of antitrust laws to be enforced is in some danger if we are unable to ameliorate the problems of delay.

Moreover, antitrust law, as doctrine, does not develop if cases become protracted. One of the interests we have is to make sure that the courts are able to develop antitrust doctrine expeditiously and clearly so that the doctrine can be used to guide future conduct.

Where cases are unnecessarily delayed, my report recognizes many causes and suggests many solutions, most of which are contained in the report of the National Commission. Although many of the solutions are not susceptible to legislative treatment, I believe that the provisions in S. 390 are an important supplement to the other things that have to be done if antitrust litigation is to be expedited.

Let me briefly talk about two of the provisions of S. 390 on which my study has a direct bearing.

First, the issue of shared discovery. It is clear from my study that shared discovery through which the Government relies on work product from private cases, has taken place under the existing rules through the cooperation of counsel, and that this has occurred without objection and without apparent abuse. Indeed, shared activity and shared work product between common plaintiffs and common defendants is fairly common in antitrust cases.

The other general conclusion that stems from my study is that sanctions are an important part of judicial control. Sanctions, and the ability to threaten to impose sanctions, when used as an integral part of controlling a case, learning the issues, and knowing what discovery has been taken, will perceptibly increase the speed with which antitrust cases can be litigated. Therefore, I believe that the record created by my report fully supports the amendments to section 1927 of title 28, which would increase the sanctioning power of judges.

Thank you.

Senator METZENBAUM. Professor Gerhart, we are going to include your entire report in the record at the conclusion of your oral testimony. Do we have a copy?

Professor GERHART. Yes.

Senator METZENBAUM. I have just a few questions for each of the witnesses. I think I will just conclude with those.

Professor Sullivan, you state in your excellent book, *Antitrust Law*, that it is anomalous for section 7 of the Clayton Act to have a different jurisdictional reach than the provisions of the Sherman Act. Do you wholeheartedly support section 7 of S. 390?

Professor SULLIVAN. I do, for the reasons stated in the book, and for the reasons that other witnesses have given here.

Senator METZENBAUM. Can mergers with significant anticompetitive impact escape Department of Justice review because of the limitation placed on section 7 jurisdiction by the *American Maintenance Industries* case?

Professor SULLIVAN. Yes. I think that case itself is an example.

Senator METZENBAUM. Do the 1975 amendments to the Federal Trade Commission Act give the FTC authority to challenge these types of mergers?

Professor SULLIVAN. Yes, but I don't think that throws doubt on the need for this amendment. The Department of Justice should have the same authority as the Federal Trade Commission.

Senator METZENBAUM. I would like to ask Professor Fox a couple of questions.

You were involved in the GAF suit against Kodak?

Professor Fox. Yes.

Senator METZENBAUM. You were on the plaintiff's side?

Professor Fox. Yes. I was one of the litigating attorneys for GAF. I have been counsel on the case since I began teaching.

Senator METZENBAUM. Do you believe that discovery material covered by a protective order should be unavailable to the Justice Department through the civil investigative demand procedure?

Professor Fox. I believe it should be available.

Senator METZENBAUM. You believe it should be available?

Professor Fox. That is right; yes.

Senator METZENBAUM. Do you believe the rights of the person from whom the documents are originally obtained can be completely protected?

Professor Fox. Yes. They can be, and I think the bill does a good job in providing all the appropriate protection.

Senator METZENBAUM. Do you think sections 2 and 3 adequately provide those protections?

Professor Fox. Yes, I do.

Senator METZENBAUM. My reading of the legislative history of section 5(a) suggests to me that it is an historical accident that government antitrust judgments are not given collateral estoppel effect. I understand that you share my impression of the legislative history. Could you explain for us how this historical accident came about by reason of judicial interpretation?

Professor Fox. Yes.

When the Clayton Act was first adopted, the words "prima facie" were put into the statute with the intent of giving the private plaintiff an advantage it would not otherwise have. "Collateral estoppel" was then a very undeveloped doctrine.

In the 1970's, the collateral estoppel doctrine outran the value of "prima facie" effect, and "prima facie" became frozen as a word of limitation. It is unfair that a plaintiff in an antitrust action should have less of a right to a collateral estoppel effect than a plaintiff in another action.

Senator METZENBAUM. Judge Renfrew mentioned that the New York State Bar Association is taking steps to discourage some of the abusive discovery practices that he has seen. I know you are a member of the New York State Bar and are active in the bar association.

Can you describe for us the steps the bar association is taking?

Professor Fox. I cannot; but I will be glad to supply it for the record.

Senator METZENBAUM. Thank you.

Let me also thank all of the witnesses for being so patient with this committee and understanding the problems of weather. I think

you have been here for the last 1½ days. We gave you a chance to see Washington from a different perspective than you usually do. The cherry blossoms are not out.

Professor Gerhart, do the judges and attorneys you interviewed believe that abuse of the discovery process was a major cause of this unnecessary delay?

Professor GERHART. Yes, many of the attorneys I interviewed did attribute much of the delay in antitrust cases to abusive conduct. I was not able to determine if these allegations are true, but the attorneys believe them to be true. They perceive abusive conduct to be relatively common in some cases and are anxious to have a remedy.

These allegations come from attorneys for both plaintiffs and defendants.

Senator METZENBAUM. Did the judges believe that sanctions could be effective tools for controlling discovery?

Professor GERHART. Yes. The judges do. Most recognize and worry about the difficulty of drawing the line between abusive conduct and good advocacy. Most agree they would impose sanction only where sanctions are clearly warranted, because of unreasonable conduct.

Most judges also emphasize that sanctions should be coupled with other means of controlling litigation and that sanctions are most usable when they follow tight judicial control. It is easiest to recognize abusive conduct when you know what is going on in the litigation. Most judges believe that sanctions and threats of sanctions are important means of controlling litigation.

Senator METZENBAUM. Thank you, Professor Gerhart.

Senator THURMOND?

Senator THURMOND. I want to thank you, ladies and gentlemen, for your appearance here. We appreciate your being here, especially on this snowy day.

I do not think I have any other questions. [I07Thank you, Mr. Chairman.

The subcommittee will stand in recess until next Monday.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene on Monday, February 26, 1979.]

ANTITRUST PROCEDURAL IMPROVEMENTS ACT OF 1979, S. 390

MONDAY, FEBRUARY 26, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLY,
AND BUSINESS RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:05 a.m., pursuant to notice, in room 2228 of the Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present. Senator Metzenbaum.

Also present: David Boies, chief counsel and staff director, Barry Dierenfeld, chief counsel and staff director, Subcommittee on Antitrust, J. Michael Cooper, staff counsel, Marilyn Falksen, staff assistant and Peter Chumbris, minority counsel.

Senator METZENBAUM. The hearing will come to order.

OPENING STATEMENT OF SENATOR METZENBAUM

Last Tuesday, despite Washington's blizzard of 1979, the Subcommittee on Antitrust, Monopoly and Business Rights conducted its first day of hearings on S. 390, the bill to expedite the procedures and reduce the costs of antitrust litigation. At that time we heard the testimony from the Department of Justice and representatives of the judicial and academic communities.

Today the subcommittee will conduct the final day of hearing on S. 390. Our witnesses today are David L. Foster, a member of the New York law firm of Willkie, Farr & Gallagher; Mark Green, director of the Public Citizen's Congressional Watch; Hon. C. Clyde Atkins, Chief Judge of the U.S. District Court for the Southern District of Florida, and John J. Nevin, chairman of the board of directors of the Zenith Radio Corp.

Both the U.S. Chamber of Commerce and the Business Roundtable have been invited to testify before this subcommittee on S. 390. They have declined but will submit written statements for the record.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, this Subcommittee on Antitrust and Monopoly is moving into new areas on issues which stem from some of this subcommittee's previous hearings in the 95th Congress and from the hearings by the National Commission for the Review of Antitrust Laws and Procedures. As chairman, it is your responsibility to hold such hearings. But, before embarking on

hit and run hearings, including those by the President's Antitrust Review Commission, I believe we should have extensive discussion and much careful deliberation so that we can obtain the best evidence, and not necessarily just theories. I feel very strongly that this must be done before we approve new legislation, such as the pending bill.

This great Nation of ours—considered for the past 60 years since World War I as the greatest Nation on Earth—has suddenly come to the realization that its economic strength is now being severely tested. Our economic problems, both domestic and international, are many and diverse. They are large and they are extremely complex. They are difficult to solve as separate major issues, and even more troublesome because they are so interrelated.

For example, our standard of living depends on our productivity—that is to say, on output per worker. Our productivity rise in 1978 over 1977 was only four-tenths of 1 percent, the smallest increase since the recession year of 1974. But this low productivity is not only a domestic concern for us, it is also critical with respect to our present and future economic relationships with other nations around the world. The rate of increase in productivity of the United States has been much lower than that of other developed nations over the 15 years period of 1962–77. During that time, Japan's rate was triple ours and France and Germany double ours.

This disappointing productivity performance has contributed to other problems of the U.S. economy, particularly to our one most overriding major problem: inflation. The 9-percent rate of inflation that we experienced in 1978 has caused tragic consequences for many of our American people—and the inflation rate, even now, appears headed higher and higher. Our Nation's rate of growth is slowing to the extent that our real GNP this year will probably be only equal, or at best slightly higher, than in 1978. Our unemployment rate is expected to rise from about 6 percent to around 7 percent at the end of this year. Interest rates continue at unacceptably high levels. Our U.S. trade deficit and trade balance problems are greatly alarming. The value of the dollar continues to slide downward, adversely affecting consumer prices here in the United States and also affecting the dollar trading value in the international money market.

We in this Congress must give the most careful consideration to the legislative options and alternatives that are available to us. Then we must act positively and with determination to provide the leadership and to open the avenues toward solving these grave economic problems.

Many experts reveal that our Nation's problems have been created by too many new laws and rules and regulations that have been passed since 1960 when a new thrust was emphasized by the Government in its attempt to solve social problems. These type problems are difficult to solve and still maintain the stability that we need in our economic system. The result now is that we find our backs to the wall in numerous areas—both social and economic. Many of these areas are directly involved with the subject area responsibility of this subcommittee, and also of these hearing that we being today.

With reference to the severe inflationary problems of this country, we hear claims that the proposed legislation would reduce inflation. But we must make certain that we don't overlook the fact that, at the same time, there are still major segments of our economy—for example, the labor unions—that remain exempt from our antitrust laws. The long-term contracts and agreements of these large industrial unions might well exert significantly more inflationary pressure on our overall economy than can be offset by the legislation that we are considering here today.

Certainly we need to discuss and create beneficial legislation, and, if we are to do this properly, we need to be sure our priorities are in order. The task we face will not be easy, and it will not be popular to some groups and segments of our society. We must, however, meet head on these forces and issues that are slowly, but surely, chipping away at the foundations upon which this great Nation was built.

Perhaps we need new experts to testify before this subcommittee who are experts in the areas I have mentioned—those areas where this Nation's long-standing and basic economic strengths have fallen to a significant degree. We have been listening to too many witnesses of one philosophy and limited areas of expertise. But we have not had enough of the several other philosophies or broader areas of expertise that could put the Senators on this subcommittee and the Judiciary Committee on notice of the dangers of some of the proposed subjects and bills that have come before this committee and its Antitrust Subcommittee in the past 15 to 20 years.

The bill before us and a further extension of recently enacted laws may seem minor; but before we amend our antitrust laws further, let us have the best evidence possible and make sure we take the necessary time to consider adequately such legislation in subcommittee and committee. Historically, once a bill gets to the Senate Chamber, it is too difficult to get the full attention of the 100 Members, who generally rely on the action taken in committee and subcommittee.

Hence, let us fulfill our responsibilities in this subcommittee by being sure that our actions reflect our consideration of the full breadth and depth of these issues that are so crucial in our economy and to the American people.

Senator METZENBAUM. Our first witness today is Mr. Foster. We are very happy to welcome you, sir. I understand you are a former Clevelander and we are therefore particularly happy to welcome you.

STATEMENT OF DAVID L. FOSTER, A MEMBER OF THE LAW FIRM OF WILLKIE, FARR & GALLAGHER, AND CHAIRMAN OF THE CIVIL PRACTICE AND PROCEDURE COMMITTEE OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST SECTION

Mr. FOSTER. I have submitted a written statement on S. 390, and I certainly won't repeat here orally everything that is in that statement.

Senator METZENBAUM. The entire statement will be included in the record.

Mr. FOSTER. I can summarize briefly the views that I have on various sections of the bill. I take them in the order that the bill does.

[The prepared statement of David L. Foster follows:]

PREPARED STATEMENT OF DAVID L. FOSTER

I am David L. Foster, a member of the law firm of Willkie Farr & Gallagher of New York City.

My interest in the matters before this committee, and in antitrust law generally, is substantial. I am chairman of the Civil Practice and Procedure Committee of the American Bar Association's antitrust section. I served as a member of the section's task force in making submissions to the Antitrust Commission. I have spent much of my professional life on antitrust matters and have tried antitrust cases on behalf of plaintiffs as well as defendants.

Before making my presentation I must emphasize that the views I express here are solely my own. I am not testifying today as a representative of the ABA, the antitrust section, or the Committee on Civil Practice and Procedure. Accordingly, the views I am about to express are not to be interpreted as the views of the ABA or any of its committees.

My remarks will be directed successively to the several sections of S. 390.

ANTITRUST CIVIL PROCESS ACT AMENDMENTS

By way of general background, I assume that the basic objective of section 2 of the bill is to facilitate the obtaining of documents (and other discovery items) disclosed in private litigation by a CID which is addressed to the discovery items as such, and thereby to afford the Government some of the benefits of the efforts of a private plaintiff. Although staunch exponents of the adversary process might question any procedure which confers an unearned benefit upon one side of a litigation or potential litigation, I personally take no issue with the judgment, implemented in S. 390, that considerations of judicial administration and governmental efficiency justify conferring upon the Government that unearned benefit. Nor will I here invoke those philosophical principles discussed by Judge Frankel in *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976) concerning the "unease engendered by the alliance," *id.* at 132, of interested private parties and the Government "as an adversary litigant, confined in its powers," *id.* at 133. However, I have several reservations about the way in which S. 390 achieves its objective.

First, I perceive a significant tension between S. 390 and the full utilization of protective orders in private litigation. In the years of my practice, I have observed the growth of the protective order as one of the most effective devices for expediting discovery. As a practical matter, discovery disputes in litigation today resolve themselves to questions of burden, with issues of confidentiality, and even scope, giving way to the issuance of protective orders. Literally incalculable hours have been saved by the elimination of detailed consideration as to which assertions of confidentiality are legitimate, and which are overblown. Apart from the differing perceptions of counsel as to confidentiality, the existence of an adequate protective order is routinely of vital significance in persuading a client to acquiesce in discovery which he would otherwise insist be resisted to the utmost.

Considerations of judicial efficiency will thus be ill served by any legislation which places a party making discovery pursuant to a protective order in a weaker position to protect confidentiality than he would have been in had he not made the discovery. S. 390 in its present form does, I submit, disadvantage a discovered party to a measurable degree.

In the first place, one cannot overlook the brute fact that exclusive possession of a document provides an opportunity to withhold disclosure until court adjudication. Under S. 390, if a court adjudication does not take place, the documents will be revealed.

The time period envisioned by the bill for institution proceedings to prevent disclosure seems to me to be unrealistic. Let us hypothesize a treble-damage suit with a sweeping document demand. Pursuant to that demand, hundreds of thousands of documents were produced, and because of a broad protective order, it was unnecessary to prepare for presentation to a court a careful analysis of the different types of confidential and trade secret documents which were included in the mass of material. Under S. 390, the party making that discovery could be limited to a period of 10 days within which to analyze the mountain of material, and to prepare and file a petition which "shall specify each ground" for seeking relief from the CID.

That is plainly an unrealistic schedule, and while negotiations for additional time may be envisioned, it is apparent that the bargaining position of the party who made the discovery is significantly weakened as contrasted with a party who still holds the confidential documents in his exclusive possession.

Indeed, it is quite possible under S. 390 that a party who made production in reliance upon a protective order would not have 10 days, and might not have 1 day, to file his petition. Although the CID under section 3(b) of the bill may not be "returnable until after 10 days," the bill provides no real assurance that the party to whom the documents were produced will not make an immediate return.

The importance of the foregoing observations seems to me to be not that defendants will be disadvantaged by S. 390, but rather that there will be a significant impediment to discovery in the initial action.¹ This effect could be somewhat ameliorated by a substantially extended time period, and by insuring in section 3(b) that an express demand for a product of discovery would be neither "returnable" nor "returned" until the conclusion of the specified period. A more effective modification would be a provision that preexisting protective orders would not be superseded without order of court, upon reasonable notice to the person who had made the discovery.

The wholesale vacating of prior protective orders seems to me to be unduly heavy handed on additional grounds as well. If the initial order was entered in a Federal district court, S. 390 does provide that the petition protesting the express demand will be filed in the same district, but there is nothing which even suggests that the matter should be referred to the judge who entered the earlier order. Given the variety of local procedures concerning assignment of matters, it may be that the statute could not insure resubmission to the same judge. However, at least the legislative history should recognize that the original judge is normally entitled to some deference, and should ordinarily be the proper judge to consider the petition.

If the protective order was initially entered in a State court, it is simply disregarded with no consideration of traditional constraints on the relationship between State and Federal judicial systems. I personally find an inconsistency between the ruling that a State court judgment which actually facilitates an antitrust violation is immune from Federal interference, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), whereas a perfectly proper State court order which violates no law is wholly disregarded in the sole interest of Federal procedural efficiency.

The final problem area I see in the CID provisions of S. 390 may be loosely termed "the work product problem." It must be conceded, I think, that the definition of "product of discovery" clearly comprehends what many would deem lawyer's work product under the protection of *Hickman v. Taylor*, 329 U.S. 495 (1947). While it is of course the case that conceptual problems may arise in applying the work product protections of Federal Rule of Civil Procedure 26(b)(3) to a CID, there is in any event a residue of more generalized protection of materials prepared with an eye to litigation which many of us deem vitally important.

Work product problems may arise, I submit, even where the CID is directed to the party to whom discovery was made. Envisioning myself in that role, I might be perfectly willing to turn over to the Government copies of documents I had received, but I would not necessarily be willing to give anyone all of my analyses or indices of those documents. Furthermore, if the person from whom the discovery had been obtained was successful in obtaining some limitation on the reproduction of documents, I would be loathe to spend the time to go through my voluminous work product to redact all references to those documents, and I would be absolutely unwilling to permit the party making discovery to inspect the completeness of my redacting effort.

The work product problem becomes significantly worse if we envision a CID directed to me relating to documents produced by my client or by a codefendant. Nothing in S. 390 clearly states that my analyses and computer data bases of my client's own documents are not "products of discovery." I would hope that a court would so rule, but I cannot be confident. When I asserted by petition my work product arguments, I would find my position weakened by the following:

(a) Congress in S. 390 had announced a specific policy of production directed toward exactly the type of documents I was trying to protect; and

(b) Under the specific terms of section 3(c)(4) of S. 390, an "express demand for any product of discovery supersedes any inconsistent * * * rule * * * preventing or restraining discovery * * *," and is not the work product doctrine just such a rule?

¹ Those impediments in the initial action will result from both an adjustment in the attitude of the court toward the discovery process, see, e.g., *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 78-1 Trade Cas. ¶ 61,961 at 74,068-69 (E.D. Pa. 1976) as well as that of the parties, *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 131-32 (S.D. N.Y. 1967).

The importance of protecting work product has been much debated, of course, but as a trial lawyer I deem it essential that my client get the benefit of any litigation advantage which can accrue from through preparation. I believe that the adversary system generally depends upon this principle, and accordingly, I would not favor that portion of S. 390 which renders work product subject to the general rules for production of products of discovery.

Before leaving the subject of CID modifications, I should express my support for that portion of the legislation which allows the Antitrust Division to use outside agencies to analyze documents produced under CID's. I do note one problem: Under section 3(d) of S. 390, the requirement of approval by the discovered party to eliminate the obligation of confidentiality of CID material applies only to documents produced under an "express demand" (typically, products of discovery covered by a prior protective order). The bill should extend the requirement to any product of discovery, to avoid creating a stimulus to further proliferation of protective orders in private actions.²

SANCTIONS FOR ATTORNEY DELAY

One of the major themes of the Antitrust Commission Report is the stiffening of sanctions for dilatory behavior. Section 4 of S. 390 is a direct implementation of the Antitrust Commission's recommendation and accordingly one's analysis of its desirability turns upon one's assessment of the Commission's conclusions.

I submitted to the Commission the results of a questionnaire circulated on behalf of the antitrust section of the American Bar Association to antitrust practitioners throughout the country. On the specific subject of sanctions, 83 percent of the attorneys who responded to the questionnaire indicated that existing sanctions are sufficient if fully utilized. That is my own view as well. The plain fact is that existing sanctions are not utilized, in even the most egregious of cases. Attorneys who have, as I have from time to time, sought sanctions from the court find that they are routinely denied. The exceptions are few enough to stand out starkly in one's memory of many years of practice.

The proposed amendment to section 1927 of title 28 aims the sanctions squarely at counsel, rather than at the client. Accordingly, it is strong medicine indeed. The intent standard of the amendment—"unreasonably and primarily for the purpose of delaying or increasing the cost of litigation"—is subjective in the extreme. It is my prediction that the vast majority of district judges will never require an attorney to pay the opposing client's counsel fees under the amended section.

Accordingly, I deem section 4 of S. 390 to be both unnecessary and ineffective. In addition, I think that the statute has a potential for mischief in the hands of the extremely rare district judge who may use it vindictively. Although the possibility of abuse should not deter passage of a necessary and effective statute, that possibility does become pertinent where the desirability of the legislation is not otherwise firmly established.

I have no doubt that in some cases it is entirely proper to assess against an attorney the fees incurred by the opposing party. I do not quarrel on principle with the "primarily for the purpose of delay" standard. Nevertheless, for the reasons stated above, I cannot endorse section 4 of S. 390.

PREJUDGMENT INTEREST

Section 5 of S. 390 implements another recommendation of the Antitrust Commission by establishing a general rule that a successful antitrust plaintiff would receive interest on actual damages awarded from the date of service of the complaint to the date of judgment. The court has power to adjust (or, I take it, entirely deny) prejudgment interest if it deems an award unjust. According to the Report of the Antitrust Commission, as well as the Justice Department's letter supporting S. 390, the denial of interest would primarily occur where a plaintiff had itself engaged in dilatory tactics or purposeful delay.

At the outset, it seems apparent that the circumstances of the "unjust" exception should be broader than those suggested by the legislative history today. For example, many antitrust damage suits seek lost profit, and the present value of future profits. Such computations are normally made as of a time close to the date of judgment. Similarly, other forms of antitrust damages are not uncommonly proven with respect to a time period which includes the litigation, rather than being cut off

² Even if S. 390 is modified to meet my objections, it will inevitably motivate a discovered party in a private action to seek some protective order for the entirety of the production. Such an order will insure that products of discovery are produced only under an express demand, with notice to the discovered party.

as of the date of filing. Under such circumstances as the foregoing, prejudgment interest seems obviously to be inappropriate.

More fundamentally, however, I submit that S. 390 in its present form, as well as the recommendations of the Antitrust Commission (which, significantly, were made over the adverse comments of a considerable number of commissioners), rest upon an improper reversal of the obligation to prosecute litigation. It seems fundamental to me that a plaintiff has the burden to prosecute his case, and if he lets it lie fallow, a defendant who acquiesces is blameless. If the case is properly administered by the court, the period of the plaintiff's acquiescence should be short, but in any event the basic burden of pressing the case should not be shifted to the defendant.

It must be emphasized that the absence of the duty on the part of the defendant to advance the case toward trial does not excuse dilatory tactics, and where improper conduct is found, sanctions are proper and should be invoked. Under such circumstances, an award of prejudgment interest could indeed be appropriate.

In most cases, where a case moves slowly it will be difficult to ascribe overall blame to one side or the other. The following comment exemplifies the views of many respondents to the questionnaire I have referred to previously:

"In short, it is impossible for a defendant's lawyer either to speed up or slow down any case in any significant way without either the active assistance or defalcation of the plaintiff's lawyer and/or the judge."

Even where the delay may be perceived to lie at the defendant's door, it is likely that the underlying cause will be not intentional obstruction, but overpreparation. One respondent to the survey called it "the fear of leaving any stone unturned." An award of prejudgment interest will not be effective to alter the views of counsel as to the way in which a case should be prepared, and is not justifiable as a punitive measure under such circumstances.

An additional objection to section 5 of S. 390 is that it creates a rule for antitrust cases different from other types of litigation, many of which raise problems of judicial administration as complex as those in the antitrust field. Not all of the force of this comment is blunted by the fact that special attorney fee award provisions exist in antitrust suits, since that incentive to litigation, like the trebling of damages, was thought by Congress to be peculiarly necessary in the antitrust field, whereas problems of delay are endemic in all complex litigation.

It may be noted in passing that there is currently under consideration within the American Bar Association a proposed report with recommendations of the special committee on Coordination of Federal Judicial Improvements which in principle advocates the award of interest back to the accrual of the claim "in all cases where the plaintiff has suffered a loss or defendant has been unjustly enriched because of his actions toward the plaintiff." That report has not been taken up by the House of Delegates, and accordingly must be deemed simply the view of a group of individuals within the association. It is, however, interesting that that report observes that the award of prejudgment interest as of right would not be justified as a device to encourage settlements and discourage delay because of its failure to distinguish between a defendant who has "resisted through the legal process from belief that he is in the right" and one who has sought "to stave off a result he knows to be right or * * * has used 'the law's delay' to put off the inevitable."

In my view, the foregoing factors establish the need for a modification of section 5 of S. 390 to authorize the award of prejudgment interest when, under all of the circumstances, the court finds it just to make such an award. The court's discretion in making such a determination could be informed by such factors as the assertion of claims or defenses so unmeritorious as to suggest bad faith, the cooperation of counsel and parties in expending the litigation and, of course, any indication of intentional delay.

COLLATERAL ESTOPPEL

Section 6 of S. 390 is designed to eliminate any implication, from the *prima facie* provisions of the Clayton Act, that the emerging doctrine of one-way collateral estoppel is not applicable in the antitrust field. Justification for the legislation is found in the Antitrust Commission Report, which recommends such legislation on the ground that application of collateral estoppel principles will enhance the deterrent effect of the antitrust laws and promote efficient adjudication of complex antitrust cases.

After a good deal of reflection, I have concluded that section 6 of S. 390 is appropriate legislation. Any person with an ounce of sporting blood finds one-way estoppel distasteful. And I am prepared under appropriate circumstances to argue at length that the logic and efficiency which underlie *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co. v. Shore*, 47 U.S.L.W. 4079 (U.S. January 9, 1979), are altogether too much of

what in other circumstances might be good things. However, the legislation in question does not create or define the common law collateral estoppel doctrine. I find it hard to argue that a statute which was enacted in order to give a treble damage plaintiff greater rights than existed at common law should today be used to deny him the benefits of the common law's growth (whether that growth be benign or malignant!).

I note in passing that the efficiency objectives of section 6 of S. 390 will be lost if plaintiffs are allowed to reprove the colorful events of an unlawful conspiracy in order to soften up a jury for a liberal damage award. The broad discretion of a court in deciding whether to allow use of offensive collateral estoppel, as mandated by *Parklane Hosiery*, should in my view be exercised to deny application of the doctrine where the plaintiff chooses to reprove his entire case, or worse yet, seeks to highlight the damage issue with a few sexy items of liability evidence. That issue, however, appears to be one for another day.

In passing I should note that section 6 of S. 390 also modifies existing law by assigning prima facie effect to judgments in Government damage suits, and permits a prior Government adjudication to have estoppel effect in such cases. In general I do not oppose those changes. It would indeed be disturbing to see the Government adopt a practice of commencing 4A cases for single damages of \$25, in order to create a prima facie benefit. I hope that is not a real danger.

MERGER JURISDICTION

Section 7 of S. 390 would make two major substantive modifications in the applicability of section 7 of the Clayton Act. In contrast to the rest of the bill, these changes are not responsive to any perceived or actual need relating to the expenditure of litigation, and their appearance in a bill otherwise directed toward implementing findings of the Antitrust Commission is at best curious.

One of the modifications, the congressional overruling of *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), concerns a subject much discussed by persons in all phases of the antitrust field. The issue presented is essentially political (in the nonopprobrious sense of that term), and accordingly the desirability of the legislation must be assessed in the light of demonstrated needs for section 7 coverage of combinations between firms not engaged in interstate commerce. The amendment is urged here on the basis of a brief Department of Justice letter which, in my view, does not adequately demonstrate the need for modification of existing law, and fails entirely to assess such questions as the impact of the amendment on combinations of purely foreign companies who may be perceived to be potential entrants into U.S. commerce.

But at least the prospective overruling of *American Building Maintenance* is a live question. By contrast, the provision of S. 390 which would make Clayton Act section 7 applicable to natural persons as well as corporations is a veritable bombshell. From the very introduction of H.R. 15657 by Mr. Clayton on April 14, 1914, section 7 has been by its express terms specifically limited to corporate transactions. The ferment of comment and criticism arising from *American Building Maintenance* contrasts starkly with the general absence of debate about the limitation of section 7 to corporate transactions. The only justification advanced by the Department of Justice for its support of this literally stunning reform is the fact that various partnerships engaged in the accounting profession have become substantial concerns. There is no claim that anticompetitive combinations of these firms have occurred or are threatened. Indeed, the Department of Justice letter does not identify even one anticompetitive transaction in the entire history of the Clayton Act that has escaped scrutiny because of the limitation of the scope of section 7 to corporate combinations. The observation that various provisions of the antitrust laws regulate actions by individuals and partnerships points away from, rather than toward, an amendment of section 7, since in the apparently unprecedented event of a personal acquisition with significant anticompetitive consequences, it is likely that the Sherman Act itself could be invoked. Cf. *United State v. First Nat. Bank*, 376 U.S. 665 (1964). Furthermore, characterization of this basic structural characteristic of section 7 as a "loophole" does not advance analysis in the absence of a demonstration that a meaningful gap in antitrust coverage exists.

I respectfully submit that the proposed modification of section 7 to apply to noncorporate transactions should immediately be amended out of S. 390. Such a basic structural change obviously merits extensive hearings and thorough consideration by many groups having differing interests. Not only would S. 390 be bogged down by the process, but the continuation in the bill of such a fundamental substantive amendment may detract from the credibility of what is in other respects a bill

of carefully defined scope, predicated upon the extensively documented findings of the Antitrust Commission.

Mr. FOSTER [continuing]. The first subject is the modification of the Antitrust Civil Process statute. I have no basic opposition to the concept that documents discovered in a private case should be available under appropriate circumstances to the Government for the prosecution of its cases.

I do, however, have great concern about any change in the law which would cause parties to resist discovery in private litigation for fear that the documents will become more readily available by reason of their passing out of the discovered party's hands in the first instance.

I also have great concern about the possibility that the section as drafted appears to me to cover documents that traditionally would be thought of as lawyer's work product.

Senator METZENBAUM. I perused your statement last night but it was rather late, and I do not recollect that you specifically suggest any modifications of the language pertaining to the protection of the confidential aspects of the information. Do you have any specific recommendations in that area?

Mr. FOSTER. I do have one specific recommendation relating to the definition of the term "products of discovery." My work product problem would be solved by deleting from that definition the reference to materials that are prepared from the discovered documents as contrasted with the discovered documents themselves.

Senator METZENBAUM. As a matter of fact, you mentioned this and you used a word that I am not familiar with, "redacted." I am not familiar with that. I practiced law for a number of years and I do not know that I ever redacted anything. What does that mean?

Mr. FOSTER. One of my associates taught me the word. I take it that it means to go through a document and leave certain portions of it out. To delete material from a bill would be redacting that bill.

Senator METZENBAUM. You have no problem about making the original material available. Did you indicate you have concern about the indexing of the material? Why would you have concern about that?

Mr. FOSTER. Well, I have concern about that for two reasons. Let us suppose, as I think most people in addressing this bill do suppose, that the normal route of the discovered material will be from plaintiff's counsel in a private case to the Government.

Now I, representing a discovered defendant, may very well wish to assert in court that many of the materials are covered by trade secrets or other traditional-type protections and nothing in the bill prevents me from going into court and pressing that kind of a confidentiality argument.

If I prevail in that regard then the material which would ultimately go to the Government must not include reference to my trade secret document. If the indices that the plaintiff's counsel has prepared are given to the Government, how am I to assure myself that he has carefully gone through his own indices and digests to omit all of that material which the court said should be omitted?

The second concern I have with work product indices is, as drafted, the bill could I think be read to require me, representing a

defendant who has furnished documents to a plaintiff, to give to the Government my own indices of the documents that I have produced. I think that probably is not envisioned but it is quite possible that the bill would be so construed. I just do not want to give up my indices. It is a constant problem in litigation today that we have to assess the discoverability of our work product before we prepare it.

Senator METZENBAUM. I would like to suggest that you write us as promptly as possible indicating exactly what you think should be done, but I want to share with you my own personal reaction to a broad-based prohibition with respect to the indices. I think there is some merit to what you are saying, because the index itself could in some ways indicate what you have in your work product.

Recognizing that as a fact, as a concern of the Chair, why don't you address a communication to us and see whether or not there isn't some ground, (a) to protect the work product and, (b) when you get into the index aspects to see whether or not there isn't a middle ground that you would find would be protective of the defendant's or plaintiff's position and at the same time making it possible for that index or the indices, as the case may be, there may be more than one, to be used in the interest of saving time.

Let me clarify one thing for the record. You are chairman of the subcommittee of the American Bar Association.

Mr. FOSTER. I am chairman of the Civil Practice and Procedure Committee of the antitrust section. Of course, I make the normal disclaimer that I do not speak on behalf of the American Bar Association or the antitrust section, but I am generally appearing under the auspices of the section.

Senator METZENBAUM. You are generally appearing, but the position you are taking is a personal position and not the committee position.

Mr. FOSTER. Exactly, Mr. Chairman.

Senator METZENBAUM. Please proceed. Thank you very much.

Mr. FOSTER. In response to your question about specific modifications, two other specific modifications that I would propose in the CID section are, first, a greater time period than 10 days within which a party who is confronted with a demand can go into court and seek relief against discovery of his documents. I think 10 days is too short.

Senator METZENBAUM. Do you feel that it would be satisfactory if it provided 10 days but the court could on motion extend that period?

Mr. FOSTER. I think it should be not less than 30 days in the first instance. I think that because I believe that a party confronted with a request for documents in a treble damage suit will assess the likelihood that his documents may ultimately go on to the Government. He should not feel that by reason of making discovery in the private case, under a broad protective order, he somehow gives up any right at all as far as the Government demand is concerned.

I basically think that it is terribly important to preserve the protective orders' efficacy in the initial treble-damage proceeding. The one thing that I have seen throughout my practice as an effective expediting device is the protective order.

Years ago, we objected to all manner of discovery requests and went through them line by line with the courts. Now, more and more, the need for line-by-line coverage of documentary requests is eliminated by broad protective orders which are entered almost as a matter of routine. That has saved a tremendous amount of judicial time over the years. I am greatly concerned that if we in any way interfere with that, the whole effort will be counterproductive in terms of its effect on the expedition of litigation generally.

A second specific, or I guess I am up to a third specific modification, is the following: A demand that calls for material covered by a prior protective order cannot be made returnable in less than 10 days under the bill. However, there is nothing in the bill which says that it cannot be returned in less than 10 days.

As soon as the CID is served upon the plaintiff's counsel who has the discovered documents and the defendant who has produced the documents, the plaintiff's counsel would technically be free from the impact of prior protective orders and could immediately that day turn the documents over.

I am clear that that was not the intention of the legislation. I propose specific language to address that in my statement.

I turn now to the subject of sanctions. I certainly have no opposition whatever in principle to the notion that an attorney who unreasonably delays a case should be personally responsible for the costs which he incurs. However, I personally do not favor the sanctions proposal in the bill for the following reason: It seems to me that the current problem with the sanctions we have is the courts do not impose them.

I think the courts would be even less willing to impose heavy personal financial charges on counsel. Therefore, it seems to me that the modification in section 1927 will accomplish nothing.

On the other hand, I see some slight potentiality for oppression in the hands of that rare district judge who would not exercise the power properly. I think most of them will not exercise it at all. I am concerned that a rare one might exercise it improperly.

I address the prejudgment interest section in my written statement. My concern there is again not that prejudgment interest is improper where a defendant has delayed a case. However, I submit that it should not be a matter of routine because it is fundamentally the obligation of the plaintiff to prosecute the action.

If the plaintiff chooses to let the action lie fallow and the court does nothing, a defendant is blameless in the matter if the case does not advance, in my view. To create in effect a presumption that delays in litigation are attributable to a defendant, it seems to me reverses the normal order.

I would prefer, therefore, a bill which gave a court broad discretionary power to award prejudgment interest where it deemed it appropriate on the basis of all of the circumstances.

Senator METZENBAUM. Let me ask you a question a little bit aside from that. Are you familiar with any antitrust cases in which a court refused to permit the plaintiff to proceed forward until such time as a debt owed by the plaintiff to the defendant was paid? Have you ever heard of such an instance?

Mr. FOSTER. I do not believe I have, Mr. Chairman. At least I cannot think of one.

Senator METZENBAUM. I ask the question because when we talk about this prejudgment interest and the question of the plaintiff delaying the case, the court, hearing the *City of Cleveland v. Cleveland Electric Illuminating* case, refused to permit the city to go forward with its discovery procedure until \$14 million had been paid on the debt and then went on to say if it was not paid by the end of the year, he would dismiss the antitrust case.

Have you ever heard of that kind of a situation where the antitrust case would be dismissed by reason of the failure of the defendant to pay its obligation to the plaintiff?

Mr. FOSTER. Well, again nothing comes to mind, to my recollection, Mr. Chairman.

Senator METZENBAUM. And then the court would not allow the case to go forward at all because the plaintiff had not completed discovery. The court put the case at the bottom of the list for trial.

I have never heard of that kind of thing occurring and I was just curious about your own experience in the field.

Mr. FOSTER. Well, of course in the third category I have heard of antitrust cases which were dismissed because of the plaintiff's failure to prosecute. One of the leading cases is *Sandee v. Rohm & Haus* in the seventh circuit.

Senator METZENBAUM. Is that the case that Judge Renfrew had?

Mr. FOSTER. No.

Senator METZENBAUM. I think he testified last week that he dismissed one on that basis.

Mr. FOSTER. It is very possible. There are a number of those cases. I happen to have been involved in the *Sandee* case many years ago.

Senator METZENBAUM. Thank you.

Mr. CHUMBRIS. Before he leaves that subject, could I ask a question there? I will ask you the same question that Senator Thurmond asked in the first day of the hearings. Where would you draw the line as to what is dilatory and what is the conscientious effort to obtain the best and most thorough defense possible in a given district damage suit, especially in the so-called big cases?

Mr. FOSTER. This is addressed to the subjectiveness of the "primarily for purposes of delay" standard. As I indicate in my written statement, that standard seems to me to be subjective in the extreme and very difficult of application in an individual case.

I submitted to the Antitrust Commission the results of a questionnaire that I had circulated under the auspices of the antitrust section to 100 antitrust practitioners around the country. The result of that questionnaire showed that in general the recipients of the questionnaire felt that antitrust litigation was carried on on a higher ethical plane than litigation generally.

I subscribe to that view and I suggest that in ordinary litigation in our State courts, for example, no one seriously questions the propriety of making motions for purposes of delay. Indeed, I often put this question to myself in attempting to assess the propriety of sanctions in the antitrust field.

Suppose that I represented in a criminal case a defendant charged with armed robbery and I knew that the judge who had the case would be going into the hospital on the first of June and I knew that the judge who would then get the case is one who would

be much more sympathetic to the socioeconomic privations which my client had undergone.

Would not I under those circumstances feel it not merely appropriate but perhaps mandatory to make a motion solely for the purpose of putting the case over to get the better judge?

Senator METZENBAUM. What if I think the judge some day is going to die, and if I could delay it 10 years then it would help? Is that what we are talking about in antitrust cases, a case that took 7, 8, or 10 years, and where the chance of mortality is so great? You don't have to answer that question.

Mr. FOSTER. I would like to answer that question. I think that delay is almost always tactically undesirable for an antitrust defendant. Indeed it is interesting that when we look at the report of the Antitrust Commission we find that one of the Commissioners who did not wholeheartedly subscribe to 2-year time limitations for bringing the cases on was Max Bleecher who is primarily a plaintiff's attorney. In general, defendants, if they are wise, will accelerate the cases and press them toward trial as quickly as they can.

So I would never probably be in the position of waiting 10 years for the death of the judge. I did try an antitrust case one time where we started trial less than 1 year from filing, and this was down in Judge Atkins' home district down in Miami.

Mr. CHUMBRIS. As a matter of fact, you in your statement place a lot of responsibility on the judge in moving the case and also in the plaintiff in prosecuting his own case.

Mr. FOSTER. I think the obligation is on the plaintiff to prosecute his case first, last and always, but almost invariably a case will not be delayed unless one of the parties, at least, and the judge himself, allow it to be delayed. If both parties want it to go or the judge himself presses the case, it will move.

Mr. CHUMBRIS. I have just one other question which Senator Thurmond asked. What legal protection from a multimillion-dollar-damage suit against defense counsel or possibly plaintiff's attorney is there if counsel withheld certain legal maneuvers or other defenses because he feared that the maneuvers would be deemed dilatory by the presiding judge? You place that financial burden on him that the bill places on the counsel.

Mr. FOSTER. That is a frightening prospect, of course, but as I have indicated my concern with the sanction is that it will do little or no good because it will not be used when it should be. On the other hand, it could be used by the extremely rare, if he exists at all, vindictive Federal judge. Under those circumstances, the problem such as you suggest could be important.

Mr. CHUMBRIS. You stated on pages 2 and 3 that in the years of your practice you have observed the growth of the protective order as one of the most effective devices for getting discovery and so on. Could you give this subcommittee in as brief words as possible such a detailed example of expediting discovery?

Mr. FOSTER. I certainly could. I mentioned this previously in response to a question of the chairman. I will take as an illustration the case that we tried a year from filing in Miami.

A broad protective order was entered at the outset of the case. From that time forward discovery proceeded completely openly on the basis of each side having total access to the entirety of the files

of the other side, and indeed my adversary brought in 11 microfilm machines to my client's headquarters and microfilmed the paper on the wall, among other items.

Mr. CHUMBRIS. Thank you.

Senator METZENBAUM. Mr. Boies has a few questions representing Senator Kennedy.

Mr. BOIES. I would like to follow up something that you said in response to one of the earlier questions where you indicated, I believe, that you thought that the sanctions against attorneys for delay would not be used. I interpreted that as your saying there was not much utility because they would not be very widely applied. Is that a fair statement?

Mr. FOSTER. That is my characterization, Mr. Boies.

Mr. BOIES. That is one of the things that is troubling me also in terms of how far this legislation goes. I think it is a useful first step but would you be in favor of something perhaps that went a little further, like requiring as the Antitrust Commission recommended, that with rare exceptions all cases must go to trial within 2 years of filing?

Mr. FOSTER. I personally basically support the recommendations of the Antitrust Commission in that regard. I think that ordinarily antitrust cases can be brought on for trial within 2 years of filing. I would be extremely disturbed, of course, if that 2-year rule, or indeed any rule were applied in a Draconian manner.

Mr. BOIES. But if we gave the court some discretion to make an exception where manifest injustice would otherwise result, you would favor a 2-year limitation?

Mr. FOSTER. I personally feel that that is a reasonable way to proceed.

Mr. BOIES. Would that also eliminate the problem that you raised with respect to prejudgment interest? That is if we require the cases simply to go to trial, you would not have the problem of prejudgment interest being assessed against the defendant when it wasn't the defendant's fault?

Mr. FOSTER. In other words the time limitation would replace the concept of prejudgment interest?

Mr. BOIES. Yes.

Mr. FOSTER. Well, that would seem to me to be a desirable development. As I say, I am not opposed to prejudgment interest if it is awarded in the discretion of the court and not as a matter of routine.

Mr. BOIES. Thank you.

Mr. FOSTER. It appears that I am opposing or modifying virtually everything in the bill, so I will move on to something which I am supporting.

The collateral-estoppel provisions of S. 390 give a change, I guess, in existing procedures in that instead of having merely prima facie effect, a prior Government judgment could in fact estop a defendant from denying liability. Now, as I say in my written statement, this one-way collateral estoppel must be distasteful to any person with any sporting blood, and it is personally distasteful to me.

However, the law has grown in that manner, whether malignantly or benignly. I, myself, cannot frame any reasoned argument that the Clayton Act should be interpreted to deny a treble-damage

plaintiff something which he otherwise would have under the general law of collateral estoppel as it has become. So, I take no issue with that section of the bill.

Last, we see the changes that are proposed in section 7 of the Clayton Act. One of those, the overruling of the *American Building Maintenance* decision or more correctly the alteration of the statute to change the language that the Supreme Court relied on in the *American Building Maintenance* case is a subject which has been much discussed by everyone involved in the antitrust field.

I take it the question is a political one in the best sense of the word political. It is not primarily one for expedition of cases. I personally think it unnecessary. The section 7 standards are so generalized that the requirement that a corporation be engaged in commerce in order to come under section 7 seems to me to be reasonable.

However, I am far more concerned about the other proposed modification in section 7. Ever since Mr. Clayton first introduced his bill in 1914, section 7 has been limited to corporate transactions. A modification now, in a bill which is styled a "Procedural Improvements Act," is very fundamental. Indeed it is revolutionary.

There has been no discussion, to my knowledge, of the need for such a modification. I think that that particular provision of S. 390 will bog down the rest of the bill. I think it requires much more demonstration of need than has been given in the Department of Justice memorandum where the only justification for the change is the fact that various accounting firms have become quite large.

Senator METZENBAUM. Give me the nexus of that. I am having difficulty in understanding your concern about this. Who might be affected by the change in section 7 of the Clayton Act made by S. 390? Is there a major business operation in this country owned by an individual? I cannot really think of any in that category.

But if there were and that particular individual or family were involved in an anticompetitive merger, why should they not be equally subject to the provisions of the law as would a corporation? I am having a little bit of difficulty in following your reasoning there.

Mr. FOSTER. In general, Mr. Chairman, they should be and would be. Section 1 of the Sherman Act has been held to reach mergers by the Supreme Court in the *Lexington Bank* case. It would reach an acquisition by an individual where the anticompetitive consequences were sufficiently severe.

In the *Beatrice Foods* case, the Federal Trade Commission held that it, too, under section 5, had the power to reach acquisitions which did not fall within section 7 of the Clayton Act by reason of their not being purely corporate transactions.

So the first answer is that if the individual does in fact engage in anticompetitive activity, he will be caught under existing law. The problem seems to me to be that section 7 speaks not of anticompetitive conduct, but it speaks of an incipient incipency where the effect may be substantially to lessen competition.

We know, for example, in the *DuPont-General Motors* case that section 7 can be utilized to reach far back into history to a small or relatively small transaction at the time, that after many years

would seem to have anticompetitive consequences. With the benefit of the hindsight, the courts can go back and look at this initial transaction.

I suggest that that is a very, very broad statute indeed. Section 7 reaches conduct that none of the other antitrust laws approach. Accordingly, it seems to me to be reasonable and desirable to say that only corporations fall within the ambit of that very broad incipency provision.

Senator METZENBAUM. You haven't really quite answered it. You have given us several different examples of how the courts have interpreted both section 1 and section 7 to affect persons or individuals. At least I gather that that was the thrust of your comment.

Mr. FOSTER. That is section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act.

Senator METZENBAUM. So therefore you are saying it has been done and the courts are doing it. Now, if the legislation merely clarifies that situation and states that individuals may be affected as well as corporations, my question to you is: What is the harm and what is the problem with which you are concerned? You talk about the incipient incipency, but I am not certain that I understand what the problem is. Whom are we trying to protect?

Mr. FOSTER. We are trying to protect, it seems to me, individuals who are competing and attempting to develop their own businesses. We are protecting them from a statute which could at the end of their lives look back upon transactions in which they engaged in their formative years as individuals and strike down those transactions. I think that is economically undesirable.

Senator METZENBAUM. You are talking now about it being retroactive.

Mr. FOSTER. Yes. I am talking now about it being retroactive which section 7 clearly can be. I may have misled the Chair by commenting on section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. I do not believe in any way that the proposed amendment to section 7 is declarative of existing law. Indeed, in the *ABM* case the Supreme Court observed that no one could reasonably argue that section 7 of the Clayton Act could be interpreted to reach transactions on behalf of individuals.

I might give the chairman the benefit of a personal observation about the impact that the change would have. It occurs to one in private practice to analyze transactions under section 7 of the Clayton Act quite frequently. Merger analyses under section 7 are normally expensive for clients and normally are indecisive in terms of the conclusions.

Section 7 has been in one case or another interpreted to reach virtually any transaction that a corporation can engage in so that the counseling function is very difficult. Even very small transactions have been attacked under section 7.

Occasionally an individual comes in who owns a small business and he wants to acquire another small business. It is very helpful in advising that individual to be free from the concern of section 7 because you can then assess his conduct in terms of the clearer precedents that exist under section 1 of the Sherman Act, for example. You can be much more categorical in your advice to him than you would be under this amendment.

Senator METZENBAUM. That I understand, Mr. Foster, but if that individual's conduct is violative of the Clayton or Sherman Act, then it is true the lawyer would then be in a position to advise him that he need not concern himself about it, but should that be the case?

Let me give you an example. You practiced in Ohio. You may recollect that Squires, Saunders & Dempsey, and Peck, Shafer & Williams of Cincinnati at one time were the only two law firms in that State that could approve municipal or public bodies underwritings. They were the only bond counsel that the underwriters in New York would accept.

Let us assume that they got together and sat down and said, "Let us merge and then we can kick up the rates 100 percent," and suppose they made no bones about it, and suppose that is exactly what they do. Do you think that that should have been exempt?

They did not do it but under those circumstances do you think that they should be exempt from the provisions of the Sherman and the Clayton Acts just because they are individuals?

Mr. FOSTER. I do not propose that they should be exempt from the provisions of section 1 of the Sherman Act at all and indeed they would not be. It is very clear that section 1 of the Sherman Act can reach acquisitions or combinations and I take it—since section 1 relates to persons and not corporations—section 1 of the Sherman Act could relate to noncorporate combinations.

Of course, the answer to the Chair's question is that my own firm has a municipal finance department and we would be delighted to break up the monopoly that you suggest.

Senator METZENBAUM. The hearings are not for advertising, Mr. Foster. [Laughter.]

Mr. FOSTER. But the question that the Chair presents is a serious one, and I answer it really in this way: It seems to me that in order to justify any law, there has to be a demonstrated need. One must see that there are activities that are threatened or which have occurred in the world that make the law necessary. Otherwise we should not have the law, this or any law, I would think.

Since 1914, to my knowledge, there has been no significant number of transactions by individuals which call out for enforcement under section 7 of the Clayton Act. There have been many antitrust violations by individuals which have been reached under other statutes. If I am in error and if a careful or rational study would demonstrate that there is a significant need for a modification of section 7, then the Chair's question would indeed be unanswerable.

I suggest that to hypothesize a need and then say it should be met is not really to me the question that I see presented here.

Senator METZENBAUM. All right. Senator Thurmond.

Senator THURMOND. I am glad to have you with us.

Mr. FOSTER. Thank you, sir.

Senator THURMOND. I wonder if you could give this committee some methods used by counsel which may be deemed to be a conduct unreasonable to the purposes of delaying or increasing the cost of litigation as envisioned by section 4 of S. 390.

Mr. FOSTER. Well, it is very difficult. I myself have encountered, from time to time, what I deemed to be delaying tactics by an

adversary. However—I guess before I say, “however,” I can say I have had one particular litigation in which I was a plaintiff which I believe failed because of effective delay by my adversary.

And yet the statute as it would be amended would not reach that conduct in that case because the reason for the delay was not delay as such. It was a difference in the style of the way the lawyers prepared their case. They really thought, I believe, that they had to do all of the things which they did in the litigation.

If that is true, I would be very concerned about utilization of the statute to deprive them of the opportunity to take those steps which they did deem appropriate.

Senator THURMOND. Would you care to comment on the establishment of a special roster of a limited number of judges to handle complex cases of antitrust and other litigation?

Mr. FOSTER. On behalf of the Antitrust Section during the time of the Antitrust Commission, I circulated a questionnaire to antitrust practitioners around the country. The responses to that questionnaire were strongly opposed to a specialized roster of judges. I oppose it personally.

One of the reasons that I oppose it most strongly is that it has not been my experience that judges with antitrust experience are any more likely to expedite antitrust cases than judges without antitrust experience. Some of the finest trials and procedures that I have seen have involved judges who did not deem themselves antitrust judges.

Senator THURMOND. How would you feel about using magistrates?

Mr. FOSTER. I was very pleased to see that the Antitrust Commission did not strongly endorse the proposition that cases should be heavily referred to magistrates. In the Southern District of New York we see a lot of magistrate practice so that we have a good deal of familiarity with it.

Magistrates can be very helpful to the court. However, it is essential in my view that the district judge himself stay intimately involved with the case. A broad-gaged reference to a magistrate can well interfere with the district judge's own control of the situation.

Senator THURMOND. Could you give us some examples of where the plaintiffs or their lawyers may have been dilatory?

Mr. FOSTER. Well, I of course would prefer not to talk about specific cases, but in one's practice there are a number of ways.

Senator THURMOND. Without mentioning the names, or the lawyers either, and maybe just tell us of cases and perhaps mention the city and the year.

Mr. FOSTER. One will see from time to time that if the plaintiff commences a case, perhaps in the hope of obtaining an early settlement, and if he does not obtain the early settlement and if the discovery procedures do not go well, he may be very reluctant to see the case brought on for trial within the specific timeframe that the court is suggesting.

Under those circumstances, one of the ways that the plaintiff can delay is to withhold candid and specific detailing of his complaint, either by way of answers to interrogatories or during the pretrial process itself. He can also withhold damage-type documents which

are sought. Indeed, the plaintiff has virtually the same arsenal of weapons to obtain delay that a defendant has.

Senator THURMOND. Now, Mr. Chairman, I ask unanimous consent that my brief opening statement will be included in the record following yours.

Senator METZENBAUM. Without objection, it is so ordered.

Mr. BOIES. I would like to return to the comment you made about the provision of S. 390 that extends section 7 to persons. I take it that if there were a threat of serious violations of the principle of section 7 that we saw in a particular area or a particular market that was carried on by business organizations that happened not to be corporations, if you saw that problem, you would not have an objection to extending application of section 7 to those business entities that were not corporations, is that correct? But you just do not think that that is going to exist?

Mr. FOSTER. Essentially I think that it has not been demonstrated to date. I further feel that it detracts from the credibility of this bill to involve that question in this bill.

If, however, the Congress were to determine after study and hearings that such need existed, then, on principle, I suppose the statute could well be amended.

Mr. BOIES. I guess my point is that perhaps we do not know whether it is a serious problem or not. I know that in the real estate brokerage industry there are many brokers that are not corporations and that there has been a significant trend toward mergers and concentration in that area. That is at least one potential problem.

Personally, I do not know how much of a problem mergers by noncorporations are nationwide, but I do not understand why we do not just close that loophole. Nobody, I would think, would contend it ought to make any difference what form of organization a business entity has as to whether or not it ought to be subject to particular antitrust laws.

Section 7 may be good or bad and I do not want to debate that but as long as we have section 7 and most people think it is a good idea, shouldn't it apply to all business entities regardless of their organizational form?

Mr. FOSTER. Well, if you assume it is a loophole, of course, it calls out to be closed. As I suggest in my statement, to say it is a loophole assumes that there is a gap in coverage of some significance. I say that the literature of section 7 and the rhetoric of the commentators have both been characterized by a total absence of concern for combinations of individuals which might be reached under section 7 of the Clayton Act.

Perhaps the real estate brokerage industry is one on which a study should focus. I would suggest there, however, that the ease of entry into that activity probably ameliorates the kind of combinations that you have been describing.

But my concern presently today is that in contrast perhaps with the *ABM* case which has been much discussed, the changing of "corporations" to "persons" is a bombshell, a highly significant change in the law potentially, with no background either in congressional studies, in the literature, or, to my knowledge, in demonstrated failures of the antitrust law in the past.

Mr. BOIES. Can you give examples of instances in which you believe we should define the reach of the antitrust laws in terms of the nature of the business organization that the merging company or the acquired company has?

Mr. FOSTER. Surely. I think that the corporate form with limited liability presents an opportunity for structural consequences which simply do not exist for individuals. I think that combinations of individuals are very unlikely to achieve structural significance. Individual conduct may be reached under the behavioral provisions of the antitrust laws but not, in my view, significantly under the structural provisions.

Senator METZENBAUM. Thank you very much, Mr. Foster. I do hope that you will let us hear from you very promptly with respect to such specifics as you might have in mind, or if it is convenient for you, you might stand by and afterward talk with members of my staff, because we are interested in some of the suggestions you make.

I am not sure we can accommodate all of them, but we are interested in particular in the matters of protective orders and certain other items that you have mentioned.

Mr. FOSTER. Thank you.

Senator THURMOND. I want to thank you for your appearance.

Senator METZENBAUM. Mr. Mark Green, director of Congress Watch, is our next witness. This committee is usually very strict about obtaining a statement in advance of the hearing, but I have checked the rules of the Senate, and they provide that where your wife is having a baby the week before and it is your first baby, there are exceptions to the rules, so we make that in your case. Also I want to congratulate you on the first baby in the family.

STATEMENT OF RALPH NADER AND MARK GREEN, DIRECTOR OF CONGRESS WATCH

Mr. GREEN. Neither rain nor snow nor sleet, of which we had much last week, could have kept me from this appointed round. But the arrival of my first baby, Tenya, was a splendid distraction. So I appreciate, Mr. Chairman, your "baby" exemption.

In keeping with the spirit of the bill, I will testify expeditiously and submit my statement for the record.

Senator METZENBAUM. Your entire statement will be inserted in the record.

[The prepared statement of Ralph Nader and Mark Green follows:]

PREPARED STATEMENT OF RALPH NADER AND MARK GREEN, DIRECTOR OF CONGRESS WATCH

Mr. Chairman, those of us who believe in the need for antitrust law enforcement as a discipline on market power reside uneasily between two poles. On the one hand, many in the business community would prefer unfettered laissez-faire capitalism to the antitrust laws—Barron's, for example, reflects this point of view. On the other hand, critics like John Kenneth Galbraith dismiss antitrust enforcement as a "charade" and look to overt state ownership rather than ineffectual State law enforcement.

The most sound refutation of these two schools of anti-antitrust would be efficient antitrust enforcement that restored competition to monopolized, oligopolized, or price-fixed markets. Instead, antitrust cases inch forward with Bleak House-like complexity and delay. We're sure this subcommittee is aware of the grim record:

The average Antitrust Division case takes 3½ years from start to finish; antimerger cases consume over 5 and antimonopoly (section 2) cases 8 years (all data as of early 1970). Even before there was IBM, there was the 1945 *Alcoa* case (15,000 pages documentary evidence and 20 years to resolve), the 1953 *Oil Cartel* case (100,000 documents 13 years), and *El Paso National Gas* (1957 to the mid-1970's). As a result, few if any section 2 cases are now brought; consent decrees become the norm due to fear of time-consuming litigation; and assistant attorneys general often shun more creative or difficult cases knowing any resolution will occur years after their departure. Such facts and examples impeach the credibility of antitrust law and give credence to those who seek to abolish it.

There are several interacting reasons for such delays—dilatatory judges, inadequate prosecutorial resources, and burdens of proof that are difficult to measure or demonstrate (“intent” to monopolize, “dangerous probability of success”). Though S. 390 does not deal with these problems, it does confront and alleviate several other causes of antitrust delay. We think it is a modest though real advance in efficient antitrust procedure.

Significantly, S. 390 seems rooted in the realization that current antitrust law is designed to fail, for at least two reasons. In a system where defense lawyers typically earn \$150 to \$200 an hour and where defendants companies retain the profits of an illegal market activity until divested or enjoined, you inevitably invite delay. One needn't be a psychologist to appreciate that if delay and obstruction is profitable to one party in a legal action, they will engage in delay and obstruction. Empirical evidence confirms this intuition. According to a *Fortune* reporter, renowned antitrust counsel Hugh Cox told his client DuPont to divest itself of its GM stock voluntarily in 1949 since he predicted, accurately, that the firm would lose the case. DuPont refused, proposing a full legal battle since there were many profits to be made in the interim. When we interviewed attorneys in 1970 for our study of Federal antitrust enforcement, “the Closed Enterprise System,” we heard the following sentiments:

“Antitrust is a game to private counsel. They think they can milk a client since they know it can take 8 years for a resolution. They know no one will push them, so they take a free ride and travel around the country getting admissions and taking depositions—which alone can take three years.”—Former Antitrust Division lawyer.

“Delay—that's what they get paid for.”—Antitrust Division trial lawyer.

“Defense counsel tell their clients: if the Antitrust Division sues, you will lose, but you can still gain 3 to 5 years to make your profit or acquire know-how from the illegal merger. Delaying a Government prosecution is justified on the theory of maybe getting a better deal next year. In private treble-damage suits the philosophy is consciously or semiconsciously to wear out the plaintiff.”—Former Division lawyer, New York City defense attorney.

“Delay? It's the greatest disgrace of the antitrust bar.”—Wall Street antitrust lawyer.

“Law firms do feel free to delay when it is in the best interests of their clients—which includes attacking everything with motions of very little factual basis. For example, one judge for all aspects of the case speeds it up, so you challenge such form of assignment. You will certainly lose, but will certainly add a month and a half to the litigation. Discovery and depositions are a rich field (‘sorry, he's away; sorry, wrong man, etc.’).”—Former Division attorney, New York City defense attorney.

These views are typical, not exceptional. The late Thurman Arnold, who was in a position to know, claimed that many defense lawyers deliberately bogged down antitrust cases “to wear the Government out.” Dilatory tactics got so prevalent that the former head of the Federal Trade Commission's Bureau of Competition, James Halverson, denounced it a few years ago as a “specifically designated tactic” in an unusually stinging address before the Association of General Counsel.¹ The Anti-

¹ Halverson said: “While not intending to exhaust the means available for intentional delay of investigations, I would point to the following types of conduct which may be evidence of bad faith on the part of counsel: promises voluntarily to comply with document demands, in lieu of compliance with subpoenas, which are not promptly kept and were not intended to be kept; motions to quash subpoenas, the basis of which are boilerplate objections which have already been repeatedly rejected by the Commission; request after request to extend the deadline date for compliance with the subpoena, while no reasonable effort has been made in the document search. Litigation is also fraught with opportunities for inexcusable delay, that is making unnecessary motions to extend deadlines or to change pretrial conference dates; and asking for subpoenas to be issued to third parties knowing full well that enforcement of them will probably be tied up in Federal court, while little valuable evidence is expected to be forthcoming.”

Yet as a private corporate lawyer with Shearman & Sterling in December 1976, Halverson recommended to an antitrust conference that defendants take exhaustive discovery, particularly if it has more resources than the plaintiff, and that defendants take enough time for government staff to “turn over a couple of times.”

trust Commission, too, criticized how antitrust lawyers "too often file meritless claims, defenses, or counterclaims, make excessive or abusive discovery demands, unreasonably resist legitimate discovery requests, provide unresponsive, 'stonewalling' answers, and unreasonably produce masses of insignificant, nonresponsive information."

S. 390 attempts to reduce the motivation for delay, and hence delay.

Sections 2 and 3 make clear that the Antitrust Division through the issuance of CIDs can obtain discovery materials from private parties in private litigation. Due to the omission of this subject from the Antitrust Civil Process Act, courts have been undecided whether the Division can obtain such materials in the face of a protective order.

This section continues the sensible evolution of the Antitrust Division's pre-filing civil investigative authority. Before 1962, the Division could not even obtain documents from companies under investigation. The Civil Investigative Demand Act that year gave the Division this rudimentary authority, despite predictable objections against "the prying eyes of a powerful bureaucracy" (*Wall Street Journal*, S. 11, 1962, at 1). Over a decade later, the act was amended to allow the Division to orally depose individuals and to obtain information from relevant parties though they weren't the subjects of the investigation.

Sections 2 and 3 of S. 390 appropriately piggyback private antitrust actions—which are and should be invaluable supplements to public antitrust enforcement—in order to conserve limited governmental resources. Why duplicate what a private party has already done, other than to give defendants two bites at the apple and prolong cases? As the Antitrust Commission pointed out, "Potential defendants have no legitimate interest in wasting the Government's time and taxpayers' money in the interests of gamesmanship." By allowing the acquisition of relevant private discovery, S.390 continues the tradition of encouraging the Division to understand, prefilling, whether it has or doesn't have a good case. If it has a good case, S. 390 will result in a perfected complaint that can save agency and court resources later; if it doesn't, the Division will be more likely not to bring suit, saving defendants money and avoiding needless exposure.

Section 4 attempts to make existing sanctions for willful attorney delay more real than ritual. Currently, the Federal Rules of Civil Procedure prohibit motions or filings made solely for the purposes of delay, a narrow restriction dilatory lawyers can easily deny. This section ever so slightly broadens the prohibition to include conduct "primarily" for the purpose of delay and provides that the culpable attorney assume the "excess costs" imposed as a result of his action.

One can be skeptical how often Federal judges will actually apply this section, given their historic disinclination to apply existing rules against vexatious conduct. To encourage judges to appreciate and utilize this new authority, we would suggest the following nonlegislative steps be taken: The subcommittee should compile a report of hypothetical situations which it thinks should warrant judicial action; only by giving concrete examples of attorney abuse will the vague language of the act come to life and have meaning for reluctant jurists. The committee should suggest new, stronger language against lawyer delay for the ABA's code of professional responsibility, which is currently being rewritten for only the third time this century. And the Antitrust Division and Federal Trade Commission should establish units to gather examples of abusive attorney conduct and send them on to relevant bar authorities—for if these Federal lawyers don't vigilantly watch and report such conduct, who will? Those who fear that such sanctions might "chill" vigorous attorney advocacy are comparable to people who council the severely overweight not to diet because they may get too skinny. Given the motives for delay and nonsanctions against delay now, section 4 is a tiny, necessary first step to make lawyers more responsive, in the words of the Antitrust Commission, "to the system of justice, not just to their clients."

Section 5 amends the Clayton Act to establish judicial authority to award "pre-judgment interest" on damages to prevailing plaintiffs from the filing of the complaint to the judgment. This provision makes delay more costly, and is largely self-executing—unless a defendant can assume the burden of demonstrating an unjust result (e.g., plaintiffs themselves were vexatious).

Section 5 of S. 390, in conjunction with the premerger notification provision of the Hart-Scott-Rodino bill, does make it somewhat less likely that companies will quietly engage in conduct or make acquisitions so as to scramble assets and stall Government proceedings. But the Hart act did not substantively strengthen the Division's premerger injunctive authority, and neither it nor S. 390 addresses the major incentive to intentional delay—the profits earned postcomplaint and prejudgment. We would hope that as this committee looks at the motivations that lead to defend-

ant delay, it not ignore the most significant one. Can a system be devised to require losing defendants to disgorge profits earned as a result of illegal conduct? If the committee does not ask this question, it certainly cannot answer it. Such a "tax" on ill-begotten gains would create the most effective incentive for expeditious antitrust enforcement and seems no more difficult to devise than many other equitable remedies.

Section 6 amends the Clayton Act to give Federal courts the explicit authority to accord collateral estoppel effect to litigated antitrust issues. Thus, once an issue has been litigated in a Government case, it need not be relitigated in a private case based on the same fact situation. The collateral estoppel effect, even more than the prima facie presumption, avoids duplication, wasted resources and inconsistent rulings by different courts. But why does this section merely permit courts to do this, rather than to direct that they do it or a least rebuttably presume that they do it? Other than for some exceptional cases where it might not be appropriate, section 6 ought to at least presume that collateral estoppel attach to all Federal litigated judgments. The conserving court resources argues for such a presumption.

In conclusion, S. 390 is neither a liberal bill nor a conservative bill. It is an efficiency bill. It saves taxpayers money, it saves courts' time, and it saves consumers' money by helping resolve major antitrust actions more expeditiously. We urge that this subcommittee strengthen this bill and report it to the full judiciary Committee for prompt consideration.

Mr. GREEN. The antitrust law system is now designed to fail due to its motivational structure. If delay and obstruction will lead to higher legal fees for \$150-an-hour lawyers and higher profits for companies who can retain ill-begotten gains, one does not have to be a psychologist to realize that we will have delay and obstruction.

This anxiety is not theoretical. There are many examples and studies which document not only the conclusion that cases are quite long but the reasons for them.

Thurmond Arnold, who was head of the Antitrust Division from 1938 to 1943, and later an attorney with Arnold & Porter, said that many defense lawyers deliberately bog down antitrust cases "to wear the Government out."

Several years later James Halverson, head of the Bureau of Competition of the Federal Trade Commission, bitterly complained in an unusually candid address before the Association of General Counsels that the delaying tactics by the lawyers are "a specifically designated tactic."

Curiously, perhaps not so curiously, when he left the Federal Trade Commission to become a private attorney in the country's largest law firm, Shearman & Sterling, he gave an address to an antitrust conference and urged that defendants take exhaustive discovery, particularly if it has more resources than plaintiff has, and that defendants take enough time for Government staff to "turn over a couple of times."

In the prepared statement I have examples of attorneys in the Antitrust Division and in the private area who off the record told me and Mr. Nader, while we were doing the study of Federal antitrust enforcement, about the extent of the potential attorney delay.

Let me quote just one. This is from a former Antitrust Division lawyer who is now a New York City defense attorney:

Defense counsel tell their clients: if the Antitrust Division sues, you will lose, but you can still gain 3 to 5 years to make your profit or acquire know-how from the illegal merger. Delaying a Government prosecution is justified on the theory of maybe getting a better deal next year. In private treble-damage suits the philosophy is unconsciously or semiconsciously to wear out the plaintiff.

Senator METZENBAUM. Did you mean consciously? I think you said unconsciously.

Mr. GREEN. I meant to say consciously. I may have unconsciously said unconsciously.

Mr. CHUMBRIS. Mr. Green, when you go to a new subject will you tell us what page you are on?

Mr. GREEN. Mr. Chairman, I am jumping around for a few minutes. That quote is on page 2.

In giving the analysis of the structural defects of the antitrust law enforcement process, I would like to say we think S. 390 is a modest but important initial step in expediting antitrust cases and reducing the Bleak-House-like delays that affect too many antitrust cases.

I would like to suggest several possible extensions that would logically flow from S. 390 which we think could improve the act. The act provides for the imposition of prejudgment interest from the time of filing the complaint to the time of judgment upon damages.

But it seems to be a logical next step that if you want to tax away the interest on ill-begotten gains, why not make the defendant disgorge ill-begotten gains? This would take the profit out of delay and that would encourage defendants to act expeditiously because they want to clear the cloud on the transaction.

Second, in the area of attorney sanctions, I would suggest some nonlegislative actions that the committee could legitimately take. I don't know if the staff will appreciate the suggestion, but I think the staff could very usefully compile a compendium of hypothetical situations which it thinks should warrant judicial action to sanction attorney delay.

Only by giving concrete examples of attorney abuse will the necessarily vague language of the act come to life and have meaning for historically reluctant jurists.

Also, the committee should suggest new, stronger language against intentional lawyer delay for the ABA's code of professional responsibility, a code which is currently being rewritten for only the third time in this century.

Finally, I hope you will consider urging the Justice Division of the Federal Trade Commission to establish small groups to gather examples from their attorneys of intentional defendant delay when these Federal lawyers see such instances of delay and dilatory conduct, and forward such examples on to relevant law associations.

Finally and more broadly, when the committee is considering applying collateral estoppel effect to Government litigated judgment, it should consider applying the collateral-estoppel effect, or prima facie effect, to consent decrees. This is occasionally or rarely done by antitrust enforcement agencies. They would argue that it would unbearably increase actual litigation because defendants would no longer want to settle.

In conclusion, and on behalf of Mr. Nader, who is joining in this testimony, we think S. 390 is a good bill. It is not a liberal bill. It is not a conservative bill. It is an efficiency bill. We urge that the committee consider ways to strengthen it and then report it to the full Judiciary Committee.

Thank you.

Senator METZENBAUM. Do you feel that the length and cost of many antitrust cases today impairs effective enforcement of the antitrust laws and actually discourages many who may have valid antitrust cases from filing them by reason of the obvious cost involved in the long, drawn-out litigation?

Mr. GREEN. Very much so. There are those who worry that there may be too many plaintiffs suing companies, too many spurious cases.

But when you look at the potential cost and aggravation of prosecuting public and private antitrust cases you realize, if anything, the law should encourage citizens in court to keep companies responsible to consumers in the marketplace. The waste of antitrust resources encourages excessive settlements.

Obviously, as you have often said, even a bad settlement is better than a good lawsuit. When you get to the point when 80 or 90 percent of the civil and criminal actions are settled by the Antitrust Division and when no more than a dozen cases a year are actually litigated by this \$30 million agency, you worry whether the settlement process is becoming the loophole that subsumes the mandate. These big cases obviously discourage even a vigorous assistant attorney general in charge of antitrust, who has the incentive to pursue a large number of bread and butter cases not difficult to prosecute, rather than leaping into the unknown by pursuing a decade-long case the resolution of which will occur long after the head of the division is gone.

In my statement I indicate that there are polar critics of antitrust. Barron's magazine, for example, that triple entendre of American capitalism which urges unfettered laissez-faire in antitrust.

On the other hand, Prof. John Kenneth Galbraith cogently argues that antitrust enforcement is a "charade." Until we do something about the "big case" problem, their criticisms have credibility.

Senator METZENBAUM. Do you believe that attorneys are responsible for the extraordinary length of antitrust cases? And in the investigation that you and Mr. Nader did, did you come to any conclusion whether more plaintiff lawyers are involved in the delays or more defendant lawyers, or was it about equal?

Mr. GREEN. Intentional attorney delay is not the only, but it is a fundamental cause of unduly lengthy antitrust cases. And we give some examples in our testimony.

I think as a matter of logic and evidence it is very difficult to argue that plaintiffs attorneys' delay approaches the extent of delay inflicted by defendants' attorneys. Where plaintiffs file a case, they want the case conducted expeditiously to get the ill-begotten gains back. Defendant's counsel can earn profit and fees by delay.

So, I think that this act is appropriately tailored to where the problem is, which is defense counsel delay rather than plaintiff delay.

Senator METZENBAUM. Do you have any idea of the percentage of antitrust cases that are brought by plaintiffs on a contingent fee basis as compared to those brought on a fee for service basis?

Mr. GREEN. No; I don't. Off the top of my head I would imagine, and Mr. Boies may help us in this respect, that a majority would be brought on a contingency fee basis.

Senator METZENBAUM. Will you please repeat that.

Mr. GREEN. Off the top of my head, a majority of the plaintiffs' actions would be brought on a contingency basis. That may be a good thing for the committee to look at in terms of whether there is an incentive for plaintiffs to delay because it means larger legal fees.

Senator METZENBAUM. I gather you support the prejudgment interest part of the bill?

Mr. GREEN. Yes; we do.

Senator METZENBAUM. Do you believe the award of treble damage in antitrust cases encourages defendants to expedite these cases or discourage them from doing so?

Mr. GREEN. When we are dealing with liability as large as the treble and original damages one imagines that defendants bid in their heels to avoid such liability. It is hard to argue that it encourages defendants to be expeditious. I think such instances would be too infrequent to affect legislative judgment.

Senator METZENBAUM. Do you have any thought on the subject that was discussed with Mr. Foster relative to making the law applicable to persons as well as to corporations?

Mr. GREEN. Yes, I heard a discussion of that point. It is not inappropriate for legislation to anticipate problems, not merely to correct demonstrated abuses. When you look at the nature of the accounting profession, which is populated by huge noncorporate partnerships, and the structure of the legal profession, which is by and large partnerships and which is engaged in a trend toward national law firms, one can envision unincorporated businesses creating antitrust problems.

I think the law should focus on not so much the organization of the entity but the impact of the entity. The *DuPont-GM* case in 1956, although it has been ignored as precedent by the Antitrust Division, could lead to some kind of retroactive application of the antitrust laws. Any new act could. That theoretical anxiety could stop the committee from supporting that provision, since there are such things as large unincorporated entities which can have undeniably anticompetitive impact.

I think it is a good thing for the committee to pursue that section.

Senator METZENBAUM. One last question. Why do you feel that it is important that the Antitrust Department have the same authority to attack anticompetitive mergers under section 7 of the Clayton Act that the Federal Trade Commission has under section 5 of the FTC Act?

Mr. GREEN. Mr. Chairman, we have not commented on that in our statement because we thought people would take judicial notice of the logic of that section. It is illogical and incongruous to have the standard of "affecting" commerce apply to sections 1 and 2 of the Sherman Act and section 5 of the FTC Act, but a different standard, "in commerce," affecting section 7 of the Clayton Act.

Section 7 of the Clayton Act is the great writ for horizontal and vertical mergers. It slowed them down a decade after it was passed

in 1950. For reasons of symmetry, if not improved law enforcement, we think that the broadened standard of S. 390 should be applied to section 7 as well as these other sections.

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. Thank you, Mr. Chairman.

Where do you draw the line between what is dilatory and conscientious efforts to obtain the most thorough defense possible in a difficult, treble-damage case, especially so-called big case?

Mr. GREEN. There is no answer other than looking at a case-by-case situation. It is extremely difficult, I agree. That is why I indicated in my testimony that judges probably will be reluctant to sanction attorneys who they may think are simply defending zealously their client.

That is why I suggested that the American Bar Association and this committee should work together on developing agreed-on hypothetical examples based on real instances to guide judges in this area of great discretion.

Senator THURMOND. Do you believe that attorneys will have confidence that each preceding judge will react the same as to what is dilatory and what is a thorough defense?

Mr. GREEN. No more confidence than they now have in going before different judges. Some judges send pickpockets away for 10 years, and some give them probation.

I would hope that your report, as I indicated, would give common guidance to the hundreds of Federal, district, and Supreme Court justices on how to apply the sanctions in the act.

Senator THURMOND. Could you give us any examples of where plaintiffs and their lawyers may have been dilatory in their cases?

Mr. GREEN. In our testimony, in "The Closed Enterprise System," we discuss some cases historically which went on for a suspect amount of time: The 1945 *Alcoa* case; *El Paso Natural Gas* case, mid-1950's to mid-1970's; *National Lead* case in the 1950's. Some would argue the *IBM* case currently.

While it is difficult to argue that the delay in any one case was due solely and primarily to attorney delay, we have many examples of attorneys off the record confiding that they pursued the tactic of intentional delay. As a prior witness indicated, often counsel thinks that other counsels pursue the tactic of intentional delay.

Senator THURMOND. Mr. Green, what legal protection is there from a multimillion dollar damage suit against defense counsel or possibly the plaintiff's attorney if counsel withheld certain legal maneuvers or defenses because he feared those maneuvers might be deemed dilatory by a presiding judge?

Mr. GREEN. The code of professional responsibility allows attorneys to conduct cases zealously on behalf of their clients, but in ways that do not abuse the process. It is a judgment that the attorney has to make in every case. It is almost inconceivable to me that a successful action could be brought against defendants' or plaintiffs' attorney if in their professional discretion they were pursuing a line of conduct which they thought did not violate the act.

Senator THURMOND. They still have to defend?

Mr. GREEN. I think that is unlikely. And after a couple of cases were brought, precedent would make it clear that this act in conjunction with the code of professional responsibility encourages attorneys to pay attention not only to zealously represent their clients, but also protecting the integrity of the system of justice in which they are participating.

Senator METZENBAUM. Mr. Boies.

Mr. BOIES. Mr. Green, I would like to pursue with you a question that I asked Mr. Foster as well. That is, whether we ought not perhaps go somewhat further than this act does and provide that except in cases of great injustice every case ought to go to trial in 2 years.

As you suggest, it is often hard to figure out exactly who is responsible for delay or, in any event, to prove it. That makes sanctions difficult to apply and maybe unfair to apply in some cases.

Why don't we just provide a pretty firm rule, subject to rare exceptions, that every case ought to go to trial within 2 years?

Mr. GREEN. Without having examined that closely, it sounds like an excellent suggestion. By analogy the Bank Merger Act requires the Antitrust Division to decide whether to bring a case within 30 days after a bank merger has been accomplished. By analogy, the Speedy Trial Act requires criminal defendants to be brought to trial in a certain time period or else they cannot be brought to trial.

The judgment made there is for expeditious law enforcement, even though in some instances, unique instances, greater delay might be desired. The trade was made in favor of a mandated schedule.

I think the idea is a good one if it is conditioned, as you have indicated, on some kind of exemption of demonstrated injustice. In some cases, obviously, it may have to go beyond 2 years. But the vast bulk should take less than that.

Senator METZENBAUM. Thank you very much, Mr. Green. We appreciate your being with us.

Mr. GREEN. Thank you for your understanding remarks at the beginning of my testimony.

Senator METZENBAUM. Mr. Nevin.

Your entire statement will be inserted in the record.

STATEMENT OF JOHN J. NEVIN, CHAIRMAN, ZENITH RADIO CORP.

Mr. NEVIN. I was going to ask for permission to summarize it because I know it is lengthy. In your letter of February 16 inviting me to testify at these hearings, Mr. Chairman, you noted that Zenith had considerable experience with discovery material associated with a number of investigations by the Antitrust Division, by the International Trade Commission, and by the Senate Judiciary Subcommittee on Antitrust Monopoly.

[The prepared statement of Mr. Nevin follows:]

PREPARED STATEMENT OF JOHN J. NEVIN

My name is John J. Nevin. I am chairman of the board of Zenith Radio Corporation. In a letter dated February 16, 1979, inviting me to testify at these hearings, Chairman Metzenbaum wrote:

"Because of your experience with discovery material in connection with investigations by the Antitrust Division, the International Trade Commission and the Senate Judiciary Subcommittee on Antitrust and Monopoly, I feel that your testimony would contribute a great deal to the subcommittee's understanding of the problems raised by protective orders. Accordingly, I strongly urge that you agree to testify before the subcommittee on February 26."

The Antitrust Procedural Improvement Act of 1979 seeks to expedite and reduce the cost of enforcing this country's antitrust laws. It also seeks to clarify the authority of the Antitrust Division to issue civil investigative demands for material that has been produced through discovery in private litigation. Zenith has had considerable experience with antitrust and antidumping litigation and investigations associated with the importation of television receivers. That experience has led us to conclude it is very important that the Congress provide the Antitrust Division and other Federal law enforcement agencies with significantly improved access to discovery material that has been produced in private antitrust litigation.

Zenith supports the Antitrust Procedural Improvement Act of 1979 in its entirety. This testimony, however, will concentrate on the need to provide Federal law enforcement agencies with improved access to material produced through discovery in private litigation.

No American industry has been more characterized in recent years by financial losses, employee layoffs and plant shutdowns than has been American television industry. In the last 5 years domestic producers as widely known as Admiral, Philco, Motorola, Magnavox and Warwick have been forced into liquidations or acquisition. Only 1 year ago General Electric sought but failed to obtain approval to merge its television business with that of Hitachi of Japan.

Zenith has long believed that the economic difficulties of the television industry have been directly attributable to flagrant violations of American antitrust, antidumping and Customs fraud laws associated with the importation of television receivers from Japan. Late in 1974 Zenith filed a law suit in the U.S. district court in Philadelphia charging a number of Japanese television manufacturers, their U.S. subsidiaries and Motorola Inc., with violations of U.S. antitrust and U.S. antidumping laws. In February of 1977, Zenith filed a counterclaim in that law suit adding Sanyo Manufacturing Corporation, Sears Roebuck and Co. and Melco Sales, Inc. as defendants. (Exhibits 1, 2, 3 and 4.)

Through discovery associated with that litigation, Zenith has gathered a large amount of material to support its charges that Japanese television manufacturers have been involved in unlawful dumping and a variety of other anticompetitive activities. Approximately one million of the documents that have been accumulated in the Zenith case are covered by a protective order preventing the disclosure of their contents to parties not involved in the litigation.

In the years since Zenith filed its antitrust and antidumping suit, the Department of Treasury, the U.S. Customs Service, the U.S. International Trade Commission and both the Antitrust and Criminal Divisions of the Department of Justice have been involved in investigations directly related to the television dumping and antitrust controversy. In addition, the Subcommittee on Trade of the House of Representatives has, as a part of its oversight responsibility, sought to determine why antidumping laws were not being enforced in the television case and this subcommittee has, as a part of its oversight responsibility, sought to learn why the Antitrust Division has failed to take action with respect to what appeared to be unlawful price fixing and market allocation agreements entered into by Japanese television manufacturers.

It is Zenith's belief that the investigations of both Federal law enforcement agencies and the investigations undertaken by the Congress have been seriously impeded by limitations imposed by protective orders on information that has been made available to investigators. To support that belief, however, it is necessary that I provide the subcommittee with some background on the chronology and the facts of the television case.

In 1968 American television producers concluded that it was the predatory pricing of Japanese imports that was causing the financial distress in the domestic market and filed a dumping complaint with the Department of Treasury as provided by the Antidumping Act of 1921. Dumping is the practice of selling products in an export market at a price below the price at which a comparable product is sold in the home market or selling a product in an export market at a price below its cost of

production. In March of 1971 the Tariff Commission found that dumping was injuring the domestic television industry. The Commission concluded that the sellers of dumped Japanese television receivers had for the most part undersold U.S. manufacturers in the American market and had contributed significantly to declining prices of domestically produced receivers.

The 3 years that elapsed from the submission of the dumping complaint until the injury finding were years of considerable economic stress for the domestic industry. In 1968, 9 of the 16 U.S. producers incurred losses. In 1969, 8 of 15 remaining American producers lost money and in 1970, 10 of the 15 U.S. producers incurred losses.

It was declining prices in the American market that had produced the financial losses. American manufacturers, confronted with the low prices at which dumped Japanese receivers were being sold, found it necessary to lower their own prices to remain competitive. The alternative was to be driven from the American television market by low priced imports as completely as they had earlier been driven from the American radio market. (Exhibit 5.)

When the Tariff Commission reached its injury finding, the U.S. Customs Service, which reports to Treasury, became responsible for assessing a special dumping duty equal to the difference between the "purchase price" of the dumped television sets in the United States and the "foreign market value" of those sets. The initial efforts to establish and assess dumping duties were concentrated on determining the foreign market value of the dumped receivers. The Customs Service assumed that the purchase price of those receivers had been correctly stated on Customs documents submitted at the time television sets had been imported. That assumption would later prove to be invalid.

Beginning in 1963, Japanese television manufacturers, with the approval of Japan's Ministry of International Trade and Industry (MITI) had entered into agreements establishing, among other things, the minimum or check prices at which Japanese television receivers would be sold to American purchasers. For many years import documents submitted to Customs by large purchasers of Japanese television receivers almost invariably showed purchase prices that were the same as the check prices listed in the Japanese agreements.

In 1970, Zenith advised Treasury in a confidential meeting of its belief that the check prices being declared by importers on Customs documents were not in fact the real prices at which imported Japanese television receivers had been purchased. Zenith asserted that Japanese television manufacturers were offering substantial secret rebates and kickbacks to American purchasers who would ostensibly purchase at check prices. By failing to report the rebates and kickbacks to Customs, the American importer could avoid television dumping penalties that might later be assessed. Zenith urged Treasury in 1970 to investigate the financial records of large American television importers to determine the validity of the rebate assertions. Treasury refused to pursue the matter.

Between March of 1971 and April of 1972, Treasury collected about \$1 million in television dumping duties. In March of 1972, however, the assessment of dumping duties on Japanese television receivers was stopped and not resumed until March of 1978. The cessation of assessments was not announced and the 6-year interruption has never been explained.

In the 5-year 1968-1972 period pretax profits of American television manufacturers other than Zenith amounted to only 3.6 percent of sales. Pretax profits in American manufacturing industries other than television approximated 8 percent of sales. By 1973 economic pressures had reached an intensity that would force a number of American producers into mergers and liquidations. Late in 1973, Admiral was acquired by Rockwell International. At about the same time Ford Motor Company sought to sell its Philco television business to White Consolidated Industries. Zenith did not object to either of these proposals. (Exhibit 6.)

In March 1974, however, the press reported that Motorola intended to sell its television business to Matsushita, Japan's largest television producer. In a letter to the Antitrust Division, Zenith vigorously protested the acquisition pointing out that Matsushita already had a substantial presence in the United States through its Panasonic affiliate and would become the third largest competitor in the American television market if it were permitted to acquire the Motorola business. Zenith noted that Matsushita was the world's largest producer of television components and asserted that Matsushita had been deeply involved in the dumping that had injured the American television industry. Zenith contended that the Antitrust Division's acquiescence in the acquisition would permit Matsushita to benefit from its allegedly illegal acts. Magnavox joined Zenith in protesting the acquisition and

asserted that if it were permitted to proceed, the acquisition would lead to a radical restructuring of the American television industry. (Exhibit 7.)

In May of 1974, however, Matsushita acquired the Motorola television business without opposition from the antitrust Division. In August of 1974, a U.S. affiliate of Philips Gloeilampenfabrieken of the Netherlands extended a tender offer that led to its acquisition of Magnavox. In September of 1974 Zenith filed its antitrust and antidumping suit in Philadelphia.

Discovery material gathered to support Zenith's antitrust and antidumping suit included copies of the check price agreements that had been entered into by the Japanese television manufacturers. Those agreements established that the signers would not sell television receivers to American buyers at prices lower than the check prices and that the signers would register with a "council" any American customer to whom they proposed to sell television sets. The council consisted of executives of the signatory companies. The council was authorized to collect a fine up to 30 percent of the total value of the transaction if one of the signers was found to have sold television sets at a price below the check price or to have sold to a customer not previously registered with the council.

In June 1975, Japan's Ministry of International Trade and Industry wrote to the U.S. district court in which Zenith's suit had been filed to explain the check-price agreements. The Ministry told the court the agreements have been developed with the Ministry's direction which, according to the letter, had "a compulsory power equivalent to law." The Ministry asserted that the purpose of the agreement was to implement Japan's basic trade policy which was to assure "that Japanese exports do not cause unnecessary disruption in the national economies of Japan's trading partners." Several years earlier, in response to an interrogatory in the *Continental Forwarding* case, the Ministry had advised the U.S. Department of Justice that if a Japanese manufacturer sold at prices below those set in a check price agreement, the manufacturer would be subject to criminal prosecution in Japan.

Early in 1976 the International Trade Commission undertook investigations of possible violations of American antitrust, antidumping and Customs fraud laws associated with the importation of television receivers. The Departments of State, Justice and Treasury moved in concert to block those investigations. Treasury contended that it, and not the Commission, should investigate dumping questions and Justice took a similar position with respect to antitrust matters.

In September of 1976, the Secretary of the Treasury wrote to the Commission explaining the reasons for Treasury's refusal to cooperate with Commission investigators. With reference to the television dumping case, the Secretary said: "... dumping duties are being, and will continue to be, assessed on merchandise subject to the finding so long as it is sold at less than foreign market value or, as appropriate, constructed value." The Secretary's assertion was totally inaccurate and seriously misleading. At the time the letter was written, 4½ years had elapsed since Treasury had last assessed a television dumping duty.

In October of 1976, during Commission hearings, Peter Fleming, counsel for Sylvania, introduced the Japanese check-price agreement into evidence. He asserted that "If it was signed by GTE Sylvania and by Zenith there would be a criminal antitrust prosecution."

The Department of Justice indicated in the course of the hearing that it was not concerned with the agreements because they set only minimum prices. In January 1977, Senator Edward Kennedy forwarded copies of the Japanese agreement to the Antitrust Division. In his letter, Senator Kennedy stated:

"I am troubled that, notwithstanding such prima facie evidence of per se and other violations of sections 1 and 2 of the Sherman Act and section 337 of the Tariff Act, the antitrust Division of the Department of Justice has both opposed ITC's efforts to investigate these allegations and declined to initiate and independent civil or criminal investigation of whether the near destruction of the United States television industry has resulted from activities which violate U.S. antitrust laws."

In his letter Senator Kennedy quoted article 8, paragraph 2 of the agreement which provided that the signers would not sell at prices lower than those established in the agreement. The Senator quoted article 10, paragraph 4 which provided that the signers would not conduct transactions with customers other than those that had been previously registered with a council consisting of executives of the companies participating in the agreement. Finally, Senator Kennedy quoted article 15 of the agreement which authorized the council to levy a fine equal to 30 percent of the total value of the transaction if any of the signers sold at prices below those established in the agreement or to customers not registered in the agreement. (Exhibit 8.)

In early 1977, the International Trade Commission suspended its unfair trade practices investigations to consider a petition from COMPACT, a group representing American television industry unions and manufacturers for tariff or quota protection against color television imports from Japan that had jumped from 1,044,000 units in 1975 to 2,530,000 units in 1976.

In January of 1977 Zenith, although not a member of COMPACT, testified on behalf of the quota petitioners. In its testimony Zenith demonstrated that the least expensive 19-inch color television receivers available for sale in Japan were priced at 150,000 yen or something over \$500 at the then-existent exchange rate of about 300 yen to the dollar. Zenith also showed that 19-inch color television receivers that had been produced in Japan were offered for sale in the United States at prices under \$300. Zenith submitted to the Commission engineering analyses that showed that the Japanese receivers sold in the home market for over \$500 were essentially identical to the Japanese receiver being sold in the United States for less than \$300.

During the later stages of the ITC quota hearings, a document from the discovery material in Zenith's antitrust and antidumping litigation was introduced into evidence. That document indicated that within a few months of Zenith's supposedly confidential discussion in 1970 with Treasury officials on possible customs fraud in television importation, a report of the substance of the meeting was forwarded to Japanese manufacturers by a U.S. attorney for the Electronic Industries Association of Japan. The report stated that Zenith was "placing pressure on the U.S. Treasury Department" to investigate double pricing. It noted that "Zenith had not produced any substantiating data to back up the charges," and went on to say: "Whether our files of correspondence and old purchase orders should be purged will have to be discussed with our legal people."

During the International Trade Commission quota hearings Zenith had recommended that any tariff or quota relief provided the industry be limited to the time period needed by the International Trade Commission to complete its unfair practices investigations. The United States, however, negotiated a television Orderly Marketing Agreement with Japan. The agreement provided that the Japanese would limit television exports to the United States to 1,750,000 units for the 3-year period of the agreement. The 1,750,000 units was 31 percent below the very high level of 2,530,000 units exported to the United States in 1976. It permitted the Japanese, however, to export to the United States at rates about 65 percent above the rates they had achieved during the 1971-1975 period. (Exhibit 9.)

The Orderly Marketing Agreement placed no restrictions on dumping or other unfair trade practices. In fact there is reason to believe that the Japanese have interpreted a side letter associated with the Orderly Marketing Agreement to represent an agreement on the part of the United States that the unfair trade practices issue would not be pursued further. About a year after the Orderly Marketing Agreement had been negotiated the Trade Subcommittee of the House of Representatives was given a copy of the side letter the Government of Japan had been provided at the time the Orderly Marketing Agreement was signed. It was the first time that the side letter was made public.

With respect to antitrust matters the Government of Japan was assured that "In regard to the conspiracy and monopolization charges added to the complaint, the Department of Justice has stated in respect to this particular case that to hold the Japanese Government liable for sovereign conduct relating to normal policies involving domestic taxation, domestic investment and Japanese commerce, or to hold Japanese firms acting pursuant to governmental directives implementing such policies within sovereign Japanese territory, liable under section 337, would raise serious problems of sovereign immunity, act of state and comity. With regard to the issue of predatory pricing, the Department of Justice is of the view that this issue is not separable from an antidumping complaint and is within the jurisdiction of the Treasury Department. I fully concur and will reiterate that opinion to the USITC."

With respect to dumping matters, the Japanese Government was assured that the International Trade Commission would be urged to terminate its investigation of television dumping and leave the dumping issue entirely in the hands of the Department of Treasury. The Government of Japan was also assured that "The Treasury Department will carry out these efforts in strict conformity with the International Anti-dumping Code."

The Congress in 1968 had specifically and categorically rejected the International Antidumping Code. In Title II of the Renegotiation Amendments Act of 1968 the Congress had directed the Secretary of the Treasury to "resolve any conflict between the Antidumping Code and the Antidumping Act, 1921 in favor of the act. . ." and to "take into account the provisions of the International Antidumping Code only insofar as they are consistent with the Antidumping Act, 1921."

In the year immediately following the filing of its antitrust and antidumping litigation, Zenith focused considerable resources on discovery efforts directed at ascertaining the extent to which large American buyers of Japanese television receivers had benefited from discounts or rebates from the reported check prices. The discovery also sought to determine whether such rebates had been reported to the Customs Service at the time of importation.

In early 1977 the U.S. Customs Service obtained information indicating that the purchase prices declared on Customs documents at the time television receivers had been imported may have been falsely and/or inaccurately stated. According to a report directed to the Commissioner of Customs: "A voluntary tender of duties was made by an importer (Gambles) in early 1977. The importer's records show that the Japanese manufacturer Mitsubishi was engaged in 'double pricing', i.e. presenting Customs an invoice showing one price while the actual or true price was in fact lower. Such a practice effectively reduces or eliminates dumping duties."

Customs investigators were aware of Zenith's discovery efforts in its private litigation and decided to review discovery material in the Zenith case that was available to the public. Customs learned from that review that other importers had also been engaged in double pricing. According to the report to the Commissioner of Customs: "Subsequent to the double invoicing disclosure, the Office of Investigations undertook a massive inquiry of large importers of TV's including large mass retailers as well as subsidiaries of Japanese TV producers. The investigation revealed rebate schemes as well as other practices directed to the masking of potential antidumping duties."

In June of 1977 Time magazine reported that 86 U.S. importers of Japanese television receivers were under investigation in a fraud inquiry being conducted by the U.S. Customs Service. Customs Service documents indicated that Customs investigators had concluded that all but one or possibly two of the Japanese manufacturers had been offering undisclosed rebates from the check prices. In March of 1978 the U.S. Customs Service turned over to the Criminal Division of the Department of Justice the evidence it had accumulated in the television case. In the past several weeks the press has reported that three Federal grand juries are now reviewing the matter.

When, in 1977, the Antitrust Division sought to respond to this subcommittee's request that it investigate the Japanese check-price agreements, it concluded that serving CIDs on the defendants might result in the Division being inundated by millions of documents. The Division was unable under existing law to serve Zenith with a CID demanding those documents Zenith considered important to such an investigation. Thus, the Division sought to reach an agreement with the defendants under which they would permit the Division to review selected documents that were in Zenith's possession but subject to the protective order.

The defendants obtained a number of what Zenith regarded to be unreasonable concessions before they agreed to permit the Antitrust Division to review the documents. The Antitrust Division review was limited to the number of documents that could be considered by two attorneys in 5 business days. The Antitrust Division was precluded from copying or retaining copies of any of the documents. The Division agreed to provide the attorneys for the defendants a set of notes listing all documents brought to their attention by Zenith and agreed to identify for the defendants any documents Zenith's attorneys seemed to consider to be of special significance. The agreement provided that when the Antitrust Division met with the defendants' attorneys, it would keep only one set of notes, and that set would not be made available to Zenith. (Exhibit 10)

On September 7, 1977, Edwin P. Rome representing Zenith wrote to the Antitrust Division to object to the constraints that had been imposed by counsel for the Japanese companies. The letter requested an opportunity for a conference on the matter. The answer came in the Wall Street Journal on September 23, 1977. John Shenefield, Assistant Attorney General for the Antitrust Division advised the Journal that Zenith Radio Corporation had balked at an exchange of documents. He was quoted by the Journal as saying: " * * * the one possible inference in the complaint is without substance."

On September 27, 1977, I wrote to Mr. Shenefield and requested a meeting. The meeting took place on October 11, 1977 in Mr. Shenefield's office. We described our concern with what we regarded to be unreasonable and unbalanced constraints imposed by counsel for the defendants. We were advised that the Antitrust Division believed that the agreement was the best it could obtain from the attorneys for the defendants. In the meeting I expressed Zenith's view that its allegations of concerted and predatory action were based on the long sustained dumping in the American market, the evidence of customs fraud activity intended to mask the dumping, the

evidence of concerted activity shown by the check-price agreements and other evidence of anticompetitive activity that I believed to be included in protected discovery material that was not available to me. I was given no hint in that meeting that the Antitrust Division had agreed that predatory pricing allegations were inseparable from the dumping issue and, thus, were a matter for Treasury and not Justice to consider.

A matter of days after the meeting, Zenith concluded it would accept the conditions laid out by attorneys for the defendant Japanese companies. On April 12, 1978, Mr. Shenefield advised this subcommittee that, after a detailed review of the evidence, he had found "no evidence of ongoing concerted activity by Japanese enterprises aimed at the United States market." With respect to the agreements about which Senator Kennedy had written, Mr. Shenefield said: "As you are, I am aware of the check-price agreements of an earlier period. However, we have no evidence that these agreements continued beyond 1973. In addition, we found no evidence that, even in earlier periods, any concerted activity was intended to or did serve a predatory purpose * * *"

Two weeks earlier, on March 31, 1978, the Treasury Department had assessed \$46 million in television dumping penalties, covering the 1972-73 period. Almost all of the Japanese television companies that had signed the check-price agreements had been involved in the dumping. The \$46 million assessment represented a dumping margin of about \$30 at the time of importation. The \$30 dumping margin at the time of importation was the equivalent of a \$50 advantage in retail markets.

The dumping assessment meant that Japanese television manufacturers had enjoyed a price advantage of about \$50 at retail during the 1972-73 period, not because they were more efficient than American competitors but because they had successfully violated American antidumping laws.

It would seem difficult to describe dumping on that scale as not being "concerted" and "predatory." For 10 years the Japanese television companies had succeeded in keeping their prices higher in their home market and their prices low in the United States. In the absence of a concerted effort it would be reasonable to expect that one of the Japanese manufacturers would have reduced his prices slightly in Japan to improve his volume rather than reducing his prices substantially in the American market to add volume.

By the time the Customs Service announced its \$46 million finding, some 60,000 jobs had been lost in the American television industry. More than a dozen American communities had suffered the consequences of having a major television plant shutdown and five well-know U.S. television producers had been forced into liquidation or acquisition. Dumping was the major cause of the economic chaos in the domestic industry; the dumping was certainly predatory.

Two weeks before Mr. Shenefield reported to the Senate subcommittee, the Criminal Division of the Justice Department received from Customs the evidence to support possible Customs fraud prosecutions. The purpose of the "double pricing" schemes had been to make it possible to sell television receivers in the United States at prices lower than the check prices shown in the pricing agreements. The Ministry of International Trade and Industry in its letter to the Philadelphia court had said the purpose of the check-price agreements had been to avoid "un-necessary disruptions of the international economies of Japan's trading partners * * *." The Ministry had earlier advised the Department of Justice that sales below check prices would constitute criminal offenses in Japan.

The Customs Service had concluded that all but one or two of the Japanese manufacturers had been offering rebates from check prices. Time magazine's report and Customs documents suggested that a very large number of American buyers had accepted the rebates. In fact, there was no large American buyer of Japanese television sets during the period 1963-73 who didn't know of the check price agreements and who did not know that discounts and rebates were being offered from the check prices.

In 1970, following Zenith's meeting with Treasury, Japanese television manufacturers had been warned that Zenith was well aware of the rebate schemes and was seeking to persuade Treasury to take action with respect to those schemes. That information plus the large number of American buyers who knew of the rebates and Japanese sellers offering the rebates makes it impossible to conclude that the Council described in the check-price agreements was unaware that the terms of the check-price agreements was being flagrantly violated.

There is nonetheless no evidence of fines being levied as provided in the agreements nor is there any evidence of criminal action being taken in Japan against television companies that violated MITT's order by paying rebates. That would seem to constitute again a clear record of concerted action. If the check prices were

designed to avoid disrupting the American market, and if sales below the check prices were punishable as criminal offenses in Japan, it is impossible to conclude that the rebates and kickbacks weren't predatory.

In our efforts to deal with what we consider to be an unlawful conspiracy among Japanese television companies, much, but certainly not all, of the difficulty has been associated with protective orders or confidentiality orders. When the International Trade Commission undertook its unfair practices investigation, it sought to obtain from the Philadelphia Court access to discovery material; the Court on the basis of what appears to be clearly applicable law refused the request.

We believe that access to the discovery material would have led the International Trade Commission to pursue its unfair trade practices investigations rather than opting for quota or tariff restrictions that failed to deal with the basic problem. The Antitrust Division obtained access to discovery material in the television case only because, in our view, Zenith accepted onerous conditions imposed by the attorneys of the defendants.

Zenith's difficulties with constraints on access to data have not been limited to protective orders. Treasury refused to provide International Trade Commission investigators with access to Customs files in the dumping case. Access to those files in 1976 would have made it clear to ITC investigators that the assessment of dumping duties had been quietly stopped 4 years earlier.

In 1977, when the U.S. Customs Service concluded that cost of production information submitted by Japanese manufacturers in the dumping case was unreliable, Customs was unable to obtain access to cost of production information that had been developed by the International Trade Commission. When Customs requested from the Japanese manufacturers permission to inspect the ITC data, the requests went unanswered or were denied.

If a firm is to prosper or even survive in the American enterprise system it must be able to invest in laboratories to improve technology and in plant and equipment to improve productivity. The funds required to support these investments must come either from corporate profits or from investors who believe that their investments will generate an adequate future return. An industry confronted with predatory pricing can neither earn the profits nor obtain the investor confidence needed to finance those investments.

Since the enactment of the Sherman Act in 1890, the Congress has been aware that it is readily possible for a very powerful producer or for a cartel consisting of several producers to use predatory pricing to drive competitors from the market and thus achieve a monopoly. The Congress has long recognized the need to provide law enforcement agencies with the powers necessary to protect the economy from conspiracy and monopoly.

In recent years as foreign trade has become a more important factor in the American market the need for vigorous enforcement of American antitrust laws has, in our view, grown geometrically. It is an undeniable fact that most of the countries of Asia and of Europe do not place the same priority on the enforcement of antitrust laws that the United States has. An American company operating in compliance with American antitrust law is at a terrible disadvantage if its competitors are permitted for diplomatic or other reasons to flaunt those laws.

Zenith recommends the enactment of the Antitrust Procedural Improvements Act of 1979. We believe its provisions directed at expediting the enforcement of antitrust laws are constructive and needed. We believe the provisions that would give the Antitrust Division improved access to discovery material produced in private antitrust litigations are also constructive and needed.

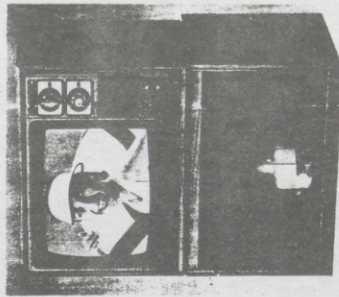
We would urge, however, that this subcommittee consider the possibility of expanding that section of the bill so as to make certain that the Congress and authorized Federal law enforcement agencies also have access to discovery material covered by protection orders that they may need to accomplish legitimate legislative or law enforcement purposes.

EXHIBIT 1

19" COLOR TELEVISION TABLE MODEL PRICING IN JAPAN

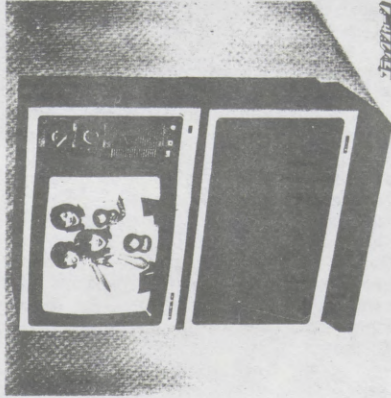
(As of January, 1977)

TOSHIBA



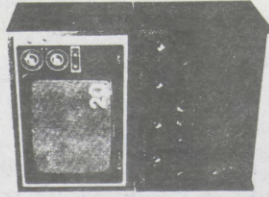
20, 20T228
標準価格 **149,800円** (税別)
テレビ料別 1120円 7,500円(送料)
●新しい映像いっしょに楽しもう

SANYO



20型 スペースセーブのニューファミリーカラー
19" 16:9 標準価格 **151,000円** (税別)
●カラー映像の美しさを最大限に引き出す
●スピーカー・オーディオシステム
●リモコン・ビデオ・VTR・ビデオカメラとの接続が可能
●標準価格より10%引きの特別価格で販売中
●テレビ料別 1120円 7,500円(送料)

SHARP



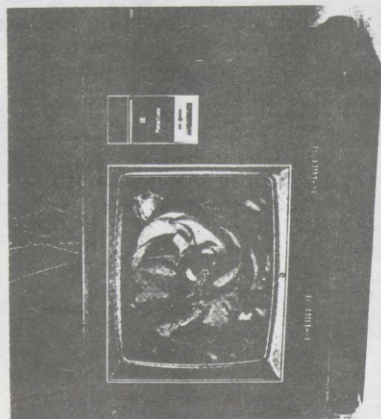
●カラー映像の美しさを最大限に引き出す
●スピーカー・オーディオシステム
●リモコン・ビデオ・VTR・ビデオカメラとの接続が可能
●標準価格より10%引きの特別価格で販売中
●テレビ料別 1120円 7,500円(送料)

20型 20C-223S(A)
標準価格 **149,000円**
●カラー映像の美しさを最大限に引き出す
●スピーカー・オーディオシステム
●リモコン・ビデオ・VTR・ビデオカメラとの接続が可能
●標準価格より10%引きの特別価格で販売中
●テレビ料別 1120円 7,500円(送料)

Products that are designated as 19-inch receivers in the United States market are designated 20-inch receivers in the Japanese market. The differences are in the method of measurement, not in the size of the products. The stands upon which the Japanese receivers are displayed are available to the customer at extra cost.

(AS OF JANUARY 1977)

NATIONAL
(MATSUSHITA)



支術の粋を結集したバナカラーの高級品

TG26-Z2G^(N) 標準価格 ¥10,000 円

(アンテナ及び工事費別)

CEC

付 マジコン付

シールド アンテナ端子類

164.000

通行) 61.7cm

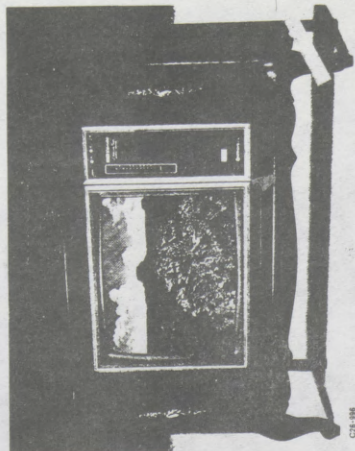
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ated 26-inch r

d of measure

Products that are designated as 25-inch receivers in the United States market are designated 26-inch receivers in the Japanese market. The differences are in the method of measurement, not in the size of the products.

HITACHI



ザ・ビント!

C26-996

0000'069大 編 97

●ザ・ピント／く顔キドスカープ広角(110°)タイプ

●消費電力減・ノイズ少 ●子重の大きい ●自動カラーコートラスト方式 ●電子フィルムター採用 ●自動カラーコートラスト

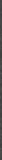
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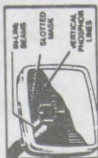
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NOW THRU SATURDAY!



19-inch diagonal measures picture for a big 185-square inch screen.



In-line picture tube has side-by-side color guns for proper alignment.

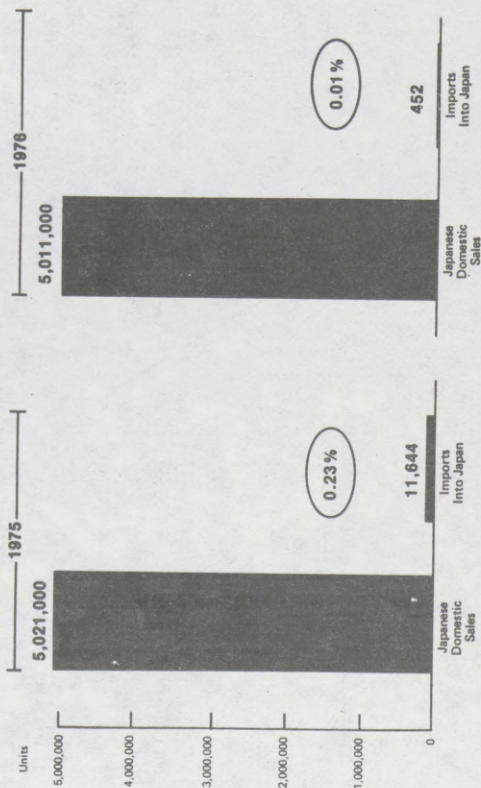
BIG SCREEN
100% Solid-State
Color TV

\$299

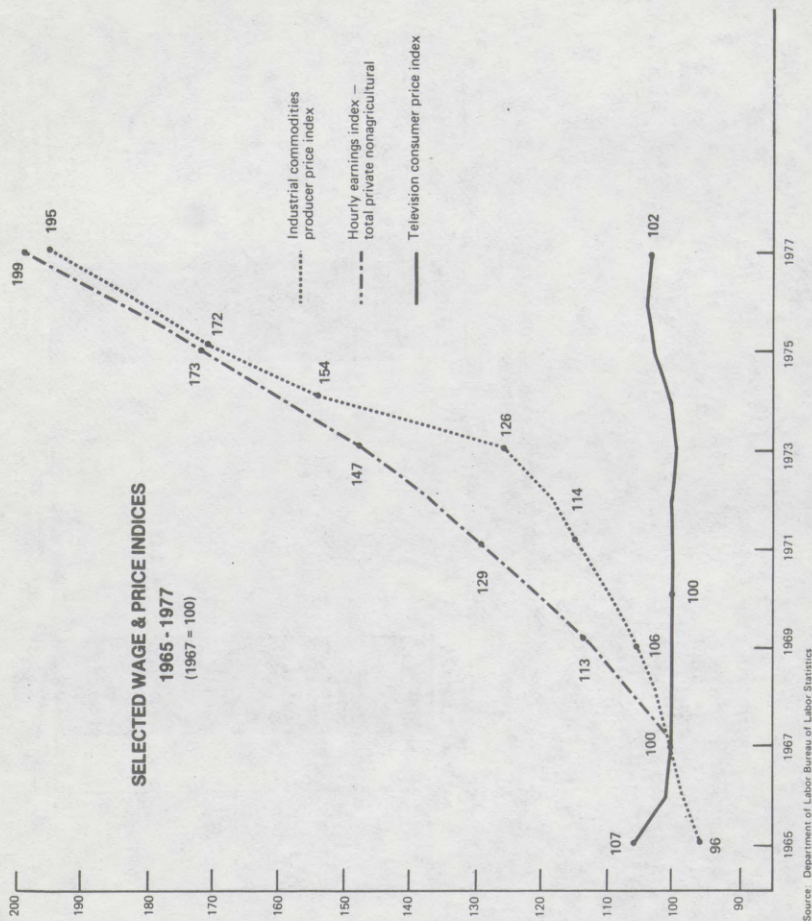
Sears Low Price

(AS OF JANUARY, 1977)

JAPANESE DOMESTIC SALES AND IMPORTS
COLOR TELEVISION



Source: Imports - Color TV U.S. - Japan Trade Council
Domestic Sales - Color TV - Electronics Industry Association Japan



DOMESTIC TELEVISION INDUSTRY PROFITABILITY
(Dollars in Millions)

	<u>SALES</u>	<u>PRETAX OPERATING PROFIT</u>	<u>PROFIT AS PERCENT OF SALES</u>
<u>FIVE YEARS 1968 - 1972</u>			
ZENITH	\$ 3,364	\$ 385	11.4%
ALL OTHERS	9,262	332	3.6
TOTAL INDUSTRY	12,626	717	5.7
<u>FIVE YEARS 1973 - 1977</u>			
ZENITH	\$ 4,732	\$ 284	6.0%
ALL OTHERS	8,376	34	0.4
TOTAL INDUSTRY	13,108	318	2.4
<u>TEN YEARS 1968 - 1977</u>			
ZENITH	\$ 8,096	\$ 669	8.3%
ALL OTHERS	17,638	366	2.1
TOTAL INDUSTRY	25,734	1,035	4.0

SOURCE: U.S. INTERNATIONAL TRADE COMMISSION

U. S. TELEVISION INDUSTRY
MERGERS AND ACQUISITIONS
1973 - 1978

- NOVEMBER, 1973 ADMIRAL ACQUIRED BY ROCKWELL INTERNATIONAL
(LIQUIDATED IN AUTUMN OF 1978)
- MAY, 1974 MOTOROLA TELEVISION ASSETS ACQUIRED BY MATSUSHITA
(TWO OF THREE PLANTS SHUT DOWN. U.S. ENGINEERING
ELIMINATED)
- OCTOBER, 1974 MAGNAVOX ACQUIRED BY AFFILIATE OF NV PHILIPS
- OCTOBER, 1974 PHILCO TELEVISION ASSETS ACQUIRED BY GTE SYLVANIA
(ASSETS OTHER THAN BRAND NAME LIQUIDATED)
- DECEMBER, 1976 WARWICK TELEVISION ASSETS ACQUIRED BY SANYO OF JAPAN
(CHICAGO PLANT SHUT DOWN. U.S. ENGINEERING
ELIMINATED)
- NOVEMBER, 1978 PROPOSED MERGER OF GENERAL ELECTRIC AND HITACHI
TELEVISION BUSINESSES BLOCKED BY JUSTICE DEPARTMENT

JAPANESE CHECK PRICE AGREEMENTS
KEY PROVISIONS

PARAGRAPH 2, ARTICLE 8

"THE PARTIES TO THIS AGREEMENT, WHEN PRICES HAVE BEEN ESTABLISHED IN ACCORDANCE WITH THE PROVISIONS OF THE ABOVE PARAGRAPH, SHALL NOT OFFER FOR SALE, MAKE A CONTRACT FOR SALE OR DELIVER TO EXPORT BUSINESSMEN GOODS AT PRICES LOWER THAN THE ESTABLISHED PRICES."

PARAGRAPH 4, ARTICLE 10

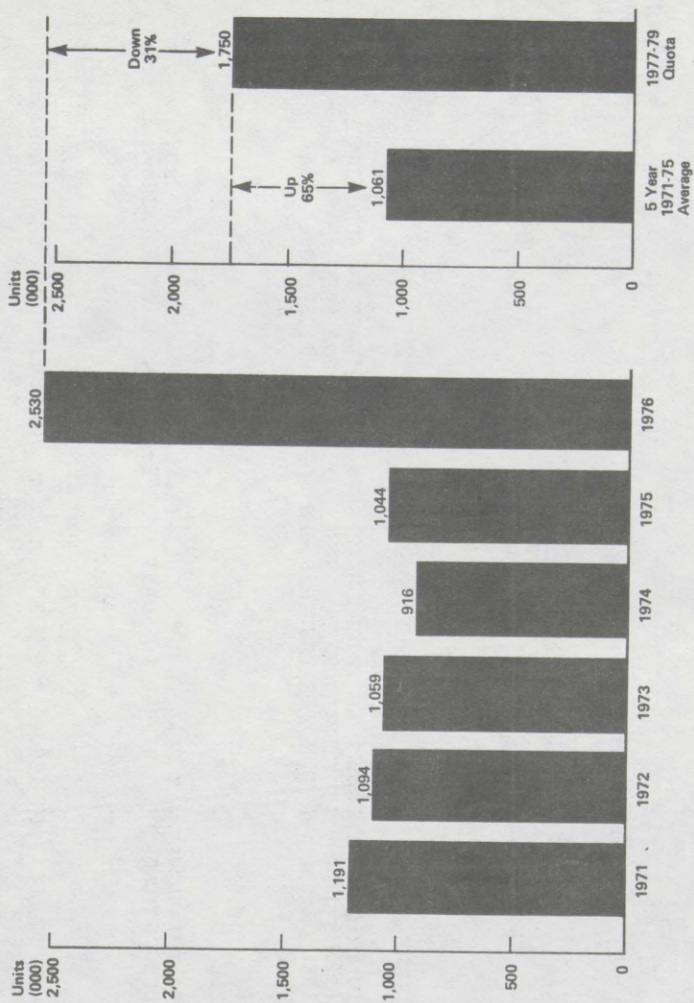
"THE PARTIES TO THIS AGREEMENT SHALL NOT CONDUCT TRANSACTIONS WITH ANY PERSON OTHER THAN THOSE CUSTOMERS REGISTERED PURSUANT TO THE PROVISIONS OF PARAGRAPH 1."

ARTICLE 15

"THE COUNCIL MAY COLLECT, IN ACCORDANCE WITH RULES OF THE COUNCIL TO BE ESTABLISHED SEPARATELY, A FINE NOT TO EXCEED 50/100 OF THE AMOUNT OF MONEY OF THE TRANSACTION INVOLVED IN THE VIOLATION IF ANY PARTY TO THIS AGREEMENT HAS BEEN ENGAGED IN AN ACT CONSTITUTING EITHER OF THE FOLLOWING:

- A. A VIOLATION OF THE PROVISIONS OF PARAGRAPH 2, ARTICLE 8;
- B. A VIOLATION OF THE PROVISION OF PARAGRAPH 4, ARTICLE 10.

COLOR TELEVISION IMPORTS FROM JAPAN



UNDERSTANDING BETWEEN CERTAIN DEFENDANTS
IN THE JAPANESE ELECTRONICS PRODUCTS ANTI-TRUST LITIGATION
AND
THE UNITED STATES DEPARTMENT OF JUSTICE

EXHIBIT 10

KEY PROVISIONS

- "THE TOTAL LIST (OF DOCUMENTS) IS NOT TO EXCEED THE AMOUNT OF DOCUMENTS WHICH THE DEPARTMENT CAN REVIEW, WITH TWO EXPERIENCED LAWYER-INVESTIGATORS, SUBSTANTIVELY BUT NOT IN DETAIL, DURING FIVE FULL BUSINESS DAYS.
- "THE DEPARTMENT WILL NOT TAKE POSSESSION OF THE ORIGINALS, COPIES, OR TRANSLATIONS OF ANY DOCUMENTS SHOWN TO OR DISCUSSED WITH ITS REPRESENTATIVES BY PLAINTIFFS' QUALIFIED ATTORNEYS."
- "DURING THIS REVIEW (WITH PLAINTIFFS), DEPARTMENTAL ATTORNEYS WILL TAKE TWO SEPARATE SETS OF NOTES. THE FIRST SET WILL BE A SPECIFIC LISTING OF ALL DOCUMENTS ... THIS FIRST SET OF NOTES WILL ALSO INDICATE TO WHICH OF THE DOCUMENTS, IF ANY, THE PLAINTIFFS GIVE SPECIAL SIGNIFICANCE ...
- "THE SECOND SET OF NOTES WILL BE THE ATTORNEY WORK PRODUCT ... THIS SECOND SET OF NOTES WILL BE CONFIDENTIAL TO THE DEPARTMENT OF JUSTICE TO THE FULL EXTENT PROVIDED BY LAW."
- "UPON RETURNING TO WASHINGTON THE LAWYER-INVESTIGATORS WILL FURNISH WITHIN THREE BUSINESS DAYS THE FIRST SET OF NOTES TO QUALIFIED ATTORNEYS FOR EACH OF THE DEFENDANTS ...
- "AT THE DEFENDANTS' PRESENTATION, THE DEPARTMENTAL LAWYER-INVESTIGATORS WILL TAKE ONLY ONE SET OF NOTES WHICH WILL BE ATTORNEY WORK PRODUCT AND INVESTIGATORY FILES AND RECORDS ...

Mr. NEVIN [continuing]. We are aware that the Antitrust Improvement Procedural Act of 1979 seeks to expedite and reduce the cost of enforcing this country's antitrust laws. It also seeks to clarify the authority of the Antitrust Division to issue civil investigative demands for material that has been produced through discovery in private litigation.

We support the Antitrust Procedural Improvement Act in its entirety. In my testimony, however, I will concentrate on what we think is a need to provide Federal law enforcement agencies with improved access to materials produced through discovery in private litigation.

No American industry has been more characterized in recent years by financial losses, employee layoffs, and plant shutdowns than has been the American television industry. In the last 5 years domestic producers as widely known as Admiral, Philco, Motorola, Magnavox, and Warwick have been forced into liquidations or acquisition. Only 1 year ago General Electric sought but failed to obtain approval to merge its television business with that of Hitachi of Japan.

Zenith has long believed that the economic difficulties of the television industry have been directly attributable to flagrant violations of American antitrust, antidumping, and customs fraud laws associated with the importation of television receivers from Japan. Late in 1974, Zenith filed a lawsuit in the U.S. district court in Philadelphia charging a number of Japanese television manufacturers, their U.S. subsidiaries, and Motorola, Inc., with violations of U.S. antitrust and U.S. antidumping laws. In February of 1977, Zenith filed a counterclaim in the lawsuit adding Sanyo Manufacturing Corp., Sears, Roebuck & Co., and Melco Sales, Inc., as defendants.

Through discovery associated with that litigation, Zenith has gathered a large amount of material to support its charges that Japanese television manufacturers have been involved in unlawful dumping and a variety of other anticompetitive activities. Approximately 1 million of the documents that have been accumulated in the *Zenith* case are covered by a protective order preventing the disclosure of their contents to parties not involved in the litigation.

In the years since Zenith filed its antitrust and antidumping suit, the Department of Treasury, the U.S. Customs Service, the U.S. International Trade Commission, and both the Antitrust and Criminal Divisions of the Department of Justice have been involved in investigations directly related to the television dumping and antitrust controversy.

In addition, the Subcommittee on Trade of the House of Representatives has, as a part of its oversight responsibility, sought to determine why antidumping laws were not being enforced in the television case and this subcommittee has, as a part of its oversight responsibility, sought to learn why the Antitrust Division has failed to take action with respect to what appeared to be unlawful price-fixing and market allocation agreements entered into by Japanese television manufacturers.

It is Zenith's belief that the investigations of both Federal law enforcement agencies and the investigations undertaken by the Congress have been seriously impeded by limitations imposed by

protective orders on information that has been made available to investigators.

I might ask you to turn to page 4 of the statement and I will pick up again at the bottom of page 4.

In 1974 we filed the litigation I described earlier. If I could ask you to look at exhibit 7, in 1974 we filed a litigation when the economic pressures on the television industry had reached the point where at the end of 1973 Admiral had been acquired by Rockwell International which was later liquidated. Motorola television assets were acquired by Matsushita of Japan and Magnavox was acquired by W. V. Philips of the Netherlands.

At the bottom of page 4: We sued at this point in time to protect ourselves against what we thought was an unlawful assault.

Discovery material gathered to support Zenith's antitrust and antidumping suit included copies of the check price agreements that had been entered into by the Japanese television manufacturers.

Again I will ask you to turn to exhibit 8. Exhibit 8 provides a summary of those check price exhibits which are acknowledged to have existed from 1963 to 1973. The first provision of the agreement was that the parties to this agreement shall not offer for sale or make contract for sale or deliver export business at prices lower than the established prices.

Paragraph 4 of that agreement said:

Parties to this agreement shall not conduct transactions with any person other than those customers registered pursuant to the provisions of paragraph one.

Certainly construable is a market allocation committee. Article XV, which was the chief component of the agreement, said council, and council is defined elsewhere in the agreement to consist of executives of participating companies—

may collect in accordance with rules of the council to be established, a fine not to exceed 30 percent of the total amount of the transaction involved in the violation if any party to this agreement is engaged in the following—

And it refers to the paragraph I just read. If either party underpriced the prices in the agreement or sold to an American customer that he had not been approved to sell to in the agreement he was subject to those kinds of fines.

Turning now to page 5, in October of 1976, during Commission hearings, Peter Fleming, counsel for Sylvania, introduced the Japanese check price agreement into evidence. He asserted that, "If it was signed by GTE Sylvania and by Zenith there would be a criminal antitrust prosecution."

The Department of Justice indicated in the course of the hearing that it was not concerned with the agreements because they set only minimum prices. In January of 1977, Senator Edward Kennedy forwarded copies of the Japanese agreement to the Antitrust Division. In his letter, Senator Kennedy stated:

I am troubled that, notwithstanding such prima facie evidence of per se and other violations of sections 1 and 2 of the Sherman Act and section 337 of the Tariff Act, the Antitrust Division of the Department of Justice has both opposed ITC's efforts to investigate these allegations and declined to initiate an independent civil or criminal investigation of whether the near destruction of the U.S. television industry has resulted from activities which violate U.S. antitrust laws.

In his letter Kennedy summarized essentially the provisions I have in the exhibit.

I will turn to page 9, Mr. Chairman, top of the page. Later in 1977 when the Antitrust Division sought to respond to this subcommittee's request that it investigate the Japanese check price agreements, it concluded that serving CID's on the defendants might result in the Division being inundated by millions of documents. The Antitrust Division was also concerned that many of the documents would be in the Japanese language and, therefore, not intelligible to it. The court in Philadelphia through whose powers these documents were gathered, had previously denied to the ITC investigators, about 1 year earlier, access to these documents.

The International Trade Commission had to go to the court and the court, on the basis of its protective order and legal precedence denied access. The Antitrust Division was unable under existing law to serve Zenith with a CID demanding those documents Zenith considered important to such an investigation.

Thus, the Division sought to reach an agreement with the defendants under which they would permit the Division to review selected documents that were in Zenith's possession but subject to the protective order.

The last exhibit I want to bring to your attention is exhibit 10. The Antitrust Division was now in a position in which it had to negotiate with the defendants in the litigation in order to obtain their approval for the Division to get access to the documents.

As you note on exhibit 10, the defendants succeeded in obtaining what we considered to be a series of rather unreasonable concessions before they agreed to permit the Antitrust Division to review the documents. Those concessions included a limitation on the number of documents to those that two experienced lawyers and investigators could review during 5 business days.

The Antitrust Division was required to agree it would not take possession of the originals, copies, or translations of any of the documents that were shown to it. In other words, it would not retain any copies. The Antitrust Division was required to take two separate sets of notes, the first set being a specific listing of all documents to be turned over to the defendants and also, particularly onerous to us, a requirement that the Antitrust Division turn over to the defendants also a notation of any of the documents we had discussed with the Antitrust Division to which we, the plaintiffs, seemed to give special significance.

Senator METZENBAUM. As I understand, the main thrust of your concern is that you actually wanted to make available certain parts of this information that you had put together in connection with your private action, you wanted to make it available to the Antitrust Division of the Department of Justice but the constraints that were imposed by attorneys for the defendants were of such a nature that you were not able to proceed in that manner? Do I understand you correctly?

Mr. NEVIN. Exactly, Mr. Chairman. When Senator Kennedy requested the investigation, and I should say for the record I have not had the opportunity to either meet or so much as to speak to Senator Kennedy, he was acting as part of the Senate staff or Senate responsibility, not on any request of ours.

When he asked for the investigation the Antitrust Division concluded that it would need access to these documents, that it didn't want to subpoena the defendants themselves, that there was this mass of documents available that I talked about.

We were prepared to turn over the documents. We did take exception—and I described that in my full statement which it is not necessary here—we did take exception as to what we believed to be onerous conditions that the defendants were able to impose on the Antitrust Division before we gave them documents.

We thought it was reasonable to be unable to copy, that the Antitrust Division would have to go back to the defendants and tell them which of the documents we thought were significant in our private litigation. In fact, we thought it was unreasonable that the Antitrust Division was required to give a full listing of the documents.

We did, however, enter into the agreement. We ultimately agreed to the conditions that are summarized on exhibit 10. And on April 12, 1978, Mr. Shenefield reported to this subcommittee that with respect to the agreement:

As you are, I am aware of the check price agreements of an earlier period. However, we have no evidence that these agreements continued beyond 1973. In addition, we found no evidence that, even in earlier periods, any concerted activity was intended to or did serve a predatory purpose. * * *

I would like to take a brief minute because I don't want to pass over that. About 2 weeks before Mr. Shenefield reported to the committee, the Department of the Treasury assessed \$46 million in dumping penalties against Japanese television receivers that had been imported during the 1972-73 period, which is the period covered by these agreements. That \$46 million assessment amounts to about \$30 dumping margin at the time of importation and provided a \$50 advantage in retail markets in the United States. In a market as competitive as television, a \$50 retail advantage obtained by violation of the law would seem just to us to be predatory.

There is another part of this I will summarize very briefly, and that is that the prices that were in these check price agreements were for almost 10 years almost invariably the prices that were shown by American purchasers to the Customs Service at the time they imported television receivers.

In other words, if an American retailer had bought television receivers in Japan and had brought them into the United States and he had to state to the Customs Service what was the price at which he bought them, almost without exception it was the check prices that were shown at the time of importation.

In 1977 the Customs Service found that those representations had probably been not correct and began what Customs Service described as "a massive fraud investigation."

In March 1978, just before the Antitrust Division reported to this subcommittee, the Customs Service turned over to the Criminal Division of the Department of Justice the evidence that it accumulated in this investigation of customs fraud.

The press is now reporting there are three grand juries studying the matter. I make that point, sir, only to suggest that if the press reports that there are dozens and dozens of American retailers who

are engaged in taking these kickbacks, and that 9 out of 10 of the Japanese companies were offering these kickbacks, and that these kickbacks were against the provisions of this price-fixing agreement and in fact subject to very sizable penalties if discovered, then it is difficult for us to believe that it did not take both concerted and predatory action.

Senator METZENBAUM. Mr. Nevin, would you tell the committee what has happened since 1968, the last 10 years, with respect to both the regular television market and color television market in this country as far as share of the market is concerned, American companies and Japanese?

Mr. NEVIN. Let me use an exhibit here. Let me start with exhibit 5 and I will do this very briefly, sir. May I take a minute on each of the exhibits because I think they will give you the picture?

Senator METZENBAUM. All right, briefly.

Mr. NEVIN. The first one is a picture of Japanese television receivers as shown in sales brochures in Japan, 19-inch television receivers, and represented by me in sworn testimony to be the lowest priced 19-inch television receivers available in Japan at the time. I testified before ITC in 1977, priced at 150,000 yen. If you divide that by 300 yen to the dollar their price is \$500.

Now, I will ask you to skip to exhibit 3. While at the same time these sets were being sold in Japan for \$500, large American retailers were marketing sets purchased from the same suppliers in the United States for \$300.

Senator METZENBAUM. That is the \$299 set?

Mr. NEVIN. Exactly. In sworn testimony before the ITC I advised the Commission that we had taken the set that is shown in this advertising in our engineering organization. We had torn it down, taken it apart. We had bought, in Japan, the set that was being sold for \$500 in Japan by the supplier of this set in the American market, taken all those parts and laid them side by side and submitted a detailed engineering analysis to the ITC, and we reached a conclusion that was never challenged in the enormous majority of the parts where identical, and there was not \$5 worth of cost difference between the two receivers.

Exhibit 4 is the Japanese market. It is completely closed. Five million television receivers sold in 1975, 11,000 imported. Five million sold in 1976, 452 imported.

The heart of our antitrust position is that we have been excluded from the Japanese market, that our competitors in Japan have been able to get \$500 prices for the 5 million sets that they sold in Japan and that is why it was possible for them to sell 2½ million sets in the United States—1½ to 2½ million sets in the United States at very low prices.

Senator METZENBAUM. If you had been permitted to enter the Japanese market and there were the same kind of tariff provisions on the sets you took into Japan that are applicable with respect to Japanese set brought into this country, could you have sold your sets at less than \$500 and still make a profit?

Mr. NEVIN. Yes. No, sir, no question about that.

Senator METZENBAUM. Do you have an estimate?

Mr. NEVIN. My best estimate is that we could have been \$50 below the market if we were shipping in and that allows for extra marketing cost.

Senator METZENBAUM. Why didn't you sell in Japan?

Mr. NEVIN. We made two attempts to get in and we were blocked. We were stopped from getting into Japan. The third attempt we made was a year ago. We had C. Itoh do a study of the Japanese market for us. We were in the process of developing a program to go into Japan because of the high prices.

They came back with a report to us describing all the details of the Japanese market and what we would have to do. In that report they told us that Sears Roebuck had worked out an arrangement with the Sabu Stores in which Sabu would offer the Sears catalog, and Japanese customers could come in and buy from the Sears catalog.

There was an instruction sheet at the beginning of the catalog; you take the dollar price of the catalog, multiply by 300, and you get the yen price. Except when they got to the television section of the Sears catalog, they all of a sudden had \$300 to \$325 television receivers, 19-inch, being offered in the Sears catalog. If you multiplied them by 300 yen to the dollar, you were going to offer them for 90,000 to 100,000 yen in a market that no one offered them below 150,000 yen.

According to C. Itoh:

The second largest Japanese television company reported to us that matter was handled by a special little note in the television section that said in this section to multiply the dollar prices by 600 yen to the dollar to get the purchase price.

I would point out to you from the chart the 600 yen to the dollar is designed to force the price up to 180,000 yen. I would point out that there is no European company in the Japanese market, companies like Philips and Telefunken, that do television business in South Africa. The Japanese companies that have plants in Taiwan for export business bring none of that production back into the Japanese market. It is effectively closed.

Senator METZENBAUM. What you are testifying to today is that while the Japanese manufacturers were inundating the American market, your ability to sell in the Japanese market was effectively precluded. Even in attempting to sell back into the Japanese market the same Japanese sets that were being sold in the American market at \$300, these sets were being sold at an inflated price.

Mr. NEVIN. Very quickly thereafter taken off the market, but that is exactly right, sir.

Senator METZENBAUM. It is fair to say that in the antitrust case that you brought against the Japanese manufacturers who joined in this collusive agreement, the information that you had gathered in that case could not be made available to the U.S. Government by reason of the restrictions that are presently applicable in connection with CID's?

Mr. NEVIN. That is right. The U.S. Government, in the form of the Antitrust Division, International Trade Commission, and other agencies that were authorized to be investigated, including the U.S. Customs Service, for example.

Senator METZENBAUM. If our bill had been in effect at that time, it would not have actually changed the question of entry into the

Japanese market or Japanese entry into the American market, but it would have made it possible for you to make available to the Antitrust Department of the Department of Justice the information which you had gathered in a private suit in order that the U.S. Government might effectively enforce the antitrust laws. Is that correct?

Mr. NEVIN. Exactly right, Mr. Chairman. I would suggest, sir, that as foreign trade becomes a more and more important part of our commerce, it is important for us to note that the countries of Europe and the countries of Asia simply do not put the same emphasis on antitrust law that we do.

Therefore, I think that a rapid response is critical.

If I may speculate on the television case, for the Antitrust Division to be deprived of information until the case has run 7 or 8 years and gone through the courts is to preclude the Antitrust Division from taking effective action. That is why we support this element of your bill.

Senator METZENBAUM. We very much appreciate your testimony, Mr. Nevin, because it makes it possible for us to meet the American businessman's concern for the need for those provisions of this legislation which are particularly applicable to your case, and we are very grateful to you for your testimony.

Senator Thurmond may have some questions, but we appreciate your participating in these hearings for that very reason.

Mr. NEVIN. Thank you, sir.

Senator THURMOND. Thank you very much.

Mr. Nevin, we are glad to have you here. I wish to thank you for your presentation. I am sure it will be a fine addition to the testimony here. I don't think I have any special questions to propound to you at this time.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you.

Mr. Boies.

Mr. BOIES. I would like to begin by also expressing our appreciation for the help that your company and your counsel, Mr. Nash, has given the committee and the committee staff in looking into this question.

I would just like to clarify a couple of things because I think it is important that the record not be inaccurate or misleading.

The Justice Department did eventually get the documents in order to take a look at your allegations, did it not?

Mr. NEVIN. That is correct. As a matter of fact, I quoted, I think, as a part of even the abbreviated testimony, accurately, I think, from Mr. Shenefield's statement to this committee.

Mr. BOIES. Your complaint about the state of the law was that the Justice Department was delayed in getting the evidence which you had and perhaps got the evidence under circumstances that made it difficult for them to evaluate the evidence; is that correct?

Mr. NEVIN. No, I don't think that that adequately states it. I think with respect to the Antitrust Division that it did ultimately get some significant number of documents. I think when the Congress enacted the Trade Act of 1974 and authorized the International Trade Commission to investigate dumping, unlawful conspiracies among importers and that kind of thing, the fact that the ITC

was completely precluded from access to the discovery material, even though it want to the court to get it, is a much more serious problem.

Mr. BOIES. This act would not deal with this particular issue; is that correct?

Mr. NEVIN. I am sorry. Let me add to my testimony and urge that this subcommittee consider the question of whether or not access to discovery material ought not be made available to legitimate law enforcement agencies of the United States other than the Antitrust Division. Thank you for bringing that to my attention, because I did not read that part of my statement.

Mr. BOIES. When the Antitrust Division did look at the documents that you presented, they concluded essentially there was not an antitrust violation by the Japanese television manufacturers?

Mr. NEVIN. The exact words were that there was no predatory—no evidence even in prior years of any concerted activity, that any concerted activity was intended to and did serve a predatory purpose.

Mr. BOIES. Do you believe that the Justice Department's conclusion would have been different if you had been able to supply the Government with documents and other material either earlier or without the restrictions that were imposed on you?

Mr. NEVIN. That is a very difficult question to answer. I think in light of new information that has been available and the grand jury activities and all, I am influenced by what is now the public record as opposed to protected, and it would be speculative of me to answer as to what would have happened under an earlier date.

Mr. BOIES. Thank you.

Senator METZENBAUM. Senator Baucus, we are happy to have you with us this morning.

Senator BAUCUS. Thank you, Mr. Chairman.

Thank you, Mr. Nevin, for your testimony which I have found very interesting. I have one question and that is whether you have had a chance to give thought to the section of the bill which deals with sanctions against attorneys or parties who engage in unreasonable delay. Do you think the bill's sanctions against dilatory treaties are adequate? Do you have any recommendations with respect to those sanctions?

Mr. NEVIN. We gave consideration to that section of the bill, Senator. We did decide we would support the entire bill. I sat here this morning listening to some discussion of the problems that might arise. My own view of those problems was that the bill was leaving that decision up to the judge. I think the history of providing an attorneywide latitude in protecting his clients is pretty well established. I think those sanctions are desirable to punish and discourage the outrageous delay and I was not, when I read them, inclined to be concerned that they would be abused to the point where an attorney could not defend his client. So we would support those.

Senator BAUCUS. You would not suggest any stronger sanctions or more lenient sanction?

Mr. NEVIN. No; I think that there are a number of situations in which the sanctions that are going to be applied vary so widely

that the law has no choice but to leave it to the discretion of the jurist in charge.

Senator METZENBAUM. Mr. Nevin, your case is still pending?

Mr. NEVIN. Yes, sir.

Senator METZENBAUM. How long has it been in the courts?

Mr. NEVIN. We filed the case in October 1974.

Senator METZENBAUM. 1974?

Mr. NEVIN. Yes, sir.

Senator METZENBAUM. Do you feel there have been any unreasonable delays in bringing the matter to trial?

Mr. NEVIN. Mr. Chairman, I think I would find it difficult to answer that question affirmatively. We decided in February 1977—we, Zenith, decided in February 1977—to add three new defendants to that litigation. There is no doubt in my mind that that delayed bringing it to trial. But that was an act of our doing as opposed to the court.

I am not an attorney, sir, so I am expressing to you views that I have heard from my counsel. I could not say that on the basis of views I have heard that there have been unreasonable delays. I think it is the impression of our counsel that the two judges that have handled the case have sought to expedite it, sir.

Senator METZENBAUM. If you do not care to answer this question, I will understand. But if you do, we will accept your answer. Would you care to indicate to the committee how much Zenith has expended to bring this case this far in the courts?

Mr. NEVIN. I have no hesitancy to advise the committee of that. I was asked that question in a stockholders' meeting 1 year ago. My answer was that I was sure that there had been no year in which we had spent more than 1 cent a share. Now, that would be more than about \$400,000. The reason is that the great bulk of the work is being done by in-house counsel at Zenith.

If I were to add the cost of having them on the payroll, I would come up with a higher number. But we have not expanded our office of general counsel enormously. To give you a very safe answer, sir, I would say it is under \$500,000 a year, which means we would be under \$2.5 million in the 5 years that the case has gone. I think the right answer is probably under \$2 million.

Senator METZENBAUM. When you say under \$2 million, under \$2 million goes all the way down to \$1.

Mr. NEVIN. No, in the range of \$2 million. If I had to give you an estimate now, I would say it was \$400,000 to \$500,000 a year. But in the early years it may have been significantly less than that. I would say the cumulative amount was within several hundred thousand of \$2 million. I am sure you understand I am responding with an estimate.

Senator METZENBAUM. I just wanted an indication in the record as to the costliness of maintaining the case.

Mr. NEVIN. I can assure you the estimate is close.

Senator METZENBAUM. Directing your attention to exhibit 10, I notice that in that understanding between certain defendants in the Japanese electronics products antitrust litigation and the U.S. Department of Justice one of the agreements was: "The total list of documents is not to exceed the amount of documents which the

Department can review, with two experienced lawyer investigators, substantively but not in detail, in 5 full business days."

Did anybody ever explain to you why it was so important that two investigators would have to do the work in 5 days when the case is now in its fifth year? Why would that kind of limitation be placed on it? Did anybody explain it to you?

Mr. NEVIN. Yes. I think the explanation begins with the Anti-trust Division's reluctance to become involved in what I described as a massive investigation and sought to respond to what was initially Senator Kennedy's request and later the request of the subcommittee by doing a preliminary investigation.

Now, I can't go beyond that. But I think I can say with certainty it was not a case of the Antitrust Division wanting to spend a month on it and assigning four fellows and the attorneys for the defendants would not let them.

How the two of them arrived at that number, I can't testify to because we were presented with an agreement that the Antitrust Division had worked out with the defendants' attorneys. We were not surprised there was some limitation on the documents. I hope that is responsive.

Senator METZENBAUM. Yes, I find exhibit 10 of great interest. The agreement allows the Department's lawyer-investigators to take only one set of notes which will be attorney work product and investigatory files and records.

The limitations are so unique and so limiting that I find that exhibit of particular interest and, of course, it will be included in the record.

Mr. NEVIN. Of course, we felt that way. We felt it was unfair that they have access to all the documents we presented and notes and that we not get any in reciprocity.

Mr. BOIES. I might note we might put in the record also the agreement under which the Antitrust Subcommittee was furnished these documents which was much less restrictive in terms of the use that could be made and I think much more evenhanded in making sure that both sides got access to comparable documents.

Senator METZENBAUM. Without objection, that agreement will be included in the record as well as your testimony and the exhibits that are attached thereto.

Thank you very much, Mr. Nevin.

Mr. NEVIN. Thank you, Mr. Chairman.

Senator METZENBAUM. Judge Atkins, we are very happy to welcome you. It is great that you came all the way from Florida, a warm and sunny climate, to the great weather we are having in Washington. You did just get in and came out from the airport, is that it?

Judge ATKINS. YES.

Senator METZENBAUM. Judge Atkins, we will ask you not to read your entire statement but to summarize it for us and then we will have some questions.

**STATEMENT OF HON. C. CLYDE ATKINS, CHIEF JUDGE, U.S.
DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA**

Judge ATKINS. Mr. Chairman and members of the committee, I do appreciate this opportunity to appear before you this morning in

support of certain sections of the bill that is under consideration. I will confine my remarks to sections 4, 5, and 6, although I am familiar with the other sections and do support them. The latter relate primarily to actions by the Antitrust Division of the Justice Department and therefore, since my appearance here is as a district judge, I will confine my observations to 4, 5, and 6, although I will be glad to attempt to answer any questions relating to the other sections.

[The prepared statement of Judge C. Clyde Atkins follows:]

PREPARED STATEMENT OF JUDGE C. CLYDE ATKINS

Thank you, Mr. Chairman, for this opportunity to discuss those features of the Antitrust Procedural Amendments Act of 1979, which relate to certain recommendations of the Report of the National Commission for the Review of Antitrust Laws and Procedures.

I will not attempt to review those sections of the bill treating products of discovery and challenges to anticompetitive mergers involving firms which affect interstate commerce. These are matters directly affecting actions involving the Antitrust Division of the Justice Department. All of these subjects are thoroughly and persuasively discussed by the Honorable John Shenefield, Chairman of the Review Commission and Director of the Antitrust Division of the Department of Justice, in his letter dated February 7, 1979, to you, Senator Metzenbaum. Mr. Shenefield also treated these matters in his testimony on February 19. I concur in the views expressed by Mr. Shenefield.

In my opinion, section 4 and section 5 will assist the Federal district judges in achieving some of the recommendations of the Review Commission's report. I reach this conclusion for the following reasons:

SANCTIONS

1. The tendency on the part of some lawyers to use discovery excessively or to be truculent about discovery demands is a contributing factor to the cost and delay in complex cases. As the Commission observed: "Discovery is too often used purposely to protract pretrial or to wear down an opponent rather than to gather relevant information in preparation for trial." Antitrust Commission report at 13.

The Commission found that dilatory and abusive conduct occurs far too frequently in antitrust litigation. Lawyers, particularly in "high-stakes" antitrust litigation, too often file meritless claims, defenses, or counterclaims, make excessive or abusive discovery demands, unreasonably resist legitimate discovery requests, provide unresponsive, "stonewalling" answers, and unreasonably produce masses of insignificant, nonresponsive information. Other dilatory behavior may take the form of unjustified refusals to stipulate or admit facts, unwarranted motion practice, mishandling of documents, bad-faith claims of privilege or confidentiality, and disruption of depositions. Antitrust Commission report at 82.

My personal experience has confirmed this observation. The use of lengthy, repetitive interrogatories, the taking of many useless depositions, and the failure to provide required discovery without being compelled to do so, is almost the rule rather than the exception in complex cases.

While Federal Rules of Civil Procedure 37 permits sanctions to be imposed when discovery is compelled, this treatment is one-sided in its usual application in that its application is limited to failures to discover and not used to reach excessive discovery. Moreover, rule 37 is expressed in general terms. These generalities have caused reluctance on the part of district judges to impose sanctions in antitrust cases, as have the experience of reversal by appellate courts. This ineffective handling and uncertainty can be eliminated through the authorization of sanctions in antitrust cases specifically, and through elucidation of standards for application of sanctions, as is done by the proposed amendments.

As mentioned, sanctions for delay will expedite antitrust litigation. Section 4 of the bill would further improve administration of these sanctions. By altering the "state of mind" requirement for imposing sanctions authorized in 28 U.S.C. § 1927 for dilatory practices by attorneys, and section 4 would broaden the range of sanctions authorized by the statute in handling delaying procedures.

Counsels dilatory tactics in discovery have a triple effect. They cause delay, and the increased and often unnecessary activity enhances the cost of litigation to the judiciary as well as to the litigants. I have known of litigants who were compelled to

settle because of the crushing burden of the financial expense or the expense of time to their having to devote substantial periods to excessive discovery demands.

The present language of § 1927 requires a showing of "vexatiousness" before the court can impose any resulting excess costs for an attorney's unreasonable conduct. The current provisions are unclear and have received strict interpretations by some courts.

The proposed amendment would strike the requirement of "vexatiousness" and would permit sanctions whenever unreasonable conduct has been undertaken "primarily for the purpose of delaying or increasing the cost of the litigation." In addition, the new language would authorize assessment of excess "taxable costs" and, as well, all excess expenses and attorney's fees. The latter items must have been incurred because of the conduct in question. The decision to impose these sanctions would remain, as it is now, in the sound discretion of the court.

I am pleased to advise that this suggested amendment is identical to that recommended by the National Commission for the Review of Antitrust Laws and Procedures. I believe it will assist in overcoming protracted delays in this type of litigation by strengthening the hands of the district judges in dealing with this problem.

A number of cases come to mind which point up the need for this support mechanism.

PREJUDGMENT INTEREST

(2) As the report of the Commission points out "Financial incentives operating on private parties contribute to delay."

Permit me to reiterate the reasons why this section is needed. Litigants may seek to delay or obstruct the progress of a lawsuit for a variety of reasons. A plaintiff may seek oppressive and overreaching discovery to pressure a defendant into settlement. A defendant may desire to similarly force a lower settlement on a plaintiff of limited resources through delay, or a defendant may make the sound business decision that the costs of delay are less than the costs of proceeding with the action. While the decision may be sound from a business standpoint in that it is more profitable to delay than to proceed, such decisions are not necessarily the best for other litigants, the court, and society at large. In economic terms, as the discovery of the antitrust case is now structured, the externalities of the process are not internalized. By imposing the sanctions more easily provided by these amendments to the antitrust laws, we can raise the costs of delay and make it no longer profitable.

One of the proposed amendments would give judges authority to award prejudgment interest from the date of the service of the complaint to the date of the judgment, at the prevailing commercial rates when judgment is entered. Imposition of prejudgment interest would defuse the incentive for delay and thereby assist in avoiding the protraction that has characterized these cases. There is need for this new language because the existing law is unclear.

Appropriately, such interest awards must be computed upon the established actual damage, not on a trebled sum. The awards are essentially automatic, but a court, if an award would be unjust under the circumstances, is given the discretion to disallow such interest. Dilatory conduct on the part of the plaintiff is illustrative of a circumstance warranting rejection.

I have often tried cases in which I felt prejudgment interest on unliquidated damages would have been appropriate, but was without the authority to allow it, and no relief could be granted. Accordingly, I urge adoption of these amendments to the antitrust laws.

COLLATERAL ESTOPPEL

Under the Clayton Act as it now stands, government judgments that establish a violation of the antitrust laws may be used against the defendants in a later action as prima facie evidence with respect to all matters to which the judgment or decree would be a bar between the parties. Some courts have read section 5(a) of the Clayton Act as precluding the use of collateral estoppel in subsequent actions against the same defendants. Section 6 of this bill amends section 5(a) to explicitly permit the application of collateral estoppel. I wholeheartedly support that amendment for the following reasons:

(1) Collateral estoppel is an equitable doctrine. Under rules recently reasserted by the Supreme Court, it is applied only if the judge sitting in the present case finds that in light of the attendant circumstances its application is fair. Although collateral estoppel is coming into more and more use by the courts, the present section 5(a) of the Clayton Act threatens to undercut its use where it would be most effective—in large, complex antitrust litigation.

(2) The advantages to the use of the doctrine are numerous and marked. Its application precludes litigation of the same issues by parties, thus advancing judicial economy. It avoids potential inconsistency that may occur if relitigation is permitted. It also achieves the important goals of finality and certainty in litigation.

(3) As Mr. Senefield has so ably pointed out, when section 5(a) was introduced as part of the original Clayton Act in 1914, both the Senate and House favored the policy of granting collateral estoppel effect to Government actions in subsequent private antitrust litigation. The prima facie standard was adopted because of concern with the mutuality requirement. That doctrine required that for collateral estoppel to be applied, the parties in the second action must have been identical with those in the first, or in privity. Since the passage section 5(a), the law has dramatically changed. The prevailing view is now that fairness should be determined on a case-by-case basis, rather than mechanical application of a wooden, outmoded rule, or as Bentham described it, one "destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench'." * * *

(4) The adoption of section 6(3) of this bill would add the following sentence to the Clayton Act: "Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel." The enactment of the legislation would encourage the use of this flexible doctrine in the antitrust field. Complex antitrust litigation is generally unwieldy.

The enactment of this section would reduce relitigation of already determined antitrust issues saving our scant judicial resources and promoting consistent and fair decisionmaking. In addition, as Mr. Senefield has pointed out, it may provide an additional deterrent effect to the violation of the antitrust laws.

(5) For example, you could have a situation where the Government brings an antitrust action against a large oil company and prevails. In a subsequent action by a private litigant claiming treble damages for the same violation, under the present law, "offensive" collateral estoppel may not be applied because of the limitations in present section 5.

In another context, we can see the potential positive use of collateral estoppel. Suppose an automobile manufacturer is sued in various jurisdictions by purchasers of his cars for price-fixing violations. If one class of purchasers prevails on the merits and the facts are essentially the same, constant relitigation of the determined issues will be avoided by the application of collateral estoppel and we will have achieved a just, efficient and consistent conclusion of all the cases.

Judge ATKINS [continuing]. The thrust of the report of the Commission to the President was that there needs to be firm, early judicial control of complex antitrust cases. I am convinced this is the wise course. We follow that same course in all of our civil cases in the Southern District of Florida.

We feel that sections 4 and 5 particularly will strengthen the hands of the district judges in being able to carry out that goal of early, firm judicial management and control.

Section 4 amends the language of title 28, section 1927, and it will give the district judge authority to impose costs directly upon the attorney in those circumstances where the letter is involved in dilatory conduct that caused excessive delays or costs in the litigation. The assessment is not limited by the language to attorneys fees but may include other costs.

What is mainly being accomplished by this amendment is the broadening of the authority of the court with respect to the assessment of costs and modification of the intent requirement which we think would be helpful to the judge.

With respect to the prejudgment interest feature in section 5, my experience has been that if there is a business practice that is attached in complex antitrust cases, it is of advantage to the defendant to defer the ultimate day of judgment, in a sense, and therefore delay is the key to the defendant's desires.

On the other hand, the plaintiffs in many instances make excessive demands for discovery, hopeful that by means of that action some kind of settlement will be accomplished. I believe that this language which permits the assessment of prejudgment interest from the date of the filing of the complaint, should have a deterrent effect and ought to achieve the goal of expediting litigation and avoiding dilatory conduct which often effects a delay.

I prefer the automatic provision that the bill now contains. It provides for prejudgment interest to be assessed from the date of filing of the complaint unless the court finds that it would be unfair or unjust to impose that interest. I can think of an illustration where a plaintiff may have, itself, unduly delayed litigation by excessive discovery demands. In that case the court could deny assessment of interest or reduce the amount.

Section 6 deals with collateral estoppel. The present language provides for a prima facie effect of a decree in actions by the Government against private parties. That prima facie language has been construed strictly in subsequent actions between private parties and only against the defendant who appeared in the private case. By broadening the terms of the act, that is, amending the Clayton Act as provided in section 6 of this bill, you permit the court to apply collateral estoppel offensively, which means that it could be used by a private plaintiff in a subsequent action to forestall inquiry into issues that were fairly and fully tested and resolved in the prior Government action.

I think this broader application has a number of benefits and some detriments. But I believe the benefits outweigh the detriments. Therefore, I support those sections.

With respect to the other sections I concur with Mr. Shenefield's views that they, too, will have a beneficial effect and ought to be included in the action by the Senate and the House.

Senator METZENBAUM. Thank you very much, Judge Atkins. Let me state there is no question about it that your entire statement will be included in the record.

Judge ATKINS. Yes.

Senator METZENBAUM. In your statement you express strong support for section 4 of S. 390 which strengthens the tools available to judges to sanction dilatory behavior by attorneys. It indicates you have been involved in the several cases that demonstrate the need for section 4 of the bill.

Are you in a position to describe a couple of those cases for us and would you also comment at the same time as to why you feel that the present procedures are not adequate?

Judge ATKINS. To answer that in inverse order, the present section 37 does permit the imposition of costs for failure to produce discovery. It could be used in conjunction with rule 26 to impose costs where one did not produce discovery and a motion to compel or motion for protective order is filed. In that instance the court can consider the issue of excessive discovery and award fees accordingly.

However, the courts have been reluctant to impose fees and both the ABA Litigation Section Committee and the Judicial Conference Committee have indicated that we need to send a message to the judges as well as to the lawyers that sanctions should be imposed

more frequently. I believe that without amendment of these rules and even further without the language of section 1972 being amended that message will not be received. The lawyers need to be aware that there is this potential for assessing costs and the judges need to be more willing to impose them. We have been reluctant. I suppose this is natural and the appellate courts have been reversed in some instances when they have been imposed and therefore, I think, amendment of section 1972 is needed. It is an expression of the Congress. I think we need that statutory enactment plus the amendments that have been proposed to rules 37 and 26.

Presently the assessment cost is generally only against those who have failed to produce discovery or who are truculent. But it does not embrace, implicitly excessive discovery demands. The amendment of 1972 would be broad enough to permit imposition of costs in these circumstances.

As for illustrations, I can think of one case in which the dependent sought production of the records of a corporation. There were two corporate entities involved. The corporation said, "Here is the warehouse; on the first, second, or third floor are the file cabinets. Go over there and find them." There were many, many items in those several floors that were just beyond what was needed in that particular discovery demand which was quite precise.

I did assess cost. I would have felt more comfortable doing it if I had had 1927 as now amended as a guide, as a tool, so to speak.

I have had circumstances where requests were made for admissions by a party with respect to certain records, they attached certified copies and asked them to admit whether these were corrected copies. The adverse party responded it didn't have an opportunity to examine the records to determine whether or not these were correct copies. Of course, certified copies themselves would be self-evident, self-proving.

There I felt there should be an assessment of cost against the party responding. With the 1927 language I would have felt more comfortable about imposing those costs as well as expenses and attorneys fees against the recalcitrant party.

Senator METZENBAUM. In a hearing last Tuesday Judge Renfrew suggested it might be better to give Federal judges discretion to award prejudgment interest and not to make the award of prejudgment interest almost automatic. Do you have a reaction to that?

Judge ATKINS. I disagree with it, although I respect Judge Renfrew's view. I think making it automatic, subject to the court's review on an equitable basis, on a basis of not allowing it, would make it more certain. I think those that precipitate the need for award of prejudgment interest would get a clearer understanding of what the exposure is than if you left it entirely to the discretion of the court.

I think, too, that with discretion being entirely imposed in the court you would have a great variance in the application of the language, of the statute, and that would make for some uncertainty. I believe it would be better to have it virtually automatic but subject always to the discretion of the court not to allow it if the circumstances permitted it.

Senator METZENBAUM. Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Thank you, Judge, for your testimony. Do you think the ABA code of professional responsibility should be reviewed?

Judge ATKINS. I think it should.

Senator BAUCUS. In what way?

Judge ATKINS. I think it ought to be amended to provide that dilatory conduct more precisely can be a violation. The language is pretty broad as it is now and I think a more definitive description would go a long way toward getting the message across to the lawyers.

Senator BAUCUS. Are you aware of any efforts on the part of ABA to review the code of professional responsibility?

Judge ATKINS. I am not but that would not mean they are not doing so.

Senator BAUCUS. You do feel there should be a clarification of each lawyer's responsibility to avoid unnecessary delay?

Judge ATKINS. Yes. There is a dichotomy at play. There is a desire to aid the client who is entrenched and wants to remain that way.

On the other hand, there is an overriding public duty.

Senator BAUCUS. Are you in a position now to more precisely articulate where an attorney begins to cross that line where he/she no longer represent his/her client's best interest but is violating his/her duty to the court to facilitate the consideration of the case?

Judge ATKINS. Because of the somewhat liberal discovery approach I have taken the attitude generally with lawyers that we need to "open our hearts and our files" and make things be available. I think now that has been too broad an attitude. The thought there was that it was not so much the client's interest alone but the general interest in achieving full disclosure of what all the issues are and all the facts that might support those issues should control.

I believe with that kind of approach that there is an overriding higher duty than just defending your client and that is to assist the court in resolving that issue. "We who labor here seek only truth" is the inscription they have posted in the Dade County courtrooms. It is a salutary thing to reflect upon. I think emphasis upon this concept might go a long way to achieve the goal of full disclosure.

Senator BAUCUS. Thank you very much.

No further questions, Mr. Chairman.

Senator METZENBAUM. Mr. Boies, do you have any questions?

Mr. BOIES. Judge Atkins, good to see you again.

Judge ATKINS. Thank you. I enjoyed being with you on the Commission. I learned a great deal from your questions and comments.

Mr. BOIES. My question relates to something that came up during the Commission. That is the proposal that except where there was a showing of manifest injustice a court would be required to bring a case to trial within 2 years after it was filed.

Judge ATKINS. As a maximum time.

Mr. BOIES. Exactly—and hopefully with a strong indication that not every case will take 2 years. Is that a proposal that you would favor?

Judge ATKINS. Yes; I do. I believe you need to set that trial date early. I believe setting it early gives the lawyers a guideline as to

what they need to get done. I truly think that keeping it to a minimum, bearing in mind what the needs are, will help them be selective about their discovery and it will certainly achieve the goal of more expeditious resolution of the case.

Mr. BOIES. One of the things that concerns me a little bit about the provisions we have here is that while they may discourage delay by defendants they don't really do much to eliminate the delay that may come from plaintiffs attorneys. Have you in your experience seen cases made excessively long and expensive as a result of plaintiffs actions as well as defendants actions?

Judge ATKINS. I have. This sometimes occurs because of excessive discovery demands by plaintiffs. I have one right now where I am satisfied that this plaintiff is trying too hard in the sense of working discovery beyond its true goal. That is why I think the judge has to take charge early and promptly. I don't mean to act like a Federal judge in every instance but at least to be aware of what is going on regularly.

If the lawyers and the judge are aware of the potential of sanctions, I feel we are quite a ways toward solving the dilatory tactics.

Mr. BOIES. Can I take it that providing a 2-year maximum guidelines would help?

Judge ATKINS. I think it would. I really do. I am in favor of it.

Mr. BOIES. With respect to the prejudgment situation, are you at all troubled by the application of that rule in a situation where the case might have been delayed not by any fault of the defendant but due to either excessive demands by the plaintiff or perhaps because the judge did not take charge?

Judge ATKINS. I am concerned and that is why I think the language proposed giving the court discretion is needed to provide for that kind of situation. The judge would have an obligation to look at circumstances to see whether or not there should be relaxation of prejudgment interest. I think that having it there automatically subject to this discretion would be a more salutary language than if you did it the other way.

Mr. BOIES. With respect to the collateral-estoppel provisions of S. 390, those are provisions that I take you generally favor?

Judge ATKINS. I do.

Mr. BOIES. Do you see a distinction between the application of collateral estoppel rules in the antitrust context where there are triple damages as opposed to the application in other contexts where there is only the recovery of actual damages?

Judge ATKINS. I recognize that with the prima facie language it has the full effect although limited to single-damage awards. The words "effectively and fully and necessary to the results of the prior litigation," I believe, would require consideration of the circumstances and avoid any inequitable results.

Of course, always the judge must weigh the equities in collateral estoppel applications. And they are not easy to weigh, I tell you. They are pretty difficult. The existence of treble damages would be one of the factors to be weighed.

Mr. BOIES. Thank you very much.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Judge, we are glad to have you with us. Thank you for your appearance here today.

Judge ATKINS. Thank you very much.

Senator THURMOND. Judge, where do you draw the line as to what is dilatory and what is conscientious effort to obtain the best and most thorough defense possible in a given double- or treble-damage case, especially the so-called big case?

Judge ATKINS. I would expect the lawyer to use his best judgment in looking at all the facts and knowing what the law is to the extent that he determines it to be and then chart his course accordingly, not just deny everything because he knows the other side may have to prove it if he denies it, but to take an objective look at all the facts and not just be truculent or stonewall everything just for the purpose of making it difficult for the other side.

Some lawyers have a hard job doing that, I recognize that. When I try cases I endeavor to get to the issue that really determines the cause. While it is probably more easily said than done, I believe if the lawyers know what you expect of them, they will do it. The lawyers generally do what they believe the court wants them to do.

Senator THURMOND. Judge, what assurance does counsel have that each preceding judge will react the same as to what is dilatory and what is a thorough defense of the cases presented?

Judge ATKINS. I guess he really does not know that. If they know that there is always that potential, they will be a little more careful about what they do and how they do it. I would say generally the judges have been very reluctant on imposing sanctions. It is more a matter of trying to get the judge to come back to a little firmer hold. It has been the other way. He is going to have to hope for the best, although I have great confidence in the ultimate decision of most courts in trying to weigh the equities and being fair. I think the language of the bill would help them.

Senator THURMOND. Judge, what legal protection is there from a multimillion-dollar damage suit against defense counsel or possibly the plaintiffs' attorney if counsel withholds certain legal maneuvers or defenses because he felt those maneuvers might be deemed dilatory by the presiding judge?

Judge ATKINS. That is a difficult one, but I would think that the courts would have to rule on that issue and determine that these maneuvers that only seek to delay, or are primarily for delay, are being condemned by the language of the rule. And, therefore, he has a right to abide by that principle. While he might get sued, suits are being filed, it seems to me that the bar ought to respond to his position and defend him appropriately.

Senator THURMOND. If a lawyer is defending a case, for instance, and he is being jumped on by the judge for being dilatory and yet what he is doing he feels is for the best interest of his client, it makes it kind of tough, does it not?

Judge ATKINS. It does. I admit that.

Senator THURMOND. It is really the lawyer's duty to pursue every avenue to defend his client as best he can within the law.

Judge ATKINS. Yes; but short of doing it primarily for delay alone and not to get to the ultimate issue that is dispositive of the case. There is a distinction there. I know it may take some cases to make it clear, but I think it is almost a matter of the initial approach. If it is primarily for delay, then he has lost the objective of trying to get to the issue to really dispose of the case.

Senator THURMOND. I guess generally the judge that hears a case, if he is an experienced judge, can size up pretty well whether the lawyer is pursuing tactics from a dilatory standpoint or whether he is really truly trying to represent his client to the best of his ability.

Judge ATKINS. I think so. The Antitrust Commission report recommends that the judge be actively involved in the proceedings involving antitrust cases.

Senator THURMOND. Will you speak louder. I can't hear you.

Judge ATKINS. The report recommends that the judge be actively involved from the beginning in the management and control of these complex antitrust cases. That means he is going to be familiar with what is going on. The report emphasizes that he will be in a better position to impose or withhold sanctions because he is familiar with it rather than referring to a master or a magistrate or not himself knowing what is going on from the very beginning. If he has an early conference to resolve the issues, requires a schedule for discovery and status reports, there is a lot of control. That is what is needed to bring these protracted cases in line. The court is going to know when the lawyers are truculent or diligent in pursuing their client's interest.

Senator THURMOND. Are there some sections or provisions in S. 390 about which you have reservations, that is, whether identification of a particular section where there is possibly need for some minor or major alteration in the bill that you feel would improve it?

Judge ATKINS. I did not find any that needed to be altered. I support the entire bill. I am not as familiar with the CID aspect as I am with the other phases that I have talked about. But I was familiar enough with it to vote in the report and I do favor it. I think the bill is a good bill.

Senator THURMOND. I believe last week Judge Renfrew from California testified, and on preinterest judgment recommended to reverse the matter. I am wondering how you feel about it.

Judge ATKINS. Senator, I do respect Judge Renfrew very much. As I earlier indicated, I favor the more or less automatic application of interest subject to the judge's review of whether circumstances would make it unjust. I think that procedure would give more certainty to the potential for the imposition of interest from the time of filing the complaint. It would afford less variance among the district courts in their decisions and I think would achieve the objective of prejudgment interest.

Senator THURMOND. I believe his statement was along this line:

Automatic grant of prejudgment interest often based on a treble-damages award would result in a windfall bonus to successful plaintiffs which I believe to be unwarranted. This is a particularly undesirable result in those cases in which defendants conduct windfalls within the gray area of antitrust enforcement; that is, conduct that the defendant engaged in this good faith believing that his actions were within the permissible bounds of the law. Moreover, the proposal does not adequately remedy the problem to which it is directed. Section 5 intends to punish defendants whose trial tactics are based on the theory that any delay is in their best interest. It assumes that all defendants institute dilatory tactics in order to retain the use until the last possible moment of the money that might ultimately be awarded as damages. But the proposal requires defendant to pay interest on this amount even if there has been no finding that they contributed to the delay of the trial in any way. As a result, it penalizes defendant which aids the court in the

speedy resolution of the case as well as the defendant which drags its feet throughout the proceedings.

He goes on to say:

I do not reject this proposal completely, however. Instead of making award of prejudgment interest automatic with the court empowered to scale down the award in the interest of justice, perhaps it would make sense to reverse the presumption; that is, an amendment could be worded to allow the court in its discretion to make award of prejudgment interest unless it found that the defendant had been engaged in dilatory tactics. This change would achieve the purpose that the proposal set out to achieve, preventing the defendant from profiting by that delay, but it would insure that only those defendants who actually did seek to delay the proceedings would be deprived of the investment value of the money to be awarded.

That was more or less left within the discretion of judge.

Judge ATKINS. Of course, the interest is awarded not only on the treble-damage but a single-damage amount.

However, the court does have the authority under the language of the amendment to void its application; that is, prejudgment interest, if it would be unjust to do so. It seems to me that the court would weigh the conduct of the defendant that he has not been dilatory, that he has been prompt, forthright, defending properly and adequately or if the plaintiff had delayed it, himself or itself, by dilatory tactics or by excessive demands on discovery. Those are circumstances that the court can take into consideration and determine that the award would be unjust, which I believe would include reducing the interest on the award itself, the rate, or not allowing it in some instances.

I think the discretion is there. It simply puts it in the reverse order from what Judge Renfrew has suggested. I think it is better to have it the way the bill provides because it diffuses the incentives that are there. While the plaintiff could be guilty, and I recognize that, but that incentive is also reduced in overly demanding discovery.

Senator THURMOND. As an experienced trial judge, would you care to give us some examples of where the plaintiffs or their lawyers may have been dilatory in their cases?

Judge ATKINS. I can't give you any precisely in antitrust situations. I can give you some in complex litigation cases, however, where I thought in one instance the plaintiff had just been unmerciful in his demand for discovery. That was the approach under the previous language of the rules themselves and even the language of 1927. So there was not any means of really imposing any costs, if one had sought them, against the plaintiff.

I have had others where the defendant, himself or itself, was just delaying in the matter of discovery or giving multiple records that needed to be ferreted out to get to the real issues involved. In those situations I felt that if we could have awarded interest from the time of the filing of the complaint rather than from the entry of the judgment itself, that it would have had a deterrent effect on each party in those separate situations.

Senator THURMOND. Judge, thank you very much. I appreciate your being here today and I thank you for your presence and your testimony.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Thurmond.

Judge Atkins, thank you on behalf of the entire committee both for your service on the President's Commission as well as your taking time and trouble to be with us this morning. We are grateful to you for your assistance.

Judge ATKINS. Thank you very much.

Senator METZENBAUM. This concludes the public hearing with respect to the Antitrust Procedural Improvements Act. Written statements will be accepted by the committee until the end of the day on March 7, which is a week from Wednesday. We will be glad to hear from those who may have additional statements until that deadline.

The committee announces that there will be a markup of the bill on the morning of March 9, if at all possible. The staff will keep in touch and work with the minority to see whether or not that time will work out. But it is our present intention to go forward on the morning of March 9, at 9 a.m., and conclude the markup, if at all possible, on that day.

Thank you very much.

The meeting stands adjourned.

[Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.]

A P P E N D I X

96TH CONGRESS
1ST SESSION

S. 390

To expedite and reduce the cost of antitrust litigation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 8 (legislative day, JANUARY 15), 1979

Mr. METZENBAUM (for himself, Mr. KENNEDY, Mr. BAYH, Mr. LEAHY, Mr. MORGAN, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To expedite and reduce the cost of antitrust litigation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Antitrust Procedural Im-
4 provements Act of 1979".

5 ANTITRUST CIVIL PROCESS ACT AMENDMENTS;

6 DEFINITIONS

7 SEC. 2. Section 2 of the Antitrust Civil Process Act (76
8 Stat. 548; 15 U.S.C. 1311) is amended—

2

1 (1) in subsection (g), by striking out the semicolon
2 and "and" at the end thereof and inserting in lieu
3 thereof a comma and the following: "and any product
4 of discovery;";

5 (2) in subsection (h), by striking out the period at
6 the end thereof and inserting in lieu thereof a semi-
7 colon; and

8 (3) by adding at the end thereof the following new
9 subsections:

10 “(i) The term ‘product of discovery’ includes with-
11 out limitation the original or duplicate of any deposi-
12 tion, interrogatory, document, thing, result of the in-
13 spection of land or other property, examination, or ad-
14 mission obtained by any method of discovery in any
15 litigation or other judicial or administrative proceeding;
16 any digest, analysis, selection, compilation, or any deri-
17 vation thereof; and any index or manner of access
18 thereto; and

19 “(j) The term ‘agent’ includes any person retained
20 or consulted by the Department of Justice in connec-
21 tion with the enforcement of the antitrust laws.”.

1 ANTITRUST CIVIL PROCESS ACT AMENDMENTS; SERVICE
2 REQUIREMENTS FOR A DEMAND FOR ANY PRODUCT
3 OF DISCOVERY

4 SEC. 3. (a) Section 3(a) of the Antitrust Civil Process
5 Act (15 U.S.C. 1312(a)) is amended by adding at the end
6 thereof the following new sentence: "Whenever a civil inves-
7 tigative demand is an express demand for any product of dis-
8 covery, the Attorney General or the Assistant Attorney Gen-
9 eral in charge of the Antitrust Division shall cause to be
10 served, in any manner authorized by this section, a copy of
11 such demand upon the person from whom the discovery was
12 obtained and notify the person to whom such demand is
13 issued of the date on which such copy was served."

14 (b) Section 3(b) of that Act (15 U.S.C. 1312(b)) is
15 amended by adding at the end thereof the following new sen-
16 tence: "Any such demand which is an express demand for
17 any product of discovery shall not be returnable until after
18 ten days after a copy of such demand has been served upon
19 the person from whom the discovery was obtained."

20 (c) Section 3(c) of that Act (15 U.S.C. 1312(c)) is
21 amended—

22 (1) by inserting "(1)" immediately after "(c)";

23 (2) by striking out "(1)" and inserting in lieu
24 thereof "(A)";

4

1 (3) by striking out “(2)” and inserting in lieu
2 thereof “(B)”; and

3 (4) by adding at the end thereof the following new
4 paragraph:

5 “(2) Any such demand which is an express demand for
6 any product of discovery supersedes any inconsistent order,
7 rule, or provision of law preventing or restraining disclosure
8 of such product of discovery to any person. Disclosure of any
9 product of discovery pursuant to any such express demand
10 does not constitute a waiver of any right or privilege, includ-
11 ing without limitation any right or privilege which may be
12 invoked to resist discovery of trial preparation materials, to
13 which the person making such disclosure may be entitled.”.

14 (d) Paragraph (3) of section 4(c) of that Act (15 U.S.C.
15 1313(c)(3)) is amended by inserting immediately after “tran-
16 scripts” the second time it appears, a comma and the follow-
17 ing: “and, in the case of any product of discovery produced
18 pursuant to an express demand for such material, of the
19 person from whom the discovery was obtained”.

20 (e) Paragraphs (2) and (3) of section 4(c) of that Act (15
21 U.S.C. 1313(c) (2) and (3)) are amended by striking out the
22 phrase “official or employee” and inserting in lieu thereof
23 “official, employee, or agent” each time it appears.

24 (f) Section 5 of that Act (15 U.S.C. 1314) is amended—

25 (1) by amending subsection (b) to read as follows:

1 “(b)(1) Within twenty days after the service of any such
2 demand upon any person, or at any time before the return
3 date specified in the demand, whichever period is shorter, or
4 within such period exceeding twenty days after service or in
5 excess of such return date as may be prescribed in writing,
6 subsequent to service, by any antitrust investigator named in
7 the demand, such person may file and serve upon such anti-
8 trust investigator, and in the case of an express demand for
9 any product of discovery upon the person from whom such
10 discovery was obtained, a petition for an order modifying or
11 setting aside such demand—

12 “(A) in the district court of the United States for
13 the judicial district within which such person resides, is
14 found, or transacts business; or

15 “(B) in the case of a petition addressed to an ex-
16 press demand for any product of discovery, only in the
17 district court of the United States for the judicial dis-
18 trict in which the proceeding in which such discovery
19 was obtained is or was last pending.

20 “(2) The time allowed for compliance with the demand
21 in whole or in part as deemed proper and ordered by the
22 court shall not run during the pendency of such petition in
23 the court, except that such person shall comply with any
24 portions of the demand not sought to be modified or set aside.
25 Such petition shall specify each ground upon which the peti-

1 tioner relies in seeking such relief, and may be based upon
2 any failure of such demand to comply with the provisions of
3 this Act, or upon any constitutional or other legal right or
4 privilege of such person.”;

5 (2) by redesignating subsections (c), (d), (e), and (f)
6 as subsections (d), (e), (f), and (g), respectively;

7 (3) by inserting immediately after subsection (b)
8 the following new subsection:

9 “(c) Whenever any such demand is an express demand
10 for any product of discovery, the person from whom such
11 discovery was obtained may file, at any time prior to compli-
12 ance with such express demand, in the district court of the
13 United States for the judicial district in which the proceeding
14 in which such discovery was obtained is or was last pending,
15 and serve upon any antitrust investigator named in the
16 demand and upon the recipient of the demand, a petition for
17 an order of such court modifying or setting aside those por-
18 tions of the demand requiring production of any such product
19 of discovery. Such petition shall specify each ground upon
20 which the petitioner relies in seeking such relief and may be
21 based upon any failure of such portions of the demand to
22 comply with the provisions of this Act, or upon any constitu-
23 tional or other legal right or privilege of the petitioner.
24 During the pendency of such petition, the court may stay, as
25 it deems proper, compliance with the demand and the run-

1 ning of the time allowed for compliance with the demand.”;

2 and

3 (4) in subsection (d), as that subsection has been
4 redesignated by paragraph (2) of this section, by insert-
5 ing immediately after “such person” a comma and the
6 following: “and, in the case of an express demand for
7 any product of discovery the person from whom such
8 discovery was obtained,”.

9 **SANCTIONS FOR ATTORNEY DELAY**

10 **SEC. 4.** Section 1927 of title 28, United States Code, is
11 amended to read as follows:

12 **“§ 1927. Counsel’s liability for excessive costs**

13 “Any attorney or other person admitted to conduct
14 cases in any court of the United States or any territory there-
15 of who engages in conduct unreasonably and primarily for the
16 purpose of delaying or increasing the cost of the litigation
17 may be required by the court to satisfy personally the excess
18 costs, expenses and attorney’s fees reasonably incurred be-
19 cause of such conduct.”.

20 **PREJUDGMENT INTEREST**

21 **SEC. 5.** (a) Section 4 of the Clayton Act (15 U.S.C. 15)
22 is amended—

23 (1) by inserting after “sustained,” the following:

24 “interest on his actual damages from the date of serv-
25 ice of the complaint to the date of judgment at the pre-

1 prevailing commercial rate at the time judgment is entered,"; and
2

3 (2) by adding at the end of the section the following
4 new sentence: "The court may adjust interest on
5 actual damages from the date of service of the complaint to the date of judgment if it finds that the award
6 of all or part of such interest is unjust in the circumstances."
7
8

9 (b) Section 4A of the Clayton Act (15 U.S.C. 15a) is
10 amended—

11 (1) by inserting after "sustained" a comma and
12 the following: "interest on such actual damages from
13 the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time
14 judgment is entered,"; and
15

16 (2) by adding at the end of the section the following
17 new sentence: "The court may adjust interest on
18 actual damages from the date of service of the complaint to the date of judgment if it finds that the award
19 of all or part of such interest is unjust in the circumstances."
20
21

22 (c) Section 4C(a)(2) of the Clayton Act (15 U.S.C.
23 15c(a)(2)) is amended—

24 (1) by inserting after "subsection," the following:
25 "interest on such total damage only from the date of

9

1 service of the complaint to the date of judgment at the
2 prevailing commercial rate at the time judgment is en-
3 tered,"; and

4 (2) by adding at the end of the section the follow-
5 ing new sentence: "The court may adjust interest on
6 total damages from the date of service of the complaint
7 to the date of judgment if it finds that the award of all
8 or part of such interest is unjust in the circum-
9 stances."

10 COLLATERAL ESTOPPEL

11 SEC. 6. Section 5(a) of the Clayton Act (15 U.S.C.
12 16(a)) is amended—

13 (1) by striking out "or by the United States under
14 section 4A,";

15 (2) by striking out "or to judgments or decrees
16 entered in actions under section 4A"; and

17 (3) by inserting at the end thereof the following
18 new sentence: "Nothing contained in this section shall
19 be construed to impose any limitation on the applica-
20 tion of collateral estoppel."

21 MERGER JURISDICTION

22 SEC. 7. Section 7 of the Clayton Act (15 U.S.C. 18) is
23 amended—

10

1 (1) by striking out "corporation" each time it ap-
2 pears in the first and second paragraphs and inserting
3 in lieu thereof "person";

4 (2) by striking out "corporations" in the second
5 paragraph and in the first sentence of the third para-
6 graph and inserting in lieu thereof "persons"; and

7 (3) by inserting "or in any activity affecting com-
8 merce" after "commerce" each time it appears in the
9 first three paragraphs.

Calendar No. 249

96TH CONGRESS
1ST SESSION**S. 390**

[Report No. 96-238]

To expedite and reduce the cost of antitrust litigation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 8 (legislative day, JANUARY 15), 1979

Mr. METZENBAUM (for himself, Mr. KENNEDY, Mr. BAYH, Mr. LEAHY, Mr. MORGAN, Mr. DECONCINI, Mr. BAUCUS, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 9 (legislative day, JUNE 21), 1979

Reported by Mr. METZENBAUM, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To expedite and reduce the cost of antitrust litigation, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Antitrust Procedural Im-
- 4 provements Act of 1979".

1 *sure of trial preparation material of any person who*
2 *obtains any product of discovery; and*

3 “(j) The term ‘agent’ includes any person retained
4 ~~or consulted~~ by the Department of Justice in connec-
5 tion with the enforcement of the antitrust laws.”.

6 ANTITRUST CIVIL PROCESS ACT AMENDMENTS; SERVICE
7 REQUIREMENTS FOR A DEMAND FOR ANY PRODUCT
8 OF DISCOVERY

9 SEC. 3. (a) Section 3(a) of the Antitrust Civil Process
10 Act (15 U.S.C. 1312(a)) is amended by adding at the end
11 thereof the following new sentence: “Whenever a civil inves-
12 tigative demand is an express demand for any product of dis-
13 covery, the Attorney General or the Assistant Attorney Gen-
14 eral in charge of the Antitrust Division shall cause to be
15 served, in any manner authorized by this section, a copy of
16 such demand upon the person from whom the discovery was
17 obtained and notify the person to whom such demand is
18 issued of the date on which such copy was served.”.

19 (b) Section 3(b) of that Act (15 U.S.C. 1312(b)) is
20 amended by adding at the end thereof the following new sen-
21 tence: “Any such demand which is an express demand for
22 any product of discovery shall not be returnable *or returned*
23 until after ~~ten days~~ *twenty days* after a copy of such demand
24 has been served upon the person from whom the discovery
25 was obtained.”.

1 (c) Section 3(c) of that Act (15 U.S.C. 1312(c)) is
2 amended—

3 (1) by inserting “(1)” immediately after “(c)”;

4 (2) by striking out “(1)” and inserting in lieu
5 thereof “(A)”;

6 (3) by striking out “(2)” and inserting in lieu
7 thereof “(B)”;

8 (4) by adding at the end thereof the following new
9 paragraph:

10 “(2) Any such demand which is an express demand for
11 any product of discovery supersedes any inconsistent order,
12 rule, or provision of law preventing or restraining disclosure
13 of such product of discovery to any person. Disclosure of any
14 product of discovery pursuant to any such express demand
15 does not constitute a waiver of any right or privilege, includ-
16 ing without limitation any right or privilege which may be
17 invoked to resist discovery of trial preparation materials, to
18 which the person making such disclosure may be entitled.”.

19 (d) Paragraph (3) of section 4(c) of that Act (15 U.S.C.
20 1313(c)(3)) is amended by inserting immediately after “tran-
21 scripts” the second time it appears, a comma and the follow-
22 ing: “and, in the case of any product of discovery produced
23 pursuant to an express demand for such material, of the
24 person from whom the discovery was obtained”.

1 (e) Paragraphs (2) and (3) of section 4(c) of that Act (15
2 U.S.C. 1313(c) (2) and (3)) are amended by striking out the
3 phrase "official or employee" and inserting in lieu thereof
4 "official, employee, or agent" each time it appears.

5 (f) Section 5 of that Act (15 U.S.C. 1314) is amended—

6 (1) by amending subsection (b) to read as follows:

7 “(b)(1) Within twenty days after the service of any such
8 demand upon any person, or at any time before the return
9 date specified in the demand, whichever period is shorter, or
10 within such period exceeding twenty days after service or in
11 excess of such return date as may be prescribed in writing,
12 subsequent to service, by any antitrust investigator named in
13 the demand, such person may file and serve upon such anti-
14 trust investigator, and in the case of an express demand for
15 any product of discovery upon the person from whom such
16 discovery was obtained, a petition for an order modifying or
17 setting aside such demand—

18 “(A) in the district court of the United States for
19 the judicial district within which such person resides, is
20 found, or transacts business; or

21 “(B) in the case of a petition addressed to an ex-
22 press demand for any product of discovery, only in the
23 district court of the United States for the judicial dis-
24 trict in which the proceeding in which such discovery
25 was obtained is or was last pending.

1 “(2) The time allowed for compliance with the demand
2 in whole or in part as deemed proper and ordered by the
3 court shall not run during the pendency of such petition in
4 the court, except that such person shall comply with any
5 portions of the demand not sought to be modified or set aside.
6 Such petition shall specify each ground upon which the peti-
7 tioner relies in seeking such relief, and may be based upon
8 any failure of such demand to comply with the provisions of
9 this Act, or upon any constitutional or other legal right or
10 privilege of such person.”;

11 (2) by redesignating subsections (c), (d), (e), and (f)
12 as subsections (d), (e), (f), and (g), respectively;

13 (3) by inserting immediately after subsection (b)
14 the following new subsection:

15 “(c) Whenever any such demand is an express demand
16 for any product of discovery, the person from whom such
17 discovery was obtained may file, at any time prior to compli-
18 ance with such express demand, in the district court of the
19 United States for the judicial district in which the proceeding
20 in which such discovery was obtained is or was last pending,
21 and serve upon any antitrust investigator named in the
22 demand and upon the recipient of the demand, a petition for
23 an order of such court modifying or setting aside those por-
24 tions of the demand requiring production of any such product
25 of discovery. Such petition shall specify each ground upon

1 which the petitioner relies in seeking such relief and may be
2 based upon any failure of such portions of the demand to
3 comply with the provisions of this Act, or upon any constitu-
4 tional or other legal right or privilege of the petitioner.
5 During the pendency of such petition, the court may stay, as
6 it deems proper, compliance with the demand and the run-
7 ning of the time allowed for compliance with the demand.”;
8 and

9 (4) in subsection (d), as that subsection has been
10 redesignated by paragraph (2) of this section, by insert-
11 ing immediately after “such person” a comma and the
12 following: “and, in the case of an express demand for
13 any product of discovery the person from whom such
14 discovery was obtained,”.

15 SANCTIONS FOR ATTORNEY DELAY

16 SEC. 4. Section 1927 of title 28, United States Code, is
17 amended to read as follows:

18 “§ 1927. Counsel’s liability for excessive costs

19 (a) “Any attorney or other person admitted to conduct
20 cases in any court of the United States or any territory there-
21 of who *intentionally* engages in conduct unreasonably and
22 primarily for the purpose of delaying or increasing the cost of
23 the litigation may be required by the court to satisfy person-
24 ally the excess costs, expenses and attorneys’ fees reasonably
25 incurred because of such ~~conduct.~~” *conduct.*

1 “(b) Costs, expenses, and attorneys’ fees shall be im-
2 posed under this section upon motion of any party only after
3 a hearing, held after trial.

4 “(c) No such costs, expenses, and attorneys fees shall be
5 imposed unless the attorney continues to engage in conduct
6 which is deemed to violate this section after having been pre-
7 viously warned by the court that continuation of such con-
8 duct would result in the imposition of such costs, expenses,
9 and attorneys fees.”.

10

PREJUDGMENT INTEREST

11 SEC. 5. (a) Section 4 of the Clayton Act (15 U.S.C. 15)
12 is amended—

13 (1) by inserting after “sustained,” the following:
14 “interest on his actual damages from the date of serv-
15 ice of the complaint to the date of judgment at the pre-
16 vailing commercial rate at the time judgment is en-
17 tered,”; and

18 (2) by adding at the end of the section the follow-
19 ing new sentence: “The court may adjust interest on
20 actual damages from the date of service of the com-
21 plaint to the date of judgment if it finds that the award
22 of all or part of such interest is unjust in the circum-
23 stances.”.

24 (b) Section 4A of the Clayton Act (15 U.S.C. 15a) is
25 amended—

9

1 (1) by inserting after "sustained" a comma and
2 the following: "interest on such actual damages from
3 the date of service of the complaint to the date of judg-
4 ment at the prevailing commercial rate at the time
5 judgment is entered,"; and

6 (2) by adding at the end of the section the follow-
7 ing new sentence: "The court may adjust interest on
8 actual damages from the date of service of the com-
9 plaint to the date of judgment if it finds that the award
10 of all or part of such interest is unjust in the circum-
11 stances.".

12 (e) Section 4C(a)(2) of the Clayton Act (15 U.S.C.
13 15c(a)(2)) is amended—

14 (1) by inserting after "subsection," the following:
15 "interest on such total damage only from the date of
16 service of the complaint to the date of judgment at the
17 prevailing commercial rate at the time judgment is en-
18 tered,"; and

19 (2) by adding at the end of the section the follow-
20 ing new sentence: "The court may adjust interest on
21 total damages from the date of service of the complaint
22 to the date of judgment if it finds that the award of all
23 or part of such interest is unjust in the circum-
24 stances.".

1 *SEC. 5. (1) Section 4 of the Clayton Act (15 U.S.C.*
2 *15) is amended by adding at the end of the section the follow-*
3 *ing new sentence: "The court may award interest on actual*
4 *damages from the date of service of the complaint to the date*
5 *of judgment at the prevailing commercial rate if it finds that*
6 *the award of such interest is just in the circumstances."*

(2) Section 4A of the Clayton Act (15 U.S.C. 15a) is amended by adding at the end of the section the following new sentence: "The court may award interest on actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate if it finds that the award of such interest is just in the circumstances."

13 (3) Section 4C(a)(2) of the Clayton Act (15 U.S.C.
14 15C(a)(2)) is amended by adding at the end of the section the
15 following new sentence: "The court may award interest on
16 total damage from the date of service of the complaint to the
17 date of judgment at the prevailing commercial rate if it finds
18 that the award of such interest is just under the circum-
19 stances."

20 COLLATERAL ESTOPPEL

21 SEC. 6. Section 5(a) of the Clayton Act (15 U.S.C.
22 16(a)) is amended—

23 (1) by inserting "at least" immediately after
24 "shall be";

DISCOVERY SANCTIONS: A JUDICIAL PERSPECTIVE^(C)

Charles B. Renfrew*

The civil justice system in the United States depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down, and in contravention of the fundamental goal of the Federal Rules of Civil Procedure,¹ the determination of civil actions becomes unjust, delayed, and expensive.

My experience as a participant in and observer of civil litigation has convinced me that abuse of the judicial process, while difficult to detect and to prove, is widespread.² Abuse of the judicial process occurs most often in connection with discovery. Unjustified demands for discovery and refusals to provide discovery drag out litigation and drive up its costs. Fabrication and suppression of material facts is a regrettably common occurrence, although lawyers and judges are often reluctant to admit it.³ Because the overwhelming percentage of civil cases settle before trial,⁴ pretrial costs constitute the major item of litigation expenses, and measures that would reduce the costs of pretrial would make litigation significantly more affordable.

© 1978 by Honorable Charles B. Renfrew, United States District Judge for the Northern District of California. At a meeting of a Federal Judicial Center committee studying discovery abuse, A. Leo Levin, Director of the Center, suggested that it would be helpful to have a paper prepared on the subject of sanctions from the perspective of a trial judge. This article followed that suggestion.

* I wish to express my gratitude to my law clerk, Anthony C. Epstein, for his invaluable assistance in the preparation of this article.

These abuses affect not only actual litigants but also deter potential litigants from resorting to the judicial process for the vindication of their rights.

Perhaps the most notorious recent example of this kind of abuse occurred in the trial of an enormous antitrust case in the Southern District of New York.⁵ After a liability phase which consumed more than 100 days of trial and a damage phase lasting several more weeks, Berkey Photo recovered over \$100 million in damages from Eastman Kodak for violation of Sections 1 and 2 of the Sherman Act. In the last week of the liability phase, it was discovered that the attorneys for Kodak had failed to produce a report by one of Kodak's main expert witnesses which was covered by Berkey's discovery requests and which eventually played a major role in an effective, if not devastating, cross-examination of the witness. It was also disclosed that a partner of the law firm representing Kodak had falsely stated in an affidavit filed with the court that he had discarded documents which he had in fact kept in his office. The case is now on appeal, and disciplinary and criminal investigations are proceeding against certain of the attorneys involved.

This does not seem to be merely an isolated instance of abuse of the discovery process. In a recent meeting of the chief judges of metropolitan federal district courts, a prominent and distinguished trial attorney disclosed that attorney members (including himself) of a blue-ribbon panel formed to study abuse of discovery frankly confessed that they themselves had in various ways abused discovery rules. The recent National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the so-called Pound Conference,

identified abuse of the discovery process as an important cause of the growing crisis in our court system.⁶ Many others share the same conclusion.⁷

Although the most frequent and notorious examples of abuse of the judicial process occur during discovery, it is unrealistic to believe that litigants and lawyers who deliberately frustrate the judicial process in the discovery phase of litigation are unwilling to employ tactics of delay and harassment at other stages. Violations of Rule 11, which requires that attorneys as well as their clients believe in good faith that good grounds support the allegations in pleadings, are not unknown⁸ as parties file complaints in order to gain access to discovery, which they use not to find evidence to support their claim but to discover whether they have any claim at all.⁹ I do not mean to suggest that the parties need to know all of the facts underlying their claim. For example, an independent gasoline retailer with a number of outlets which sell petroleum products below the prevailing marketing prices of the major outlets may suddenly find himself cut off from a source of supply. Not only is he unable to obtain products from his former supplier but no other major will do so. It may well be that in such a situation, certain circumstances might lead the independent retailer and his counsel to conclude that the independent was cut off because of his pricing policy in violation of the antitrust laws. Yet he may not know without discovery whether this was a result of a unilateral refusal to deal, forward vertical integration by his supplier, a group boycott, a price-fixing conspiracy, or exactly what caused his injury. Similarly, a minority plaintiff

who was discharged under suspicious circumstances may not know all of the facts essential to support his claim but yet believe they were related to his race or national origin. Such plaintiffs are often in the position of victims and to preclude them from access to the court because they do not know all of the details of their injuries would be unconscionable. It is not these cases to which I refer. It is rather the case where neither the client nor the attorney has any reason to believe in good faith that a claim exists but hopes that something may turn up in discovery which would support a claim.

The enormous reluctance in the American court system to evaluate the merits of cases prior to trial¹⁰ and the huge potential for invasion of privacy which our discovery system permits¹¹ make this kind of abuse particularly costly. Finally, litigants take advantage of superior financial resources to bury their opponents in an unending barrage of motions which make capitulation to unfair settlements the only sensible alternative to continued litigation.

Although there is now general agreement that these abuses present a serious problem, no consensus has developed about the proper solutions. The thesis of this article is simple: The judicious use of sanctions on litigants and lawyers who abuse the judicial process is one effective means to make justice achievable and affordable for the citizens who turn to the courts for the vindication of their rights. Sanctions cannot solve the entire problem, but in combination with other remedies, they can help to control the misconduct of participants in the judicial process.

States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously * * * to satisfy personally such excess costs." Although this statute is directed at the individual who is all too often the real culprit in abusing the judicial process, it has shortcomings. The most serious is its limitation of the sanction to taxable costs, which are often nominal and exclude attorneys' fees,¹⁹ and to taxable costs in excess of those that would reasonably have been incurred, which favors the compensatory function of §1927 at the expense of needed deterrence. The intent requirement suggested by the term "vexatiously" is also ambiguous. Some courts have required proof of a bad-faith, willful, deliberate multiplication of the proceedings,²⁰ but as the Supreme Court recently pointed out in a different context, the term does not necessarily imply any subjective bad faith and may mean only that the action is frivolous, unreasonable, or without foundation.²¹ Especially in view of the lightness of the sanctions under §1927, a strict interpretation of the intent requirement seems inappropriate.

Rule 37, §1927, and their inherent power give courts the means to "impose sanctions for conduct by lawyers that falls short of contempt of court."²² The civil and criminal contempt authority is available as well, although its strict intent requirements and procedural formalities reduce its effectiveness in dealing with some kinds of abuse of judicial process.²³ Courts should also use to greater advantage their authority to adopt local rules of court which provide for sanctions for litigants and lawyers who violate them.²⁴

Finally, the victims of abuse of the judicial process can bring actions for malicious prosecutions or abuse of process, torts which

I

The range of sanctions presently available to federal judges has been recently described,¹² and I need only summarize a few important features. For the purposes of this paper, I do not address the various proposals for broadening the range of sanctions available to the trial judge.¹³ I wholeheartedly support such efforts. The reason why this paper deals with the presently available sanctions is that they have not been fully utilized. I do not want courts to wait for statutory or rule changes before considering the appropriate use of sanctions as a judicial tool.

The primary source of authority for sanctions for abuse of discovery is Rule 37 of the Federal Rules of Civil Procedure, which provides for sanctions at two different stages. First, Rule 37(a)(4) requires the court to award reasonable expenses, including attorneys' fees, to the party prevailing after a hearing on a discovery motion unless the position of the losing party was substantially justified or unless other circumstances make the award unjust.¹⁴ Contrary to a common misunderstanding, Rule 37(a)(4) makes it very clear that this sanction can be imposed on parties or their attorneys who make unreasonable discovery demands as well as on those who oppose reasonable demands. Second, Rule 37(b) empowers the court to impose any sanction that is just on parties which fail to obey the court's discovery orders, including establishing certain facts as true for purposes of the action; striking designated claims, defenses, testimony, and exhibits; dismissing the action; rendering a default judgment; and holding the party in contempt.

Courts also have inherent power to impose sanctions for abuse of the judicial process, including abuse of discovery. Rule 37(b) is not the only source of authority to impose sanctions for abuse of discovery.¹⁵ In situations where the Rule applies, there is no reason not to treat it as the exclusive source of authority because its authorization to impose any sanction that is just makes resort to any other source of authority unnecessary. But the coverage of Rule 37(b) has gaps. Foremost among them is its failure to authorize explicitly sanctions for discovery abuse that does not involve noncompliance with a court order, such as misrepresentation that a requested document does not exist which causes the requesting party to forego seeking a court order compelling production. Sanctions may be appropriate in such cases, and the authority for them comes from the courts' "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases."¹⁶ The Federal Rules of Civil Procedure were not intended to circumscribe this essential power,¹⁷ and courts have the authority to deal with litigants and lawyers who undermine the litigation process which the Federal Rules were intended to facilitate. An amendment of Rule 37 explicitly authorizing such sanctions is desirable,¹⁸ but not essential.

In addition to their authority under Rule 37 and their inherent power, courts have other means to deal with those who abuse the judicial process. Section 1927 of Title 28 of the United States Code, an often overlooked provision, authorizes courts to require "[a]ny attorney or other person admitted to conduct cases in any court of the United

apply to some kinds of misconduct within the scope of this paper. Those actions remit those victims to the same processes that failed them in the first place, and the misconduct must be egregious and the damages great to make the prosecution of such actions worthwhile. The increasing abuse of the judicial process despite the availability of these tort remedies suggests that they cannot deal effectively with the problem.

II

The most serious abuse of the judicial process occurs in discovery, and Rule 37, together with the inherent power of the courts to punish those who interfere with the administration of justice, give the courts the means to deal with the problem. The basic cause of the under-utilization of sanctions is not their unavailability but the unwillingness of the courts to use them. A recent study conducted by the Federal Judicial Center found that attorneys move for the imposition of sanctions in less than one percent of the total requests for discovery.²⁵ In other words, for every one hundred requests for discovery, including interrogatories, oral depositions, and document requests, one motion for sanctions is made. The study also found that less than half of those motions (42.7%) resulted in rulings by the courts. However, of the motions ruled upon, 74.3% were granted. These statistics are impressive, because only 3 of the 26 motions granted were granted conditionally, so that the losing party could avoid sanctions by fulfilling the responsibilities which he had evaded from the beginning.

Whether the contrast between the frequency of discovery abuse and the frequency with which courts impose sanctions for it continues to be as striking as these data indicate is open to question because

of an increasing willingness among judges to impose sanctions for abuse of discovery.²⁶ The deterrent function of sanctions has now been explicitly legitimized by the Supreme Court,²⁷ and the law is equally settled that eventual compliance with the rules of discovery does not preclude the imposition of sanctions.²⁸ The growing awareness of the magnitude of the problem of abuse should also lower the judicial barriers to the imposition of sanctions.

Nevertheless, I sense a still substantial reluctance among judges to impose severe, unconditional sanctions. Some of that reluctance is clearly justified, but it depends, I think, on a variety of concerns which overestimate the dangers of sanctions. It is my purpose to address some of those concerns and to suggest counterbalancing considerations.

A. The Double-Edged Sword

One reason why judges are unwilling to impose sanctions is that lawyers are unwilling to seek them, and judges are often inclined to defer to the judgment of lawyers (whose clients may be victimized by abuse) that sanctions are inappropriate. Not only do judges and attorneys share professional and social ties, but most judges remember when they were attorneys and their attitude at that time toward sanctions affects in some way their attitude toward sanctions as judges.

This judicial faith in the zeal of lawyers to protect the interests of clients possibly injured by abuse of the judicial process is misplaced. Lawyers generally are not at all hesitant to file motions, but I have noticed in my years on the bench an unusual reluctance among lawyers to seek sanctions where the making of a motion for

sanctions is clearly justified, even if the ultimate success of the motion is uncertain. I suspect that the reason for this reluctance stems in large part from lawyers' recognition that sanctions for discovery abuse are a double-edged sword. A lawyer who wants the option to abuse discovery when it is to his client's advantage will hesitate to seek sanctions when his client is the victim of such practices -- especially if the sanctions are imposed on the attorney instead of or in addition to the client. As a result, a kind of gentlemen's agreement is reached, with the tacit approval of the bench, which is extremely convenient for the attorneys who avoid the just imposition of sanctions and extremely unfair to the litigants who pay more and wait longer for the vindication of their rights than they should.

This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait upon lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused.

"[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."²⁹

Judges must be willing to take it upon themselves to help protect the rights of present and potential litigants whose interests are not adequately represented by the attorneys in cases before them. In order to protect these rights, it may be necessary for judges to

assume the additional work required to draft an opinion setting forth their reasons for imposing sanctions in the cases in which such remedies are appropriate. In the long run these efforts will be rewarded many times over because in furnishing some clarification in this area, they assist in obtaining greater compliance with the spirit and the letter of the federal rules.

B. The Sins of the Lawyer and of the Client

Another reason why courts have been reluctant to impose sanctions for abuse of the judicial process is a concern that some kinds of sanctions make the client suffer for the sins of his attorney.³⁰ In cases where the misconduct involves phases of litigation which the attorney and not the client controls, it may be unfair to punish the client for his attorney's wrongdoing. The proper course in that situation may be to impose monetary sanctions directly on the attorney instead of the client which both punish the misconduct and compensate the victim. Rule 37 explicitly authorizes the court to assess costs against lawyers as well as litigants, and §1927 is aimed solely at attorneys. Moreover, "[t]he inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."³¹ The danger that the deterrent effect of the sanction will be diluted by passing on the fine to the client can be minimized by requiring the attorney to pay the fine personally and by specifically prohibiting the attorney from passing on the cost.³²

Sanctions imposed on the attorney are sometimes inadequate, and in those instances, courts should not hesitate to make the client pay for his attorney's wrongs. The concern about visiting the sins of

the lawyer on his client is often exaggerated. The real issue is often which client the sins of the attorney should be visited upon -- the client of the offending attorney or of the offending attorney's opponent. Attorney misconduct imposes costs, and if someone must bear them, the litigant who retained the offending attorney is most responsible. If the client truly is an innocent victim of his attorney's misconduct, the client can recover damages for any injury he may have sustained because of that misconduct in a tort action for legal malpractice against the attorney, and that approach properly puts the burden on the attorney's client rather than on his opponent.³³ The responsibility of the judge in a particular case is to do justice between the plaintiff and the defendant, and accommodation of the client vis-a-vis his attorney should be resolved in another forum. The attorney and his client must be viewed as a unit, and the misconduct of the former imputed to the latter. In upholding the dismissal of an action because of dilatory prosecution of a lawsuit by an attorney, the Supreme Court found

"no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"³⁴

The realistic possibility of sanctions can put lawyers in a difficult position. The failure to take an arguably justifiable position on behalf of his client exposes the attorney to malpractice and disciplinary liability³⁵ and makes his client angry, but the

assertion of an unjustifiable position exposes an attorney to substantial sanctions for abuse of the judicial process. Judicious use of sanctions will not, however, significantly deter attorneys from the zealous representation of clients. A minimum requirement of culpability (at least of a level of negligence³⁶) will protect lawyers who make honest errors of judgment while exercising the level of care observed by reasonably competent and ethical lawyers. If the threat of sanctions leads attorneys to investigate a little more fully the claims which their clients want them to assert on their behalf, that result will be generally salutary.³⁷

C. The Goal of Deterrence

Deterrence of abuse of the judicial process is clearly a legitimate purpose of sanctions.³⁸ What judges sometimes tend to overlook is that deterrence, which is an achievable goal, requires a readiness to impose relatively severe sanctions.

Abuse of the judicial process is difficult to detect and to prove, and that difficulty means that abuse that is detected and proven must be dealt with severely. The lower the probability of detection and proof, the more severe the sanction must be in order to deter misconduct effectively. Deterrence is an achievable goal especially with respect to misconduct by lawyers because they generally make strategic and tactical decisions about litigation in a deliberate, calculating manner and because word of sanctions travels fast in the world of the trial bar. Lawyers can pass that word along in subtle ways to clients who they suspect might be inclined to suppress or fabricate evidence or otherwise disobey their obligations as litigants and citizens. If

courts begin to impose sanctions, litigants and lawyers willing to engage in questionable tactics will re-evaluate their approach to litigation.

Unless severe sanctions are imposed, the low likelihood of detection and proof of harassing tactics will make them worthwhile, and the deterrent function of sanctions will not be achieved. In the recent case of National Hockey League v. Metropolitan Hockey Club,³⁹ the Supreme Court emphasized the deterrent function of sanctions under Rule 37 and upheld the severe sanction of dismissal so that "other parties to other lawsuits would [not] feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts." The dynamics of litigation compel that result.

D. Judicial Awareness of the Court Crisis

The primary need for an increased use of sanctions derives from the exponential increase in the number and complexity of federal cases.⁴⁰ An indulgent toleration for the misconduct of lawyers and litigants is simply a luxury that the federal court system can no longer afford.

The recent emergence of a tougher judicial attitude toward those who abuse the judicial process has doubtless been prompted by a growing recognition of these problems. Yet I still fear that some judges continue to underestimate the dimensions of this crisis and the role of sanctions in its solution. That is certainly true of trial judges, but appellate judges seem somewhat more resistant to stern measures which keep litigation moving. Appellate judges have always tended to take a more restrictive view of sanctions than trial judges,⁴¹ despite an occasional acknowledgment of the problems facing trial

courts.⁴² That trend continues. After the Supreme Court make unmistakably clear that in addition to compensation of the injured party, deterrence is a proper goal of sanctions,⁴³ a court of appeals continued to apply "the normal rule that the proper sanction 'must be no more severe * * * than is necessary to prevent prejudice to the movant.'"⁴⁴

Perhaps my concern merely reflects the supposed mutual distrust of trial and appellate judges that many observers have commented upon. My considered conclusion, however, is that my concern is more than that. Trial judges cannot deal effectively with abuse of the judicial process unless appellate tribunals are willing to back them up, and to date the necessary support has not always been found. However, there is a more recent decision in the Court of Appeals for the Ninth Circuit which hopefully may point the way for the other circuits. In that case the court affirmed a dismissal of an action with prejudice for failure to comply with discovery orders. The opinion strongly endorsed the use of sanctions under such circumstances stating:

"Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance. Fed.R.Civ.P. 37(b). Here the court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism. Here the appellants' last-minute tender of relevant documents could not cure the problem they had previously created." (Emphasis supplied.)⁴⁵

E. Failure to Reach the Merits

Another source of judicial willingness to impose sanctions is the reluctance of judges to use sanctions that limit or deny "the opportunity for a hearing on the merits" of a party's lawsuit, a goal that might rise to constitutional significance.⁴⁶ To be sure, a party has a right to have his action decided on its merits, and the construction of needless obstacles to the realization of that right would defeat the basic goal of the Federal Rules of Civil Procedure.⁴⁷ But that right is not unqualified, and a party's opponent has a corresponding right to have a prompt and inexpensive determination of his substantive rights. When one party abridges the rights of the other, courts should have no hesitation about imposing sanctions like dismissal, default, or preclusion⁴⁸ which affect the ultimate result. As Professor Rosenberg pointed out,

"the difficulty with literal adherence to the reach-the-merits philosophy [of the Federal Rules] is that it dulls the cutting edge of sanctions intended to enforce compliance with procedural rules. To some extent, it does this by softening the resolve of judges to compel suitors to play fairly or lose."⁴⁹

The interest in reaching the merits is obviously an important one. My only point is that it is not an overriding one and that it must be balanced against other important interests. Dismissal may be too severe a sanction not because of its inherent nature which prevents a determination of the merits but because its severity is not necessarily related to the degree of the offending party's culpability and its consequences. It would be improper to dismiss a lawsuit with a value of \$100,000 because a party's response to court-ordered discovery was a few days late -- this would be the equivalent of a

\$100,000 fine for such conduct.⁵⁰ But where the misconduct is sufficiently egregious where the circumstances indicate the likelihood that the misconduct will otherwise be repeated or where the prejudice to the victim is irreparable, dismissal may be the only sanction which compensates the victim for the past misconduct, protects him from future misconduct, and vindicates the public interest in the continuing integrity of court processes.

F. Abuse of the Sanctioning Process

There is also a concern that an even greater judicial receptiveness to the employment of sanctions will cause abuse of motions for sanctions. Demands for sanctions will become part of boilerplate motions to compel discovery, and courts will become mired in endless hearings about the good or bad faith of parties and lawyers.

Even with more liberal use of sanctions, the focus of litigation can remain on the conduct of the parties before and not after the filing of the complaint. A principled application of sanctions upon adequate proof of misconduct will not unnecessarily encourage the filing of insubstantial motions for sanctions, and a requirement of some showing of misconduct in addition to a ruling against the allegedly offending individual should serve to screen out the frivolous motions.

III

Liberalized use of sanctions for abuse of the judicial process is no panacea, and for a variety of reasons, this abuse will continue despite a greater judicial willingness to impose sanctions.

Perhaps the most important reason why the judicial process is abused is because the stakes in litigation are so high that they create an occasionally irresistible temptation to cheat. So long as millions of dollars in both damages and attorneys' fees depend on the outcome of the litigation, both litigants and lawyers will be tempted to abuse the judicial process. The contingent fee system, combined with the gradually expanding recoverability of attorneys' fees by prevailing parties,⁵¹ are factors pointing to the likelihood that this cause of abuse by lawyers will continue. Where the attorneys' fees will be based at least in part upon the hours spent on a case, whether retained counsel or counsel for the prevailing party is awarded attorneys' fees by the court, it is simply too often a lack of economic incentive for counsel to expedite preparation for and trial of the case. It is certainly not my intention to suggest that awards of damages and attorneys' fees should be decreased solely to decrease the incentive to abuse the judicial process. But we must understand that one of the inevitable prices we pay for making litigation so profitable is an increase in such abuse. It also points out why the sanctions which are imposed must have a sufficient impact in order to achieve their purpose.

The willingness of lawyers to resist this temptation to abuse the judicial process is reduced by the prevailing ethic that requires a lawyer to assert any position on behalf of his client unless the lawyer is absolutely convinced that the position is frivolous or fraudulent. As Judge Marvin Frankel discussed in his provocative and controversial article, The Search for Truth: An Umpireal View,⁵²

the problem may be not that law schools do not adequately teach ethical standards but that the ethical standards contained in the Code of Professional Responsibility fail to stress the lawyer's independent duty to seek the truth even when it does not advance his client's interests. Whether the lawyer's obligations toward his client should be redefined is a question far beyond the scope of this paper. But one might hope that a redefinition along the lines tentatively suggested by Judge Frankel would lessen the willingness of lawyers to allow, directly or indirectly, their clients to abuse the judicial process and to participate in such abuse.

Another reason why abuse of the judicial process will continue regardless of judicial steps to combat it involves a matter already mentioned, the difficulty of detection and proof of such abuse. It is one thing to say that abuse often occurs; it is another to identify with reasonable certainty the individual cases in which it occurs. Except in the rare case where a party inadvertently discloses a document that he promised did not exist, it is usually impossible to prove that a party is deliberately holding back material that he is obligated to disclose. A party that is determined to abuse the judicial process can generally do so successfully. The court and the opposing party may have a pretty good idea when a party or his attorney abuses the judicial process, but their inability to prove it makes them unable to do anything about it.

This problem of proof is exacerbated by the increasing complexity and confusion of our statutory and judge-made law. The more unwieldy this body of law becomes, the more difficult it becomes to fault a party or his attorney for conduct that the judge disapproves of. The logical

culmination of this trend is illustrated by Lucas v. Hamm,⁵³ where the California Supreme Court affirmed the dismissal of a legal malpractice action on the pleadings because the legal issue which the lawyer had allegedly butchered (the rule against perpetuities) was so confused that a reasonably competent lawyer could not reasonably be expected to understand it. When different judges and magistrates apply widely varying standards to discovery, how can a judge fairly say that a party's position in a discovery dispute lacks substantial justification, a finding necessary to an award of attorneys' fees under Rule 37(a)(4)? Proposed revisions of Rule 26(b)(1) which would limit the permissible scope of discovery may, at least in the short run, generate additional uncertainty and litigation. While it may be impossible to define with perfect clarity what conduct constitutes abuse and what does not, the courts do have an obligation in my judgment to select on a case by case basis the reasons why they find certain conduct to constitute abuse. This is essential if we are to clarify the law in this area and establish standards of conduct so that lawyers and their clients can be held fairly accountable for their failure to meet them.

Finally, some kinds of abuse result more often from good-faith errors in judgment than from intentional, reckless, or negligent conduct. Serious as the problem of culpable abuse is, lawyers and litigants place a far heavier unnecessary burden on the judicial process by failing to think through their position or by losing sight of their ultimate objectives while becoming bogged down in unimportant details. All too often, for example, lawyers and their clients fail to decide before they begin discovery what they are looking for and resort to

discovery simply because it is there. Once they begin discovery, they never pause to digest the information they have obtained, so they continue to pursue avenues of investigation which they justifiably began but have no need at all to complete.

A partial solution to this source of discovery abuse is not sanctions but the careful supervision of the discovery process by the court. The most effective means of supervision which does not excessively involve the court in the day-to-day management of litigation is through regular status conferences where the parties are required to explain and defend their overall approach to the litigation, through limits on the number of interrogatories which a party can file without court approval, through the early setting of deadlines for the completion of discovery and the commencement of trial, through discovery conferences like those proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference,⁵⁵ and through the refusal to postpone those deadlines without a showing of good cause.

Just as the reforms described in the preceding paragraph play an important role in complementing sanctions, sanctions are a necessary supplement to other means of controlling abuse of the judicial process. Preventive means can never be completely successful, and no matter how closely a judge supervises the discovery process, some abuses will go undetected. When they are detected and proven, they must be punished.

IV

An increased willingness to employ sanctions for abuse of the judicial process does not of course mean that judges should take a cavalier attitude toward their use. To the contrary, a careful,

considered approach is obviously essential.

Ordinarily, a party must be given notice that sanctions may be imposed and an opportunity to present evidence and arguments concerning the propriety of such sanctions, although not "every order entered without notice and a preliminary adversary hearing offends due process."⁵⁶ The kind of notice and hearing that must be provided depends on the facts of the case and the severity of the sanction to be imposed. The judge who imposes the sanctions should make findings preferably in writing, explaining why he imposed any sanction and why he chose one sanction instead of another.⁵⁷ In some cases, it is advisable for the trial judge to have another judge decide whether sanctions are appropriate in order to avoid any appearance that personal animosity between the judge and the attorney or litigant influenced the decision to impose sanctions.⁵⁸ Observance of these procedural safeguards, combined with the immediate appealability of some kinds of sanctions,⁵⁹ strikes a fair balance between the interests of litigants actually victimized by abuse of the judicial process and the interests of litigants unfairly accused of engaging in such abuse. It ensures not only that an abuse for which punishment should be imposed has occurred, but that the severity of the punishment is proportionate to the proven abuse.

Heavy sanctions are not always better than light ones, and light ones are not always better than none. Patience and forbearance are no less essential elements of the judicial temperament in this context than in any other. But judges must be firm with lawyers and litigants who unfairly take advantage of the judicial process. Although we need to know more about the incidence and effect of sanctions for such abuse,

there can be no doubt that courts have not made effective use of the sanctions available to them. The current increasing willingness of judges to make better use of those sanctions is an overdue trend which judges should continue to pursue.

FOOTNOTES

1 Fed.R.Civ.P. 1 requires that the Rules "be construed to secure the just, speedy, and inexpensive determination of every action."

2 I will use the term abuse of the judicial process to refer only to conduct which is culpable because it is done either deliberately in bad faith, in reckless disregard for its propriety, or through a negligent failure to observe reasonable standards of care and competence.

Although good-faith and non-negligent errors in judgment can cause many of the same consequences as culpable abuse of the judicial process, I will focus only on the latter. Courts have made fault (a term broad enough to include negligence) a precondition for the imposition of sanctions, see In re Sutter, 543 F.2d 1030, 1035-1036 (2 Cir. 1976), and the Constitution may require that standard at least for sanctions which affect the determination of a substantive issue. Societe Inter-nationale v. Rogers, 357 U.S. 197, 209 (1958); see 8 C. Wright & A. Miller, Federal Practice and Procedure §2283, at 763 & n.58 (1970).

3 Frankel, The Search for Truth: An Umpireal View, 123 U.Pa.L.Rev. 1031, 1054 (1975).

4 According to the 1977 Annual Report of the Director of the Administrative Office of the United States Courts, at p. 332, only 7.8% of federal civil cases reached trial.

5 In this account of the Kodak case, I have relied primarily on Kiechel, "The Strange Case of Kodak's Lawyers," Fortune Magazine (May 8, 1978). I of course cannot vouch for the accuracy of that article.

6 Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F.R.D. 277, 288 (1977).

7 E.g., Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv.L.Rev. 1033 (1978); Comment, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U.Chi.L.Rev. 619 (1977); Kirkham, Complex Civil Litigation -- Have Good Intentions Gone Awry?, 70 F.R.D. 199, 204 (1976); Byrnes, Discovery: Its Uses and Abuses: The Defendant's Perspective, 44 ABA Antitrust L.J. 14-28 (1975); Decline and Fall of Sanctions in Civil Discovery, 9 U.S.F.L.Rev. 360 (1974).

8 Strike suits occur more often in some areas of the law than in others. The securities fraud field is notorious for this kind of abuse. See Sullivan v. Chase Investment Services of Boston, Inc., 434 F.Supp. 171, 188 (N.D.Cal. 1977).

9 Kirkham, Complex Civil Litigation -- Have Good Intentions Gone Awry?, 70 F.R.D. 199, 204 (1976).

10 Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 250 (1977) ("the plight of defendants must be seriously considered in a system which so unconditionally mandates going through trial as long as genuine issue as to a material fact remains").

11 Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976):

"I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment."

12 See, for example, Rule 37(e) proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 77 F.R.D. 613, 652-653 (1978); Shenefield, *Improved Manageability of Complex Antitrust Litigation: Alternatives to the Meat Axe*, Remarks before the Ohio State Bar Association Annual Antitrust Law Institute, October 28, 1977; Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 *Fordham L.Rev.* 1069 (1976).

13 Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 *Harv.L.Rev.* 1033 (1978) (hereinafter cited as *Harvard Note*); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 *U.Chi.L.Rev.* 619 (1977) (hereinafter cited as *Chicago Comment*).

14 The 1970 amendments to Rule 37(a)(4) shifted the burden of proof with respect to justification from the winning to the losing party, so that the losing party had to establish the presence of substantial justification rather than the winning party having to establish its absence. The purpose of the change was to increase the use of this sanction. See *Chicago Comment*, *supra*, note 13, at 632.

15 *Britt v. Corporacion Peruana de Vapores*, 506 F.2d 927, 932 (5 Cir. 1975), is not to the contrary. In *Britt*, the Court of Appeals affirmed the decision of the District Court not to sanction a party for failing to produce evidence whose production had been formally requested by the plaintiff but not ordered by the court. The court's statement that "only violation of an order compelling discovery issued under Fed.R. Civ.P. 37(a) could be punished by the sanctions permitted under Fed.R.Civ.P. 37(b)" has no converse implication that courts have no authority to punish a party for abuse of discovery not covered by Rule 37(b). The Court of Appeals affirmed the District Court not because the trial judge lacked discretion to impose sanctions but because it did not abuse its discretion by not imposing sanctions under the circumstances. The implication is clear that the discretion exists.

16 Link v. Wabash Railroad Co., 370 U.S. 626, 630-631 (1962) (sua sponte dismissal of action for lack of prosecution). But see Societe Internationale v. Rogers, supra, 357 U.S. 197, where the Court spoke of Rule 37 of the Federal Rules of Civil Procedure as the exclusive source of authority for a court to dismiss a complaint because of noncompliance with a discovery order. Since the government had successfully obtained the dismissal brought under Rule 37, the Court's remarks were necessary dicta. In any event, the subsequent decision in Link makes clear that sua sponte dismissals for lack of prosecution -- and, I believe, for failure to properly prosecute -- is an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases." 370 U.S. at 630-631.

17 In Link, see note 16 supra, the Supreme Court upheld the sua sponte dismissal of an action for lack of prosecution even though Rule 41, which generally covers dismissal for lack of prosecution, does not provide for sua sponte dismissal. The Supreme Court had no trouble in concluding that the Rules did not limit the settled authority of the courts "to manage their own affairs as to achieve the orderly and expeditious disposition of cases." 370 U.S. at 630-631. The same principle applies to Rule 37. The provision for sanctions in that Rule for certain kinds of discovery abuse should not be interpreted to abridge the availability of sanctions for other kinds.

18 Adopting the recommendation of the Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that Rule 37 be amended to include the following subsection:

"(e) Additional Sanctions. In addition to the sanctions authorized by this rule and those authorized by Title 28, U.S.C. §1927, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorney's fees, if any party or counsel (1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f), or (2) otherwise abuses the discovery process in seeking, making or resisting discovery.

"In an appropriate case, the court may, in addition to other remedies, notify the Attorney General of the United States in a public writing that the United States, through its officers or attorneys, has failed without good cause to cooperate in discovery or has otherwise abused the discovery process." 77 F.R.D. 613, 652-653 (1978).

19 E.g., United States v. Ross, 535 F.2d 346, 350 (6 Cir. 1976) (McCree, J.); 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7 Cir. 1971).

20 E.g., United States v. Ross, supra, 535 F.2d at 348-350 (McCree, J.); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2 Cir.), cert.denied, 404 U.S. 871 (1971).

- 21 Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978).
- 22 In re Sutter, 543 F.2d 1030, 1037-1038 (2 Cir. 1976) (assessment of \$1500 penalty against attorney who unjustifiably caused three-day delay in start of trial).
- 23 See generally Chicago Comment, supra, note 13, at 619-623.
- 24 The legitimacy of reasonable local rules should now be clear after In re Sutter, supra, 543 F.2d 1030. In Sutter, the Court of Appeals for the Second Circuit properly rejected the unduly narrow approach of cases like Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 732 (3 Cir.) (en banc), cert.denied, 371 U.S. 888 (1962), and Padovani v. Bruchhausen, 293 F.2d 546 (2 Cir. 1961), which cast doubt on the propriety of any local rules in the process of striking down unreasonable ones or unreasonable applications of reasonable rules. Of course, some local rules relating to pretrial procedure are oppressive, and those which conflict with the letter and spirit of the Federal Rules of Civil Procedure are invalid. See Hedrick v. McCargo, 545 F.2d 393 (4 Cir. 1976) (local rule held invalid).
- 25 The Federal Judicial Center study analyzed 7,117 requests for discovery. Motions for sanctions were made in 67 instances, or 0.9% of the instances in which discovery was requested. The data were further broken down revealing that although motions for sanctions were made in about 0.2% of requests for oral depositions (7 motions in 3065 requests), such motions were made in 1.4% of requests for interrogatories (44 motions in 2519 requests) and in 2.1% of requests for documents (16 motions in 1031 requests). Judicial Controls and the Civil Litigative Process: Discovery, Federal Judicial Center, June 1978, at 24.
- 26 Harvard Note, supra, note 13, at 1044-1047.
- 27 National Hockey League v. Met. Hockey Club, 427 U.S. 639, 643 (1976) (per curiam).
- 28 State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10 Cir. 1978); Dellums v. Powell, 566 F.2d 231, 235-236 (D.C.Cir. 1977).
- 29 Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).
- 30 E.g., Link v. Wabash Railroad Co., supra, 370 U.S. at 637 (Black, J., dissenting), quoting Link v. Wabash Railroad Co., 291 F.2d 542, 548 (7 Cir. 1961) (Schnackenberg, J., dissenting); see In re Sutter, 543 F.2d 1030, 1037 (2 Cir. 1976) (because of unfairness to client of sanctions imposed on him, sanctions may be imposed directly on attorney).
- 31 In re Sutter, supra, 543 F.2d at 1037, quoting Flaksa v. Little River Marine Constr. Co., Inc., 389 F.2d 885, 888 (5 Cir. 1968).

32 That solution was recently employed in Associated Radio Service Co. v. Page Airways, 73 F.R.D. 633, 636-637 (N.D.Tex. 1977). In such cases it may be advisable for the court to notify the client directly of its order to minimize the possibility of misunderstanding or circumvention of the order.

33 See Harvard Note, supra, note 13, at 1051 & n.104 and 1052 n.106.

34 Link v. Wabash Railroad Co., supra, 370 U.S. at 633-634.

35 Canon 7 of the ABA Code of Professional Responsibility requires lawyers to pursue the lawful objectives of their clients by any available means that are legal.

36 See note 2 supra.

37 For a thought-provoking suggestion for the revision of Canon 7 of the ABA Code of Professional Responsibility (see note 35 supra) that would place less of a premium on the ignorance of attorneys, see Frankel, The Search for Truth: An Umpireal View, supra, 123 U.Pa. L.Rev. at 1050-1051.

38 See note 27 supra and the accompanying text.

39 427 U.S. at 643 (per curiam).

40 Harvard Note, supra, note 13, at 1044-1045 & nn. 72-74. One corollary of this fact is that severe sanctions are more often appropriate in big cases than in little ones. Complex and protracted litigation is completely unmanageable unless the parties act in good faith, and judges must deal swiftly and surely with lawyers and litigants whose misconduct can fatally sabotage the big case. In re Professional Hockey Antitrust Litigation, 63 F.R.D. 641, 655 (E.D.Pa. 1974) (strong sanctions are "particularly appropriate in complex antitrust litigation * * * where efficient and effective discovery procedures are essential to orderly adjudication") (emphasis in original), affirmed sub nom. National Hockey League v. Met. Hockey Club, supra, 427 U.S. 639 (per curiam); see Dellums v. Powell, 566 F.2d 231, 236 (D.C.Cir. 1977) ("special structure of discovery in class suits" affects choice of sanction).

41 E.g., Waterman, An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders, 29 F.R.D. 420, 424-425 (1962).

42 In Bardin v. Mondon, 298 F.2d 235, 237-238 (2 Cir. 1961), after explicit recognition of the critical condition of the docket in the Southern District of New York, the Court of Appeals nevertheless reversed the discretionary decision of the trial judge that a few hundred dollars in penalties was an inadequate sanction for unjustified delay caused by the plaintiffs' attorneys.

43 See note 27 supra and the accompanying text.

44 Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 504 (4 Cir. 1977) (ellipses in original), quoting Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1127 (5 Cir.), cert.denied, 400 U.S. 878 (1970).

45 G-K Properties v. Redevelopment Agency, Etc., 577 F.2d 645, 647 (9 Cir. 1978). The result reached was particularly encouraging to me, as I was the trial judge that had dismissed the case and had done so without the benefit of the teaching of National Hockey League v. Met. Hockey Club, supra, 427 U.S. 639. The opinion below, reported at 409 F.Supp. 955 (N.D.Cal. 1976), set forth in considerable detail the circumstances which led me to conclude that the only alternative available to me was dismissal with prejudice.

46 Societe Internationale v. Rogers, supra, 357 U.S. at 209.

47 See Note, Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation, 72 Yale L.J. 819, 825-826 (1963).

48 By preclusion, I mean precluding the offending party from raising a claim or defense or from offering certain types of evidence. See Fed.R.Civ.P. 37(b) (2) (B).

49 Roseberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L.Rev. 480 (1958).

50 In the National Hockey League case, the plaintiffs valued their lawsuit at approximately \$3 million, so the Supreme Court in effect upheld what some courts might have construed to be a \$3 million fine against the plaintiffs.

51 E.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988.

52 123 U.Pa.L.Rev. 1031, 1051 (1975).

53 56 Cal.2d 583, 15 Cal.Rptr. 821, 826, 364 P.2d 685 (1961). This holding was perhaps modified sub silentio in Smith v. Lewis, 13 Cal.3d 349, 118 Cal.Rptr. 621, 530 P.2d 589 (1975).

54 The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recommended that Rule 26(b)(1) be amended to restrict discovery to "any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *." 77 F.R.D. 613, 623 (1978). Rule 26(b)(1) presently allows discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *." This proposed amendment is perhaps less restrictive than that proposed by the Special Committee for the Study of Discovery Abuse of the Section of Litigation of the American Bar Association. That Special Committee recommended that Rule 26(b)(1) permit discovery regarding "any matter, not privileged, which is relevant to the issues involved in the pending action * * *." See id., at 627.

55 Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 624-626 (1978).

56 Link v. Wabash Railroad Co., *supra*, 370 U.S. at 632; see Israel Aircraft Inc., Ltd. v. Standard Precision, 559 F.2d 203, 207 (2 Cir. 1977) (procedural requirements for sanction of dismissal) (dictum).

57 See Wilson v. Volkswagen of America, Inc., *supra*, 561 F.2d at 516 (need for explicit findings); Edgar v. Slaughter, 548 F.2d 770, 773 (8 Cir. 1977) (duty of trial judge to consider whether sanctions that do not go to merits of case are more appropriate than those that do).

58 In re Sutter, *supra*, 543 F.2d at 1033 n.4.

59 State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1372 (10 Cir. 1978) (appealability of order imposing fine).

Statement of

Eleanor M. Fox

before the

Subcommittee on Monopolies of the

Committee on the Judiciary of the

House of Representatives

on

H.R. 6001

June 16, 1977

My name is Eleanor Fox. I teach law, including antitrust law, at New York University School of Law. I am outgoing Chairperson of the Committee on Trade Regulation of the Association of the Bar of the City of New York, and of the Section 7 (Clayton Act) Committee of the Antitrust Section of the American Bar Association, and I am incoming Vice Chairperson of the Section of Antitrust Law of the New York State Bar Association. I have practiced law for a number of years at the New York City law firm of Simpson Thacher & Bartlett, where I was a partner and am now of counsel, and have spent a large portion of my professional career consulting, advising, litigating and writing on the antitrust consequences of mergers.

It is with great pleasure that I accept the invitation of the Subcommittee to testify on H.R. 6001.

I speak for myself only and not for any group with which I am associated.

H.R. 6001 is a bill to plug a jurisdictional loophole, and I support it. H.R. 6001 would bring within the jurisdictional purview of our principal merger law, Section 7 of the Clayton Act, corporations "engaged in commerce or in any activity affecting commerce," rather than only corporations directly "engaged in commerce."

As amended, Section 7 should stop all anticompetitive mergers of corporations within the Constitutional reach of Congress.

Background

Section 7 of the Clayton Act is one of the mainstays of our antitrust laws. Sixty-three years ago Congress foresaw that corporate empires could be quickly and easily built, and competition could be restrained, by corporations' buying up their competitors. In 1914, Congress passed Section 7 of the Clayton Act with the intent to stop corporations from acquiring stock of their competitors¹ even before a restraint on competition could occur. In 1950, Congress amended Section 7, extending its coverage to asset transactions and to mergers and acquisitions of all kinds -- not just mergers of competitors -- "where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section² of the country." Thus, Section 7, which has not been amended since, prohibits all potentially anticompetitive mergers within its jurisdictional scope. It is intended to stop mergers at a point long before they actually can work their harm on competition; at a point long before they rise to the level of the unreasonable restraint of trade prohibited by Section 1 of the Sherman Act. Section 7 is intended to bar mergers that are incipient violations of the³ Sherman Act.

Despite some problems,⁴ some judicial set-backs,⁵ and some loopholes,⁶ Section 7 has been effective. Its principal effect has been deterrence of anticompetitive acquisitions. We can only guess how many anticompetitive mergers have not taken place because of Section 7. We can only guess what the structure of our industry would look like but for Section 7. But I am confident that our industries would be significantly more concentrated and restrained were Section 7 not the law.

In these times when we are struggling with hard issues of deconcentration, with imponderable questions about the gains and losses of industry break-ups, it is most important to give full breadth to our merger laws to stop the growth of anticompetitive market structures before they are formed.

Jurisdictional Scope of Section 7: Interstate Commerce

Substantively, Section 7 prohibits all mergers whose effect may be substantially to lessen competition in any section of the country. Thus, the prohibited merger⁷ need not impose an actual restraint on interstate commerce. Indeed, even the predicted potential effect may be within⁸ the confines of a state or even a locality. Given this substantive scheme of Section 7 Congress could not directly incorporate the jurisdictional nexus of Section 1 of the Sherman Act -- which prohibits combinations that actually

restrain commerce. Instead, in Section 7, Congress attached the jurisdictional limitation to the participating corporations. It nonetheless intended to nip Sherman Act violations "in the bud."⁹

There are two prohibitory paragraphs of Section 7. The first prohibits one corporation "engaged in commerce" from acquiring another corporation "engaged also in commerce" where there may be the proscribed effect.¹⁰ The second prohibits any corporation (apparently whether or not engaged in commerce) from acquiring a corporation engaged in commerce where there may be the proscribed effect.¹¹

Thus, as Section 7 presently stands, at least the acquired corporation must be "engaged in commerce" to come within the jurisdictional purview of Section 7.¹²

In the Warren Court years, "engaged in commerce" was given an expansive reading to accord with the broad preventive purposes of the Act. For example, in United States v. Penn-Olin Chemical Company¹³ the Supreme Court said that a joint venture not yet formed at time of suit, and therefore not engaged in commerce at time of suit, could be deemed engaged in commerce because it was so engaged immediately thereafter.¹⁴

However, by its opinion in United States v. American Building Maintenance Industries¹⁵ in June 1975, the Supreme Court made a technically narrow interpretation of the "in commerce" requirement of Section 7. It held that the express language of Section 7 means that the acquired corporation

"must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce"¹⁶ and that Section 7 is jurisdictionally inapplicable to corporations that merely "affect" commerce. Accordingly the Supreme Court upheld, by reason of a technicality, a grant of summary judgment in favor of American Building Maintenance Industries, one of the largest suppliers of janitorial services in the country, serving more than 500 communities, and accounting for 10% of the Southern California market, which had acquired two of its competitors who together accounted for 7% of the Southern California market and who derived 80% to 90% of their revenues from interstate and international clients.¹⁷

The Court's opinion, written by Mr. Justice Stewart, is not based in public policy. Rather, it is a technical exercise in statutory construction based upon the supposed "plain meaning" of the words of Section 7.¹⁸

Justices Blackmun, Douglas and Brennan dissented. They viewed Section 7 as I and many others have always viewed it -- that is, to have the full reach allowed to it by the Commerce Clause, and thus to apply to acquired firms that have a substantial effect on interstate commerce.¹⁹

Public Policy

The question today is no longer whether Section 7 does reach acquired firms affecting commerce, but whether it

should reach acquired firms affecting commerce. To me the answer is clear; it should. I believe that H.R. 6001 should be enacted because I believe in Section 7 and I therefore believe that it should be as jurisdictionally encompassing as permissible under the Commerce Clause. Our energies ought not to be spent on litigating the line between "directly engaged in the flow of commerce" and "affecting commerce." Our true concern should be with the acquisition's effect. If an acquisition is likely to be anticompetitive, the law ought to stop it. 20

FOOTNOTES

1. See Fox and Fox, Corporate Acquisitions and Mergers § 7.03[1] (Matthew Bender & Co.).
2. See id. at § 7.03[2].
3. Id.; S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).
4. The granting of effective relief after consummation of an illegal merger has been one of the most serious problems in the implementation of Section 7. See, e.g., Elzinga, "Mergers, Their Causes and Cures," 2 Antitrust Law & Econ. Rev. 53 (1968).
5. E.g., United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).
6. See, e.g., United States v. American Building Maintenance Industries, 422 U.S. 271 (1975).
7. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).
8. E.g., United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Brown Shoe Co. v. United States, supra. See Fox and Fox, supra, § 16.03.
9. See n.3 supra.
10. "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in

section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

11. "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."
12. In *United States v. American Building Maintenance Indus.*, 422 U.S. 271 (1975), the Supreme Court, quoting only the first paragraph of Section 7, stated in dictum that the selling as well as the buying corporation must be engaged in commerce. It has never so held. See *Fox & Fox*, §7.04[2][a].
13. 378 U.S. 158, 167-68 (1964).
14. *Penn-Olin*, the joint venture, was engaged in commerce at the time of suit. The Court said:

"The technicality could, therefore, be averted by merely refiling an amended complaint at the time of trial. This would be a useless requirement." Id.
15. 422 U.S. 271 (1975).
16. Id. at 283.
17. Id. at 273-74, 283 at n.9.
18. Id. at 281. The Court stated that Section 7 would not be "frustrated" by a narrow construction of "engaged in commerce" id. at 282; but this conclusion does not address the question of what is the most effective policy alternative.

19. Id. at 286-88.
20. Congress has already given a vote of support, in principle, for H.R. 6001. Title II of the Hart-Scott-Rodino Anti-trust Improvements Act of 1976 (Section 7A of the Clayton Act) provides for pre-merger notification and waiting periods for acquisitions above a threshold size of or by persons or firms "engaged in commerce or in any activity affecting commerce." Congress thereby expressed concern that such mergers may be anticompetitive and should be scrutinized.

TESTIMONY BY HAROLD E. KOHN FOR
INCLUSION IN THE HEARINGS ON S. 390 OF THE
SENATE ANTITRUST AND MONOPOLIES SUBCOMMITTEE

My name is Harold E. Kohn, the senior member of the firm of Kohn, Savett, Marion & Graf, P.C., Suite 1214 IVB Building, 1700 Market Street, Philadelphia, Pennsylvania 19103.

I am a Fellow of the International Academy of Trial Lawyers. I served as a member of the Special Committee of the American Bar Association on Multidistrict and Protracted Litigation, and participated in the drafting of the present Multidistrict law and the Manual for Complex Litigation. I was one of the lead counsel in the Electrical Equipment Antitrust Litigation fifteen years ago. The Manual and Multidistrict law developed out of that litigation.

Most recently, I served as Chief Trial Counsel in the Plywood Antitrust Litigation (MDL 159) before Judge Pointer in the United States District Court for the Eastern District of Louisiana, a trial which was completed within 16 days, and resulted in a jury determination of the measures of damage, which may result in award probably in excess of \$1 billion, the highest jury verdict every returned.

I have previously been invited to testify before Committees of Congress, including this Senate Antitrust Subcommittee, where I recently testified on the pending Illinois Brick legislation.

Certain of my suggestions in testimony before the National Committee for the Review of Antitrust Laws and Procedures have been included in the Committee's recommendations.

It is that Committee's report which is the basis for S.390, today under consideration by this Subcommittee. I appreciate the opportunity to submit the following testimony concerning S.390.

Among the many salutary provisions of S.390, none is more urgent or necessary than Section 6(3), which reads "Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel."

I need not repeat at any length how the application of collateral estoppel can expedite antitrust actions, which is the purpose of S.390. This was already aptly described by Senator Metzenbaum on the floor of the Senate when he introduced S.390. Congressional Record, Vol. 125 No. 14, Feb. 8, 1979, at 1344. The worthwhile purposes served by collateral estoppel were described nearly 40 years ago by Judge Augustus Hand, who wrote, "Collateral estoppel is no mere technicality, but a reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues." Tillman v. National City Bank of New York, 118 F.2d 631, 634 (2d Cir. 1941).

Instead of speaking of collateral estoppel generally, I wish to focus on why it is urgent that Congress enact Section 6(3) promptly. The reason is simple.

Section 5(a) of the Clayton Act is presently a millstone around the necks of private antitrust plaintiffs. It puts them at a disadvantage compared with every other plaintiff in federal court--whether those plaintiffs are litigating tort, or property, or securities, or employment discrimination matters.

It also puts them at an unfair disadvantage compared with their adversaries, private antitrust defendants. Enacting Section 6(3) as quoted above would cut off that millstone, and allow private antitrust plaintiffs to shoulder the same load as other litigants.

That Section 5(a) should now be a burden is gravely ironic. Senator Metzenbaum, in introducing S.390, published a letter from the Justice Department that accurately describes the legislative history of the present Section 5(a) of the Clayton Act. Both the House and Senate in 1914 desired to confer on private antitrust plaintiffs an advantage, by allowing them collateral estoppel use of prior government judgments, but ultimately did not because of a fear, very real and justified in 1914, that non-mutual collateral estoppel would be unconstitutional. 96 Congressional Record Vol. 125 No. 14 at 1346-7 (February 8, 1979). The clear intent in 1914 was to establish a floor to support private plaintiffs. These plaintiffs could use a prior government judgment at least to establish a prima facie case. There is absolutely no indication in the legislative history, in 1914 or at anytime since, that Congress intended Section 5(a) to be a low ceiling that would act to stunt these same plaintiffs by depriving them of other developments in the law, such as collateral estoppel, that would become available over time. But Section 5(a) is now being misinterpreted to preclude antitrust plaintiffs from participating in the benefits of new developments.

For example, the Parklane Hosiery decision of only a month ago, cited in the Justice Department's letter, now allows

every private plaintiff in federal court to assert the collateral estoppel effect of a prior judgment obtained by the Government. That is, every plaintiff except one: the private antitrust plaintiff.

Section 5(a) is being misinterpreted by the lower courts as a shackle, by saying that Congress intended to forbid the use of collateral estoppel to private antitrust plaintiffs. It is Alice in Wonderland logic that something intended to especially benefit antitrust plaintiffs in 1914 should now be construed to inflict a discriminatory burden on these plaintiffs in 1979--but that is exactly what is happening.

The most vivid example is the 7th Circuit's recent opinion in Illinois v. General Paving Co., #78-1479 (7th Cir. January 11, 1979) 1979-1 CCH Trade Cases at ¶62,426. Senator Metzenbaum cited the District Court opinion in his remarks at S.1346 of the Congressional Record, holding that Section 5(a) does not forbid collateral estoppel. That opinion has just been reversed by the 7th Circuit in General Paving, supra, a decision holding that Section 5(a) does forbid antitrust plaintiffs from using collateral estoppel. Hence the necessity for enacting S.390 is much greater than even its sponsors realized in introducing the bill a month ago.

Not only does Section 5(a), as it is presently being misinterpreted, single out and discriminate against antitrust plaintiffs as compared with all other plaintiffs, but it also puts antitrust plaintiffs at a grossly unfair disadvantage compared with antitrust defendants. Let us suppose that a grocery store litigates an issue with the Government concerning

the store's sugar purchases, and a finding is made favorable to the Government and adverse to the store. Then the store, as a private antitrust plaintiff, brings a subsequent lawsuit against the sugar growers and producers for violation of the antitrust laws.

Under the doctrine of collateral estoppel as it has currently evolved, the sugar growers and producers as defendants could use collateral estoppel against the grocery store, to prevent relitigation of the finding that was made, adverse to the store, in the prior Government litigation. Section 5(a) would not affect this because it only applies to plaintiffs, not defendants. But turn the coin over, and imagine instead that the sugar growers and producers, rather than the grocery store, litigated an issue with the Government in the first lawsuit, which resulted in a finding favorable to the Government and adverse to the growers and producers. The store as private antitrust plaintiff in a subsequent lawsuit would not be able to use collateral estoppel to prevent the growers and producers from relitigating the issue decided in the prior Government litigation. The reason? Section 5(a) as presently misinterpreted. A defendant can assert collateral estoppel effect against a private antitrust plaintiff, but a private plaintiff cannot assert collateral estoppel against a defendant. Congress can simply and swiftly remedy this unfairness by enacting Section 6(3) of S.390, to put antitrust plaintiffs and defendants on an equal footing.

In General Paving, the 7th Circuit two months ago threw down the gauntlet to Congress: "If the prima facie evidence standard of Section 5(a) is to be changed, it is for Congress to do so." Slip opinion at 6-7. S.390 at Section 6(3) responds to the challenge, by making it clear that Section 5(a) was never intended to deprive, and should not now be construed to deprive, private antitrust plaintiffs of a development in the law of collateral estoppel which has now become available to them.

By the above testimony, I do not intend to ignore the other worthwhile reforms contained in S.390. I commend especially Section 4, imposing personal sanctions on counsel who engage in dilatory litigation tactics, and Section 5, awarding interest on actual damages sustained by antitrust plaintiffs from the date of filing the complaint. Both of the above, coupled with the collateral estoppel reform, will go a long way to "expedite and reduce the cost of antitrust litigation", the purposes for which S.390 has been designed.

DATED: March 6, 1979

Respectfully submitted,

Harold E. Kohn
Harold E. Kohn



STATEMENT SUBMITTED BY
THE NATIONAL ASSOCIATION OF MANUFACTURERS
TO THE
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MARCH 30, 1979

"S. 390 -- THE ANTITRUST PROCEDURAL IMPROVEMENTS ACT OF 1979"

The National Association of Manufacturers welcomes this opportunity to submit comments on S. 390, the Antitrust Procedural Improvements Act of 1979. The NAM is comprised of approximately 12,000 member companies and has affiliations, through the National Industrial Council, with an additional 158,000 businesses. In total, the NAM members produce approximately 80 percent of the goods manufactured in this country by companies from every state, of every size, and industrial classification. A substantial number of our members may be affected by this legislation in that they may be the subject of, or significantly impacted by, prospective antitrust litigation. Accordingly, the far reaching and potentially dramatic consequences of this bill are of critical concern to our member companies.

More specifically, S. 390 -- the stated purpose of which is to expedite and reduce the costs associated with antitrust litigation -- provides for sweeping changes in current trial conduct and procedure. As explained further below, the means employed for effectuating this purpose are presumptive and require extensive review.

SECTION 2,3:

Section 2(3) of S. 390 would amend Section 2 of the the Antitrust Civil Process Act (15 USC 1311) wherein statutory definitions of words and phrases under the Act are presented. The proponents of the bill desire an addition to 15 USC 1311 to include the term "product of discovery". This phrase is intended to be used in conjunction with amendments proposed in Section 3 of S. 390 and, must be cautiously considered. Section 2(3) provides that:

(i) The term "product of discovery" includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any litigation or other judicial or administrative proceedings...(emphasis supplied)

This provision would expressly authorize the Department of Justice to issue Civil Invetigative Demand (CID) for "any products of discovery". Product of discovery is understood to include any materials in the possession of a party obtained by any method of discovery. Although the bill would allow for objection, made within 10 days, to challenge the validity of the CID, several substantive and procedural impacts will inevitably result.

In U.S. v. GAF Corporation, 449 FSupp 351 (1978), the Department of Justice sought to obtain documents from respondents which were furnished to them in a private antitrust action. (See also, GAF Corporation v. Eastman Kodak Co., 415 FSupp 129, 1976). The documents were produced during discovery in the private action and, most significantly, made available only subject to express understandings, confidentiality stipulations, and orders. To facilitate discovery, the parties entered

into a stipulation whereby either party could mark documents sought by the other party "confidential". Once so marked, these materials could be disclosed only to employees and consultants retained by counsel "for the purpose of that litigation". This stipulation was made an order of the court by Judge Frankel. (US. v. GAF Corp., 449 FSupp at 352). The Court denied GAF Corporation permission to deliver to the Department of Justice documents in its possession, and therefore denied the Department discovery of those materials.

The Court addressed the basic issue of the parties' relationship to one another in the private action, and the procedural and substantive aspects of discovery. Judge Frankel concluded that the party in possession of discovered materials has "the papers in question only by virtue of the law suit". Continuing, the Court stated: "There had been an explicit understanding between the parties that discovery was being demanded and given solely for use in, and preparation of, that particular case. All the positions taken over the years have had presumably in view the understanding that discovery was for the party receiving it, not for strangers to the case, public or private. The supervening idea of disclosure to the government must be judged (and burdened) by the understanding that this was never a proposed or expressly anticipated step when the papers were turned over to a party in the first place". GAF Corp. v. Eastman Kodak Co., 415 FSupp at 131, 132; See also, In Re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 F.R.Service 2d 1251, 1974.

Judge Frankel further considered the powers and position of the Department relative to the parties in the (private) matter:

The restrictions (applicable to CIDs--15 USC 1312 (b)(1), 1313(c)(d)) reflect a concern for the rights of privacy. Ours is not an era for fashioning lightly, from conditions

at best ambiguous, an arsenal of new implements for governmental intrusion. Congress...has allocated resources to law enforcement, both civil and criminal. Sometimes it has given express encouragement to informants and other adjuncts. See, U.S. ex rel. Marcus v. Hess, 317 US 537 (1945). It is quite another thing for a Court to sanction, and thus to encourage, the use of private litigants' devices as reinforcements for Federal prosecutors, whether civil or criminal. The potential for oppression, against enterprises large and small, or against individuals, is not rendered imaginary by our inability to forecast it with clarity. The Court is unwilling to give its approval to the use of private discovery as a possible supplement to Federal grand jury proceedings. 415 FSupp at 132, 133.

These points were supported and supplemented by the Court in U.S. v. GAF Corp., 449 FSupp at 353, wherein it was noted that the statutory scheme is not simple and it is necessary to take into account the constant concern of Congress that the investigatory powers of the Antitrust Division be balanced against the rights of the parties under investigation.

In expanding the investigative powers of the Antitrust Division in 1976, it was Congress' intent to expand correspondingly the Act's safeguards for private companies and individuals -- targets and non-targets alike. To strike a fair balance between the rights of persons under investigation and third parties against unreasonable governmental intrusion and the need for effective and efficient enforcement for the antitrust laws -- a carefully wrought system of powers balanced by safeguards. Congress did not contemplate that efforts would be made under the Act to obtain a target's documents from an adversary litigant; otherwise, Congress would surely have drafted the statute so as to provide explicit protection for the target in such cases. *id.* at 449. It is clear that no such balance exists within Section 2(3) of S. 390.

Of equal concern in Section 2(3) of S. 390 is the provision's application to products of discovery in adjudications before independent agencies where protective orders are frequently entered into. Adjudications before independent agencies procedurally parallel private litigation protections and an exhaustive discussion would be repetitious. However, it is necessary to point out the damaging effect this provision would have on the "protective order" and discovery in general.

It is well understood that the purpose of a protective order is to limit and confine the distribution of highly sensitive and confidential data to the parties within the particular action. To allow Section 2(3) be enacted would do no less than frustrate and undermine the entire purpose of protective orders and confidentiality. To permit disclosure of the fruits of discovery would unassumingly deter parties from bringing actions -- not only in the District Courts, but the independent agencies -- where the potential for Department of Justice inspection of materials, as proposed, would be permissible.*

*For example, adjudications conducted before the U.S. International Trade Commission under section 337 (19 USC 1337) consistently requires the parties to enter into protective orders. It is clear that Justice Department access to the confidential data and information would severely disrupt the ITC's ability to carry out its functions and have a deterrent effect on complainants seeking relief before the ITC from unfair methods of competition in import trade.

SECTION 3

Section 3(e) of S. 390 is intended to amend 15 USC 1313 (4)(c) (2)(3) by expanding the class of persons who may examine materials produced pursuant to a CID. Officials or employees of the Department of Justice are currently the only class of persons duly authorized to examine such materials. Proposed section 3(e) would extend this class to "agents" of the Department. This provision is intended "to make clear that the Department can contract with outside agents for the document analysis, processing, and indexing services which are often necessary to organize effectively the materials produced pursuant to demands". (See, 125 No. 14, Cong Rec., §1350, February 8, 1979) While the expressed purpose of this provision has some merit, several concerns must be articulated.

The amendment fails to consider various problems that will inevitably arise through interpretation of the term "agent". Defining the term "agent" has frequently been the focal point of considerable case law. Many courts have defined an agent and the agency relationship as being a consensual relationship with the principal having a right of control over the acts of the agent. This definition is clear and well precedented. Yet, continuously litigated is the question of the principal's control and authority exercised over the agent's acts. Proposed Section 3(e) attempts to permit "agents" to conduct and assist in investigations that have historically been carried out solely by employees and officials of the Department of Justice. This awesome provision grants a new class of persons authority to receive, examine and, in certain cases, share information received pursuant to a CID and is fraught with the danger that such confidential and highly

proprietary information may inadvertently be made public. In the absence of strict controls over agents, this proposal would have a negative rather than positive impact on the litigation process.

Further, the proposal conspicuously fails to address whether an "agent" will be subject to 18 USC 1905 wherein a party may be criminally sanctioned for releasing confidential information.

In sum, granting an additional class of persons access to highly sensitive business information would jeopardize the need for maintaining confidentiality in the investigatory process. In view of the possibility of dissemination of such competitive and sensitive information by "agents", businessmen might be severely inhibited from responding to a CID without recourse to judicial review. The effect of this would arguably be to further delay the investigatory process -- an event that would be counterproductive to the purposes of this proposed bill.

SECTION 4

Section 4 of S. 390 creates new sanctions for attorney delay in antitrust litigation. Sanctions are currently imposed under 28 USC 1927, which provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. (Emphasis supplied)

The proposed amendment to this section completely alters this provision by substituting vague and far reaching language. New Section 4 eliminates the above underscored and substitutes the following ambiguous language:

Any attorney... who engages in conduct unreasonably and primarily for the purposes of delaying or increasing the cost of the litigation may be required... (Emphasis supplied)

As proposed, Section 1927 would take on new meaning. In fact, the proposal is not a mere amendment of section 1927, but, a totally new provision preempting the essence and practicability of the original. The present law's breadth provides for realistic boundaries of liability; whereas the proposed amendment, due primarily to its vagueness and differing emphasis, completely destroys the ability of counsel to judge whether or not his practices are in conformity with the statute. The proponents of this amendment submit that it is intended to liberalize the intent requirement of Section 1927 (and) "to encourage counsel to focus on legitimate issues in lawsuits and to avoid strategic ploys that do not move the case nearer disposition". (See, 125 No. 14, Cong Rec, §1344, February 8, 1979).

Yet, S. 390 does more than "liberalize the intent requirement". In essence, Section 4 generalizes the intent for dilatory behavior and resulting liability. In the "section-by-section" analysis (See, 125 No. 14, Cong Rec, 1349, at 1350, February 8, 1979), Section 4 allegedly contains a "more realistic intent requirement". Further, it is pointed out that in construing or interpreting Section 1927, this section permits the Court to assess an attorney for such increased costs in antitrust litigation only when his actions are solely for the purpose of delay. Proposed Section 4 amends this to make clear that a court can require an attorney to pay for increased costs when his conduct is primarily, instead of solely, for the purpose of delay. The proponents contend that this amendment provides a more effective

deterrent to dilatory litigation practices by attorneys. (125 No.14, Cong Rec, § 1350, February 8, 1979).

The President's National Commission for Review of Antitrust Laws (Commision) recently concluded that "lawyers too often file meritless claims, defenses, [and] unreasonably resist legitimate discovery requests" We concede that in certain complex antitrust cases such conduct has been employed, primarily for the purpose of delaying the proceedings. However, we believe there is an essential "first step" that needs exploring prior to determining whether proposed Section 4 adequately addresses the dilatory tactics problem. Namely, Congress should seek clarification as to the ethical status of some apparently common practices carried out by counsel in complex antitrust litigation. In this regard, we fully support the Commission's recommendation that "the American Bar Association and other professional organizations . . . study the ethical issues arising from complex litigation and attempt a more particularized definition of practices that are unethical."

It is essential, then, that preliminary determinations be made as to which trial techniques are to be characterized as permissible and which are unethical. Without such guidelines, it would be impossible for counsel to ascertain the quality of his trial methods.

Rather than strengthening incentives for prompt adjudication, proposed Section 4 adds disincentives to counsel's ability to employ effective trial techniques, strategy, tactics, and originality. Due to its ambiguity, the proposal classifies potentially proper and necessary trial techniques as potentially unlawful. As a result, counsel for both plaintiffs and defendants will be unable to define

whether their conduct is judicially permitted and, more importantly, to effectively represent their clients. Since the determination of what conduct will be considered strategic, as opposed to dilatory, will not be made until after the fact, it is possible that counsel will be subject to liability without fault. We submit that ethical guidelines will considerably minimize the adverse impacts that this proposal introduces.

An additional method of minimizing dilatory conduct by counsel would be the existence of strengthened judicial controls. Judges should exercise greater control in the early stages of complex litigation through, for example, sophisticated and structured plans for discovery and pretrial preparation. This would also include a requirement that judges stay proceedings until a schedule of discovery is approved. A timely and informed judicial presence, whether through pre-trial conferences, "status calls," or informal meetings, sets a better tune for discovery and makes parties aware of their responsibilities. Close monitoring and attention by the Court can make the litigants more cooperative and sanctions less necessary. (See, Gerhart Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures, January 15, 1979, at 40-42; See also Cong. Rec. § 1356, February 8, 1979.) Additionally, judges should be more responsive toward balancing the materiality of information relevant to litigation against the expected burden of producing it.

Historically, the Courts have been reluctant to limit discovery under Rule 26(b) of the Federal Rules of Civil Procedure. A more active judicial posture -- either through greater involvement in procedural guidelines or through sanctions -- would alleviate many of the problems that result in protracted litigation.

SECTION 5

Section 5 of S. 390 seeks to amend Section 4 of the Clayton Act (15 USC 15) by allowing a successful plaintiff in an antitrust suit to be awarded "pre-judgment interest" on a claim. While the awarding of prejudgment interest to the plaintiff would not include basic Clayton Act treble damages, its affect would be to likewise penalize an unsuccessful defendant.

While proponents of this legislation find support for prejudgment interest in that the opposition to this concept "appears to be abating", nevertheless, they likewise concede that prejudgment interest is unavailable under current case law and thus lacks total precedence.

Proponents of Section 5 argue that the unavailability of prejudgment interests awards under "current case law" provides a "powerful disincentive for defendants to expedite antitrust trials." Further, they contend that "by permitting an award of interest from the date of judgment, these amendments, in effect, require that interest attributable to these ill-gotten fruits be paid by the antitrust law violators to the successful plaintiffs." This legislative effort would result only in presumptive attitudes towards those whose conduct is mistakenly violative of the antitrust laws. More importantly, proponents' understanding, that the award of prejudgment interest provides defendants with incentives to expedite those cases in which they are thrust into, rests on no more than personal perceptions or ideals of how the judicial process "should" operate. The awarding of prejudgment interest, in itself, totally ignores the procedural aspects of trial that oftentimes,

without fault of either party, result in delay of the case. Such common practices as motions, counterclaims, and other trial procedures have the unavoidable consequence of delaying plaintiffs' original claim. But, should this section be enacted, allegedly for the purpose of providing defendants with an "additional" incentive for speedy resolution of the case at bar, valid procedures made on defendant's behalf will be automatically considered dilatory. Thus, at the heart of Section 5 rests a concept that in its very nature is objectionable to the conscience of justice and fair play. This proposed section would do no more than circumvent the essence of procedural due process and, in its end result, act as only an additional penalty to an unsuccessful defendant.

SECTION 6

Section 6 of S. 390 would amend section 5(a) of the Clayton Act (15 USC 16(a)) by specifying that there shall be no "limitation on the application of collateral estoppel". The language of this proposal is vague and creates many more questions than it resolves.

The most apparent ambiguity is in attempting to discern what remedy Section 6 provides, and, in determining to which parties it is available. The proposed amendment is silent as to whether estoppel is intended to apply to government losses -- as well as victories. More importantly, it is unclear whether Courts would be permitted to impose estoppel such that the government would be likewise barred from re-litigating issues lost in prior litigation -- public or private. The statements accompanying submission of S. 390 conspicuously fail to address this problem.

Even assuming that the amendment is intended to work both ways, it is nevertheless improper and contrary to the intended purpose of this bill.

To allow for an unrestrained application of collateral estoppel would be to force, not encourage defendants to settle before trial. Few defendants could afford to risk the outcome of potentially adverse antitrust litigation; especially when subject to laws that are vague and their application uncertain. If a defendant avoids settlement and proceeds to trial receiving an adverse ruling, Section 6 would give a court the ability to foreclose potential defenses in all further cases brought on behalf of any claimant. When considering the logical alternatives of risks, any defendant subject to the application of Section 6 will be pushed into settlement. Liability or fault will no longer be as great a factor as will the possible imposition and application of this provision.

The inevitable consequence of Section 6 will be the use of this provision -- not to promote judicial efficiency as intended -- but to motivate plaintiffs in bringing unwarranted actions with intentions of forced settlement. As such, the consequence of this amendment must receive further review in consideration of this section's potential for abuse.

SECTION 7

Section 7 attempts to amend Section 7 of the Clayton Act by expanding its jurisdictional scope. Many companies have relied upon the statutory language and precedents that have defined and determined the jurisdictional reach of the Clayton Act. The sponsors note that by expanding

Section 7, the Clayton Act will conform to those changes made in statutory language affecting other antitrust statutes. Section 7 of the Clayton Act, 15 USC §18 (15 USCS §18), provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." (Emphasis supplied)

The Supreme Court, in U.S. v. American Bldg. Maintenance Industries, (ABMI), 422 US 271, (1977), fully considered the explicit jurisdictional reach of Section 7. In ABMI, the Court was asked to extend the language of Section 7 "engaged in commerce" to the language similarly proposed by sponsors of S. 390, "affecting commerce". The Court noted, at 422 US 276, citing Gulf Oil Co. v. Copp Paving Co., 419 US 186, 195, that "the jurisdictional requirements of (Section 7) cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce". More importantly, in distinguishing the language and scope of the Clayton Act to other antitrust laws, the Court provided convincing arguments opposing the jurisdictional reach of the Clayton Act to acquisitions and mergers only "affecting" commerce:

The phrase "in Commerce" does not, of course, necessarily have a uniform meaning whenever used by Congress. Both the Federal Trade Commission Act (§5) and the Clayton Act (§7) were enacted by the 63rd Congress and both were designed to deal with closely related aspects of the same problem--the protection of free and fair competition in the Nation's marketplaces. See, FTC v. Raladam Co., 283

US 643, 647-648, 75 LEd 1324, 51 Sct 587, 79 ALR 1191.

In FTC v. Raladam, the government argued that the legislative history of the Clayton Act demonstrated that the "in commerce" language of Section 7 was intended to be coextensive with the reach of congressional power under the Commerce Clause; and, that Section 7 was designed to supplement the Sherman Act. The Court expressly rejected this argument noting that under the Sherman Act Congress believed it necessary to provide the maximum authority to Constitutional power in restraining trusts and monopolies. U.S. v. South-Eastern Underwriters Association, 322 US 553, 558, (1973). Accordingly, the Sherman Act has been applied to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce. Unlike Section 7, with its precise "in commerce" language, Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several states..." The jurisdictional reach of Section 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods. See, Gulf Oil Corp. v. Copp Paving Co., 419 US at 194, 42 LEd2d 378, 95 Sct 392; U.S. v. ABMI, 422 US at 278, (1977). Further, no similar concern for the impact of intrastate conduct on interstate commerce is evident in Section 7's "engaged in commerce" requirements. (id.)

The most compelling distinction between the Clayton Act's jurisdictional scope and other similar antitrust acts was again pointed out in ABMI:

In marked contrast to the broad "affecting commerce" jurisdictional language utilized in those statutes, however, Congress retained the narrower "in commerce" formulation when it amended and re-enacted Section 7

of the Clayton Act in 1950. The 1950 amendments were designed in large part to 'plug the loophole' that existed in Section 7 as initially enacted in 1914, by expanding its coverage to include acquisitions of assets, as well as acquisitions of stock. In addition, other language in Section 7 was amended to make plain the full reach of the section's prohibitions. See, Brown Shoe Co. v. U.S., 370 US 294, 311-323, 8 LEd2d 510, 82 Sct 1502. Yet, despite the sweeping changes made to effectuate those purposes, and despite decisions of this Court, such as Bunte Bros., (FTC v. Bunte Bros., 312 US 349 85 LEd 881, 61 Sct 580) that had limited the reach of the phrase "in commerce" in similar regulatory legislation, Congress preserved the requirement that both the acquiring and the acquired companies be "engaged in commerce".

This congressional action cannot be disregarded, as the Government would have it, as simply a result of congressional inattention, for Congress was fully aware in enacting the 1950 amendments that both the original and the newly amended versions of Section 7 were limited to corporations "engaged in commerce". See, e.g., HR Rep No. 1191, 81st Cong., 1st Sess. 5-6. Rather, the decision to reenact Section 7 with the same "in commerce" limitation can be rationally explained only in terms of a legislative intent, at least in 1950, not to apply the rather drastic prohibitions of Section 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power. (Emphasis supplied) 422 US at 481.

We fully understand that each legislative Act is a unique creature of the legislative process; that the applicability, Congressional intent, and impact of each statute has a unique, individual, character. As such, it is both a precipitous and improper action for legislation to be founded on no more justification than the sole fact that similar statutes -- for reasons unique to their enforcement -- have been amended. More specifically, the Clayton Act's scope and definition, and its legislative purpose, are all unique to other antitrust statutes. Further, there is no factual evidence to believe that antitrust law enforcement has suffered due to the "engaged in commerce" jurisdictional mandate. In the absence of a compelling need -- based upon quantitative information -- justifying amendment of the Clayton Act, Congress should exercise considerable caution before legislating such a potentially far reaching reform.



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February 23, 1979

Senator Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: S.390

Dear Senator Metzenbaum:

In response to your question to me in the course of my testimony on February 20, I have asked the New York State Bar Association about its work addressing dilatory litigation practices. I am advised that it does not have any on-going project. I believe that Judge Renfrew's reference may have been to the work of the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation. As you will recall, Alan Hruska, Co-Chairman of that Committee, testified before our Antitrust Review Commission about the work of the Second Circuit Commission.

It was a pleasure to testify before you, and I would be very happy to do anything else I can to assist in the passage of S.390.

Sincerely yours,

A handwritten signature in cursive script, appearing to read 'Eleanor'.

Eleanor M. Fox

cc: Michael Cooper



AMERICAN INSURANCE ASSOCIATION

GOVERNMENT AFFAIRS DEPARTMENT

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March 6, 1979

The Honorable Howard M. Metzenbaum
Chairman
Senate Subcommittee on Antitrust and
Monopoly and Business Rights
United States Senate
Washington, D.C. 20510

RE: S.390, the "Antitrust Procedural
Improvements Act of 1979"

Dear Mr. Chairman:

The American Insurance Association is a trade association of stock property and casualty insurers whose members write all lines of property and casualty insurance throughout the United States.

Through application of the McCarran-Ferguson Act, the insurance industry receives a limited exemption from federal antitrust regulation. The Act provides that the Sherman Act, Clayton Act and Federal Trade Commission Act are applicable "to the business of insurance" to the extent that such business is not regulated by state law. The McCarran-Ferguson Act exemption does not apply to "any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation", regardless of state regulation. In addition, recent Supreme Court decisions have increased antitrust exposure by expanding the boycott exception by holding that it applies to disputes between policyholders and insurers¹ and by holding that relationships with suppliers of goods and services paid for by insurers do not constitute the "business of insurance".² Recent cases which interpret the McCarran-Ferguson Act clearly demonstrate that, consistent with the general rule that antitrust exemptions are to be narrowly construed, the scope of the insurer exception is shrinking.

The member companies of the American Insurance Association endorse the principal theme of S.390 - the need for expeditious enforcement of effective antitrust laws. However, we oppose Section 5 of the bill which would permit prejudgment interest at commercial rates on the amount of single damages awarded to a successful plaintiff.

1/ St. Paul Fire & Marine Insurance Company v. Barry L. Ed. 932 (1979)

2/ Royal Drug Company, Inc. v. Group Life and Health Insurance Company
435 U.S.903 (1979)

We oppose the provision because (1) awarding prejudgment interest will not deter dilatory conduct by defendants, (2) S. 390 and existing law provide disincentives to dilatory conduct by defendants, and (3) awarding prejudgment interest assumes that there are no close questions of law or fact which must necessarily be resolved through lengthy court proceedings.

Awarding Prejudgment Interest Will Not Deter Dilatory Conduct By Defendants.

Awarding prejudgment interest would at best merely neutralize the monetary gains from delay and does not focus on the real motivation for procrastination. United States District Court Judge Charles Renfrew stated in his testimony before the Subcommittee on Antitrust and Monopoly:

The money to be earned by price-fixing, by exploitation of a monopoly, etc., would far exceed the interest value of the potential damage award. It (prejudgment interest) makes no allowance for the fact that many defendants are able to invest their capital at a rate that exceeds the commercial rate; for these defendants, it would still be in their interest to delay, despite the new provision, because they would continue to profit from their use of the money.

S. 390 And Existing Law Provide Disincentives To Dilatory Conduct By Defendants.

Section 4 of the bill authorizes imposition of sanctions for attorney delay whenever unreasonable conduct has been undertaken "primarily for the purpose of delaying or increasing the cost of the litigation." The amendment would also allow imposition of all excess expenses and attorney's fees reasonably incurred because of the delaying conduct.

In addition, in situations in which the violation is a continuing one, as in a monopolization case, the fact that treble damage exposure is being incurred continually should deter dilatory conduct.

Awarding Prejudgment Interest Assumes That There Are No Close Questions Of Law Or Fact Which Must Necessarily Be Resolved Through Lengthy Court Proceedings.

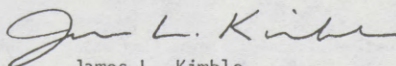
The proposal would "operate nearly automatically"³ to require defendants to pay prejudgment interest even if there has been no finding that they contributed to the delay of the trial. An automatic award of

^{3/} Testimony of John H. Shenefield, Assistant Attorney General, Antitrust Division before the Subcommittee on Antitrust and Monopoly, February 19, 1979.

prejudgment interest to successful plaintiffs acts as an unwarranted penalty for all defendants who act in good faith. It assumes that all defendants institute dilatory tactics and fails to discriminate between the defendant which assists the court in a speedy resolution of the case and the defendant which consciously slows the progress of the proceedings.

For the abovementioned reasons we urge the Judiciary Committee to delete Section 5 of S. 390 and replace the provision with language which would allow the court, in its discretion, to make an award of prejudgment interest if it finds that the defendant has been engaging in dilatory tactics..

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "James L. Kimble". The signature is fluid and cursive, with the first name "James" and last name "Kimble" clearly distinguishable.

James L. Kimble
Counsel

JLK:dab

The Business Roundtable

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Chairman

Clifton C. Garvin, Jr.
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Reginald H. Jones
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Charles J. Pilliod, Jr.
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March 7, 1979

The Honorable
Howard M. Metzenbaum
Committee on the Judiciary
Subcommittee on Antitrust & Monopoly
119 D Street N.E. - Room A-519
Washington, D.C. 20510

Dear Senator Metzenbaum:

The following comments on S.390, the Antitrust Procedural Improvement Act of 1979, are submitted on behalf of The Business Roundtable.

This bill was introduced on February 8. On February 23 The Roundtable received notice of the single hearing which was held on February 26. We are informed that the bill is now scheduled for markup on March 9.

There simply has not been time either to analyze the various sections of this bill in any depth or to seek possible witnesses. Such extraordinary haste might be justified if there were some genuine emergency or if the proposed changes were trivial, but neither excuse is present here.

Section 5, dealing with prejudgment interest, for example, would create a special rule for antitrust cases that runs directly contrary to the prevailing rule elsewhere in our legal system. Section 6, dealing with collateral estoppel, would alter the impact of government judgments after 65 years. These changes may individually be good or they may be bad, but no one has really had the opportunity to think them through.

Moreover, we observe that the overall impact of the proposed changes falls on antitrust defendants, who are already subject to extraordinary disabilities. They are subject right now to multiple actions, based on the same facts, by government and by private parties. If they beat the government, they get no evidentiary benefit at all in subsequent private actions; if they lose to the government, subsequent plaintiffs now get an evidentiary benefit which this bill would strengthen further. A losing defendant has to pay damages three times over plus attorney's fees; a losing plaintiff pays nothing. Defendants may have to fight massive "class actions" brought by lawyers who really represent no one but themselves.

POLICY COMMITTEE:

• Thomas A. Murphy, *Chairman* • Clifton C. Garvin, Jr., *Cochairman* • Reginald H. Jones, *Cochairman* • Charles J. Pilliod, Jr., *Cochairman*
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JOHN POST
Executive Director

This same concern over imbalance was expressed when one of this bill's proposals (prejudgment interest) was up for discussion before the National Commission for the Review of Antitrust Laws and Procedures. Commissioner Spivack, a former antitrust prosecutor, states:

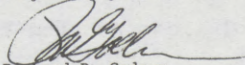
"I would suggest, if we really want to look into this or deal with this issue, which I really do not think is a major issue in this field, then a more balanced approach would be to suggest that in order to deter that kind of (dilatory) conduct, the plaintiffs, when they bring a case and lose, should pay the defendants attorneys' fees plus interest. That would deter plaintiffs from bringing or extending cases. The suggestion does not even surface. That is where I get the impression as you read this that it is all one-sided."
(Tr. Nov. 14, 1979, pp. 119120)

Dilatory tactics of defendants may indeed enhance the cost of antitrust enforcement, but also do meritless cases brought by plaintiffs, who have a great deal to gain and very little to lose. The imbalance in litigation risk and bargaining power is already a matter of serious concern and the legislation would make the situation worse.

Accordingly, we recommend that the specific proposals of the Antitrust Procedural Improvements Act be considered only as part of an overall inquiry into antitrust procedures -- an inquiry which would also consider proposals to redress the present litigation imbalance and force plaintiffs' counsel to act responsibly as well. And we further suggest that enough time be allowed for this consideration to proceed on the basis of a meaningful record.

We will appreciate it if these comments can be included in the record of proceedings.

Very truly yours,



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Senator Howard M. Metzenbaum
Senate Judiciary Committee
347 Russell Senate Office Building
Washington, D.C. 20510

Re: S.390 - Views of Antitrust Section of the ABA

Dear Senator Metzenbaum:

As Chairman of the Legislative Committee of the American Bar Association's Antitrust Section, I am pleased to forward to the members of the Senate Judiciary Committee the views of the Antitrust Section on S.390. Enclosed please find the following items:

1. Resolutions Adopted by the Council of the Section of Antitrust Law of the American Bar Association on April 6, 1979;
2. Report of the Section of Antitrust Law of the American Bar Association on S.390 - Procedural Aspects; and
3. Report of the Section of Antitrust Law of the American Bar Association on S.390 - Section 7 Aspects.

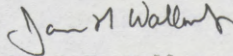
These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

The Section supports in principle the expansion of civil investigative authority proposed in sections 2 and 3 of S.390 but opposes certain technical features of the bill. The Section opposes section 4 of S.390 which would expand

attorney liability for costs resulting from delay. The Section opposes section 5 of S.390 which provides for the award of prejudgment interest in antitrust cases. The Section supports section 6 of S.390 which would permit the application to antitrust cases of principles of collateral estoppel. The Section supports that aspect of section 7 of S.390 which would expand the jurisdictional reach of section 7 of the Clayton Act to "any activities affecting Commerce" and opposes, as written, that aspect of section 7 of S.390 which would extend the application of section 7 of the Clayton Act from corporations to all persons.

As you will note, these resolutions and reports were adopted prior to the April 10, 1979 mark-up of S.390 in the Subcommittee on Antitrust and Monopoly. Nevertheless, the positions adopted by the Council are in most respects still applicable to the bill as amended. I would point out, however, that the Subcommittee chose to delete from Section 7 of the Clayton Act to reach "any activity affecting Commerce," an amendment which the Antitrust Section endorsed.

Sincerely yours,



James H. Wallace, Jr.
Chairman, Legislation Committee
ABA Section of Antitrust Law

Enclosures

RESOLUTIONS ADOPTED BY THE COUNCIL OF THE
SECTION OF ANTITRUST LAW OF THE AMERICAN
BAR ASSOCIATION ON APRIL 6, 1979

RESOLUTIONS

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

1. BE IT RESOLVED with respect to sections 2 and 3 of S. 390, a legislative proposal entitled the Antitrust Procedural Improvements Act of 1979, which seek to amend the Antitrust Civil Process Act to empower the Assistant Attorney General in charge of the Antitrust Division to obtain "products of discovery" from private antitrust litigants, that:

a) Government access to products of discovery in private litigation may in many instances further goals of efficient judicial administration and enforcement of the antitrust laws;

b) In its present form, S. 390 possesses undesirable technical features such as inadequate time to object to a Government demand;

c) Because of the importance of preserving the effectiveness of protective orders as a device to expedite private litigation, and the demonstrated willingness of the courts to consider and, under appropriate circumstances, grant Government requests for products of discovery in such litigation, further development of the law on a case by case basis is preferable to the enactment of legislation at this time.

2. BE IT FURTHER RESOLVED that section 4 of S. 390, which amends 28 U.S.C. § 1927 to make attorneys personally liable for excess costs, expenses and attorney's fees generated by conduct engaged in "unreasonably and primarily for the purpose of delaying or increasing the cost of litigation," is undesirable in that it creates an unduly subjective standard by which to judge attorney conduct and that, if the sanctions proposed are used:

a. They will inhibit the use of legitimate tactics and strategies by antitrust defendants and will undermine the quality of representation afforded antitrust defendants;

b. They will subject antitrust attorneys to conflicting interests by requiring that they represent themselves as well as their clients in antitrust litigations.

3. BE IT FURTHER RESOLVED that section 5 of S. 390, which provides for the award of interest on actual damages from the date the complaint is served to the date of judgment, except where such an award would be unjust, is inappropriate in that:

a. It reverses the traditional obligation that a plaintiff prosecute his case by penalizing a defendant for delay without regard for the identity of the party responsible for the delay;

b. It creates a unique rule for antitrust cases without justification.

4. BE IT FURTHER RESOLVED that Section 6 of S. 390, which negates any inference that collateral estoppel

is inapplicable to antitrust litigation and which gives prima facie effect to judgments obtained by the Government in suits brought under section 4a of the Clayton Act, is appropriate.

5. BE IT FURTHER RESOLVED that as to Section 7 of S. 390:

a. The expansion of the jurisdictional reach of Section 7 of the Clayton Act to include "any activity affecting commerce" (Section 7(3)) is supported;

b. The expansion of Section 7 to apply to "persons" (Section 7(1), 7(2)), as presently drafted, is opposed;

c. The Section sees merit in an Amendment to Section 7 of the Clayton Act expanding the scope of that Section to reach acquisitions of corporate stock or assets by unincorporated associations or natural persons.

REPORT OF THE SECTION
OF ANTITRUST LAW OF THE
AMERICAN BAR ASSOCIATION ON S. 390
PROCEDURAL ASPECTS

Adopted by the Antitrust Section
Council on April 6, 1979

Introduction

This report sets forth comments of the Antitrust Section of the ABA on the procedural aspects of Senate Bill 390, introduced in the First Session of the 96th Congress by Senators Metzenbaum, Kennedy, Bayh, Baucus, Leahy and Morgan. The bill was introduced on February 8, 1979, and was referred to the Senate Committee on the Judiciary.

As noted below, S. 390, entitled the Antitrust Procedural Improvements Act of 1979, is an attempt to enact into law some of the recommendations made by the National Commission for the Review of the Antitrust Laws and Procedures in its Report to the President and the Attorney General. According to Senator Metzenbaum, the bill has the "strong support" of the Administration.

The Civil Practice and Procedure Committee of the Antitrust Section was instructed to report to the Antitrust Section Council on S. 390 at the 1979 spring meeting. The Task Force, appointed by the Vice Chairman of the Civil Practice and Procedure Committee, studied the proposed legislation and prepared this Report.

SUMMARY OF SENATE BILL S. 390

S. 390 is proposed as the "Antitrust Procedural Improvements Act of 1979," with a stated purpose of expediting and reducing the cost of antitrust litigation. The bill contains five sections addressing distinct and unrelated areas of antitrust law.

The first section of S. 390 is addressed to the Civil Investigative Demand ("CID"), by which the United States Attorney General is presently permitted to obtain documents and other items of information relevant to an antitrust investigation (15 U.S.C. §§ 1311-12). Specifically, S. 390 would expand that power to permit the Government, through a CID, to obtain information and materials received and developed in the course of discovery in private civil litigation. To accomplish this, S. 390 would enlarge the definition of "documentary material" presently found in 15 U.S.C. § 1311 to include "products of discovery" which the bill defines as

"the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any litigation or other judicial or administrative proceeding; any digest, analysis, selection, compilation, or any derivation thereof; and any index or manner of access thereto." (S. 390, section 2).

Under current practice, a CID cannot be used to compel the production of information protected from

disclosure under (a) standards applicable to subpoenas in aid of a grand jury investigation (15 U.S.C. § 1312(c)(1)) or (b) standards applicable to discovery requests under Federal Rules of Civil Procedure to the extent the application of such standards would be appropriate and consistent with the purposes and provisions of the basic statute (15 U.S.C. § 1312(c)(2)). A specific purpose in S. 390 is to clarify those rules and expressly permit a CID to reach products of discovery which are the subject of a protective order in the court or tribunal ordering the original discovery. Section 3(c)(2) of the bill would provide:

"Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law preventing or restraining disclosure of such product of discovery...."

Disclosure in that circumstance would not constitute a waiver of any right or privilege (S. 390 section 3(c)(2)).

To permit the originally discovered party an opportunity to protect his own interests in the information, the bill provides in section 3(a) that where a CID contains "an express demand for any product of discovery," the Attorney General would be required to serve a copy of that demand upon the person from whom discovery was originally obtained. Further, to provide a time period for objections, section 3(b) of the bill provides that the Attorney General shall not make the demand returnable

until after ten days have elapsed following the date of service of the demand upon the party from whom the products of discovery were originally obtained. Nothing in the bill, however, would prohibit the party upon whom the demand was served from complying with the demand during that ten day period.

The procedures for objecting are set forth in section 3(f) of the bill. Section 3(f) would continue in effect the provisions of 15 U.S.C. § 1314 which first, permit a party served with a CID specified time periods (twenty days from service of the CID or any time prior to the return date, whichever is shorter) to petition a court for relief from the CID and second, provide that the time for compliance on the objected to portions of the CID are, in effect, automatically stayed during the pendency of such a petition. As to an express demand for products of discovery, section 3(f) would permit the party from whom the discovery was originally obtained to petition for relief, and would give the court discretion to stay compliance with the demand by the party to whom the CID was directed pending consideration of that petition.

The grounds for seeking relief from a CID would be consistent with the present practice, namely any failure of the demand to comply with the provisions of the statute, or any Constitutional or other legal right or privilege

of the petitioner. Petitions objecting to the disclosure of products of discovery, whether filed by the party to whom the CID was directed or the party who had originally produced the information, would be filed in the district court of the judicial district where the proceeding in which the discovery was obtained is located (section 3(f)).

Under current practice, only officials or employees of the Department of Justice are permitted access to information received under a CID. Section 3(e) of the bill would modify that to permit outside "agents" access as well.

The second portion of S. 390 would add delay to certain other categories of conduct which can give rise, in the discretion of the court, to attorney liability for vexatiously increasing the costs of litigation. Section 4 of the bill would amend 28 U.S.C. § 1927 to permit a court to require an attorney to satisfy personally a cost bill, including expenses and attorney's fees, arising from "conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation."

The third portion of the bill relates to pre-judgment interest. Section 5 of S. 390 would amend sections 4, 4a and 4C(a)(2) of the Clayton Act (15 U.S.C. §§ 15, 15(a) and 15(c)(a)(2), respectively) to include in any recovery, whether by a private treble damage plain-

tiff, by the United States as a damage plaintiff, or by a state government suing as parens patriae:

"interest on ... actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time judgment is entered."

In all instances, the court would have discretion to adjust the interest award upon a finding that any or all of such an award would be unjust in the circumstances.

The fourth portion of S. 390 deals with collateral estoppel. Section 6 of the bill would amend section 5(a) of the Clayton Act (15 U.S.C. § 16(a)) in two respects. First, judgments and decrees under section 4a, (i.e. damage awards in favor of the United States as plaintiff), would no longer be exempted from the definition of "civil or criminal proceedings brought by or on behalf of the United States under the antitrust laws," with the effect that judgments in such cases would be given prima facie effect in the same manner as judgments in the more common criminal or civil proceedings brought under the Sherman Act. Second, section 5(a) of the Clayton Act would be amended to provide specifically that the prima facie effect given judgments in favor of the United States is not intended to restrict the application to antitrust cases of new developments in the common law doctrine of collateral estoppel. Section 6 of S. 390 states:

"Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel."

The final portion of the bill relates to the jurisdiction of courts in antitrust cases. Under section 7 of the bill, section 7 of the Clayton Act (15 U.S.C. § 18) would be amended by substituting "persons" for "corporations." Section 7 presently applies only to corporations. In addition, the jurisdictional requirements of the present act that a company to whom section 7 would apply be "engaged in commerce" would be extended to a company engaged "in any activity affecting commerce."

I. ANTITRUST CIVIL PROCESS ACT AMENDMENTS

A. Basic Approach.

The basic objective of sections 2 and 3 of the bill evidently is to enable the Government to obtain documents (and other discovery items) disclosed in private litigation, and thereby afford the Government some of the benefit of the efforts of a private plaintiff. The bill proposes that a CID, addressed to the discovery items as such, be used to obtain this information.

While considerations of judicial administration and governmental efficiency seem to justify this objective, the Section believes that the objective is currently realized by the Second Circuit Court of Appeals' recent decision in United States v. GAF Corp., No. 78-6102 (2d

Cir., filed February 9, 1979), modified on petition for rehearing (filed March 15, 1979). In that case the Government served a CID on GAF in order to obtain documents which GAF had obtained from Eastman Kodak through discovery proceedings in GAF's private antitrust action against Kodak. The Government's purpose in serving the CID on GAF was to obtain "the product of GAF's legal analysis of Kodak papers." Slip. Op. at 1305 (emphasis in original). The Court, in an opinion by Judge Gurfein, held that the Antitrust Civil Process Act empowered the Government to obtain, through a CID, evidence which a private party has obtained from its adversary through discovery as well as its analysis of that evidence.

In view of the Second Circuit's holding, it seems clear that the federal courts are not averse to appropriate applications for products of discovery. Because sensitive problems of judicial administration may arise in particular cases, as noted further below, a case by case development of the law under the existing statute appears preferable to a statutory change.

B. Comments and Suggestions.

While the Section accepts the basic premise of sections 2 and 3 of S. 390, it objects to many of the procedures which the bill, if enacted, would engraft on to the current statute. First, and of great importance,

there is significant tension between S. 390 and the full utilization of protective orders in private litigation. The protective order has demonstrated its value as one of the most effective devices for expediting discovery. From the purely practical point of view, discovery disputes in litigation today are routinely limited and even avoided by the use of protective orders. Furthermore, the existence of an adequate protective order is routinely of vital significance in persuading a client to acquiesce to discovery which he would otherwise have resisted to the utmost.

Legislation which places a party making discovery pursuant to a protective order in a weaker position to protect confidentiality than it would have been in had it not made the discovery may be counterproductive to judicial efficiency and tends to undercut that objective, which is espoused by the bill's proponents. S. 390 in its present form may be thought to disadvantage a discovered party to a measurable degree and can be expected to make private litigants reluctant to grant discovery under the umbrella of a protective order which is subject to being superseded without judicial action.

In this regard it is appropriate to consider the fact that exclusive possession of a document provides an opportunity to withhold disclosure until a court ad-

judication resolving a dispute as to its accessibility in discovery. Under S. 390, once discovery has been made, the documents may be revealed to the Government without the protection of a court adjudication.

Consequently, the time period provided by the bill for instituting proceedings to prevent disclosure is critical. In S. 390, this time period (which may be as short as ten days) is unrealistic. This is amply demonstrated by hypothesizing a treble damage suit with a sweeping document demand. Pursuant to that demand, hundreds of thousands of documents were produced and, because of a broad protective order, it was unnecessary to prepare for presentation to a court a careful analysis of the different types of confidential and trade secret documents which were included in that mass of material. Under S. 390, the party making that discovery could be limited to a period of ten days within which to analyze the mountain of material involved, and to prepare and file a petition which "shall specify each ground" for seeking relief from the CID. That is plainly an unrealistic schedule. Although negotiations for additional time may be envisioned, it is apparent that the bargaining position of the party who previously made discovery is significantly weakened as contrasted with the position of a party who still holds the confidential documents in his exclusive possession.

It is quite possible under S. 390 that a party who made production in reliance upon a protective order would not have as much as ten days, and might not have even one day, to file his petition. Although, under section 3(b) of the bill, the CID may not be "returnable until after ten days," the bill provides no real assurance that the party to whom the documents were produced will not make an immediate return.

The importance of the foregoing considerations is not only that defendants may and probably will be disadvantaged by S. 390, but that there will be a significant impediment to discovery in the initial action.¹ This effect could be somewhat ameliorated by a substantially extended time period, and by insuring in section 3(b) that an express demand for a product of discovery would be neither "returnable nor returned" (*i.e.*, complied with) until the conclusion of the specified period or until any contest relative thereto was decided. A more effective modification would be a provision that pre-existing protective orders would not be superseded without order of court, upon reasonable notice to the person who had made the discovery.

¹ Those impediments in the initial action will result from both an adjustment in the attitude of the court toward the discovery process, *see, e.g., Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 78-1 Trade Cas. ¶ 61, 961 at 74,068-69 (E.D. Pa. 1976), as well as that of the parties, *GAF Corp. v. Eastman Kodak*, 415 F. Supp. 129, 131-32 (S.D.N.Y. 1976).

There are additional grounds to oppose the wholesale vacating of prior protective orders:

(1) If the initial order was entered in a federal district court, S. 390 does provide that the petition protesting the express demand be filed in the same district. There is nothing, however, which even suggests that the matter should be referred to the judge who entered the earlier order. In view of the variety of local procedures concerning assignment of matters, perhaps the statute could not actually insure resubmission to the same judge. However, it should provide that ordinarily the original judge should be the proper judge to consider the petition, unless that judge is unavailable.

(2) If the protective order was initially entered in a state court, it is simply disregarded under S. 390, with no consideration of traditional constraints on the relationship between state and federal judicial systems. This wholesale disregard for valid state court orders, which violate no law, stands in stark contrast to the solicitude shown for state court litigation which allegedly facilitates antitrust violations cf. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).

Another problem area in the CID provisions of S. 390 is the "work product problem." The definition of "product of discovery" clearly comprehends what would

be deemed lawyer's work product under the protection of Hickman v. Taylor, 329 U.S. 495 (1947). Although conceptual problems may arise in applying the work product protections of Federal Rule of Civil Procedure 26(b) (3) to a CID, there is a residue of generalized protection of materials prepared with an eye to litigation which is vitally important.

Such work product problems may arise even where the CID is directed to the party to whom discovery was made. A lawyer might be willing to turn over to the Government copies of documents he had received as a result of discovery, but he would not necessarily be willing to give anyone all of his own analyses or indices of those documents. This will be especially true where the lawyer's analysis of his adversary's documents contains his perceptions about his client's case as well as information which his client regards as privileged. It is clear from the Second Circuit's opinion in United States v. GAF, however, that it is the analyses and indices which the Government wishes to obtain. Furthermore, if the person from whom the discovery had been obtained was successful in obtaining some limitation on the reproduction of documents, the lawyer would be loathe to spend the time to go through his voluminous work product to redact all references to those documents, and would be absolutely unwilling

to permit the party making discovery to inspect and check the completeness of his redacting effort.

The work product problem would be worse with respect to a CID directed to a lawyer relating to documents produced by his client or by a codefendant. Nothing in S. 390 clearly states that the lawyer's analyses and computer data bases of his client's own documents are not "products of discovery." And an assertion by petition that the client's own documents are not "products of discovery" would be weakened by the following:

(a) Congress in S. 390 had announced a specific policy of production directed toward exactly the type of material the lawyer was trying to protect; and

(b) Under the specific terms of section 3(c) (4) of S. 390, an "express demand for any product of discovery supersedes any inconsistent...rule...preventing or restraining discovery..." and the work product doctrine could be argued to be such a rule.

The importance of protecting work product has been the subject of much debate. However, the Section deems it essential that an attorney provide his client with the benefit of any litigation advantage which can accrue from thorough preparation. The adversary system generally depends upon this principle. S. 390 threatens to undermine this concept by causing attorneys to avoid

certain types of document analysis and evaluation out of a concern that their work product, which may contain their own client's privileged information, will become the subject of a CID. Accordingly, that portion of S. 390 which renders work product subject to the general rule for production of products of discovery should be opposed.

A final provision which modifies the CID statute allows the Antitrust Division to use outside agencies to analyze documents produced under CIDs. The Section supports this change in the statute. However, one problem is to be noted: Under section 3(d) of S. 390, the requirement of approval by the discovered party to eliminate the obligation of confidentiality of CID material applies only to documents produced under an "express demand" (typically, products of discovery covered by a prior protective order). The bill should extend the requirement to any product of discovery to avoid creating a stimulus to further proliferation of protective orders in private actions.²

² Even if S. 390 is modified to meet the mentioned objections, it will inevitably motivate a discovered party in a private action to seek some protective order for the entirety of the production. Such an order will insure that products of discovery are produced only under an express demand, with notice to the discovered party.

II. SANCTIONS FOR ATTORNEY DELAY

One of the major recommendations of the Antitrust Commission Report is the stiffening of sanctions for dilatory behavior. Section 4 of S. 390 is a direct implementation of the Antitrust Commission's recommendations and accordingly an analysis of its desirability turns upon an assessment of the Commission's conclusions.

If enacted, section 4 can be expected to have one of two polar results. If used, the sanction will have a chilling effect on the use of legitimate tactics and strategies by antitrust defendants and will result in deterioration in the quality of advocacy and representation afforded defendants. On the other hand, if, like other existing sanctions, the tool contained in section 4 is not used, the legislation will be ineffective.

The prospect of a chilling effect on counsel becomes real when it is realized that a decision on whether or not delay is unnecessary and dilatory will often depend upon the subjective attitude of the person who seeks to evaluate the situation. The achievement of a result which might appear to be insubstantial and unnecessary to one observer could be considered to be very substantial to another and, in some cases, could contribute to the successful outcome of the case. As a fundamental proposition, the performance of counsel in an important and complex case -- antitrust

or otherwise -- should not be jeopardized by the constant threat of sanctions and personal penalties.

If such penalties and sanctions are available for use against any attorney, that will, in all probability, have a chilling effect upon the use of many procedural remedies in a variety of circumstances. In every case, counsel will be faced with the necessity of determining whether or not he is to be visited not only with the results of failure, but also the imposition of sanctions, which will impugn his professional reputation and threaten his financial well-being. Litigation counsel's responsibility is always heavy, and the pressure would be increased by the threat of easily-imposed sanctions.

In this respect, section 4 of the bill puts an attorney in an untenable position by creating a conflict of interest which is impossible to escape. On the one hand, the attorney must represent his client "zealously within the bounds of the law." ABA Code of Professional Responsibility, Canon 7. On the other hand, section 4 requires that the attorney protect himself from personal sanctions which will be imposed if the court perceives his zealous representation to be conduct engaged in "unreasonably and primarily for the purpose of delaying or increasing the cost of litigation." The expected result will be that the attorney will be forced to repre-

sent himself as well as his client in a situation where personal jeopardy may result from stout advocacy on the client's behalf.

Disciplinary Rule 5-101 seems, by its terms, squarely to prohibit an attorney from accepting employment where it will give rise to such a conflict unless his client consents to it after full disclosure.

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

The bill makes disclosure and consent meaningless because, if the bill is passed, every attorney who tries an antitrust case will face the conflict. The expected result will be timid representation by antitrust defense lawyers who fear the stigma and financial peril of being penalized for vigorous representation of their clients. Such a result can in no way be considered desirable.

The second horn of the dilemma created by section 4, that the sanction it contains will not be used, can be established by reference to the Commission's staff paper which is replete with references to the proposition that judges and counsel do not utilize the sanctions presently existing in the Rules. The failure of individuals to utilize tools available to them should not be taken as an

indication that such tools are useless. If existing sanctions against delay, which are far less severe than those proposed, are not used, the sanctions of section 4 cannot be expected to be utilized. Accordingly, section 4 of S. 390 is both unnecessary and ineffective.

If the Congress insists on enacting section 4 of the bill, certain safeguards should be added to minimize the chilling effect which will result from use of the personal sanctions. The safeguards are based on a presumption that all counsel are competent, diligent and ethical. Consequently, there should be a very substantial burden on anyone who contends that counsel is acting otherwise. Accordingly, it is believed that there should be three requisites for the imposition of sanctions or penalties:

- (1) a heavy burden of proving improper motive,
- (2) at least one warning by the judge with respect to the possible continuation of conduct which is deemed reprehensible, and
- (3) delays in the imposition of personal penalties upon the lawyer until the end of the case. The successful conclusion of the prosecution or defense of a lawsuit might very well help bring into clearer focus the effect of the conduct in question.

III. PREJUDGMENT INTEREST

Section 5 of S. 390 implements another recommendation of the Antitrust Commission by establishing a general rule that a successful antitrust plaintiff would receive interest on actual damages awarded from the date of service of the complaint to the date of judgment. The court has power to adjust (or entirely deny) prejudgment interest if it deems an award unjust. According to the Report of the Antitrust Commission, as well as the Justice Department's letter supporting S. 390, the denial of interest would primarily occur where a plaintiff had itself engaged in dilatory tactics or purposeful delay.

S. 390 in its present form, as well as the recommendations of the Antitrust Commission (which were made over the adverse comments of a considerable number of commissioners), rests upon an improper reversal of the obligation to prosecute litigation. It seems fundamental that a plaintiff has the burden to prosecute his case, and if he lets it lie dormant, a defendant who acquiesces is blameless. If the case is properly administered by the court, the period of the plaintiff's inactivity should be short, but in any event the basic burden of pressing the case should not be shifted to the defendant.

It is true that the absence of the duty on the part of the defendant to advance the case toward trial

does not excuse dilatory tactics. Where improper conduct is found, sanctions are proper and should be invoked. Under such circumstances, an award of prejudgment interest could indeed be appropriate.

In most cases which proceed slowly, however, it is difficult to ascribe overall blame to one side or the other. Even where the delay may be perceived to lie at the defendant's door, it is likely that the underlying cause is not intentional obstruction, but overpreparation. An award of prejudgment interest will not be effective to alter the views of counsel as to the way in which a case should be prepared, and is not justifiable as a punitive measure under such circumstances. Indeed, to the extent that overpreparation is a result of the high stakes of antitrust litigation, this proposal, which further raises those stakes, may be counterproductive.

An additional objection to section 5 is that it creates a rule for antitrust cases different from other types of litigation, many of which raise problems of judicial administration as complex as those in the antitrust field. Not all of the force of this comment is blunted by the fact that special attorney's fee award provisions exist in antitrust suits, since that incentive to litigation, like the trebling of damages, was thought by Congress

to be peculiarly necessary in the antitrust field, whereas problems of delay are common to all complex litigation.

It is worthy of note that there is currently under consideration within the American Bar Association a proposed Report with Recommendations of the Special Committee on Coordination of Federal Judicial Improvements which, in principle, advocates the award of interest back to the accrual of the claim "in all cases where the plaintiff has suffered a loss or defendant has been unjustly enriched because of his actions toward the plaintiff." That Report has not been taken up by the House of Delegates, and accordingly must be deemed simply the view of a group of individuals within the Association. It is, however, interesting that that Report observes that the award of prejudgment interest as of right would not be justified as a device to encourage settlements and discourage delay because of its failure to distinguish between a defendant who has "resisted through the legal process from belief that he is in the right" and one who has sought "to stave off a result he knows to be right or ... has used 'the law's delay' to put off the inevitable."

The foregoing factors establish the need for a modification of section 5 to authorize the award of

prejudgment interest only when, under all of the circumstances, the court finds it just to make such an award. The court's discretion in making such a determination could be informed by such factors as the assertion of claims or defenses so lacking in merit as to suggest bad faith, the cooperation of counsel and parties in expediting the litigation and, of course, any indication of intentional delay.

IV. COLLATERAL ESTOPPEL

Section 6 of S. 390 is designed to eliminate any implication, stemming from section 5(a) of the Clayton Act, that the doctrine of one-way collateral estoppel is not applicable in the antitrust field. Justification for the legislation is found in the Antitrust Commission Report, which recommends such legislation on the ground that application of collateral estoppel principles will enhance the deterrent effect of the antitrust laws and promote efficient adjudication of complex antitrust cases.

The Section believes that section 6 is appropriate legislation. It believes that, in view of the logic and efficiency which underlie Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079 (U.S. January 9, 1979), a statute which was enacted in order to give a treble damage plaintiff greater rights

than existed at common law should not today be used to deny him the benefits of the common law's growth.

However, the efficiency objectives of section 6 will be lost if plaintiffs are allowed to reprove the colorful events of an unlawful conspiracy in order to motivate a jury to make a liberal damage award. The broad discretion of a court in deciding whether to allow use of offensive collateral estoppel, as mandated by Parklane Hosiery, should be exercised to deny application of the doctrine where the plaintiff chooses to reprove his entire case, or seeks to highlight the damage issue with a few chosen items of liability evidence.³

It is also to be noted that section 6 modifies existing law by giving prima facie effect to judgments in Government adjudications brought under section 4a of the Clayton Act and by providing that nothing in section 5(a) of the Clayton Act shall be construed as limiting the application of collateral estoppel in antitrust cases. In general, those changes are not opposed.

³ The plaintiffs should be required to either rely on collateral estoppel, or to render proof on the issue of liability.

V. MERGER JURISDICTION

The Antitrust Section's views concerning Section 7 of S. 390 are expressed in the accompanying report prepared by the Section's Committee on Section 7 of the Clayton Act.

REPORT OF THE SECTION OF ANTITRUST LAW
OF THE AMERICAN BAR ASSOCIATION
ON S.390-SECTION 7 ASPECTS

Adopted by the Antitrust Section
Council on April 6, 1979

Introduction

Section 7 of the Antitrust Procedural Improvements Act of 1979 (S. 390) provides for: (1) the expansion of the jurisdictional reach of Section 7 of the Clayton Act to include mergers between firms "affecting" commerce but not "in commerce" (§ 7(3)); and (2) the expansion of the jurisdictional reach of Section 7 of the Clayton Act to include unincorporated associations or natural persons (§ 7(1), (2)).

We support in principle the expansion of Section 7 of the Clayton Act to include mergers where the corporations involved are engaged in activity which affects, but is not directly a part of, interstate commerce. We believe that this change will close a significant and recognized gap in the Clayton Act's coverage. However, as set forth more fully below, we believe that care should be taken to assure that there is harmony between the affecting commerce language of other antitrust law provisions and the proposed new language.

With respect to the proposed change to bring unincorporated associations or natural persons within the scope

of the Act, we believe action should be deferred until there is adequate study demonstrating a need for such a far-reaching change. We believe there is substantial reason to question whether the necessity for such an expansion in the scope of existing law has yet been demonstrated. We are also concerned that the amendment could have disadvantageous consequences that will not be foreseen without further study. We suggest that additional work be undertaken to determine (1) whether any threat to competition derives from combinations or acquisitions involving unincorporated firms or natural persons, and (2) the likely effect, particularly on the small business community, of expansion of the Clayton Act in the manner proposed. In addition, as explained more fully below, we would suggest that the Subcommittee consider the more limited approach of bringing the acquisition of corporate stock by non-corporate entities within the scope of Section 7.

I. Affecting Commerce

The proposed change in Section 7(3) of S. 390 which would bring mergers and acquisitions involving corporations engaged in activity "affecting commerce" within the scope of Clayton Act Section 7 is evidently intended as a response to the Supreme Court's decision in United States v. American Building Maintenance Industries, 422 U.S. 271 (1975). In

its opinion the Court there held that Section 7 of the Clayton Act (as presently enacted) "was not intended to reach all corporations engaged in activities subject to the federal commerce power", 422 U.S. at 283, and did not apply to a merger where the operations of the acquired firms were not "in commerce", but only affected commerce. Our Committee favors the proposed language of new Senate Bill 390 for a number of reasons.

First, we believe that the present language of Section 7, as interpreted in the American Building Maintenance decision, may, in a given case, limit the scope of Section 7 in a way that frustrates the Section's overall objectives. We believe that Congress intended to reach any corporate acquisition that tended substantially to lessen competition and that the difference between "affecting commerce" and "in commerce" in all probability constitutes an inadvertent loophole. For example, although the courts have repeatedly recognized that a relevant "section of the country" (as that phrase appears in existing Section 7) could be a county or a city, the requirement that the operations of both the acquiring and acquired corporations be "in commerce" may in some

cases preclude the Justice Department from acting to prevent an acquisition where one of the firms only affects commerce, regardless of the probable anticompetitive effects in the "section of the country" involved. Such a result is, at best, anomalous.

Second, the proposed amendment would clarify the now open issue as to when mergers and acquisitions involving foreign companies, which are only potential entrants into United States markets and are thus not "in commerce", may be covered by Section 7's provisions.

Third, the proposed amendment may work to simplify Section 7 litigation by eliminating the need for a trial on the issue of whether each corporation is engaged "in commerce". Heretofore, as illustrated in American Building Maintenance, some Section 7 actions have been impeded by the necessity for taking evidence on the volume of incidental interstate purchases or telephone calls in order to determine whether a company was engaged in commerce. These jurisdictional nuances are, of course, largely irrelevant to antitrust objectives.

Fourth, pursuant to Section 5 of the Federal Trade Commission Act, the Federal Trade Commission may challenge acquisitions and mergers that "affect commerce", so that following the decision in American Building Maintenance, the

power of the FTC exceeds that of the Justice Department. This result is illogical. Decisions as to which agency should handle a given matter should be based on considerations of agency expertise or agreed-to areas of responsibility, rather than on accidental jurisdictional differences.

Fifth, the Hart-Scott-Rodino Act requires that the Justice Department receive advance notice with respect to acquisitions or mergers "in commerce or in any activity affecting commerce." 18 U.S.C. § 18a(a)(1). Plainly, Congress wanted the Justice Department to have notice so that it could act with respect to any such acquisition or merger that posed a competitive threat. Yet under existing law it could not oppose such an acquisition if it merely affected commerce.

Lastly, most states have no legal machinery for the prevention of possibly anticompetitive intrastate mergers, and in those that do there has been relatively limited enforcement activity. Moreover, state law antitrust provisions tend to be inconsistent in approach; some state laws encompass only asset acquisitions, some reach only stock acquisitions, and others are unclear as to their coverage. Compare New Jersey Stat. Ann. § 56:9-4(b) (prohibiting anticompetitive acquisition of stock of one corporation engaged in commerce by another) with Mississippi Code Ann. § 75-21-13 (prohibiting anticompetitive acquisition of stock or assets of cor-

poration by a competing corporation). Thus, it cannot be expected that more effective state enforcement could fill the regulatory gap created by the present wording of Section 7. In fact, so long as the existing Clayton Act Section 7 language remains, there is some danger that proceedings under state law may be challenged as being preempted by existing federal legislation and as being in conflict with the federal regulatory scheme.

While we thus support the proposed change, we think it is important to add that there are always dangers that language in different (even complementary) provisions will be interpreted differently by the courts. Accordingly, we would urge that in its final report on the bill, the Subcommittee make it clear that the intent is to modify the Clayton Act's language so that it is congruent with that of the Federal Trade Commission Act and the Sherman Act.

II. Persons

To the extent that the proposed new Clayton Act language would bring businesses conducted as partnerships, associations, joint ventures, trusts, and sole proprietorships within the sweep of Section 7, we think passage of the provision should be deferred until there has been further

study or consideration given as to both the possible justification for and the effects of such a change. Because the change would bring within the provisions of Section 7 thousands (if not millions) of business entities that are not now covered, we believe caution is needed to assure against precipitous passage of possibly harmful legislation. We also think that less sweeping measures might be considered, particularly an amendment to bring within Section 7 the acquisition of corporate stock by non-corporate entities. Such a measure might close a genuine loophole without subjecting to the proscriptive provisions of Section 7 countless entities as to which no justification for coverage may exist.

In suggesting further study of the proposed provision, we recognize that some of the same important considerations which favor amendment of Section 7 to cover mergers by corporations whose activities "affect commerce" also indicate that the section should be amended to include non-corporate entities. We also recognize that in the end these may be properly compelling reasons for passage. For example, such an amendment would harmonize the coverage of Section 7 with that of Sections 1 and 2 of the Sherman Act, Section 5 of the Federal Trade Commission Act and the language of the Hart-

Scott-Rodino legislation.* Each of these statutes reaches "persons" and the effect of amending Section 7 in the manner suggested would be to make Section 7's coverage the same as those other statutes. Notwithstanding that, however, we see a substantial difference between the change to "persons" and the addition of the proposed "affecting commerce" language in that we know of no documented case for the proposition that combinations of unincorporated associations present the competitive threat that should be a prerequisite to such legislation. Moreover, the arguments that have been advanced in support of the proposed change may fairly be viewed as arguments that such coverage might be necessary rather than arguments based on demonstrable existing problems as to non-corporate business entities. We do not think Congress ought to pass proscriptive legislation based on possibilities alone and believe that it is therefore appropriate to defer passage of the "persons" amendment until additional supporting facts are gathered.

With respect to the need for additional study, we would note that industries such as real estate brokerage or professions such as law and engineering (which contain a

* Sections 1 and 2 of the Sherman Act prohibit restraint of trade and monopolization by any "person". The FTC has held in Beatrice Foods Co., 67 F.T.C. 473, 724-27 (1965) that acquisitions by or from noncorporate entities may be challenged under Section 5 because the language of Section 5 proscribes anticompetitive conduct by "persons, partnerships and corporations."

large percentage of unincorporated entities) tend to be characterized by low entry barriers and largely local markets with many competitors. In markets with such characteristics, mergers, acquisitions or combinations are not customarily viewed as threatening to competition. We also note that studies or investigations of competitive conditions in some or all of those industries and professions are presently being conducted by antitrust enforcement agencies and that, therefore, more information as to the competitive characteristics of such markets may be available in the not too distant future.

As to the accounting profession, where some organizations are quite large and charges have been made that there is excessive concentration, the Staff of the Subcommittee on Reports, Accounting and Management of the Senate Committee on Government Operations made a study in 1976 and concluded that still further study was needed. The report specifically stressed that any action to remedy concentration in the market for accounting services should not be taken without substantial attention being given to "the special purpose . . . in the Nation's economy" served by independent accounting firms. See The Accounting Establishment: A Staff Study ("Study") 46, Subcommittee on Reports, Accounting and Management of the Senate Committee on Government Operations (December, 1976).

Of the legislative and regulatory measures that were recommended in the text of the Study, the two which dealt with concentration in the industry were (1) that Congress consider requiring that major corporations change auditors every few years, or change the process by which auditors are selected (Study at 21), and (2) that Congress consider, after investigation by the Department of Justice and the Federal Trade Commission, "other methods of reducing concentration in the supply of auditing and accounting services to major corporations" (Study at 23). To our knowledge, neither the Department of Justice, the FTC nor any committee of Congress has completed or released findings based on such an investigation so that at this point it is not clear what action may be appropriate.

In addition to our concern as to whether there is a need for expanding the reach of Section 7 to cover non-corporate transactions, we are also concerned that there may be adverse effects from such legislation that have not been given sufficient attention. For example, consideration should be given to the effect the proposed change may have on small businesses by placing yet further legal burdens upon them. Even if small businesses were exposed only to the theoretical risk of suit by the Antitrust Division of the Department of Justice or private parties pursuant to the

provisions of Clayton Act Section 7, it could increase their legal costs because the possibility of challenge to combinations under Section 7 would have to be studied. In this respect we can imagine with some horror the possible need to study Clayton Act Section 7 issues each time partnerships operating in local communities changed their membership. We are also fearful that private claims under Section 7 could be increased materially on an essentially local level, thereby increasing the burden on the courts and small business or professional entities that cannot easily afford the heavy cost of litigation.

The Subcommittee should also consider the effect that the "persons" amendment might have upon judicial interpretation of Section 7. Care should be taken to ensure that the expansion of Section 7 to encompass transactions by entities which are predominately smaller than corporations (particularly if it is joined with new "affecting commerce" language) does not result in a perception by the courts and by counsel that Congress thereby intended to dilute the requirement that a merger or acquisition must "substantially" lessen competition to violate Section 7. In this respect it should be recalled that at the time of the 1950 amendments to Clayton Act Section 7, the Congress expressly avoided language that could cause Section 7 to impact too directly

on small business entities or essentially small business matters in local communities. Accordingly, if the Subcommittee proceeds with the "persons" amendment (as well as the "affecting commerce" change), we recommend that it consider adding clarifying language to ensure that a dilution of the "substantially to lessen competition" standard does not occur.

Conclusion

We believe that the amendment to bring within Section 7 transactions by corporations whose activities "affect commerce" is timely and well-conceived. However, we are concerned that the expansion of Section 7 to include non-corporate entities or natural persons may not have been studied to the extent necessary, and believe that it should not be enacted until such study has been completed.

Respectfully submitted,

The Section 7 (Clayton Act)
Committee

April 5, 1979

COMMONWEALTH OF PUERTO RICO
OFFICE OF THE ATTORNEY GENERAL
SAN JUAN

ADDRESS COMMUNICATIONS TO
THE ATTORNEY GENERAL

ABR. 9 1979

Hon. Baltasar Corrada del Río
Resident Commissioner
Congress of the United States
Washington, D.C.

Dear Resident Commissioner:

I am herewith referring to S. 390, also cited as the Antitrust Procedural Improvements Acts of 1979. This measure purports to expedite and reduce the cost of antitrust litigation, thus improving the effectiveness of the federal antitrust laws.

The Department of Justice gives its full endorsement to the proposed measure. The Department recognizes that both the federal⁽¹⁾ and the local antitrust laws,⁽²⁾ as they now stand, suffer from certain limitations which create difficulties in the investigation and prosecution of antitrust violations. These limitations were recognized by the National Commission for the Review of Antitrust Laws and Procedures, which then submitted specific recommendations to ameliorate problems in complex litigation. Four of these recommendations are contained in the bill now before us, namely:

1. That the government have access to discovery materials produced during private antitrust litigations. Said access can be assured by providing specific procedures with the interests of all parties in mind, and by preserving any rights and privileges with respect to the confidentiality of to such materials;

2. That reasonable sanctions be imposed upon attorneys who unreasonably delay litigation;

3. That prejudgment interest upon the untrebled portion of damage award be available to a successful plaintiff; and

(1) 15 U.S.C. 1 et seq.

(2) 10 L.P.R.A. 257 et seq.

4. That collateral estoppel be available in antitrust cases in order to avoid duplicative litigation, This doctrine which precludes a party to a prior action from utilizing in a second action those issues fairly litigated and necessary to the result in the first action should not be limited by the prima facie effect doctrine. No logical justifications exist for denying collateral estoppel effect to antitrust judgments in subsequent actions where the issues have been fully and fairly litigated.

In addition to the above-mentioned recommendations the measure proposes to expedite and increase the effectiveness of the Antitrust Division's Civil Investigative Demand investigations by clarifying said Division's ability to contract for independent support service. This proposal would not vitiate existing protection for the confidential treatment of sensitive business information. The bill will also expand the jurisdiction of Section 7 of the Clayton Act, (3) similar in scope to Article 5 of our local antitrust statute, (4) allowing the Antitrust Division to reach mergers or acquisitions involving unincorporated associations of firms whose activity affect commerce.

As stated before, the Department of Justice firmly endorses this measure and believes that it constitutes a very important step in increasing the efficiency of antitrust investigations and litigations. The Department recognizes the problems encompassed in this field because it has put into effect a very ambitious program whose aim is to eradicate those evils which the antitrust statutes propose to eliminate. In short, Puerto Rico's local antitrust statute combines the precepts included in the Sherman, Clayton, Robinson Patman, and Federal Trade Commission's Acts. Quite a task indeed!

It wasn't until this decade that in Puerto Rico vigorous implementation of antitrust legislation has been put into force. It was in 1973, year in which the Commonwealth government faced a series of problems which seriously affected our economy and in which the federal jurisdiction expressed a favorable opinion as to the undisputed effectiveness of the use of antitrust legislation in fighting the detrimental effects caused by the inflation-recession prevalent in the american economy, when the importance of the Department in protecting free and fair competition in trade and commerce in again recognized. A committee whose aim was to evaluate Law Number 77 and the Office of Monopolistic Affairs was created. Said committee rendered its conclusions on September 30, 1973, as a result of which Law Number 77 was amended, trying to give it the powers necessary to carry out the statute's purpose(5). Some of the amendments included were: to impose responsibility pursuant section 265 upon the officers of a corporation whenever

(3) 15 U.S.C. 18

(4) 10 L.P.R.A. 261

(5) 10 L.P.R.A. 266

the corporate entity they represent is found responsible of violations to Law 77; penalties were increased to \$50,000 or imprisonment not exceeding one year, or both penalties, if deemed necessary; and the investigatory powers of the Office of Monopolistic Affairs were amplified. (6)

But even with these amendments to the existing statute and with a greater conscience on the part of our citizenry as to what constitutes unfair business practices and attempts to monopolize, much remains to be done. The Office of Monopolistic Affairs is in a position to help foster the pueritorican economy and to correct prevalent practices which restrict free competition in trade and commerce; yet, due to the economic situation which has affected the Commonwealth's government during the major part of this decade, the Office of Monopolistic Affairs has lacked the economic resources to play this pivotal role in our economy.

In the fiscal years 1976-77 54 new matters came before the Office's consideration which, added to the 149 already under investigation came to a total of 203 complaints or investigations. Of these 203, 32 matters were solved remaining 171 under study. During said period, 3 civil actions were initiated. Two were solved remaining pending one. In addition, the Office of Monopolistic Affairs took part in two triple damages actions.

During said year, the Secretary of Justice gave two specific assignments to the Director of the Office of Monopolistic Affairs which were successfully completed; the office also intervened in 11 other special matters. Regulation Number VI was approved, which in essence proscribes certain practices prevalent in motion pictures distribution in Puerto Rico. The legal work was handled by 6 lawyers which were considerably assisted by the Economics Division.

The Annual Report for the fiscal year 1977-78 states that 146 new complaints were brought to the consideration of the office which, added to 171 pending matters, came to a total of 317. Of these 317, 83 matters were solved; the other 234 remained in their investigatory stage. Three civil cases were initiated in the Superior Court; one was solved, while two remained pending. In addition; the Office of Monopolistic Affairs took part in on triple damage action and fulfilled nine specific assignments of the Secretary of Justice. It divided a plan of holding seminars about the different aspects and principles of antitrust legislation, holding five during said fiscal year.

Both 1977 and 1978 have been crucial years in the development of our antitrust policies, for, in addition to the many duties already described during those two years, the Department was the recipient of a federal grant bestowed upon different states in order to improve the quality of local antitrust enforcement. Said money has been put to

good use; the Department has obtained the services of 6 investigators whose task is to obtain the necessary evidence to successfully prosecute antitrust violations. We are also in the process of obtaining the sophisticated electronic equipment which will store data and aid our professional personnel in determining whether we are in the presence or absence of an antitrust violation.

On June 23, 1978 Law 72 was enacted.(7) The same authorizes the Office of Monopolistic Affairs to initiate administrative proceedings in the Department of Consumer Affairs whenever any violation to Article 3 of Law 77 occurs, thus opening another forum where legal actions can be ventilated.(8) Said measure will prove very effective in expediting proceedings that arise because of unfair methods of competition and/or unfair or deceptive acts or practices in trade and commerce. This new statute puts the Office of Monopolistic Affairs in an analogous position with the Federal Trade Commission. Now, before having to initiate judicial action, any such violation can be prosecuted administratively in a shorter period of time.

As stated before, the Department of Justice has kept itself pretty busy in the fulfillment of the duties and objectives set by Law Number 77.(9) But much remains to be done if the Department is to keep the spirit of the law abreast of the times. Unfortunately, the puertorican economy has gone through very arduous times and the Commonwealth's government has been forced to set up very strict priorities for fiscal spending.

The need is there, they money is lacking. The Office of Monopolistic Affairs has operated in the antitrust area for several years (since 1964), but never with adequate personnel. We have been involved in all stages of antitrust prosecutions, but our investigative resources are, despite the above-mentioned federal grant, still limited. In several cases dealing with anti-competitive practices we do not have the adequate access to information. A basic requirement in successful litigation is thorough investigation which provides a sound basic for pre-court case preparations.

Several industries engaged in intrastate commerce and subject to state antitrust laws are exposed to anti-competitive practices affecting various levels of industrial operations and resulting in higher consumer costs and excessive profits.

The problems and limitations of enforcing vigorously the antitrust laws in Puerto Rico are many, but we recognize the fact that any amendments to expedite and reduce the cost of federal antitrust litigation, and, in general, improve the scope of antitrust prosecution, will eventually be adopted into our local statutes, thus making our labor more efficient and significant.

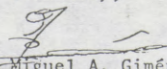
(7) 10 L.P.R.A. 259(c) to (j)

(8) 10 L.P.R.A. 259

(9) 10 L.P.R.A. 257 et seq.

Free competition is also our fundamental economic policy. As Mr. John H. Shenefield, Assistant Attorney General and Director of the Federal Antitrust Division, so ably states in his testimony before the subcommittee on Antitrust and Monopoly, competitive markets offer the greatest incentive for innovation, efficiency, productivity, and reduced prices. Antitrust enforcement serves to preserve and promote these goals. But antitrust enforcement must be expeditious and efficient if it is to be effective. We can make substantive progress in expediting antitrust litigation and reducing its costs through the modifications introduced by this Bill.

Cordially,


Miguel A. Giménez Muñoz
Secretary of Justice

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