Seminar Presentation:
"Anti-Trust Law and
the Telecommunications
Industry"

by Douglas Ginsburg

Do not quote without the permission of the author.
©1986 Columbia Institute for Tele-Information

Columbia Institute for Tele-Information
Graduate School of Business
Columbia University
809 Uris Hall
New York, NY 10027
(212)854-4222

SEMINAR PRESENTATION

"ANTITRUST LAW AND THE TELECOMMUNICATIONS INDUSTRY"

January 23, 1986

Edited Remarks of Speakers

Douglas Ginsburg
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Ken Jones
Milton Handler Professor of Trade Regulation
School of Law
Columbia University

Lawrence White
Professor of Economics
Graduate School of Business Administration
New York University

#115

This seminar was sponsored by the Center for Telecommunications and Information Studies, Columbia University Graduate School of Business, 809 Uris, NY, NY 10027, (212) 280-4222.

Remarks of Douglas Ginsburg
Assistant Attorney General, Antitrust Division
U.S. Department of Justice

This country's economy is undergoing a revolution of major proportions. We are evolving to an economy that is more and more dependent upon advanced technology. Our economic strength in the next two decades in an international marketplace will depend on our ability to foster technological growth through innovation in research and development.

One of the keys to such innovation is the ability to access and to communicate information efficiently. It thus is especially important to ensure that this country maintains the best telecommunications system in the world. The telecommunications system cannot, however, be static. Rather, it must accommodate a growing demand for more sophisticated and specialized services that satisfy diverse users needs and also provide high quality, low cost basic communications services.

Federal policymakers must be aware of changing market conditions in the telecommunications industry, whether the policymakers are in the Congress, on the Federal Communications Commission, or at the Department of Justice. In telecommunications as well as in other industries, markets generally function best when free of regulatory constraints. Government policy therefore should be designed to foster free market competition and to minimize unnecessary regulation. In the telecommunications industry, that policy is manifesting itself in the effort to open up--to demonopolize and to deregulate--the potentially competitive parts of the industry.

For example, as the enforcement agency responsible for the AT&T decree, the Department of Justice is committed to a competition-based policy that fully achieves the purposes of the divestiture decree. At the same time, however, we are very much aware of the rapid changes in the telecommunications industry. We will not fall into the trap of enforcing fixed rules and regulations beyond their useful life. In accord with that policy, the Justice Department will be conducting a study of the telecommunications industry during the next year in order to determine whether changes in the industry require modifications in the decree. That study will culminate in a report to the Court in January, 1987.

I will focus my comments today on our involvement in enforcing the AT&T decree and our more general policy initiatives, including our proposals to reform the antitrust statutes, which effect telecommunications as well as other firms.

I. <u>The AT&T Decree</u>

The AT&T decree, which is almost five years old, has brought about one of the most significant industrial restructurings in our country's history. The decree required AT&T to divest its regulated local operating companies by January 1, 1984. AT&T chose to do so by dividing its 22 Bell Operating Companies (BOCs) into the seven regional holding companies (RHCs), such as Nynex in this area. The decree left the potentially competitive manufacturing and long-distance businesses, as well as most of Bell Labs, to AT&T. In addition, the decree gave the RHCs the local plant and facilities, as well as sufficient assets to establish a joint research and development organization now known

as Bellcore. The decree was designed to foster competition in long distance service by requiring the RHCs' local operating companies to modify their central office switches to provide access for all long distance companies equivalent to the access provided to AT&T. This process began in 1984, and with minor exceptions is scheduled for completion by September of 1986.

Additionally, the decree enjoined the BOCs from discriminating between AT&T and the other long distance providers. The BOCs also were limited generally to providing local exchange telecommunications and exchange access services, unless a waiver was obtained from the decree court.

The decree's restrictions on BOC activity were based on historical and analytic factors indicating that two competitive dangers may arise when firms that control natural monopolies and that are rate regulated, such as the BOCs, participate in adjacent competitive markets. The first and most significant danger arises when, in order to compete in the adjacent markets, rivals require access to the natural monopoly facilities (here a BOC's local exchange network). Under such circumstances, the rate regulated monopolist has the incentive--and maybe the ability--to limit access to its monopoly facilities. More likely in the present circumstances, it might provide access to its competitors only on discriminatory terms. As a practical matter, however, it may be difficult for an outside observer to determine whether a particular refusal or discrimination is legitimate, or even whether the rate-regulated monopolist is in fact discriminating.

The second concern involves the potential for anticompetitive cross-subsidization. By following such a strategy, the monopolist can reduce its price to consumers in the competitive market and recoup its loss of income from customers of its monopoly services. Where this occurs, consumer welfare is harmed in two ways. First, the monopolist drives more efficient rivals out of the competitive market and may obtain the power to raise prices in that market. Second, consumers of the regulated monopoly service pay more than the true costs of those services.

Thus, the decree fosters competition in the interexchange and information services markets by requiring equal access, and by limiting the BOCs' entry into nontelephone markets, which eliminates the BOCs' incentive to retard competition in those markets.

II. Enforcing the Decree

Equal access is a concept with which no one disagrees in principle. It is also a concept that everyone acknowledges to be very difficult to define with precision or to accomplish. Nonetheless, the Department's primary decree enforcement effort is to ensure that equal access is implemented effectively. During 1985, we completed an investigation of how AT&T has discharged its obligations to achieve equal access for interexchange carriers. We currently are completing a similar investigation of the BOCs. We also have supported the FCC's efforts to foster equal access, by recommending the adoption of ballot and allocation procedures by which local telephone subscribers choose or are assigned to a long distance carrier. We will continue to work to make equal access a reality in 1986.

Equal access is not, however, a concept limited to interexchange service. The FCC is now considering how to foster competition in the information services marketplace. It is clear that we and the Commission have a common goal--to foster competition to the maximum degree possible, and to regulate only where a firm is a natural monopoly. As reflected in our comments to the FCC in the Computer III proceeding, the Department believes that the Commission generally should condition the authority of the BOCs to engage in information services on the BOCs' providing to others the same interconnection to its bottleneck facilities that it proves to itself or its affiliates. This also means that the location of the interconnection point should not put competing service providers at any significant disadvantage. Whether co-location at the carrier's central office site is feasible in any given case is a factual matter: the dominant carrier should have the burden of proof if it claims that co-location is not possible. In addition, all parties should pay the same interconnection fee under a tariff.

I can envision only one narrow exception to this general rule. If the BOC (or any other local telephone company) can demonstrate to the Commission that this general rule would result in significant efficiency losses, it may be appropriate to allow the BOC to integrate the ancillary service into its network--provided that it still affords other firms the closest comparable form of interconnection that is technologically available. Technology in the form of open architecture--that is, equal interconnection and co-location--may sufficiently reduce the

ability of the rate-regulated, bottleneck monopolist to provide discriminatory access to its facilities that an absolute ban on entry into adjacent competitive markets--at least information services markets--is no longer necessary. As a result, open architecture may provide an environment in which regulators and courts can control any residual competitive or regulatory problems with considerably less onerous and costly conditions. If new technology makes interconnection to the local switch for all information services providers truly transparent and equal, then the benefits of keeping the BOCs out of information service may no longer outweigh the costs.

Let me turn for a few moments to the procedure by which the BOCs seek waivers from the restrictions that the decree places on them. That process has absorbed significant resources over the last two years--both those of the Division's staff and those of the BOCs. We have, however, made substantial progress to streamline the process during the last two years. Moreover, with a few exceptions, the Department has made it clear that we will cooperate fully with the BOCs' efforts to enter new businesses. The Department has received 78 waiver requests (more than 3 per month) in the two years since divestiture. We have forwarded favorable recommendations to the court for 60 requests and have objected to only two requests. The court has approved 49 requests.

The Department has supported conditionally all waiver requests that have not involved interexchange services, information services, or the manufacture of telecommunications equipment or customer premises equipment--each of which is

specifically restricted by the decree. Any conditions we recommend in supporting waiver requests are intended only to block obvious opportunities for cross-subsidization and discrimination and to ensure that the firms can offer services that they would not be able to offer by direct request.

Similarly, the Department will avoid policies that would require a BOC to come back to the Court each time it wants to expand a business or alter a business strategy. The Department has sought to broaden many waiver requests, and carefully has avoided conditions that would require our ongoing monitoring of the competitive ventures' activities or of any transactions between the venture and the affiliated BOCs. We are very much aware that we are a law enforcement agency, _not_ a regulatory agency. Therefore, we have attempted to minimize--and if possible, avoid altogether--any conditions that require ongoing supervision by the Department.

In particular, the Department has been very supportive of--even to the point of encouraging--BOC entry into foreign ventures. Indeed, we have approved blanket waivers for all BOC activities outside the North American dialing plan area. The only restrictions the Department has required are those necessary to prevent the BOCs from using waivers for foreign ventures, thus allowing BOCs to indirectly enter a domestic line of business in which direct entry is prohibited. Even as to these general restrictions, the Department has informed the BOCs that they are free to come to the Department with more specific proposals that do not pose such problems. In such cases, we will

recommend that the court issue appropriate waivers.

Moreover, we recently filed a motion, joined by five of the BOCs, to make the waiver process more efficient when a BOC seeks a waiver substantially similar to a waiver already recommended by the Department or entered by the Court. We hope and expect that the motion will be granted by the Court and will further expedite the current waiver process.

It is my objective during the next year to continue streamlining our review and processing of waiver requests to the maximum degree consistent with our obligation to enforce the decree. In this way, the BOCs will be able to provide the greatest possible procompetitive benefit in the many industries in which their participation may have little or no anticompetitive effect.

III. The Legislative Initiative

While we expect to devote substantial time and effort to supporting procompetitive developments in this industry, the Division also is involved in an effort to ensure that the antitrust laws are not used to hinder competitive efforts in all industries. We have worked on the proposed legislative reforms of the antitrust laws, which will be introduced in Congress early this year. These proposals are designed to modernize the nation's antitrust and related international trade laws in four important areas: remedies, merger analysis, interlocking directorates, and import relief.

The time has come to reform private antitrust remedies. Our remedies proposal will address several related problems in the set of incentives and disincentives now facing antitrust

litigants.

At the outset, I should emphasize that the Administration clearly recognizes that private antitrust litigation can play a positive role in punishing wrongdoers and in deterring antitrust violations. The private suit against price fixers is an obvious instance of such procompetitive litigation. Private actions under the antitrust laws also carry the potential for abuse, however, particularly in suits by firms against their rivals or their potential competitors. The current system of incentives to sue and settle antitrust cases does not distinguish between those private suits that are likely to promote competition, and those suits designed only to advance one competitor's interest at the expense of its competition. This is the idea at the heart of our remedies reform legislation.

First is treble damage reform. Under the current statutory scheme, plaintiffs' recoveries in all private antitrust actions are automatically trebled. Trebling obviously provides potential plaintiffs with additional incentive to bring private actions. Where clearly harmful conduct such as bid rigging or price fixing is involved, trebling is entirely appropriate. Suits challenging such behavior are typically brought by the victims of overcharges or underpayments caused by these practies.

Where potentially procompetitive practices such as aggressive discounting or innovative distributional arrangements are involved, however, trebling can have serious anticompetitive side effects. Overdeterrence is a major concern here; trebling can cause firms to shy away from such potentially beneficial

conduct. Further. procompetitive practices that are adopted by firms are often challenged by their rivals or their potential competitors with perverse motivations to sue. Thus, the threat of a treble damages award may be used to coerce a competitively successful firm into abandoning or restricting practices that enhance efficiency and lower prices to consumers.

An optimal antitrust penalty would take into account the likely harm to society from the conduct and the probability that the conduct will be detected, prosecuted, and punished. Where such harm is obvious and the chance of its discovery relatively low, the penalty must be high in order to deter violations effectively. Conversely, where the harm to competition is uncertain and the conduct is visible, the penalty should not be more than compensatory damages to anyone injured by the conduct. The risks of mistakenly classifying beneficial conduct as anticompetitive also must be recognized in constructing an optimal penalty system. Unfortunately, the current in universal treble damage rule in antitrust cases bears little resemblance to such a system.

Our proposed changes in the treble damage rule will move us in the right direction. Specifically, we would amend the Clayton Act to limit the availability of treble damage to cases in which the plaintiff's case is based on overcharging or underpayment.

Amended in this fashion, the Clayton Act would continue to allow treble damage awards for persons who have been injured by reason of overcharges or underpayments, and thus properly focus the full deterrent force of private treble damage enforcement on unambiguously anticompetitive practices. Victims of these

practices, whether consumers or businesses, would retain the necessary incentive to discover and challenge clearly harmful behavior.

In cases alleging other types of harm, limiting recovery to full compensation addresses the overdeterrence problem, but does not deprive a plaintiff with a just cause of a complete recovery. Thus, the Clayton Act would continue strongly to deter cover cartel behavior, while avoiding deterrence--i.e., inhibition, of business conduct that benefits consumers and the economy generally. Significantly, the legislation would not alter the current rules for determining standing, injury, or liability in private actions under the Clayton Act.

There is no reason why the United States Government should continue to be limited to single damage recovery, when it has been overcharged or underpaid by an antitrust violator. This means there is less risk in cheating the federal government than any other potential victim. The result is predictably a major fraud on the taxpayers, and we must put a stop to it.

Next, our remedies proposal addresses the current imbalance in antitrust law regarding the award of attorneys' fees. Currently, prevailing plaintiffs are entitled to reasonable attorneys' fees. The general rule is, of course, to deny attorneys' fees to prevailing defendants. As you know, however, the Congress twice recently has corrected this imbalance--in the National Cooperative Research Act of 1984, and in the Export Trading Company Act of 1982.

In enacting these two statutes, the Congress recognized that

although private enforcement of the antitrust laws is an important supplement to government prosecution, some plaintiffs abuse the process. This abuse often takes the form of "strike suits," filed primarily to extract a settlement from a defendant for something less than the defendant's anticipated litigation costs. It may also arise where a competitor fears innovative procompetitive conduct by a rival, and files a potentially lengthy injunctive action to induce the defendant to abandon its plans rather than bear high litigation costs. This type of conduct undermines the purposes of private enforcement and increases the costs that litigation imposes on society generally.

Our legislation will address these problems by amending sections 4 and 16 of the Clayton Act to provide for the award of costs--including a reasonable attorney's fee--to a substantially prevailing antitrust defendant upon a finding that the plaintiff's conduct was "frivolous, unreasonable, without foundation, or in bad faith." Baseless litigation can be substantially deterred by these changes.

The final piece of our remedies reform proposal is claim reduction. Thus, the bill will amend the Clayton Act to provide that when a plaintiff settles with one or more defendants in an action under the Clayton Act, or releases a potential defendant from liability without filing a suit, the plaintiff's claim against the remaining defendants will be reduced proportionately.

Under current law, all defendants found liable for damages in antitrust cases are jointly and severally responsible for the plaintiff's entire trebled recovery. Under the joint and several liability system, should the plaintiff settle with any liable or

potentially liable party, the plaintiff's remaining claim is reduced only by the actual amount of the settlement. If a nonsettling defendant faces an already very substantial real liability it can envision that liability magnified if the plaintiff settles with other defendants for nominal or relatively small amounts--particularly if such settlements are with those responsible for a major portion of the plaintiff's damages. This "whipsaw" effect may force a defendant to abandon its factual claims and legal defenses, regardless of their merits.

Our legislation addresses this problem directly by mandating the reduction of the plaintiff's claim not by the settlement amount, but by the proportionate share of the plaintiff's damages fairly allocable to the settling defendant. Where unlawful concerted conduct has resulted in overcharges or underpayments--i.e., basically in horizontal cases--the amount of damages allocable to a settling defendant is that defendant's proportionate share of all the collaborating competitors' overcharges or underpayments in the market affected. For all other claims, the damages allocable to the settling defendant would be determined by its relative responsibility for the violation and by its benefits from the violation.

Next is revision of section 7 of the Clayton Act, which has been widely discussed in the press. The proposed legislation is designed to codify advances in merger case law and in economic analysis, and to eliminate the possibility that the past inconsistent and overly restrictive interpretations of section 7 by some courts will return to plague our economy. We propose to

make several changes in the statutory language.

The substantive standard now applied to mergers is whether "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The revised section 7 should ensure that the lawfulness or unlawfulness of a merger is based on a real probability rather than a mere possibility, of its having anticompetitive effects.

First, we would bring section 7 into line with current case law and enforcement policy, which requires a "reasonable probability" of substantial harm. Second, we would clarify that the statute is concerned with the avoidance of competitive harm rather than with the preservation of certain classes of competitors. While this concept has long been accepted in principle by courts interpreting section 7, the new language is a clearer expression of the concept and less likely to be misapplied.

Our proposal also provides a nonexclusive list of factors to be considered by the courts in determining whether a merger threatens to increase the probability that market power will be exercised. These factors will be instantly recognized as the principles underlying this Administration's Merger Guidelines. Thus, the courts would need to consider such important criteria as the number and size distribution of firms in the relevant market, before and after the proposed acquisition; barriers to entry; and the history of the market (including the industry's competitive conditions or, conversely, the presence of past antitrust violations). This array of factors will ensure that no one factor--and certainly not mere concentration data--will

determine a merger's legality, to the exclusion of other prohibative economic evidence.

In addition to these changes in section 7, our legislation will also seek to amend the Trade Act of 1974 in order to provide a new form of relief for domestic industries injured by import competition. The President would have authority to grant a limited section 7 exemption to mergers and acquisitions among firms in the injured industry, as an alternative to protectionist relief under the Trade Act.

The Administration has also given close attention to questions raised by the extraterritorial application of U.S. antitrust laws. We expect to support legislation to clarify the application of our antitrust laws in cases involving foreign commerce.

Finally, we will also seek to amend section 8 of the Clayton Act, which now generally prohibits service by any person as a director of two or more competing corporations, if any one of those corporations has capital, surplus, and undivided profits of more than $1 million. Our proposal would raise the jurisdictional amount for statutory coverage. Perhaps more importantly, it would create explicit _de minimis_ standards for analyzing competitive overlaps between companies.

These changes will eliminate the ban on interlocks where the danger of anticompetitive results from such interlocks is vanishingly small because of the inconsequential nature of the competition between the firms involved. This will allow many firms to retain better qualified directors, with no real

possibility of competitive harm to the public and no uncertainty regarding the legality of their choice of directors.

To sum up, I strongly believe that these legislative proposals contain important and necessary reforms to our antitrust statutes that will significantly benefit competition and consumers. We look forward to Congress' consideration of these proposals, and to the day when the President signs them into law.

While the last four years have been exciting ones in telecommunications, I would not be surprised if the best is yet to come--both for the industry and the public it serves. As I have indicated, the promotion of competition in telecommunications is one of the Antitrust Divisions's most important goals. It is but a particular application, however, of the goal set out in the President's Regulatory Program--"a government that regulates only where necessary and as efficiently and fairly as possible."

Remarks of Professor W. Kenneth Jones

School of Law

Columbia University

Doug focused most of his remarks on the problems of the local operating companies. I'll begin at that juncture, because Doug indicated when you have an important natural monopoly such as the local telephone company, there really is no escape from regulation. You may wish to call it by another name, but the options are very limited whenever there is a potential for integration between the monopoly company -- in this case the local telephone company -- and some activity in an adjacent market. (This might be provision of information services, manufacturing of telecommunications equipment, or long distance telephone service.)

The strategy embodied in the _MFJ_ is containment: limit the local exchange company to the provision of monopoly services and leave everything else to other firms. As Doug has indicated, that strategy simply is not a permanent solution, because it

results in drawing lines that may cease to be relevant as technology changes. To confine the local operating companies to their lines of business as they existed on January 1, 1984 may forego significant efficiencies as technology evolves -- for example, by integration of local operating companies and the provision of information services.

There's another problem with containment, clearly apart from the efficiencies that are attributable to the type of synergy that Doug mentioned. There is an elimination of the possibility of entry in a context in which entry may be significant. At the moment, there is no shortage of manufacturers of telecommunications equipment; and there are a number of long distance telephone companies. But it's not inconceivable to me that the local operating companies could be important entrants into the long distance market. Some of the existing competitors are not faring particularly well. For example, IBM decided to hedge its bets by affiliating with MCI. It's not inconceivable that there will be a shakeout in the long distance market, and

that once freed of the problems associated with access charges, AT&T may be able to exploit economies of scale and scope sufficiently significant to make life very difficult for its present competitors in the long distance market. At that juncture, or perhaps even before we reach that point and wholly apart from a synergistic relationship, the interests of the local operating companies in forming an inter-company long distance venture may begin to emerge. Regulation is designed to prevent discrmination and cross-subsidization; in general these policing activities have as their core the concept of unbundling. If you make the regulated company offer its services in separate packages, a customer can take some but not all of the packages. For example, it can obtain access to interexchange services and then tack on information service enhancements without prejudice. The trouble with that, as Doug indicated by his illustration, is that some of these add-on features simply may not lend themselves to unbundling. If the combination of telecommunications and information services is attractive because of adding on information services at the central office or because of some

other factor integral to the telecommunications function, it may be very difficult to unbundle telecommunications and information service and offer the two packages separately. In the event that such a conflict, I agree with Doug that you have to grit your teeth and accept the more efficient solution, even if it does run contrary to the idea of equal access. This is entirely consistent with my previous point, that containment as a strategy also gives up something in the interest of efficiency. I doubt we're ever going to reach a position in this complex area that will be sustainable for any period of time. The line of demarcation between monopoly and competitive services will move, and the technology will change sufficiently as to render necessary re-thinking of a strategy -- whether the strategy is containment or policing. I don't envy Doug's role in maintaining continuing surveillance over this difficult problem.

Remarks of Professor Laurence White

School of Business

New York University

It's important for me to tell you where I'm coming from. I arrived at the Justice Department three weeks after the initial Consent Decree was signed. Because I had done six or seven days of consulting for AT&T five years earlier, I was excused from doing any of the mop-up activities involving the MFJ. So I have nothing invested in MFJ.

Nevertheless, I think the idea behind the suit and the basic structure of the decree are very sensible. Doug expressed the basic principles absolutely correctly. There are two dangers in a regulated monopoly's being involved in vertically related activities. One is that it will use its bottleneck to impair competition in the related areas, favor its own subsidiary, and thereby earn excess profits in that other area. This is the one instance where vertical integration and the leverage story really do make sense. The second danger essentially is regulatory evasion -- i.e., that the regulated entity will transfer costs from the non-regulated competitive area into the regulated area through creative accounting. This would in essence increase the revenue requirement and make the rate-payers bear costs that really are not part of the regulatory area. I worry less about the impairment of competition aspect. But I do believe the regulatory evasion story.

And so I think basically the AT&T divestiture was a sensible one. We're going through a teething and shaking out period. Everybody has his or her favorite story about how service has deteriorated. I'm quite convinced that the competitive gains here are going to be worth any transitional difficulties. The thing that didn't get emphasized here is what we're trading off, when we focus on these dangers from the regulated monopoly having these other activities -- that is, excess profits and regulatory evasion. What we're trading off is the possible gain from vertical integration and synergies.

I think the trade-off was right in the AT&T divestiture, and that generally the gains from vertical integration and synergies are usually overestimated. So we should be erring on the side of keeping regulated monopolies out of these other areas. Ken Jones got it right when he just said that you let them when there are special interests. If they are just another competitor among many, who needs them? Why take the chance that there is going to be some competitive problem or some regulatory evasion set up?

Doug mentioned they've allowed sixty of the seventy-eight waivers. That worries me. Is it really important to let these companies into real estate, into lease financing? There might be some synergies, but there also might be some regulatory evasion. Yes, it's a trade-off. Where do you come out? I come out erring on the side of caution in terms of letting these companies into other activities.

Much to my regret, while I was at the Division we did not

apply these same principles to the GTE/Sprint merger. (I suppose GTE today perhaps regrets that as well!) I wish we had, because the same exact principles should have been applied to GTE's purchase of Sprint from Southern Pacific. The same principles already applied to electricity generation and distribution. Many of us believe that electricity generation is potentially or actually competitive, and that producers of electricity basically can sell their electricity at long distances from their generating sites. The distribution end of the business may well still be true natural monopoly and still needs to be regulated. But the provider of electricity doesn't have to worry about wheeling and common carrier obligations but basically the same story. If you can justify the AT&T divestiture, you could justify divesting electricity generation from distribution. You get some really nice competitive benefits there. You would also take away from regulators the really capital intensive end of the business where all the distortions from regulation can really occur.

I'm glad Doug brought up the issue of reforming the antitrust laws. Doug tells us that reform of the antitrust remedies is at the heart of the package and that there are lots and lots of crummy suits out there. As he said, there are 1,100 to 1,200 suits annually filed by private parties. That outnumbers the number of government suits filed by a factor of ten to one. And let me also remind you that in the last two years the Supreme Court heard nine antitrust cases and made eight

decisions. Eight of them were private suits; only one was a government suit. So those cases not only are numerous, but are also important for setting precedents. Again, there are lots and lots of crummy cases out there.

Doug is right when he says that in too many instances losers in the competitive process are sueing the winners, claiming predatory behavior of some kind, when in fact what is really going on is efficient pro-competitive aggressive behavior. But he is absolutely wrong in saying that the way to deal with the problem is to get rid of the treble damages remedy for those kinds of instances. The way to deal with the problem is to change the substantive laws, e.g. to make it clearer what is actionable and to rectify standing as the Division is trying to do. We should clarify the substantive laws, but retain serious penalties when there really is a serious violation. Using a change in triple damage remedy could make up for perceived deficiencies in drawing the legal lines. Now, the newspaper accounts of at least the early version of what the change in the remedies was going to entail said that treble damage remedies would remain only for horizontal offenses and would be taken away and would be reduced to only to single damages for all other offenses. That's not what I heard this evening, I heard flexibility in the damage remedy with various criteria being offered for whether something should be single, or double, or treble. Why not quintuple or sextuple damages, for the really dreadful stuff that's hard to ferret out? It's not obvious to me

that we ought to put a ceiling at trebles. I have a lot more sympathy for flexibility. It adds to uncertainty, but provides for proper tailoring of the remedy to the nature of the offense, the nature of things going on, and notions of fairness. But just seeing the elimination of trebling as a substitute for doing something about the substantive lines is the wrong way to be doing things. Move the substantive lines, but keep the penalties substantial.

Let me point out also that some good cases are not horizontal price fixing: there are some good cases that competitors may bring -- very many, but when they're there, you want an adequate remedy there. If a competitor really can show that his rival's actions have raised his costs -- e.g., through exclusive dealing arrangements -- you want an adequate remedy. Eliminating the treble damage remedy because there are too many crummy suits out there simply gets it wrong.

Changing joint to several liability is a tough problem. But it's going to reduce deterrence, and that is going to reduce the incentive to settle as well. That's the downside of that. Unless they are really extortion, settlements are good things, and you don't want to reduce them. Once again, change the substantive laws.

Third, allowing the defense to get their attorney's fees paid when it really is a crummy case is right on target. When the case really is frivolous, then allow your defendants to get their attorney fees. Finally, let's remeber what Section 7 of

the Clayton Act says: mergers should be disallowed where they tend to create a monopoly or lessen competition in any line of commerce or any section of the country. The language isn't all that bad, provided that the interpretation is reasonable, and we are moving toward reasonable interpretations. The merger Guidelines, of which I am a coauthor, have moved us even further. And I don't see any significant backsliding. I don't see any real need to codify them. You do end up putting things into stone that perhaps shouldn't be put there. Maybe we'll get smarter about law in the next decade, so why have this thing really put into stone.

Doug didn't mention the antitrust exemption for industries that are being hurt by imports. That's about the worst thing that I can think of. That's just not the way to deal with our problems of industries being subjected to serious import competition. So on this legislative reform there are basically five items: the treble damage modification; the joint and several liability modification, the nuisance suit modification; the merger provisions; and imports. To bring out the university professor in me, I would give the package about a C-. But I'm an easy grader.