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THE ANATOMY OF A SEVENTY MILLION DOLLAR SHERMAN ACT SETTLEMENT—A LAW PROFESSOR'S TAPE-TALK WITH PLAINTIFF'S TRIAL COUNSEL

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*Robert Emmett Burns***

Managing the large anti-trust class action is a monumental task requiring coordination of the activities of large numbers of plaintiffs and attorneys. In this interview, Professor Burns—through a sequence of predetermined questions—investigates the methods used by one attorney, Frederick P. Furth. Specifically discussing one case involving a very large settlement, Mr. Furth outlines procedures involved in managing the large class action. A series of appendices, compiled at the initiative of Professor Burns, provides valuable background for the discussion.

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I. INTRODUCTION

THE case of *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), 357 F. Supp. 832 (N.D. Cal. 1973) represented something of a milestone in multi-district class action litigation. The litigation involved over five thousand plaintiffs, several hundred lawyers, and seven defendants. The

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problems involved in the management of such complicated litigation were multi-farious, though indicative of many problems in discovery and procedure involved in other anti-trust litigation less complicated than the *Wallboard Cases*. In an effort to consider—and sort out—these complexities, an interview was conducted with Mr. Frederick P. Furth. Mr. Furth, an anti-trust attorney from San Francisco, served as the plaintiffs' liaison counsel in the *Wallboard Cases* and is widely experienced in the use of innovative devices for management of large class action suits.

The interview is divided into five parts including the so-called "front and back burner cases" (those cases pursued to establish liability, and those cases that merely sat in waiting); gathering requisite information for the complaint; pre-trial discovery and tactics for freezing testimony on complicated issues; settlement; and some "trial practice pointers."

The article concludes with an extensive series of appendices, derived from documents filed in the litigation, including memoranda, and excerpts from the Plaintiff Weekly Newsletter, a device used by liaison counsel to keep members of the class up to date.

II. THE FRONT AND BACK BURNER GYPSUM CASES

REB: How did you come to handle the first *Gypsum* cases? Was it a referral or walk in?

FPF: Like almost all of the business that I handle, it was a referral by another attorney—a classmate.

REB: How did he recognize that there might be potential in an anti-trust case here?

FPF: The attorney had a client who was a small dealer in Gypsum Wallboard. The client began to notice that all of the Gypsum companies he was dealing with had published similar price and similar sale terms and conditions. The client was concerned about this and came to the lawyer that referred the case to me.

REB: Was this in the setting of an industry marked by keen competition and price warfare as an historical matter?

FPF: Well, there had been, up to 1965, some competition at least in granting the discounts of list prices. Suddenly, all of the discounts for list prices were eliminated. That caused

the client to go see his lawyer.¹

REB: How did your first *Gypsum* complaint case become a milestone in anti-trust multi-district litigation?²

FPF: After we had filed the initial actions and pursued the case for some time, certain additional plaintiffs filed class actions and then the court decided to try the initially filed actions as a pilot case for the class actions. When you have a large litigation of many plaintiffs, I think we had over five thousand plaintiffs in the *Gypsum Wallboard* case, you cannot try all five thousand plaintiffs, or you would never finish discovery since defendants would always be asking to discover from the last filed plaintiff. So we put plaintiffs on what we call the front burner and the back burner, and in this case we took the six additional dealers who filed and put them on the front burner and we put everybody else on the back burner. All the other actions were stayed pending the pilot trial on liability, for these six dealers.³

REB: Was unified expedited discovery procedure employed in this case?

FPF: I think it was to this extent. Had we proceeded without the pilot trial, as I said before, the defendant would have liked to have transaction interrogatories and other dilatory discovery go on forever, as against the plaintiffs. In this case, the court simply said, you can discover against these six plaintiffs, but no one else. Then we go forward with our discovery, or complete our discovery, against the defendants, and a trial date would be set and that is what was done.

REB: How did the procedure you employed differ from standard multi-district expedited discovery procedure under 28 U.S.C. 1407?⁴

1. See generally Markovits, *Oligopolistic Pricing Suits, The Sherman Act and Economic Welfare*, 26 STAN. L. REV. 493 (1974).

2. Multi-district and anti-trust litigation refers to multiple civil actions pending in one or more district courts having common questions of fact. With the addition of 28 U.S.C. § 1407 (1970), a judicial panel on multi-district litigation provides authority for temporary transfer, coordination and consolidation of the cases at pre-trial. See generally 1 J. MOORE, FEDERAL PRACTICE, MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (2d ed. 1969).

3. See Appendix B: History of the "Back-Burner" Cases, pp. 888-90 *infra*.

4. Though the first multi-district collections were the Sherman Act suits against

- FPF: Well, as you know, this was a multi-district case, one of the first ones, and the actions from all over the country were centralized in the Northern District of California before Judge Alfonso J. Zirpoli. The court expedited discovery, sometimes even further than envisioned by the multi-district panel Manual for Complex Litigation which outlines federal multi-district litigation. The manual does not totally envision a pilot trial with affirmative collateral estoppel, as was done here.⁵
- REB: Would you explain how the affirmative collateral estoppel was applied here? It's been used occasionally in airline cases⁶ but I believe this is the first time it was employed in this manner.⁷
- FPF: I believe it was the first time it was employed on such a massive level in a complex anti-trust case. The court tried the defendants with a pilot number of plaintiffs, a limited number of plaintiffs on the liability issues. If the plaintiffs won—and in this case they did win,⁸ the court holding that there was a price conspiracy for a two-year period—the remaining plaintiffs would make a motion for partial summary judg-

various motion picture producers, distributors and exhibitions (*United States v. Paramount Pictures Inc.*, 334 U.S. 131), the origins of Section 1407 which expedited discovery procedure were the electrical equipment Sherman Act Price Fixing suits in 1960-61 where 1,900 actions involving 25,000 treble damage claims were brought in thirty-four districts. See Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

5. See Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REV.* 41 (1971).

6. E.g., *Hart v. American Airlines, Inc.*, 304 N.Y.S.2d 810, 61 Misc. 2d 41 (1969). An excellent analysis of the *Hart* decision's complication in multiple litigation situations can be found in Note, *Civil Procedure—Collateral Estoppel—Affirmative Application in Multiple Litigant Situations*, 19 *DEPAUL L. REV.* 410 (1969). See generally Note, *The Impact of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 *GEO. WASH. L. REV.* 1010 (1967). Collateral Estoppel has been held applicable to criminal cases. *Ashe v. Swenson*, 397 U.S. 436 (1970). *Res Judicata* and *Collateral Estoppel* in disaster litigation can be viewed as a form of compulsory joinder. In a stress age of litigation volume and velocity, they belong very much to the future. The important thing should be whether *there* was that one adequate day in court and not how many non-privy "freebees" appear later. See, e.g., *Caufield v. Fidelity & Cas. Co.*, 378 F.2d 876 (5th Cir. 1967), where defendants obtained a federal court motion to dismiss one of numerous cemetery desecration suits on grounds that the issues had already been tried in a state court and the defendant found not guilty.

7. Re collateral estoppel, see Appendix C, pp. 890-93 *infra*.

8. See Appendix A: Pre-trial judgment, opinion of the court, pp. 887-88 *infra*.

ment on the doctrine of collateral estoppel. A partial judgment was entered in favor of all other plaintiffs so far as liability was concerned, it being partial because only the liability issue had been tried.

REB: Are there any estoppel rights for defendant or does it work the other way?

FPF: That is a very interesting question. Originally in the liability trial, the plaintiff had attempted to prove a conspiracy based on direct price fixing. We succeeded and also attempted to prove a conspiracy based on verification, or namely, the calling by one competitor on another to check his prices. We attempted to prove a verification conspiracy for two years. The judge held against us on the verification conspiracy stating that the verification was done to conform with the Robinson-Patman Act or the good faith defense of meeting price competition. When we got up to argue the motion for collateral estoppel, the defendants, of course, first opposed this motion as being inappropriate; but if the collateral estoppel was to be granted for the two years, the defendants argued that they ought to get a judgment in their favor for the other two years of the verification period. The court held against them on both points saying, I think quite properly as a matter of law, that these other plaintiffs had not had their day in court on the verification conspiracy. It ended up by the plaintiffs—all of the plaintiffs—getting the benefit of what we had won in the pilot trial, but not having assumed the detriment or what we lost in the pilot trial.⁹

REB: What kind of financial resources from the client are needed before instituting a private anti-trust case?

FPF: I think, in candor, that it depends on the particular lawyer. Some lawyers are willing to take cases with less costs than others. On an average, I would think that the client would need at least \$5,000 in costs and payment of some retainer.

9. A "tag along" case is "a civil action apparently sharing common questions of fact with actions previously transferred under Section 1407 and which was filed or came to the attention of the Panel after the initial hearing before it." According to the March 1970 Report of the Judicial Panel on Multi-district Litigation, nearly two-thirds of the 502 cases transferred by the Panel between July 1, 1969 and June 30, 1970, were "tag along" cases.

REB: When is the class action most and least appropriate?

FPF: First, I think that the class action is to some extent to be viewed as not always totally in the interest of the particular litigant. When a particular litigant comes to you, what he wants is his own recovery. But in some circumstances his potential recovery is small; or it would be very difficult for him to pursue the litigation alone; or the attorney would want to put greater pressure on the defendants by filing a class action; or perhaps the attorney would not want to handle it as an individual action because the potential recovery would not be significant enough.

REB: With respect to the *Gypsum* case, how many attorneys, when the front and back burners became one, were involved in the proceedings?

FPF: Well, individual names, I would say in the area of 150 to 200.

REB: Did all the plaintiffs who moved for partial summary judgment, approve or appoint counsel to try the front burner cases?

FPF: In this case they did not. I had pursued the litigation for several years before the rest of the plaintiffs and their counsel became very actively involved in it, and therefore I suppose I was a logical choice by virtue of the fact that I had so much experience in the case. But what happened in this case was that after the liability had been established and after the damage trial, I was appointed chief liaison counsel for the plaintiffs, five classes were established, class representative and class counsel were appointed for each class, and I coordinated the litigation up to the present time.

REB: How did you, as liaison counsel, communicate with all the plaintiff classes and their lawyers?

FPF: We followed the practice of sending out a newsletter—the so-called *Gypsum Newsletter*.¹⁰ We numbered each one so that anyone coming into the case started to get them, could get a full set of them, and so anybody involved would know he had not missed any. Both sides to the litigation served

10. See Appendix D: Excerpts from Plaintiff's Newsletter, pp. 893-94 *infra*.

papers only through their liaison counsel. We used the newsletter to individually serve all plaintiffs' counsel with any pleadings we received from defendants' liaison counsel. Counsel was given the responsibility to serve on all plaintiffs' counsel. The service on liaison counsel was effective service. There were approximately ten defense firms involved and service on the liaison counsel for defendants was service on all of them. We had many meetings before every hearing. We would virtually rent a hall and have a large meeting and I would conduct the meeting and we would get everybody's view and try to bring everybody together. Fortunately we had, I think, a very distinguished group of attorneys and after argument we usually came to the same conclusion. When somebody decided they simply did not want to go along with the majority, I would carefully prepare a schedule which would permit him to voice his objection in the court in an orderly manner. In court, we would present the majority view, and then say that there are certain people who would like to speak who have a different view. We always tried to keep the personalities out of it and to keep it on the substantive issues.

REB: Was this pursuant to rules of court, the manual, or your best sense of the situation?

FPF: It is a logical thing to do. I do not know of any manual on it. It seemed very clear to me that we needed a very tightly organized ship. To have the plaintiffs' counsel arguing all the time in front of the defense counsel would have, it seems, a deleterious effect on the case. Further, I think it affected the defendants and their counsel in that we were so organized and stayed together as distinguished from some cases where plaintiffs' counsel are just fighting each other every step of the way. We had enough to fight about with the very distinguished and able defense counsel on the other side.

REB: A recurring thought in the area of estoppel or joinder is the question to what extent should one attorney be required to be bound by what some other attorney does? Of course, unless there *is* some element of compulsion and group re-

sponsibility for individual decision, whether it be the liaison counsel or someone else, you don't really come to grips with the problem of the volume, numbers of suits, attorneys, common causes and potential for dispute and delay.¹¹

FPF: One of the things that I tried very hard to do was to give full information to all plaintiffs' counsel so they were always informed of what was going on and I think through this one gains a certain amount of cohesion because everybody knows what is going on. The second thing is to make no so-called side deals, but simply to keep everything out in the open and permit anybody in on any discussion. Of course, it is hard to continually have discussions with 200 people present, but people tend to obtain a certain respect for the process and their input may be reduced to a telephone call now and then only when they do have a particular question.

REB: This feature of communication and access to the court to object . . . seems to go a long way towards satisfying the principle of objections to unit representation. In so far as counsel feels that his client's interests are not fully served, he at least knows that liaison counsel will communicate this and he will have the opportunity to have his view before the court.

FPF: I agree with that and we were very careful to permit people who had a different view to select a different representative. You simply cannot have 200 attorneys argue every motion. We found that we would basically come to an agreement on a position and then there would be perhaps three or four or five attorneys who would feel otherwise and I would say to them, "Look, select one of your number." In the rare instance where two of them had to speak, well, we let them go ahead and speak. But after awhile it became obvious that I was going to push very hard to have the thing organized and my class representatives stood behind me and we tended to organize that way and it worked out very well. I'd say further, that when a lawyer says "I don't want to be bound—I'm an attorney too and I don't want to be bound

11. See McDermott, *A Plea for the Preservation of the Public's Interest in Multi-district Litigation*, 37 J. AIR. L. & COM. 423 (1971).

by what everybody else is doing”—then my recommendation to him is to opt-out of the class and not be a part of it.

REB: Opt-out of the class or the suit?¹²

FPF: I think that when the opt-out time comes if everyone has done his job you have established the membership in the class early in the case. Then when the settlement comes, no one can opt-out because you cannot opt-out of the settlement. The settlement is either fair and reasonable, or not, and if it is fair and reasonable, then the parties are bound by it. The problem comes with the opt-out when you have not established membership in the class, especially if you're sending out a notice which also includes a proposed settlement, and in effect you are considering whether or not to opt-out of a proposed settlement when you should be considering, as a matter of law, whether to opt-out of the litigation or not.¹³

REB: In *Gypsum* did the settlement take place prior to ascertaining just how many classes there were and who belonged in them?

FPF: No, the settlement took place after the determination of class existence, but before the actual membership in the class had been ascertained. I think *Gypsum* is an exception to the rule that I previously stated because I believe that we should have conducted it the way we did, namely to get that pilot trial done and to get that liability established. Then we knew exactly where we were going. After winning the liability issue at least for two years, I thought it was only a matter of time until we would get a settlement—and a good one—if we could keep the plaintiffs together.

REB: In class actions are there problems posed by attorneys who are, in effect, speculators?

FPF: Well, I'm not sure what you mean. I think every attorney is more of a speculator if he's representing his clients on a contingency fee than the defense attorney who's sitting and collecting it by the hour.

12. See Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1972).

13. See FED. R. CIV. P. 23(c)(2).

REB: Well, I mean in whether or not to join a class or instead await developments.

FPF: Well, that is true and is speculation—you could call it opt-out speculation and it always occurs where the membership of the class has not been determined early in the game. If the membership in the class has been determined early in the game by sending out an initial notice, then of course that does not occur. On the other hand, I have known cases where plaintiffs' counsel—I think as a matter of good tactics—did not want the notice to go out early, because if it did they were afraid that too many people would opt-out of the class, and then the defendants would consider it too weak a class. So you can play this either way and I don't know any defendant who wants the notice to go out early to determine the class unless he was absolutely certain that everyone was going to opt-out of it.¹⁴

III. COMPLAINT PRACTICE

REB: Getting back to the *Gypsum Wallboard* case, did pretrial discovery reveal the nature of the illegal agreement under section one of the Sherman Act?¹⁵

FPF: I think it certainly went a long way to confirm what we already knew. The only thing we had to start off with was knowledge that the prices had been the same, that they had been charged and that all exceptions had been withdrawn and that there were certain other parallel activities which had occurred. Discovery did, of course, give us all the pricing information, all the cost information, all the manufacturing information, all the communications, all the marketing information and also gave us the plans of action that are at-

14. In *Berland v. Mack*, 48 F.R.D. 121 (S.D. N.Y. 1969), the court stated that its powers should be used to assure that the class action device is used to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants. 48 F.R.D. at 121. The policy of liberal class action allowance in anti-trust cases centers on the vices attendant upon rules forbidding tiny stakeholders from the lawsuit, for this would result in the retention of the fruits of price fixing or monopolizing because no one is available to bring suit.

15. 15 U.S.C. § 1 (1970).

tached to the opinion of Judge Zirpoli which were very helpful in the trial.

REB: Would you say, in this field as in others, that often the information on the basis of which a complaint is filed is somewhat speculative?

FPF: I suppose it is always a question as to how much information you need to file a complaint. If you had to have the information regarding the inner workings of the company before you filed a complaint, then we would have to have pre-complaint discovery. Now, some defense lawyers at least have said that that is in effect what we have, since the complaint does not mean anything anyway and the pre-trial statement takes over the form of the complaint at the time of a pretrial conference.

REB: Do you really need much pre-complaint discovery under liberal interpretation of federal rules?

FPF: No more than a good plaintiff lawyer's intuition on procedure and a sense of the law of substance. In analyzing and looking at what is a possible violation, often the lawyers who refer cases to me ask me how they will determine that. And I say, well you should look at it this way. In the average transaction, you have a buyer and a seller. If there is any limitation on what the buyer can do in his buying or any limitation on what the seller can do in his selling, then you have the initial indication which is worthy of pursuit by you or by an expert—if you decide to hire an expert in anti-trust work.

REB: In the *Wallboard* case, besides price uniformity, were there other indications that there may have been some Sherman Act conspiracy to peg the price of wallboard?

FPF: What we really had was that as of December 15, 1965, all the defendants agreed to withdraw all exceptions to published list prices. Now, the list prices had traditionally been the same. Beginning with the notice on November 17 and going up close to December 15, 1965, all the defendants notified the trade that they were withdrawing all exceptions to the list prices, that there would be no further exceptions to the list prices and that they would be selling

at list price. Thereafter, on March 1, they did about the same thing in regard to credit terms. Prior to this time, there had been a lot of exceptions, both in the credit field and in the price field, and this was a very strong indication to an anti-trust attorney that they were engaging in an activity which was, in an anti-trust attorney's—at least in the plaintiff's anti-trust attorney's view—illegal.¹⁶

REB: In the *Gypsum* price fixing suit, what effect, if any, came from defendants' claims that they needed to communicate in order to justify price differentials under the Robinson-Patman Act?¹⁷

PPF: In effect what they said was that they needed to call each other to determine if they were giving an off list price so that the person calling could then give an off list price and have a good faith defense to the Robinson-Patman Act.

REB: The defendants claimed that they verified prices in the beginning anyway in order to make sure that they were "meeting competition" and to find what that competition was. Did that kind of evidence have any significant influence on whether or not uniformity thereafter was the result of "prior agreement"?

PPF: I think it did and it was very strange, to me at least. We had all this calling back and forth for off list prices and all of a sudden, virtually the entire industry decides there will be no more off list price.¹⁸

16. The liability phase of the front-burner trial is reported in *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971).

17. 15 U.S.C. §§ 13(a), 15 (1970). Price discrimination is defined as a mere difference in price to a purchaser of the supplier. *F.T.C. v. Anheuser-Busch Inc.*, 363 U.S. 536 (1960). Originally the Robinson-Patman Act was enacted to protect the small independent wholesaler-retailer from the effects of price differentials or preferences which, it was thought, would result from the greater buying power of the large chain store. See Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

18. A good example of *post hoc ergo propter hoc*, no discounts after the calls therefore no discounts because of the calls. On the basic incompatibility in visions between Robinson-Patman and the Clayton and Sherman Acts, see Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948). Robinson-Patman frowns on price differentials (*prima facie* violations of the Act) though they are permitted if done in good faith to meet competition. The Act, however, envisions price consistency. Price consistency, particularly among a handful of sellers,

IV. PRE-TRIAL DISCOVERY¹⁹

- REB: How many documents were handled at the pretrial stage in the *Gypsum Wallboard* cases?
- FPF: They produced, I believe, about a million pieces of paper and we took in the neighborhood of forty depositions.
- REB: How do you handle that kind of quantity?
- FPF: Hard work. I think basically you have to be organized; you have to look at what you copy. Of course, you must copy everything the defendants give you, except for invoices and maybe bills of lading or some duplicate documents, and you must number all of those. Otherwise you run the risk of the defendants creating a fiction that they produced some important document for you which they had not produced. We keep everything on microfilm and we have reader printers which we use to print out the actual documents. But we think it is important enough to microfilm everything so that at any one point in time we can accurately report to the court exactly what the defendants did produce and of course much more importantly, what they did not produce.
- REB: Which are more important in the private anti-trust suit—interrogatories, documents or oral depositions?
- FPF: Oh, I think the most important single thing is the documents.
- REB: How does counsel obtain access to or even protect documents containing so-called trade secrets or confidential information which could be detrimental to the company if disclosed to the industry or competitors?
- FPF: As far as not disclosing trade secrets and confidential information to plaintiff's counsel, that defense is a lot of baloney. We readily agree with protective orders whereby the

is of course extrinsic evidence of only the fix forbidden by the Sherman Act (Section 1). Sellers complain that they have to know *what* their competitors' price is in order to determine whether they *can* in good faith change prices. Thus, this *need* to communicate with each other. Group awareness (of price information the result of "communication"), if followed by price rigidity, uniformity, or consistency, suggests a bad relationship between the two. *See generally* F.T.C. v. Motion Picture Advertising Service Co., 344 U.S. 392, 405-06 (1953) (Frankfurter, J.).

19. For an excellent discussion of multi-district discovery *see* Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972).

documents will not be disclosed to another competitor. Unfortunately these types of defenses are most used to try to keep the documents away from the searching eye of plaintiff's counsel and defendants often would like to make their own decisions as to what is and is not a trade secret document.²⁰ Of course, that would be very convenient for them, but we follow the practice of readily agreeing to protective orders under Rule 30 and also to obeying those protective orders.

REB: In an anti-trust suit against a major company having many people making major decisions, how do you know *who* to orally depose under Rule 26?

FPF: I might challenge your assumption that many people make major decisions, but this *can* be a difficult thing and it is usually better to start out on the bottom and sort of work up until the decision is tossed up higher and higher. I recall one company—a very well-known company not in the Gypsum industry—where we deposed everybody but the president and then we finally deposed the president, chief executive officer. Everybody had pointed up to him, or at least indicated in his direction—pointing would be a bit strong—and when he saw the documents that we had and the testimony that we had—in a fine tradition which I would like to see followed in other companies—he announced that he had not organized the plan in this way and that the program had not been properly implemented and the case was settled in about three or four weeks.

REB: Does it sometimes occur that you depose an individual with the thought that he could provide information, only to find a disclaimer requiring someone else to be deposed?

FPF: That happens. But remember, scheduling depositions is a very simple thing. It takes about ten minutes to file a notice of taking deposition and the best thing to do is just lay out about thirty notices to the defendants, one

20. Re typical examples of numerous "privilege" problems that arise in complex multi-party litigation marked by extensive document production, see *Pfizer Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972) and *Jack Winter Inc. v. Koratron Co.*, 54 F.R.D. 44 (N.D. Cal. 1971).

every day. The defendants try to make a big deal about taking depositions and filing interrogatories. I often tell the people that work for me—well, if you don't know the answer, just file an interrogatory—file one, two, twenty of them, file thirty of them. You can file one every day, you know, it's stimulating, and also productive, I might add.

REB: In *Gypsum*, did discovery disclose the agreement? Does that happen very often?

FPF: No, the defendants denied, and I am sure deny to this date, that they ever entered into an agreement. However, the court drew certain inferences from the testimony and from the conduct, the documents, and other evidence, and it is always that inference which either wins the case for you or does not.²¹ That's why so many plaintiffs' lawyers prefer trial before juries.

REB: Has enhanced prospects for damage suits, together with broad discovery, led to fewer records and less access to corporate minutes or meetings?

FPF: I think in the case of some few companies, but that's a terrible admission on a company's part to say that they're not going to keep records anymore. Now, a couple of companies I understand have gone into a very short retention period on documents, but if you have to run your company whereby you have to destroy all your records or not create a lot of them, it's not too exciting a prospect to be a member of that company, I would think.

V. SETTLEMENT²²

REB: With respect to dispositions, judgments or settlements in the private anti-trust cases, in weighing prospects of settlement versus trial, what factors do you take into account? What will make the difference?

21. Unless there was an actual agreement oral or reduced to writing or, unless an eye-witness would testify that he heard the agreement being made, all evidence of conspiracy consists of circumstantial evidence or proof by the mental process we associate with the word "inference"—all departments of reasoning, all scientific work, every day's life and every day's trial proceed upon such data, 1 WIGMORE, EVIDENCE § 41 at 435 (3rd ed. 1940).

22. See Appendix E: Settlement, pp. 894-96 *infra*. See also Appendix F: Settlement Order, pp. 897-99 *infra*.

FPF: I like to think that the difference, at least in part, is based upon counsel; but the cases, by and large, are settled; and they are settled usually, at a point where the plaintiff's counsel can demonstrate to the defense counsel that he can get by a motion for summary judgment and that he is going to get a jury trial and that he has a trial date. If you ask me what is the one single most important activity that a plaintiff's counsel can engage in, I would say that it is getting that trial date. Of course, the defense philosophy is always the same and understandably so, it's the defense TSD (trip, stumble and delay).

REB: How much is there to the claim that is sometimes made that it is the expense of trial that results in the pre-trial settlement frequency of private anti-trust cases.

FPF: Well, they tell me in the Orient that saving face is a tremendous thing. I think that is true also in litigation. Saving face is a tremendous thing. I do think that the expense of trial can be a factor. Some of these cases are very expensive to try. Remember, the plaintiff's lawyer is looking for his contingency fee. By and large the defense is in worse shape if the defense lawyer tries the whole case, charges a fair, reasonable, just, and high fee—and his fee will be high because he is very able if he is defending an anti-trust case—but then he loses the case. His client has the benefit of not only having paid high and justified fees to his defense counsel but also a substantial recovery to plaintiff; and perhaps I might add to plaintiff's counsel too.

VI. TRIAL PRACTICE POINTERS

REB: Do you have any standard jury challenge practice on voir dire in the anti-trust trial?

FPF: I think almost any twelve disinterested people are a good jury or now six in most courts—one to avoid is someone who doesn't like the anti-trust laws. What you want is ordinary intelligent jurors who will be able to understand. I found it interesting that in my anti-trust jury trials it is the defendant who more often challenges people who have a

reasonable education in the disciplines of psychology, sociology, social work or education.²³

REB: That is interesting. One would ordinarily expect the plaintiff, not the defendant, to be challenging the better educated classes.

FPF: I think the reason is that the defense attorneys are afraid because of the general feeling that industry so often prefers itself and profits over all other considerations and these educated people may understand that—and may be able to draw inferences. For instance, a man says he was in a room, or spent an evening with his counterpart in another company, but they did not discuss anything—even though his entire empire was falling because of low prices and poor profits.

REB: How do you prepare an exhibit for trial?

FPF: It is very important during the course of the trial to be organized. You are going to put your case on first, and the defense would just as soon have you disorganized, take a long time, and thereby make the judge unhappy. So rather than fight with the defense attorneys, whether they facilitate you or not, I always make three copies of an exhibit. One for me, one for the witness and one for the defense. And then you have the original of the document to let the court use.

REB: How important are summaries and compilations of documents in an anti-trust case?

FPF: I think summaries are very important because so often you have stacks of invoices, or financial statements, and you have to prepare a summary. But the best way to get the summary into evidence is to trap the defendants into the following position. You make a summary of the invoices, for example; serve it on them, with request to admit. Then you make available to them through your depository of documents all of the documents upon which that summary is based. If they decide that they do not want to do that informally with you, in pursuit of your request to admit, take the matter up in an informal pretrial conference and the court will, I believe, order the defendants to check your summary or be

23. J. Schulman, *et al.*, *Recipe for a Jury*, *PSYCHOLOGY TODAY*, May, 1973, at 37 (a before and after study, rating potential jurors in a conservative area for the trial of the Harrisburg Seven (Phillip Berrigan, *et al.*)).

bound by it. You must provide them with source data of the summary. As long as the source data are unavailable for use in court, the summary can be used. I like to have all of these problems solved ahead of time, because when you are trying a case with a jury, it is easy to lose them completely. Poor advance preparation makes anti-trust cases hard to understand. They are actually easy to understand and if you have them well organized, then you do not appear as if you are fumbling around.

REB: When are experts helpful in the anti-trust trial?

FPF: Experts are much more useful in the damage end of the business than they are in liability. Defense counsel often likes to put up an expert on liability. He reviews the entire record and then announces to the judge or the jury that he has reviewed the entire record and he says there is no conspiracy. Well, those experts never bothered me because, as one judge pointed out, "All you want him to do is to decide what I am supposed to decide." Often experts are also men of some integrity and they will often admit under cross examination by judge or by counsel that of course they do not know whether there was a conspiracy. The question I always like to first ask a liability expert is, "Do you know whether or not a conspiracy exists?" And hopefully, he will resist answering that for about a half hour while he tries to throw out every economic theory to indicate there was not any conspiracy. But you finally get him in the end to say that he does not know. Then you can ask him if he was in the board room, and if he attended any of the known meetings; and go through all of the evidence in the case showing contacts between competitors. Just ask him those questions. It makes nice cross examination. Very pleasant, in the mornings, especially.

REB: How does cross examination in an anti-trust trial vary from, say, the run-of-the-mill criminal case?

FPF: You know in cross examining, of course, by definition, the witness is adverse to you. The standard rule, is that you never ask a question in cross examination unless you know the answer or do not care what it is. The appli-

cation is different in the anti-trust case because an executive will be up there. He is very smart, probably smarter than anybody in the courtroom, and he will not only answer your question, but he wants to make a further argument about something. He will say, "I guess you don't care about the other situation." Now you do not know what the other situation is from the man in the moon. But the only thing you can do, in my judgment, is to stand back and say, "If there is anything you want to say, please say it." I have often done that—where you just permit the witness to say anything he wants. Because, remember, first of all, they have all the facts, you do not. Besides, he is going to say it anyway in his examination, so why not sit back and let him say it on *your* cross examination, as a result of your saying, in a rather grand manner, "Say anything you want, let me sit down. When you're finished you tell me." There are a hundred different ways that you can say that. I have had executives up there who, to the discomfort of their own counsel, went on for 15 minutes to the jury, about things of every nature. When they are doing that, they are running wild, and when they are running wild, let them go. So that unlike ordinary cross examination in criminal trials, I let them run wild and let them say whatever they want to. I have had situations where they have tried the sobriety of my client, the reasonableness of my client and always his good business judgment. If he wants to think something about your client—the jury is waiting to find out what he thinks of him—you might as well just ask him: "Well, what do you think about my client?" "I hate to say this, but he was a very poor businessman." "Why was he a poor businessman?" Well, then you have got him running wild. And then you can build him up as the most educated businessman in the world. And perhaps you can get him to admit it sooner or later.

REB: How important are pretrial discovery depositions for impeachment?

FPF: I think they are very important for freezing testimony, but not for technical impeachment. Because I go on the assumption—perhaps having plaintiff paranoia—that corporate executives who you're deposing, are going to tell the best

conceivable story they can from their side without directly lying, and therefore you freeze their best story, some of which, at least, will be fiction. No one can coordinate a story among 40 or 50 or 100 people. You then can freeze them to their story and make them sing the same song at the trial, a song which you, of course, have already destroyed through other discovery.

REB: How important are instructions in the anti-trust case?

FPF: I think that instructions in an anti-trust case are about as important as instructions in any other kind of a case. You should not pick out of these instructions one particular phrase, but take the instructions as a whole. As long as you get a generally fair instruction, or set of instructions, I think you are all right. Now it is really dangerous for plaintiffs' attorney to suggest rather *avante-garde* instructions, because the defendants, of course, will have their appeal after they lose to you, and one of the quickest ways to lose a great case is to force the trial judge or to argue so strenuously that he includes an instruction which you do not believe in as a matter of law. I am less interested in the substance of the instructions and I am more interested in not suggesting an instruction that is not well supported by a point of law.

REB: Can you establish with any degree of precision damages arising from Sherman Act price fixing violations?²⁴

FPF: Well, I think damages, establishing damages and damage theory are some of the most difficult things for a lawyer to learn. And it is a tremendous advantage to have studied accounting. Anti-trust damages need not be as precise as perhaps contract action, but rather must be within the realm of reason. I always say to my client when we talk about that, I say, "Well listen, you're a businessman, you've had some success, how would you compute as a businessman, what this has cost you, how much you've lost?" First, you have the amount of overcharge in a price fixing case, you

24. See Appendix G: "Ad Damnum" Excerpts, pp. 889-902 *infra*. In anti-trust cases the essences of damage theory are (1) standing, (2) causation and (3) amounts in a "relevant" market; see also discussion in *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

must have the amount of money that was actually charged your client compared with what your client would have paid in a competitive market. We call that the amount of the price fixing overcharge. But then you have an addition; you might have lost profits in the future because you could not do business; you might have lost sales and then you would have lost profits on lost sales; you might have diminution of assets, could not continue in business or lost accounts receivable because you could not stay in business to collect them. You might have lost profits on past sales, or you might have any variety of loss of economic wealth, if you can call it that. The more creative you are, of course, the better the damage study. There have been cases where we have actually valued the business. For price fixing there is no contract rule of foreseeability in damages. Defendant more or less just takes his chances. In *Gypsum* the gloomy price, supply and demand picture that followed the pricing agreement became a *plus* for the plaintiff.

REB: Well, contrary-wise, with respect to the damages, the defendant will have to pay for any given illegal fix—price fix—then it is not really foreseeable just what those damages will be or what the state of economics are, vis-a-vis price, supply, and demand thereafter. He just simply takes the risks that whatever happened he will have to account for. So that in those terms, there is no real rule of foreseeability with respect to damages in any kind of contract foreseeability sense.

FPF: I agree with you completely. When a company fixes prices, and I assume, hopefully, that they will become a defendant if they have fixed prices, at that point in time, they take not only the risks of not fulfilling a contract for a bushel of wheat, but they take the risk that the economics in the next several years, while their agreement is in effect, may work very harshly against them and they may then be liable for very substantial damages. For example, if you fix prices against an increasing supply, the supply may increase even more dramatically than you anticipated. If someone is competing in the market, and the price keeps go-

ing, down, down, down, down, why it is a very expensive price fixing conspiracy.

REB: How important are attorney's fees in policing the spirit, if not the letter, of the anti-trust laws?

FPF: I think they are very important and I would like to see attorney's fees and treble damages extended to the securities laws. Why is it in this country that we can conspire to fix prices and you have to pay treble damages and attorney's fees, but if you completely defraud someone as a matter of securities law, you do not have to pay, as under the anti-trust laws? I think it would make a tremendous difference in securities litigation, by and large.

REB: In summing up the *Gypsum* case, what in your opinion, was its outstanding legal contribution besides the amount of money settlement or the large number of plaintiffs?

FPF: Well, I think the most unique aspect in the *Gypsum* case was that they were started by a single dealer, that there was never a governmental proceeding that assisted in any way, shape or form. In the course of seven years, this single dealer and all the other plaintiffs, and plaintiff's counsel, who came afterwards, ended up effectuating a settlement of \$70,000,000 plus—without any government proceeding, without any pleas of guilty, without any indictments and without any nolo contendere pleas. It is private anti-trust enforcement, if I may immodestly say so, at its best.

VII. APPENDICES

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APPENDIX A

GYPSUM ORDER OF PARTIAL SUMMARY JUDGMENT FOR PLAINTIFFS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

In Re)
GYPSUM CASES)
Civil No. 46414-A AJZ)

PARTIAL JUDGMENT ON PLAINTIFF'S CLAIMS OF VIOLATION OF
SECTION 1 OF THE SHERMAN ACT
(15 U.S.C. SECTION 1)

Under date of June 20, 1971, the Plaintiffs listed on Appendix A, attached hereto, moved for partial summary judgment as to Defendants United States Gypsum Company, National Gypsum Company and Kaiser Gypsum Company, Inc. on the grounds of collateral estoppel of the March 17, 1971, Findings of Fact and Conclusions of Law and the April 19, 1971, Partial Judgment in the trial of the first 24 Dealer Cases. The Court having considered the papers, briefs and argument of counsel and being fully advised of the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs' Motion dated June 20, 1971 for Partial Summary Judgment is granted.
2. That during the period from December 15, 1965, until January 1, 1968, defendants United States Gypsum Company, National Gypsum Company and Kaiser Gypsum Company combined and conspired among themselves and with others, to stabilize and maintain the price level of gypsum wallboard through a course of interdependent conscious parallel action pursuant to an understanding by acquiescence coupled with assistance whereby they mutually agreed to, and did in fact, effective December 15, 1965, withdraw all deviations from list or published prices of gypsum wallboard, ignore the competition of single plant producers and centralize all pricing authority in the Chief Executive Officer, and whereby, effective March 1, 1966, they mutually agreed to, and did in fact, withdraw extended terms of credit (extended cash discount terms) from all buyers of gypsum wallboard.

3. That said combination and conspiracy continued in full force and effect from December 15, 1965 to January 1, 1968, and in effectuating said combination and conspiracy the Defendants did in substantial measure succeed in stabilizing the price of gypsum wallboard, particularly during the year 1966.

4. That the combination and conspiracy described hereinabove constituted an unreasonable restraint of interstate trade and commerce in gypsum wallboard in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1.

5. The motion of Defendants to bind Plaintiffs to such portion of the March 17, 1971 Findings of Fact and Conclusions of Law and April 19, 1971 Partial Judgment as were adverse to the Plaintiffs is denied.

6. The motion of Defendants to condition the granting of Plaintiffs' motion for partial summary judgment on their acceptance of such portions of the March 17, 1971 Findings of Fact and Conclusions of Law and April 19, 1971 Partial Judgment as were adverse to the Plaintiffs is denied.

7. This Partial Judgment will apply to all Plaintiffs, whether by intervention or otherwise and to all parties who may hereafter become Plaintiffs.

Dated this 22 day of December, 1971.

ALFONSO J. ZIRPOLI

Judge, United States District Court

APPENDIX B

HISTORY OF THE "BACK-BURNER" CASES

1. *Structuring of the Class Actions*

On June 9, 1971, the Court held a pretrial conference at which it consolidated all the "back-burner" cases for pre-trial proceedings and appointed liaison counsel for both plaintiffs and defendants. Plaintiffs' liaison counsel had served as lead counsel for the plaintiffs in the dealer cases.

On April 12, 1972, after extensive briefing and argument, the Court established class actions corresponding to the levels in the chain of wallboard distribution: (1) the dealer-wholesaler class; (2) the applicator or subcontractor class; (3) the general contractor class; (4) the first owner-builder class; and (5) the public body class. On August 12, 1972, and January 19, 1973, the Court designated those cases which could be maintained as nationwide class actions. In addition, statewide classes were established for public bodies in certain states where individual attorneys general had brought suit. In appointing class counsel the Court insisted that such counsel for each class be free of any conflict of interest, and, in particular, represent clients only within their appointed classes.

2. *Negotiation of the Interclass Settlement*

In view of the numerous litigating problems discussed hereafter—including potential interclass conflicts—plaintiffs' counsel concluded that the most effective way to advance the litigation was to enter into an interclass allocation agreement. Accordingly, on October 20, 1972, the non-governmental class counsel met for their first formal negotiations looking toward such an agreement.

The proposed interclass agreement had two major purposes: (1) to develop a feasible approach to proof of damages which would (a) eliminate the danger that the defendants would be subject to multiple recoveries for the same overcharge, (b) facilitate allocation of recovery and (c) minimize the danger that the defendants could successfully invoke the pass on and remoteness doctrines; and (2) to eliminate the major source of interclass friction and potential interclass litigation, and thus permit a fully coordinated litigating effort against the defendants.

The interclass negotiations continued into early December, 1972. Meetings were held in Washington, San Francisco and Philadelphia, between which the class representatives were in constant communication by telephone.

On December 5, 1972, a written agreement allocating any ultimate recovery among the dealer, applicator, general contractor and first owner-builder classes was signed by the representatives of those classes. Since no representative had yet been appointed for the national governmental class, it was agreed that at a later date non-governmental counsel would attempt to include the governmental classes in the agreement. Following appointment of a representative for the national governmental class on January 19, 1973, new negotiations were commenced looking toward inclusion of the governmental classes in the interclass settlement. Meetings were held in Washington, Chicago and San Francisco, supplemented by frequent telephone discussions. As a result, a new agreement including the governmental classes was signed in June, 1973.†

3. *The Litigation Effort*

Immediately after the appointment of class counsel and in anticipation of an interclass settlement agreement, a co-ordinated plan was agreed upon by plaintiffs' liaison and class counsel for a division of labor in the preparation of the "backburner" cases for trial. The focus of the case at this point was to develop (a) evidence showing the participation of Georgia-Pacific, Celotex, Flintkote and Fibreboard in the conspiracy, and the range of products involved, and (b) a damage theory and price study for computing the totality of defendants' overcharge while protecting defendants from any threat of multiple liability. Plaintiffs' efforts were addressed to preparing for an early trial date, for which they pressed the Court. Trial was set for November 19, 1973.

From October, 1972, until settlement of the cases, counsel engaged in extensive discovery to accomplish the twin purposes stated above. Document productions were taken from the single-plant producers in the first part of 1973. Additional nationwide damage documents were secured from United States Gypsum, National and Kaiser; complete document productions were secured from Georgia-Pacific and Celotex, and additional document production by Flintkote and Fibreboard was instituted. The months of April-June, 1973, were devoted to extensive depositions of Georgia-Pacific and Celotex. Interrogatories were also directed to defendants to secure damage data necessary to complete damage studies being conducted by plaintiffs and to obtain additional evidence of fraudulent concealment of the conspiracy. Simultaneously with plaintiffs' discovery efforts, responses were being filed to defendants' transaction interrogatories. Plaintiffs were also researching, preparing and filing a motion to determine the form and means of giving notice to plaintiff classes.

On March 15, 1973, the defendants filed motions to decertify the dealer class, to dismiss the claims of the dealer and applicator classes on statute of limitations grounds, and to deny standing to sue to all indirect purchasers of gypsum wallboard. Had all these motions been granted, the class action litigation would have effectively been terminated. These motions were never decided by the Court.

Liaison and class counsel decided, in light of the interclass settlement agreement, to attack these motions by filing a joint brief in opposition to all motions, and to present in that brief an outline of their approach to the administration of the remainder of the litigation. The hearing on defendants' dispositive motions and on plaintiffs' motion regarding notice was originally scheduled for June 21, 1973. On that day, the notice questions were argued and resolved substantially in plaintiffs' favor. At defendants' request, however, hearing on their own dispositive motions was put over to August 10, 1973, in order to afford them more time in which to reply to plaintiffs' joint brief.

4. *The Settlement Discussions*

On April 13, 1973, this Court rendered its damage opinion in the *Mall Products* case, which provided for the first time, some definitive indicia of defendants' expo-

† Agreement among the five national class representatives was actually reached

sure. The Court found an average overcharge of approximately 20 per cent in the San Francisco Bay Area during the December 15, 1965, to January 1, 1968, conspiracy period. The Court's decision made no finding on the percentage overcharge in other geographical areas. However, the record in the dealer trial and counsel's investigation suggested that the percentage overcharge was significantly lower in other areas.

The following principles were foremost in the formulation of a settlement policy by liaison and class counsel:

(1) the likelihood that the national percentage overcharge figure may have been lower than the figures that prevailed in the San Francisco Bay Area;

(2) the likelihood that settlement with one defendant would have a snowballing effect among others; and

(3) the notion that earlier defendants to settle would be given the opportunity to settle at a lower percentage of sales.

By the end of June, 1973, defendants found themselves in the following position: discovery by the plaintiffs was proceeding at an intensive pace; document production and depositions had clearly tied Georgia-Pacific and Celotex into the conspiracy previously found by the Court; Flintkote and Fibreboard officials were about to be deposed; the Court's damage opinion had given a clear glimpse of the potential scope of the damages involved; a trial date had been set; and the form of class notice had been approved by the Court.

From an early point in the litigation, plaintiffs' counsel had attempted to engage the defendants in serious settlement discussions. As stated above, Kaiser had offered \$900,000 in settlement during January 1973. This offer had been rejected, although the avenues of discussion had been kept open. In May 1973 plaintiffs offered to settle with Kaiser for \$2,000,000, or approximately 7.5 per cent of Kaiser's nationwide wallboard sales for 1966 and 1967. On June 29, Kaiser accepted this figure.

Prior to consummating the Kaiser settlement, plaintiffs advised all defendants that the price of settlement (as a percentage of sales) would increase with each successive settling defendant. Almost simultaneously with Kaiser's agreement to settle, Flintkote agreed to settle for a figure of approximately 10 per cent of its sales during the conspiracy period. By July 5, 1973, both Celotex and Georgia-Pacific (which settled in tandem) agreed to figures approximating 16 per cent of their sales.

Accordingly, plaintiffs' settlement strategy had produced a settlement fund of \$22.5 million from four of the seven defendants. These settlements placed enormous pressure on the two remaining major defendants, USG and National Gypsum.

On July 17, 1973, plaintiffs' counsel communicated to USG and National an offer to settle with the two of them for a combined figure of \$52.5 million. This offer was to expire if not accepted prior to the August 10 hearing on defendants' motions. On August 9, 1973, the day before the scheduled hearing, USG and National communicated to the plaintiffs a counteroffer to settle for \$37.5 million. Following additional bargaining sessions, a settlement was consummated with these two companies for a combined figure of \$45 million.

On August 15, 1973, Fibreboard, the last remaining and smallest defendant (who had successfully obtained dismissal in the dealer cases) settled for \$140,000.

All the settlements were reduced to writing. It was agreed that the settlement amounts would be paid into a fund which would be allocated among the classes according to the terms of the interclass allocation agreement, and the interest on which would accrue to the benefit of the plaintiff classes.

on May 5, 1973. The agreement was then reduced to writing and submitted by the national representative of the governmental class to the various state class representatives, all of whom ultimately signed the document.

APPENDIX C

COLLATERAL ESTOPPEL

THE SETTLEMENT OF THE DEALER CASES REQUIRED THAT THE
COLLATERAL ESTOPPEL JUDGMENTS BE VACATEDA. *When the Right to Appellate Review is Destroyed By Intervening Mootness the Trial Court's Judgment Must be Vacated So That It Will Have No Collateral Estoppel Effect*

A final judgment on the merits is one of the necessary prerequisites to application of the doctrine of collateral estoppel, *Bernhard v. Bank of America*, 19 Cal. 2d 807, 813 (1942), and a judgment is not final in this sense until the party against whom the judgment was decided shall have had a full opportunity to pursue whatever rights to appellate review exist. Note, 21 Rutgers L. Rev. 356 (1967). The trial court may have incorrectly decided the case. This is the very reason why the parties in the Dealer Cases were willing to compromise their claims. It would be fundamentally unfair to give any collateral estoppel effect to the appealed judgment, which in the statutory scheme is only a preliminary determination of the issues in dispute. Thus, where the statutory right to appellate review is destroyed by intervening events, the judgment of the last court will be accorded no collateral estoppel effect.

To assure that no such preclusive effects will result in such circumstances, the appropriate procedure for the appellate court is to dismiss the appeal, vacate the judgment of the lower court and remand with directions to dismiss.

Citing its long line of prior decisions on the point, the Supreme Court held, in *United States v. Munsingwear*, 340 U.S. 36, 95 L.Ed. 36 (1950), that it "has become the standard disposition in Federal Civil Cases" to vacate the lower court judgment "to prevent a judgment unreviewable because of mootness from spawning any legal consequences." *Id.* at 41 n.2, 42. The Court stated:

The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County*, 229 U.S. 259, 267, 81 L. Ed. 178, 182, 57 S. Ct. 202, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary."

Id. at 41.

This established practice has been consistently followed in the numerous appellate decisions reported subsequent to *Munsingwear* which have been disposed of by reason of intervening mootness. . . .

In *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267, 81 L. Ed. 178 (1936), the Supreme Court mandated that it is "the duty of the appellate court" to follow this procedure in all such cases mooted on appeal. In *Munsingwear*, the Supreme Court quoted *Duke Power* on this point with approval. *Munsingwear, supra*, at 40. See also, *Gaddis v. Dixie Realty Co.*, 420 F.2d 245, 247 (D.C. Cir. 1969) (the court held this is "the procedure prescribed for the Federal appellate courts"); *Lebus v. Seafarers Int'l Union*, 398 F.2d 281 (5th Cir. 1968) (the court held that "[t]his is the time honored, invariable practice in the Federal System . . .").

This established practice is equally applicable to anti-trust cases rendered moot on appeal. See *United States v. American-Asiatic SS Co.*, 242 U.S. 537 (1917); *United States v. Hamberg-Amerikanische Packetfahrt-Actiengesellschaft*, 239 U.S. 466 (1915).

B. *The Established Practice Applies to Cases Rendered Moot by the Intervention of Settlement.*

Where, as in the Dealer Cases, the appeal is rendered moot by reason of the settlement or compromise of the action by the parties thereto, the established practice enunciated in *Munsingwear* applies. In *Stewart v. So. Ry. Co.*, 315 U.S. 784, 86 L. Ed. 1190 (1941), the Supreme Court held:

Upon petition for rehearing, *it appearing that the case has been settled*, the petition is granted and the judgment entered February 16, 1942, is vacated. The judgment of the Circuit Court of Appeals is reversed with costs and the case is remanded to the District Court with directions to dismiss the suit as moot. [Emphasis added]

Id. at 784.

Also in *Hammond Clock Co. v. Schiff*, 293 U.S. 529, 79 L. Ed. 639 (1934), cited with approval by the Supreme Court in *Munsingwear*, *supra*, at p. 39 n.2, the Supreme Court reversed the decree of the Court of Appeals and directed the District Court to vacate its decree and to dismiss the bill of complaint where the cause had "become moot by reason of settlement." See also, *Swingline Inc. v. I.B. Kleinert Rubber Co.*, 152 F.2d 142 (D.C. App. 1945). In recent years, the Supreme Court, without disclosing the reason the cases became moot, has disposed of numerous cases mooted on appeal by simply following the established practice of vacating the lower court's judgment. It appears highly probable that a number of the many cases disposed of by the Supreme Court in this manner became moot by reason of settlement.

Strong policy favors encouraging the resolution of controversies through mutual agreement of the parties rather than through litigation. That policy dictates that the parties who have compromised a questionable and difficult issue should not be bound by the lower court's determination of the issues involved. If the established practice enunciated in *Munsingwear* were not applied to cases mooted by settlement, it would be contrary to the mandate of the Supreme Court. Furthermore, litigants with substantial exposure to collateral liability would be effectively deterred from ever settling a case after judgment is rendered by the trial court despite the seriousness of error committed by the trial court and despite the degree of probability that a reversal would be secured on appeal, or despite the reasonableness of the settlement proposal. A refusal to apply the established practice to settlement would be particularly harsh in antitrust actions, as here, where numerous cases involving similar claims have yet to be tried.

Indeed, the policies favoring judicial repose and economy are fostered by following the established practice in cases mooted on appeal by settlement, particularly here since the various settlement agreements cover the entire industry-wide litigation. By its very nature, a settlement terminates litigation between the parties to the action as to the matters in controversy. In these cases, no future trials will be necessary as to all of the class members who participate in the industry-wide settlement proposals. The failure to apply the established practice in such a situation would actually encourage potential class members to opt-out of the proposed settlements thereof and thus would be contrary to the policies favoring settlements.

An additional compelling reason exists for denying any collateral estoppel effect with respect to cases mooted on appeal by reason of settlement. When a case is settled, the disputed issues are resolved favorably to neither party. Where, as here, the settlement represents a bona fide and substantial compromise by adverse litigants of their respective claims, the parties cannot be deemed to have agreed to the resolution of the issues, particularly since the present settlements recite Defendants' express denial that they have engaged in any illegal or wrongful activity or that any plaintiff or class member has sustained any damage. It would be manifestly unfair to fix a resolution of such issues for the benefit of non-parties where such issues are not even fixed between the parties to the litigation.

The parties to the Dealer Case Settlements have determined that the settlement

of the industry-wide litigation is desirable and reasonable in view of the considerable commitment of money and management time which would be required for years to come in trial preparation, trials and probable appeals. There exists substantial dispute and uncertainty as to whether the judgments and orders from which the appeals were taken are based upon the proper application of correct principles of law and whether the judgments and orders are supported by substantial evidence. Accordingly, it would be manifestly unfair and unjust to require defendants to elect between foregoing settlement or settling at the cost of being collaterally estopped in later litigation involving other parties with respect to any of the issues rendered unreviewable on appeal by the intervention of the settlements.

APPENDIX D

ATTORNEY "SHOP TALK"—ATTORNEY'S EXCERPT FROM PLAINTIFF
WEEKLY NEWSLETTER FROM LIAISON COUNSEL FOR PLAINTIFF

May 3, 1971

TO: All Attorneys for Plaintiffs In The Gypsum Wallboard Cases
RE: Weekly Newsletter No. 1

The meeting commenced with the distribution to all present of (1) a table showing the names of all cases which had been filed and a brief description of the class allegations in the cases; (2) a list of attorneys for plaintiffs; (3) a copy of Judge Zirpoli's Order of March 26, 1971, and (4) a suggested agenda.

Fred Furth and John Boone gave to those present a brief explanation of the history of the gypsum wallboard litigation, a summary of the discovery available, and the nature of the trial record.

After extensive discussion, Fred Furth was elected liaison counsel with one dissent. His election was subsequently made unanimous. As liaison counsel, Fred Furth was instructed to work very closely with a steering committee on which all interests were to be represented. It was subsequently agreed that all attorneys so desiring were members of the steering committee. Fred Furth promised to keep all parties informed of the status of the litigation through personal contacts and a weekly newsletter, of which this is the first.

It was unanimously decided that liaison counsel should prepare an appropriate motion to lift the protective order now in existence on past discovery so that all plaintiffs' counsel in Gypsum cases would have access to this material.

It was unanimously decided that liaison counsel should take whatever action was necessary to have the past discovery made applicable to all cases without limiting plaintiffs' right to any future discovery.

There was a general discussion of the class action problems, settlement possibility, and the necessity of compiling transaction data. The class action discussion and transaction discussion were postponed until the following day.

At 9:00 A.M., Friday, April 30, the meeting of parties interested in the transaction compilation convened for the purpose of discussing the compilation of the transaction data. Those present formed two separate groups, one to discuss the mechanics of compiling transaction information from public bodies and the other group to discuss the compiling of transaction information from private bodies.

It was resolved that liaison counsel will transmit to all plaintiffs' counsel a proposed agenda for the June 9, 1971 pretrial conference. It was suggested that this agenda encompass notification to the court of appointment of liaison counsel and a timetable for future action in these cases.

There was a general discussion of the desirability of lifting the stay order of Judge Zirpoli and it was the consensus of opinion that the stay order should be lifted in the context of a timetable for future action. This timetable will in general take the following form:

1. All plaintiffs' counsel desiring to amend their complaints will do so prior to June 9, 1971.

2. On June 9 all defendants will be given 30 days to move, answer or otherwise plead.

3. There will be a pretrial conference 15 days after the Court rules on plaintiffs' motion for partial summary judgment (based on the collateral estoppel effect of Judge Zirpoli's March 18, 1971 opinion) to commence future discovery.

At 2:00 P.M. there was a general discussion of the class action problems involved in the gypsum wallboard cases and the mechanics of resolving these allegations. It was the general consensus of opinion that plaintiffs' counsel should make their own resolution of the class actions without intervention by the Court.

There was a general discussion of the desirability of a consolidated trial in the Northern District of California, including the possibility that the Federal District Courts involved might, on their own, have the power to enforce such consolidation. [S]everal . . . attorneys indicated that it was their present inclination, subject to further thought, to agree to such a transfer to the Northern District of California for consolidation, but there was reluctance on behalf of some of the other attorneys present to make this decision at the present time. Everyone was requested to transmit to liaison counsel on or before May 14 their own view as to how the question of consolidation should be handled on June 9. This matter will be discussed further on June 8.

There was also a general discussion of the possibility of expanding the product to gypsum lath and plaster. Fred Furth and John Boone explained that while the discovery (documents and depositions) included plaster and lath and that while the withdrawal of price concessions and verification appears to include plaster and lath, it would be exceedingly difficult, if not impossible, to get Judge Zirpoli to expand the cases to plaster and lath. In addition, such an attempt could seriously jeopardize some of the other items desired by plaintiffs, e.g., collateral estoppel. This matter will be discussed further at a later date.

The next meeting was called for June 8, at 10:00 A.M., Suite 1330, Russ Building, 235 Montgomery Street, San Francisco, Calif.

The meeting was adjourned at 4:00 P.M.

Fred Furth
John Boone

APPENDIX E

"OPTING OUT"

SETTLEMENT NOTICE

All defendants have agreed to pay the aggregate amount of Sixty-Seven Million, Six Hundred Forty Thousand Dollars (\$67,640,000) in final settlement of all claims involved in this litigation including the claims of plaintiffs, intervenors and members of the plaintiff classes. A substantial portion of the above settlement amount has been invested and interest is being earned which will be added to the settlement fund.

Subject to approval of the Court, the Settlement Agreements provide that the settlement fund shall be divided among the members of the classes, including all plaintiffs and intervenors, in the following proportion:

Dealer-Wholesaler Class	21.15%
Applicator or Sub-Contractor Class	21.15%
General Contractor Class	10.8%
Governmental Classes (50 States and all subdivisions thereof)	10.0%
First Owner-Builder Class	36.9%

The distribution of the settlement fund among the members of the classes, including all plaintiffs and intervenors, will be based upon plans of distribution (per the above percentages) to be filed by the class representatives with the Court for its consideration and approval or modification at subsequent proceedings.

Other than for the governmental classes, such plans of distribution will be based upon purchases of gypsum wallboard, lath and plaster during the period January 1, 1963 through December 31, 1967. Subject to approval of or modification by the Court, each designated unit of purchase shall have the following weight:

<u>Calendar Year</u>	<u>Weight</u>
1963	1
1964	1
1965	1
1966	2
1967	2

All attorneys' fees, costs of litigation and expenses of notice and administration incurred in connection with this settlement as may be allowed or approved by the Court shall be deducted from the settlement fund. Attorneys' fees for counsel for class representatives will not be charged against claimants represented, as of September 4, 1973, by counsel of record.

Any settling defendant may withdraw from the settlement if, in its judgment, a substantial and material proportion of the class members request exclusion. The litigation would then continue as to each such withdrawing defendant.

The settlement agreements and the interclass allocation agreement have been presented to the Court for its approval pursuant to Rule 23(c), Federal Rules of Civil Procedure, and the Court has authorized the submission thereof to class members. These agreements have been filed with the Clerk of the Court and are available for your inspection.

As more fully set forth in the settlement agreements, upon approval of the settlements by the Court, and such approval becoming final, each plaintiff and intervenor, and each class member which does not elect to be excluded as herein provided, shall be deemed to have covenanted to refrain from proceeding against the settling defendants, or any of them, on any present or prospective claim pertaining to any building and construction products manufactured from gypsum, including any gypsum or related products, and relating to any direct or indirect purchases or transactions occurring prior to the dates of the settlement agreements, which agreements are dated in the period July 10 to August 15, 1973, and which claims are asserted under Federal or State antitrust law or based on any allegations of collusion, conspiracy or similar assertions.

NOW THEREFORE TAKE NOTICE that a hearing will be held commencing 10:00 A.M., P.S.T., on Thursday, November 29, 1973, before the Honorable Alfonso J. Zirpoli, United States District Judge, Seventeenth Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California for the purpose of determining the fairness and adequacy of the settlement and of the allocation of the settlement fund among the plaintiff classes. The Court will not consider at that time the distribution of funds within a particular class, which matter is reserved for subsequent hearings and determination by the Court.

YOU ARE ADVISED:

1. You may qualify as a member of one or more of the above defined classes.
2. If you are a member of one or more of the classes defined above, which include all plaintiffs and intervenors, you will be included in, and you will be bound by, any judgment in this litigation, including any settlement approved by the Court and any determination affecting the classes of which you are a member, whether favorable or not, unless you mail to the Clerk of the Court on or before November 8, 1973, a written election to be excluded from the classes of plaintiffs. If you elect to be excluded from the class or classes as herein defined, you will remain free to pursue on your own behalf whatever legal rights you may have, but you will not be entitled to participate in any distribution from the settlement fund.
3. If you desire to be excluded from this litigation, complete the form herein and mail it to the Clerk of the Court at the address noted below not later than

November 8, 1973.

4. If you do not elect to be excluded from the class of plaintiffs, you may, but need not, enter on appearance through counsel of your choice, and you will have all the rights set forth in Rule 23 of the Federal Rules of Civil Procedure. If you do not request exclusion or enter an appearance, you will be represented by attorneys of record for the class representatives.

5. Any plaintiff, intervenor or member of the plaintiff classes may appear and be heard and, subject to reasonable limitation by the Court, present evidence at the hearing set for Thursday, November 29, 1973, to consider the fairness and adequacy of the proposed settlements and the allocation of the settlement fund among the plaintiff classes; provided however, that no such person shall be heard, and no papers submitted by such person shall be considered by the Court, unless said papers and a notice of intention to appear have been mailed to the Clerk of the Court by November 16, 1973.

6. All documents which you desire to file of record in this case and all inquiries concerning the matters involved should be addressed to Fergus R. Pettigrew, Acting Clerk, United States District Court, Northern District of California, P.O. Box 36014, 450 Golden Gate Avenue, San Francisco, California 94102. The postmark on any envelope will determine if an exclusion election or other required action has been timely made.

7. If you have any questions which you want to raise concerning the matters dealt with in this Notice, please address your questions to the Clerk of the Court at the address set forth in paragraph 6 above.

8. The pleadings and other records in this litigation (Civil Action No. 46414-A AJZ), including the settlement agreements and the interclass allocation agreement, may be examined and copied at any time during regular office hours at the offices of the Clerk.

DATED: October 5, 1973

Fergus R. Pettigrew
Acting Clerk United States District Court
Northern District of California

In re)
)
GYPSUM CASES)

Civil No. 46414-A AJZ

Election to be Excluded

(Must be postmarked by November 8, 1973)

TO: Fergus R. Pettigrew, Acting Clerk
United States District Court
Northern District of California
P. O. Box 36014
San Francisco, California 94102

The undersigned hereby requests to be excluded from the classes established in *In re Gypsum Cases*, Civil No. 46414-A AJZ, pending in the Northern District of California.

Name of Business Entity or Governmental
Body (if any)

By -----
Signature of Authorized Person

Typed or Printed Name and Title of Person
Signing

Address
City State Zip Code

Date _____, 1973

APPENDIX F

EXCERPT FROM IN RE GYPSUM CASES SETTLEMENT ORDER—A. ZIRPOLI

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

In re)
)
GYPSUM CASES)

Civil Action No. 46414-A AJZ

SETTLEMENT ORDER

A hearing was held before this Court on November 29, 1973, after due notice to all persons entitled thereto, at which time all persons filing timely request to be heard were fully heard in support of or in opposition to the proposed settlements between defendants and plaintiffs, intervenors and members of the plaintiff classes heretofore established and hereafter more particularly described.

At said hearing the Court heard argument, received evidence and considered memoranda and papers submitted by or on behalf of all parties supporting or raising objections to the proposed settlements. The Court has had available for review the following information obtained during the nearly seven years of pretrial and trial proceedings which precede these settlements: (1) the discovery, pretrial and trial proceedings before this Court in the related cases entitled *Wall Products Co., et al. v. National Gypsum Co., et al.*; (2) this Court's decisions in those cases on the issues of liability, 326 F. Supp. 295 (1971), and damages, 357 F. Supp. 832 (1973), and the appeals from those decisions presently pending in the Court of Appeals for the Ninth Circuit as Nos. 73-2084 through 73-2099; (3) the depositions taken and filed of present and former employees of all defendants, including the defendants who were not involved in the *Wall Products Co.* trials; and (4) the other discovery and pretrial proceedings in these cases, including documents produced by defendants who were not involved in the *Wall Products Co.* trials and the depositions of their present and former employees. From the prior proceedings in this consolidated litigation, this Court is intimately familiar with the foregoing information, as well as the complete details of every facet of such litigation.

Having considered the presentations made at said hearing in the light of the prior proceedings herein and being duly advised in the premises, the Court hereby finds and concludes as follows:

1. On July 12, August 14 and November 28, 1973 copies of Settlement Agreements (hereinafter "Settlement Agreements") between the following named seven defendants (hereinafter "the Defendants") and the plaintiffs, intervenors and representatives of the Classes were filed with the Court. The identity of each of the Defendants and the date of its Settlement Agreement are as follows:

<u>Defendant</u>	<u>Date of Settlement Agreement</u>
Kaiser Gypsum Company, Inc.	July 10, 1973
The Flintkote Company	July 11, 1973
The Celotex Corporation	July 11, 1973
Georgia-Pacific Corporation	July 11, 1973
National Gypsum Company	August 11, 1973
United States Gypsum Company	August 11, 1973
Fibreboard Corporation	September 30, 1973

2. Pursuant to the Settlement Agreements the Defendants have agreed to pay the aggregate principal amount of \$67,640,000, in final settlement of all claims involved in this litigation, as more specifically provided in said Agreements. Of this amount, \$57,390,000 has already been paid to the trustees named in the Settlement Agreements, most of these funds have been invested in certificates of deposit and all of these funds are earning interest which will be added to the settlement fund. The interest rates on said certificates of deposit range from 9.30% to 10.65%, while a

relatively small amount of the settlement funds deposited in savings accounts is earning the current interest rate on such deposits. Defendants, The Celotex Corporation, The Flintkote Company and Georgia-Pacific Corporation on or before January 19, 1974, will pay the respective balances of the settlement amounts due from them, with the interest at the rate of 8% which has been accruing since shortly after the Settlement Agreements were made.

3. As appears from the affidavits of Frederick P. Furth and Michael Kleinman filed November 27, 1973, in accordance with the provisions of Pretrial Order No. 40, entered September 6, 1973, the Class Notice was sent on or before October 5, 1973, by first class mail, postage prepaid, to all addresses on the master mailing list prepared pursuant to said Pretrial Order, and the Class Notice was published on or before October 15, 1973, in the journals specified in said Pretrial Order. The Class Notice was mailed to approximately 475,315 persons named on said master mailing list and was published in six journals of the building and construction industry.

4. The Class Notice fully and accurately informed the plaintiffs, intervenors and members of the Classes of all material elements of this litigation, of the proposed settlements and of their rights and obligations in connection therewith, in accordance with the requirements of Rule 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure, and advised plaintiffs, intervenors and members of the Classes that each would be included in, and bound by, any judgment in this litigation, including any settlement approved by the Court and any determination affecting the Classes herein, unless it mailed to the Clerk of the Court on or before November 8, 1973, a written election to be excluded from the Classes. The Class Notice also stated that any plaintiff, intervenor or member of the Classes could appear, be heard and present evidence at the hearing on November 29, 1973 with respect to the fairness and adequacy of the proposed settlement and the allocation of the settlement fund among the various Classes.

5. There is substantial support for the Settlement Agreements and the interclass allocation agreement by counsel for plaintiffs, intervenors and members of the Classes and counsel for the Defendants have also supported the Settlement Agreements.

6. Without now determining any of the disputed issues of fact or law involved in this litigation, it is apparent to this Court that, due to the complexity and uncertainty of the legal and factual issues presented in this litigation, continued litigation by plaintiffs, intervenors and members of the Classes would be costly and lengthy and that recovery by any of them is subject to uncertainty.

7. Specifically, among the many factors favoring the proposed settlements are (1) the sums of money the Defendants have agreed to pay, which are substantial even when compared to the damages which plaintiffs, intervenors and members of the Classes might recover from Defendants should all issues be determined adversely to the Defendants; (2) the uncertainty of the ability of the plaintiffs, intervenors and members of the Classes to prove liability and/or damages against any of the Defendants, including the questions of statute of limitations, remoteness of various plaintiffs', intervenors' and Classes' claims and the possibility of duplicative recoveries; (3) this Court's prior decisions on liability and damages in the *Wall Products Co.* cases, the appeals from those decisions which are pending and this Court's collateral estoppel determination, all as referred to above; and (4) Defendants' denials of any violation of the antitrust laws, and any overcharges, and the fact that they can be expected to litigate all issues fully, including appeals if necessary.

IT IS THEREFORE ORDERED:

I.

The proposed settlements with Defendants set forth in the Settlement Agreements are just, fair, reasonable and adequate under the circumstances of these cases and

satisfy the prerequisite to approval thereof under Rule 23 of the Federal Rules of Civil Procedure. All objections to these settlements are hereby overruled, and said settlements are hereby each approved as a final settlement and compromise of the cases entitled *In re Gypsum Cases*, Civil Action No. 46414-A AJZ, binding on all plaintiffs, intervenors and members of the Classes, excepting only those persons whom the Court has determined to have filed timely written requests for exclusion.

II.

All attorneys' fees, costs and other claims against the settlement fund, and expenses of notice and administration incurred in connection with the settlements, as may be allowed or approved by the Court, shall be charged against and deducted from, the settlement funds and the Defendants shall have no liability therefor.

III.

No just reason exists for delay in entering final judgment as to all Defendants in accordance with the terms of the Settlement Agreements, which Agreements provide that the settlements shall inure to the benefit of any and all officers, directors, agents, employees, affiliates, subsidiaries, parents, successors, assigns, and past and present stockholders of each and every one of the Defendants. Entry of a contemporaneous final judgment dismissing all the Defendants with prejudice and without cost is hereby directed. By said final judgment, this Court will retain jurisdiction over the actions so dismissed for the limited purpose of supervising and directing the administration of the settlements and distributing the settlement funds, including the payment of additional settlement funds owed by certain of the Defendants, allocation of the settlement funds, subject to the interclass allocation agreement, among plaintiffs, intervenors and members of the Classes, consideration of applications for attorneys' fees, costs and other claims against the settlement fund, consideration of resignation and discharge of one or more trustees of the settlement funds, and distribution of such funds to the parties entitled thereto. In addition, with respect to those actions so dismissed, in which one or more but not all plaintiffs and/or intervenors filed timely written elections to be excluded herefrom, as provided in paragraph 7 above, this Court will retain full and complete jurisdiction of such actions but only with respect to such excluded plaintiffs and/or intervenors for any and all further proceedings which may be required with respect to them, or any of them.

Dated: November 29, 1973.

ALFONSO J. ZIRPOLI

United States District Judge

APPENDIX G

"AD DAMNUM"

EXCERPT FROM ZIRPOLI DECISION

A review of the pricing practices of the defendants in Northern California conclusively establishes that prices for gypsum wallboard were fixed by the defendants and paid by the plaintiffs at a substantially higher level than would have been the competitive price, in the absence of the price fixing conspiracy, and that plaintiffs were damaged as a result. A determination of what that differential was and the extent to which it may be attributed to defendants' illegal conspiracy, as contrasted to the extent that such differential or some part thereof, may be attributed to economic factors unrelated to the conspiracy, carries with it certain difficulties. These difficulties, however, are not insurmountable.

Four factors, among others, that give rise to these difficulties are:

(1) the very nature of the gypsum wallboard industry, which Mr. Wright of USG in the aforementioned memorandum of September 30, 1965, describes as one where

"the price may fluctuate within a very wide range depending upon pricing strategy and leadership within the industry;"

(2) the extreme positions taken by plaintiffs and defendants as to what the price of gypsum wallboard would have been during the relevant period absent the conspiracy;

(3) the extent to which, if any, the evidence will support a passing-on defense within the limitations set forth in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); and

(4) the inconclusive character of much of the evidence constituting the voluminous record made in the 35 days of trial on the damages issue.

In considering these difficulties it must be remembered that the wrongdoer may not object to the plaintiffs' just and reasonable estimate of the amount of damages supported by relevant data, because it is not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.

Here, despite these difficulties and the extreme positions taken by the parties, enough relevant data emerges from the evidence from which the court can and does make "a just and reasonable estimate" of the damages suffered by each plaintiff.

Defendants contend that the price differential between what plaintiffs paid per thousand square feet (MSF) of gypsum wallboard and what they would have paid therefor absent the conspiracy is: (a) zero, or (b) \$1.00 per MSF, or (c) about \$2.00 per MSF.

Plaintiffs contend that the differential should be at least \$20.00 per MSF on all wallboard, or that the price on $\frac{1}{2}$ " wallboard during the conspiracy should have been \$34.00 per MSF and that the price on $\frac{5}{8}$ " wallboard during the conspiracy should have been \$52.25 per MSF.

Defendants' contention that the price differential is zero is based upon the opinion of their expert, Dr. Crutchfield, that price deviations (exceptions to list price) would not have gone on for more than a few months. This opinion is pure speculation and is rejected by the court. It runs counter to all the economic data established in this case and counter to the conclusions of the top executive officers of USG, including its president, Mr. Morgan. At a meeting in October of 1965 top management considered a memorandum on pricing strategy which provided in part:

Whereas we had hoped that the projected December results would represent stability and from here new strategy for restoration could be evolved and implemented early in 1966, we are now of the opinion that *the projected level does not represent true bottom, and deterioration will continue at only a slightly modified pace unless a dramatic change in strategy is made soon.* (Emphasis added)

After considering the memorandum the only change made was when Mr. Morgan struck out the words "at only a modified pace," leaving as top management's considered opinion "that the projected level does not represent the bottom and deterioration will continue unless a dramatic change in strategy is made soon." *That dramatic change was the conspiracy.* And, once that dramatic change terminated, within less than a year (August, 1966) there was a dramatic "deterioration" in price.

The \$1.00 per MSF differential estimate is based upon defendants' claim that it was the differential prevailing in the nationwide market. Yet, as discussed above, there were many marketing zones or submarkets, and the market for the purposes of these cases is Northern California. The competitive activities of defendants in this market, which was a strong "dealers'" market, were substantially unlike those in any other market of the nation. It is to the Northern California market that the court turns in its determination of damages.

The \$2.00 per MSF differential estimate is based upon defendants' claim that the maximum deviation granted any plaintiff prior to December 15, 1965, was \$2.00 per MSF. But this price deviation only tells a part of the story. As Mr. Harper, Presi-

dent of Kaiser, testified, the price deviations, exceptions to list price, had a snowball effect which defendants realized and wanted to prevent and which, as indicated in the above quoted memorandum, they did stop by the conspiracy. The desire to stop this deterioration in price is further reflected in the aforementioned memorandum of Mr. Wright of September 30, 1965, wherein he stated in part:

In a situation where a product is not sensitive to price, the price may fluctuate within a very wide range depending upon pricing strategy and leadership within the industry. The range is limited on the high side by the price at which other firms are attracted into the industry. The ideal price, for a commodity type product such as gypsum, would be just under the level which will attract new occupation. On the low side, the price is limited at the point where the return on investment is very low or non-existent. *The width of this range in our industry probably is quite large, running from a possible low of \$25 per thousand feet on gypsum wallboard to a high of somewhere in the low or mid-forties. . . .* When industry capacity is added and the redistribution of volume and ultimate lower plant utilization is achieved through severe price competition, the result is lower plant utilization and in addition drastically reduced prices and profits. (Emphasis added)

By early October USG's management recognized that unless something was done USG would suffer such further dramatic price deterioration and that it would incur a loss in gross profits in 1966 calculated to be \$18,000,000 below 1965 and \$29,000,000 below 1964. As has been established, the question of doing "something" was answered at least by USG, National and Kaiser through an illegal conspiracy to fix prices and stem the precipitous decline in prices—to stem, in the words of Mr. Harper of Kaiser, "the snowball effect" of price deviations.

The foregoing makes it quite evident that defendants' claim that the price deviations would not have exceeded the \$2.00 per MSF that existed before December 15, 1965, is wholly without merit. The evidence runs directly counter to Dr. Crutchfield's opinion that the deviation from list price would not have continued for more than a few months.

For the above stated reasons the court rejects the measures of damages suggested by defendants.

The first claim of plaintiffs that the price differential that they suffered because of the conspiracy is at least \$20.00 per MSF for all wallboard is based upon Mr. Wright's opinion that unless there was a change in pricing strategy the deterioration in price would be "a possible low of \$25," and on their study and analysis of production costs (mill net costs) at certain plants of the defendants. While this approach and the data in support thereof has its attractions, it is somewhat speculative and not as true a reflection of the differential as that shown by actual market performance of which we have specific relevant proof.

Performance in the market brings us to plaintiffs' alternative claim that but for the conspiracy the price they would have paid for ½" wallboard would have been \$34.00 per MSF and that for ⅝" wallboard it would have been \$52.25 per MSF. This claim is supported by substantial relevant data. Immediately prior to the conspiracy prices were dropping precipitously and the level to which they would have dropped in 1966 and 1967 but for the conspiracy is evidenced by the low level reached for defendants' wallboard prices within less than a year after the termination of the conspiracy (August, 1968).

Prior to December 15, 1965, the prices of defendants' ½" wallboard was \$45.75 per MSF with most of the plaintiffs' purchases at \$43.75 (list price minus \$2.00) per MSF. After the inception of the conspiracy the prices paid by plaintiffs for ½" wallboard went to \$45.75, then to \$47.00, and then to \$49.00 per MSF. In August, 1968, eight months after the dissipation of the conspiracy, the prices for ½" wallboard had dropped from \$49.25 rail delivery and \$49.25 truck delivery to

\$36.00 rail list price (\$34.00 for deliveries consisting of 120,000 lb. car lots) and to \$36.00 truck list price. Also, within eight months after the dissipation of the conspiracy, the prices of $\frac{5}{8}$ " wallboard dropped from \$71.50 rail list price and \$71.50 truck list price to \$57.00 rail list price (\$52.25 for deliveries consisting of 120,000 lb. car lots) and \$57.00 truck list price.

From this dramatic evidence of the August, 1968 prices, it is just and reasonable to infer that a competitive or normal price of \$36.00 per MSF for $\frac{1}{2}$ " wallboard and a competitive or normal price of \$57.00 per MSF for $\frac{5}{8}$ " wallboard would have prevailed in 1966 and 1967, the period of the conspiracy. The court utilizes the figure \$36.00 per MSF for $\frac{1}{2}$ " wallboard and the figure \$57.00 per MSF for $\frac{5}{8}$ " wallboard because these figures represent normal rail prices, whereas the \$34.00 and \$52.25 figures represent sales of car lots of 120,000 lbs. or more, which were the exception rather than the rule. The use of such measure of damages was employed in *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914, 935-36 (S.D. N.Y. 1965), where the measure of overcharge was "the large gap between the order and book prices after the conspiracy was uncovered as contrasted with the small gap which previously existed," 244 F. Supp. at 935.

Other economic data confirming the use of the \$36.00 figure for $\frac{1}{2}$ " wallboard and the \$57.00 figure for $\frac{5}{8}$ " wallboard as just and reasonable indications of what the price for such wallboard would have been in 1966 and 1967 consist of the following:

(1) production cost data of defendants, from which one could reasonably infer that the competitive prices indicated by the 1968 level could have been, and in all probability would have been, substantially lower in the short 1966-1967 period in question;

(2) price data for 1969 and 1970, which show that the low prices in 1968 were sustained for a substantial period of time and were in fact even lower in 1970 than in 1968;

(3) industry capacity utilization statistics, which show that the percentage of industry capacity utilization was lower in 1966 and 1967 than it was in 1968-1970, thereby indicating that the incentive to cut prices was actually greater in 1966 and 1967 than it was in 1968;

(4) statistics of construction activity, which show that the demand for gypsum wallboard was greater in 1968 and 1969 than in 1966 and 1967;

(5) construction cost indexes, which show that, in general, construction prices were higher in 1969-1970 than in 1966-1967; and

(6) a comparison of freight rates, which show that delivery by truck costs more than by rail (thus, a \$36.00 truck delivery price should be the equivalent of a \$34.00 rail delivery price).

The conclusion to be drawn from all this relevant data is that absent the conspiratorial actions of the defendants the 1965 price decline would have resulted in a price of \$36.00 (or less) per MSF for $\frac{1}{2}$ " wallboard and \$57.00 (or less) per MSF for $\frac{5}{8}$ " wallboard.

The court finds no merit in the defendants' rebuttal. It considered and, as stated above, rejected as pure speculation Dr. Crutchfield's "belief" that if the conspirators had only refrained from their illegal conspiracy, the prices would have been restored without illegal tampering. The court also rejects defendants' contention that the precipitous drop in prices in 1968 was the result of changes in marketing practices unrelated to the conspiracy. These changes, which came after dissipation of the conspiracy, resulted from Georgia Pacific Corporation's emergence as a strong competitor employing new marketing techniques (direct sales from warehouses) and the establishment by USG (announced in December, 1967) of a "Supply Division" in the San Francisco Bay Area market, thereby enabling it to sell as a "dealer."