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THE "BIG" ANTITRUST CASE: 25 YEARS OF SISYPHEAN LABOR*

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INTRODUCTION

A. *Background to the Current Situation*

The problem of efficiently and fairly managing large civil litigations in the federal courts, particularly large antitrust cases, has been extensively examined over the past twenty-five years. Apparently stimulated by several unusually complex and protracted governmental civil antitrust actions in the late 1940's,[1] pioneering studies were undertaken between 1949 and 1954 which form the basis for much of the current wisdom on how to expedite protracted litigation.[2] These early writings emphasized the efficient

* This Article is intended to be an up-date of the pioneer study, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950), written 25 years ago by Mr. Withrow's partner Breck P. McAllister, who died this past summer.

Note: Throughout this Article, citations to the Federal Rules of Civil Procedure will appear in the shortened form "Rule 28," "Rule 16," etc.

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The views expressed herein are strictly those of the two authors and do not in any way represent those of the Justice Department.

[1] *See* Yankwich, *"Short Cuts" in Long Cases*, 13 F.R.D. 41, 62-64 (1952).

[2] ABA SECTION ON ANTITRUST LAW, REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES (1954) [hereinafter cited as MCALLISTER

pretrial organization of single large suits, primarily governmental actions for equitable antitrust relief.

In the main, the early studies proposed that large cases be quickly assigned to a single judge,[3] that the judge immediately assume "iron-hearted" control over the scope and structure of pretrial proceedings,[4] that discovery and presentation of proofs be limited to clearly material areas,[5] that an early and on-going effort be made to particularize and narrow disputed issues,[6] and that trial proofs be identified and scheduled in advance.[7] The early studies usually assumed that trial would be before the pretrial judge and without jury.

Between 1954 and 1964, much scholarly activity was directed at consolidating and refining the studies of the early fifties. The Judicial Conference of the United States Courts held seminars on "protracted cases" and related matters at New York University in 1957,[8] at Stanford University in 1958,[9] and in Boulder, Colorado, in 1960.[10] In 1958 the ABA published a study on complex litigation entitled *Streamlining the Big Case*,[11] and in 1960 the Judicial Conference issued its *Handbook of Recommended Procedures for the*

REPORT]; SYMPOSIUM, BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS (CCH 1951); McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950) [hereinafter cited as *The Big Case*]; Yankwich, *supra* note 1.

Other early studies of protracted litigation include the following: THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT, pt. VIII, at 343-93 (1955); Connelly, untitled remarks, *in The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 140-45 (1951); McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A.J. 289 (1952) [hereinafter cited as *Procedural Problems*]; Marsh, *Pretrial Discovery in an Anti-Trust Case*, 8 RECORD OF N.Y.C.B.A. 401 (1953); Noonan, *The Trial of an Anti-Trust Case*, 8 RECORD OF N.Y.C.B.A. 392 (1953); Prettyman, *Recommendations from the Courts*, 2 ABA ANTITRUST L.J. 27 (1953); Yankwich, *Observations on Antitrust Procedures*, 10 F.R.D. 165 (1951); Gesell, Book Review, 65 HARV. L. REV. 1085 (1952). For a very comprehensive study on the general application of pretrial procedures, see H. NIMS, PRE-TRIAL (1950).

[3] *The Big Case*, *supra* note 2, at 52.

[4] Gesell, *supra* note 2, at 1087; Prettyman, *supra* note 2, at 27; Yankwich, *supra* note 1, at 65-66.

[5] MCALLISTER REPORT, *supra* note 2, at 23, 26-27; Connelly, *supra* note 2, at 145; Hand, *Trial Efficiency*, *in* BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS, *supra* note 2, at 31-33A; *The Big Case*, *supra* note 2, at 56-57.

[6] MCALLISTER REPORT, *supra* note 2, at 18-21; *The Big Case*, *supra* note 2, at 53-56; Prettyman, *supra* note 2, at 29; Yankwich, *supra* note 1, at 66-68.

[7] MCALLISTER REPORT, *supra* note 2, at 32-35, 39; *The Big Case*, *supra* note 2, at 55.

[8] *Proceedings of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957).

[9] *Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 319 (1958).

[10] *Proceedings of the Seminar on Practice and Procedure under the Federal Rules of Civil Procedure*, 28 F.R.D. 37 (1960).

[11] 13 ABA ANTITRUST L.J. 183 (1958).

Trial of Protracted Cases.[12] The basic recommendations of the earlier studies were generally accepted in these later studies, which sought to articulate precise methods to accomplish certain goals—*e.g.*, "particularization" of issues, "control" of discovery, and shortening of trial proofs.

These studies recognized the importance of timing each pretrial step for maximum advantage, but they remained flexible, if not downright uncertain, as to what was the best possible schedule. Considerable attention was given to the possibility of early trimming away of "fringe" issues and undisputed matters, and of using special masters to expedite discovery and direct the organization of complex and technical proofs. One critic remarked that the creation of elegant pretrial procedures was becoming a goal in itself, to the detriment of effective issue-refinement by judge and counsel.[13] The debate over whether formal procedures are preferable to informal ones (with both sides citing splendid examples of their favorite techniques) has not died, as will be seen below.

Judicial and professional thinking about the management of large antitrust litigations took a second quantum leap forward in the early 1960's, with the advent of the myriad "electrical equipment" cases.[14] The rapid onslaught of so many treble-damage actions strikingly demonstrated that necessity mothers invention. Using untried and voluntary procedures, the Judicial Conference faced the new problem of multiparty/multidistrict litigation by organizing national programs of discovery and issue determination, and by encouraging the consolidation and transfer of separate actions into a relatively few forums.[15] There has been both praise and criticism of the energetic, perhaps ruthless manner in which the Conference's Coordinating Committee limited the timing and scope of national discovery, and one writer has gone so far as to assert that the electrical equipment cases were settled in spite of the

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[12] 25 F.R.D. 351 (1960) [hereinafter cited as *Handbook*].

[13] McDowell, *Pretrial Procedures: Pretrial v. Procedure*, 4 ANTITRUST BULL. 675 (1959). *See also* Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417 (1958); Wright, *The Pretrial Conference*, 28 F.R.D. 141 (1960).

[14] The electrical equipment cases have been written about so often in law reviews that a description is unnecessary. Of interest, are two books which deal with them. C. WALTON & F. CLEVELAND, CORPORATIONS ON TRIAL: THE ELECTRIC CASES (1964), and J. FULLER, THE GENTLEMEN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY (1962). Suffice it to say that commencing in 1961, between 1,900 and 2,000 separate treble-damage actions were filed in some 35 different districts.

[15] *See Panel Discussion: The Impact of the Electrical Antitrust Cases upon Federal Civil Procedure*, 39 F.R.D. 495 (1965) [hereinafter cited as *Panel Discussion*].

coordinated procedures instituted therein.[16]

The experience of the electrical equipment cases led directly to the passage of 28 U.S.C. § 1407, allowing transfer for coordinated pretrial proceedings, and to the creation of the Judicial Panel on Multidistrict Litigation to administer the new law.[17] Furthermore, aspects of the electrical equipment experience found their way into the Judicial Panel's 1969, 1970, and 1973 *Manuals* for large cases.[18] In particular, the emphasis of the *Manuals* on carefully observed timetables and successive "waves" of discovery apparently derives from that experience.[19] The alternative procedure for coordinating complex cases without a section 1407 transfer, as outlined in the current *Manual*, also seems to be drawn from the methods devised in the early sixties.[20]

With the arrival of truly complex multiparty/multidistrict litigation in the mid-sixties, along with the advent of massive class actions in the late sixties, judicial emphasis has shifted from "merely" managing single party issues of antitrust liability and injunctive relief to managing diverse and sometimes competing issues which affect many parties—*e.g.*, liability, fact of damages, and quantum of damages. The definition of complexity has itself become more complex.

B. *The Current Situation*

After some twenty-five years' study, it might seem that "manageability" has been achieved in complex antitrust cases. A comprehensive *Manual* exists to guide the complete course of pretrial and trial endeavor. The United States courts have available the research resources of the Federal Judicial Center.[21] Use of single-

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[16] Sawyer, untitled remarks, *in Panel Discussion* at 506. For other views on the discovery and pretrial proceedings in the electrical equipment cases, see Bane, *Pretrial Discovery in Multiple Litigation from the Plaintiffs' Viewpoint*, 32 ABA ANTITRUST L.J. 117 (1966); Kohn, untitled remarks, *in Panel Discussion* at 499; McAllister, *Judicial Administration of Multiple-District Treble Damage Litigation*, *in* N.Y. STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 55 (1966); O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ABA ANTITRUST L.J. 133 (1966).

[17] *See* H.R. REP. No. 1130, 90th Cong., 2d Sess. 2 (1968); McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974).

[18] FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (CCH 1969, 1970) and MANUAL FOR COMPLEX LITIGATION (CCH 1973) [hereinafter cited as 1969 MANUAL, 1970 MANUAL, etc.].

[19] *See* 1970 MANUAL § 1.5; 1973 MANUAL § 1.50.

[20] *See* 1973 MANUAL §§ 5.02-5.40.

[21] *See id.* at xi.

judge assignments[22] and pretrial procedures[23] has become the norm. Nonetheless, the matter of "manageability" continues to be studied,[24] both in an effort to further refine or reform well-established pretrial and trial devices, and in an effort to control the course of complex treble-damage suits. The proliferation of multiple-plaintiff suits has added a new "horizontal" dimension to judicial management of large cases. This new dimension has helped to confound the older, "vertical"—*i.e.*, chronological—aspect of judicial management. Questions of transfer, class determination, "waves" of discovery, scheduling of successive trials, and the like now compete for attention with motions to dismiss, motions for summary judgment, motions for leave to amend, and judicial efforts to particularize the issues through entry of detailed pretrial orders. Furthermore, new cases may be brought while older ones are being readied for trial and while still others are being settled—with court supervision in the case of class actions. Control of large litigations has, more than ever, become a matter of timing and early determination by the judge of his own pretrial objectives.

C. *Current Needs*

In the text that follows, we maintain that the crux of truly fair and efficient management of large cases is still "iron-hearted" control by the judge.[25] Despite, or perhaps in part because of the plethora of recommended and required pretrial techniques, it is by no means clear that such control is always exercised. Second, we believe that large antitrust litigations would be better controlled and certainly more fairly adjudicated if it were frankly recognized that pretrial, not trial, is where the merits of such cases are revealed. Trial, if it occurs at all, is but the final denouement of pretrial adjudication,[26] save in the case where pretrial responsibilities have been neglected by the presiding judge.

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[22] *See id.* § 5.01.

[23] *See* Pollack, *Pretrial Conferences*, 50 F.R.D. 451 (1970).

[24] *See, e.g.*, ABA Section of Antitrust Law, *Investigation and Evidence in Antitrust Cases: New Developments*, 41 ABA ANTITRUST L.J. 519 (1972); ABA Section of Antitrust Law, *Preparation and Trial of an Antitrust Treble Damage Suit*, 38 ABA ANTITRUST L.J. 1 (1968); ABA Section of Antitrust Law, *Symposium on Antitrust Class Actions*, 41 ABA ANTITRUST L.J. 229 (1972); Pollack, *supra* note 23; Pollack, *Pretrial More Effectively Handled*, 65 F.R.D. 475 (1974); Note, *supra* note 17.

[25] *See also* Withrow, *A Defense Counsel's View of a Government Civil Antitrust Case*, 21 F.R.D. 427 (1957).

[26] *See* Kaufman, *Judicial Control over Discovery*, 28 F.R.D. 111, 125 (1960).

I

MOST CASES ARE NOT TRIED

That the trial of antitrust actions is rather a rare event is attested to by current figures from the Administrative Office of the United States Courts. In fiscal year 1973, sixty civil antitrust actions brought by the United States terminated, but only seven, *i.e.*, only 11.7 percent, reached trial.[27] In fiscal year 1974, fifty-four such actions terminated, with only six, or 11.1 percent, actually reaching trial.[28] As for private antitrust actions, 981 terminated during fiscal year 1973, with only ninety-two of them, or 9.4 percent, reaching trial.[29] In fiscal year 1974, 1,473 private antitrust actions terminated, with but ninety-eight cases, or 6.7 percent, reaching trial.[30] It has come to be recognized that termination prior to trial is the rule in the antitrust area,[31] as in many other areas of litigation.[32]

Breaking down the above statistics, the Administrative Office records show that around forty percent of these pretrial terminations have been by settlement.[33] A slightly larger proportion, roughly fifty percent, have been by court action, with the majority of these occurring "before pretrial" as opposed to "during or after pretrial."[34] No clear definition is given as to what is covered by the rubrics "before" and "during or after" pretrial. In any event, termination before trial is vastly more common than termination by way of trial.

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[27] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-4, at 358-59 (1973) [hereinafter cited as ADMIN. OFFICE REP. 1973, 1974, etc.].

[28] ADMIN. OFFICE REP. 1974, Table C-4, at 415.

[29] ADMIN. OFFICE REP. 1973, Table C-4, at 358-59.

[30] ADMIN. OFFICE REP. 1974, Table C-4, at 416.

[31] *See, e.g.*, Collen, *Procedural Directions in Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997 (1972); Furth & Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape Talk with Plaintiff's Trial Counsel*, 23 DE PAUL L. REV. 865, 880 (1974); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971).

[32] *See* ADMIN. OFFICE REP. 1973, Table C-4, at 358-59; ADMIN. OFFICE REP. 1974, Table C-4, at 415-17.

[33] ADMIN. OFFICE REP. 1974, Table C-4, at 416.

[34] *Id.*

II

THE IMPORTANCE OF PRETRIAL ADJUDICATION

Although most antitrust claims are resolved prior to trial, such resolutions can take a long time. Again turning to statistics provided by the Administrative Office, one sees that during fiscal year 1973 the median duration of private actions terminated by the court "before pretrial" was eleven months, with ten percent of these actions dragging on for over forty-five months.[35] Where such terminations occurred "during or after pretrial," the median duration of the cases was twenty-seven months, with ten percent lasting over sixty-four months.[36] During the following year, the median duration of private actions terminated by the court "before pretrial" increased to eighteen months, with ten percent of these cases consuming sixty months or more.[37] Where such terminations occurred "during or after pretrial," the median duration of the cases declined slightly to twenty-four months, with ten percent lasting beyond fifty-four months.[38] In view of these statistics, it is clear that a great deal of work goes into the pretrial adjudication of complex cases.

Moreover, pretrial termination is a decision on the merits, not only because it effectively represents all of the justice that the parties will receive, but because settlements or other pretrial terminations are largely determined by the merits of the various claims and defenses. Assuming that the burden of being sued or bringing suit does not alone coerce a settlement, any resolution prior to trial will represent the parties' composite assessment of how they stand on questions of liability and damages.[39] Likewise, even preliminary

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[35] ADMIN. OFFICE REP. 1973, Table C-5a, at 368-69.

[36] *Id.*

[37] ADMIN. OFFICE REP. 1974, Table C-5a, at 428-31.

[38] *Id.* By way of comparison, the median duration of private cases terminated *by trial* was 28 months in fiscal year 1973 (10% lasting over 62 months) and 30 months in fiscal year 1974 (10% lasting over 64 months). ADMIN. OFFICE REP. 1973, Table C-5a, at 368-69; ADMIN. OFFICE REP. 1974, Table C-5a, at 428-31. In general, termination by trial does not appear to have been significantly slower than termination during or after pretrial proceedings.

[39] *See* 3 J. MOORE, FEDERAL PRACTICE ¶ 16.17 (2d ed. 1974); Collen, *supra* note 31, at 998; National Institute on the Corporate Trustbusters, *Workshop IV: Handling the Big Case*, 43 ABA ANTITRUST L.J. 215, 241-42 (1973). *See also* Brennan, *The Continuing Education of the Judiciary in Improved Procedures*, 28 F.R.D. 42, 49 (1960) (a splendid example):

> When each side can see through pretrial discovery the whole case exposed to view before the day of decision, each is in the best possible position to evaluate his chances of success, or lack of them. But what they have learned should be con-

judicial determinations—*e.g.*, rulings coordinating "front-burner" and "back-burner" cases as to discovery and preparatory efforts, rulings on class action matters, and rulings on the initial scope of discovery—reflect the judge's view of the parties' substantive positions, if not the precise weight to be accorded to each.[40]

Remarks made during Judicial Conference proceedings with specific reference to Rule 16 procedures also emphasized the importance of pretrial adjudication:

> The administration of justice does not mean merely dispensing justice, merely having a judge referee a fight between two lawyers. The administration of justice means administration; a judge has to get into these cases and administer them. The lawyers are likely, in their advocacy, to run off in different directions; it's the judge who brings them back to the issues; it's the judge who shows them where the point of the case is, where the issues are.[41]
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> * * *
>
> The adjudication of a case in the federal courts should be seen as a process continuing from the date of filing to the date of final decree. The "courtroom scene" often alluded to is only the last act in an often extended drama.[42]

While pretrial proceedings do not always result in the court's finding answers as to where the merits lie, they should at least refine the relevant questions so the parties themselves or the trier of facts can more easily divine the answers. Pretrial proceedings without such a goal are likely to be diffuse and wasted.[43] Ultimately, the goals of pretrial (and trial) proceedings are efficiency of disposition and accuracy of result. Although antitrust cases account for only a very small percentage of federal cases filed,[44]

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densed before trial if both sides are to have the maximum results from its use. And it is at the pretrial conference that the case is synthesized in a tailor-made document suited only for the particular cause to which it relates.

[40] Although district courts are not supposed to pass upon the merits in ruling on preliminary issues such as whether to certify a class action (Eisen v. Carlisle & Jacquelin ("Eisen III"), 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974)), many district courts appear to construe that stricture narrowly.

[41] Wright, *supra* note 13, at 141.

[42] Kaufman, *supra* note 26, at 125.

[43] *See* Freund, *The Pleading and Pre-trial of an Antitrust Claim*, 46 CORNELL L.Q. 555, 562 (1961); Gourley, *Effective Pretrial Must be the Beginning of Trial*, 28 F.R.D. 165, 170 (1960); *The Big Case*, *supra* note 2, at 29-30; McDowell, *supra* note 13, at 679-82; Pollack, *supra* note 23, at 451; Wright, *supra* note 13, at 150.

[44] In fiscal year 1974, some 1.2% of all federal civil actions were antitrust cases—the

increased dispatch in their adjudication is of value to the entire federal court system[45] and to litigants as well.[46] Accuracy of result is likewise important as a basic component of justice: it is the substance behind the form of pretrial and trial procedures and a goal which must be reconciled with the need for efficiency.[47]

III

DEVICES FOR PRETRIAL MANAGEMENT

A number of procedures can be used to effectively adjudicate large antitrust actions during the pretrial period. Much of the remainder of this Article will examine the more prominent of these procedures to see whether they allow: (*1*) early and effective control by the pretrial court, (*2*) determination of the merits of the litigation (*i.e.*, the true issues and their support), (*3*) efficiency and speed, and (*4*) accurate findings of material facts.

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same figure as in fiscal year 1973. ADMIN. OFFICE REP. 1974, *supra* note 27, at 207; ADMIN. OFFICE REP. 1973, at 127.

[45] In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 348-49 (1971), the Supreme Court stated that liberalized use of collateral estoppel would be justified in patent-infringement cases even if few suits were thus disposed of, since such liberalization would, in the Court's view, still eliminate several complex and lengthy actions. *See also* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 190-94 (1973).

[46] A good example of inefficient judicial administration leading to what might be called an indefinite delay in adjudication is the case of Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965), *aff'd sub nom.* Waldron v. Cities Service Co., 361 F.2d 671 (2d Cir. 1966), *aff'd sub nom.* First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968), a case in which one of the authors participated. This action, alleging group boycott and conspiracy by major oil companies in the early 1950's, was brought in 1956. By 1968, all that had been accomplished was summary judgment for one defendant. *See* 391 U.S. 269-70. For an analysis of that summary judgment, see 10 B.C. IND. & COM. L. REV. 196 (1968). By 1968, there had already been two substitutions of plaintiff due to the deaths of earlier claimants. As of 1971, certain other summary judgment motions were being considered, and plaintiff still had not been allowed to commence general discovery. *See* First Nat'l Bank v. British Petroleum Co., 324 F. Supp. 1348, 1361-63 (S.D.N.Y. 1971) (appendix to opinion outlines 15 years' worth of pretrial proceedings). The lack of truly "ironhearted" control by the early pretrial judges helped turn this particular litigation into a marathon that literally outlived its value to the original claimant and embroiled the defendants for years on end.

[47] *See The Big Case, supra* note 2, at 29; Prettyman, *The Spirit of the Rules,* 28 F.R.D. 51, 57-60 (1960). As Prettyman explained:

> Accuracy is not an easy goal. It requires patience, persistence, intelligence, energy, self-control. And these are virtues difficult to attain.
>
> However all that may be, the Rules accentuate accuracy as the goal to be sought. The whole purport of the Rules is to that effect. Pretrial and discovery are two outstanding features to that end.

Id. at 60.

A. *Multidistrict Transfers*

One device of signal importance to antitrust litigation is the multidistrict transfer of actions deemed to share common issues of fact and law. The initial determination whether actions share common issues and deserve joint pretrying is made by the Judicial Panel on Multidistrict Litigation, the body created to apply the pretrial transfer statute.[48] The Panel's decisions are to be based on consideration of each transfer petition in its entirety, with regard for every significant factual nuance.[49] To a considerable extent, the most important factor appears to be the potential for saving judicial effort, and not the immediate convenience to parties or witnesses.[50] In any event, the Panel's primary responsibility is only to effect the *transfer* of supposedly complex and related actions; it is the transferee court which must *coordinate* those actions through plans which do justice to all.[51]

The simultaneous pretrying of numerous separate actions by a single judge may lead to conflicts among the parties as to the timing and scope of discovery, and the scheduling of trials. These are precisely the kinds of problems that led to creation of the pretrial transfer process under section 1407;[52] their resolution, however, is no simple matter.

As for conflicts between early and late filing plaintiffs, an accepted solution has been to let the latecomers share in earlier general discovery and to defer their individual demands.[53] This seems fair enough, since latecomers cannot expect to disrupt on-going proceedings which in many instances they might well have joined before. If a defendant wishes to pursue discovery against latecomers, however, that should be unobjectionable so long as he does not delay elsewhere.[54] Under some circumstances, the late-filed claim should be adjudicated in tandem with similar, earlier ones, even

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[48] 28 U.S.C. § 1407 (1970). *See* H.R. REP. No. 1130, *supra* note 17, at 3; McDermott, *supra* note 17, at 220.

[49] *See* McDermott, *supra* note 17, at 220. For a ready listing and summary of all Panel decisions, see 13 MODERN FEDERAL PRACTICE DIGEST, Courts 277.2.

[50] *See* McDermott, *supra* note 17, at 220.

[51] *See* 1973 MANUAL, *supra* note 18, at § 1.10; Note, *supra* note 17, at 1033.

[52] *See* H.R. REP. No. 1130, *supra* note 17, at 2.

[53] *See* 1973 MANUAL § 3.11 (regarding use of prior discovery).

[54] In the antibiotics proceedings (*see* notes 201-07 and accompanying text *infra*), in which the authors have been involved as defense counsel, the court allowed defendants to conduct some discovery against a number of late-filing foreign government plaintiffs even while defendants prepared for and commenced trial with certain domestic consumer and competitor plaintiffs.

where the earlier discovery does not entirely fit the new claim. A converse problem may arise where a new claim dresses itself in the pleadings and discovery requests of other actions in order to achieve an early joint adjudication which it does not truly deserve.[55] This sort of "piggy-backing" can only be prevented by intense judicial analysis that digs behind the pleadings of each new claim.

As for conflicts regarding the timing and subject matter of discovery, important issues common to all or most of the actions have generally taken precedence. In the electrical equipment cases, this meant national discovery (*i.e.*, coordinated discovery in the different cases which were located from coast-to-coast) by plaintiffs on issues of defendants' liability (existence of conspiracy, etc.) and national discovery by defendants with regard to transactions in certain primary product lines.[56] Some defense attorneys in the electrical equipment cases have expressed the view that they were unduly hamstrung by the rigid schedules and narrow bounds regarding their discovery.[57] However, the intention of the national discovery program was to delay local discovery until closer to trial. To the extent that many cases were not actually settled before trial,[58] this is apparently what happened.

In a more recent litigation, involving the gypsum wallboard industry, it appears that these conflicts were decided at least in part by the dates on which the 141 separate actions were filed.[59] The earliest cases, the so-called "dealer group," were prepared for trial and actually tried while proceedings in the other groups (contractors, subcontractors, owner-builders, and governmental entities) were stayed. Eventually, pretrial proceedings commenced in the "back-burner group," with not only discovery being made available from the earlier proceedings, but also collateral estoppel effect as

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[55] Referring again to the antibiotics cases (*see* note 54 *supra* and notes 201-07 and accompanying text *infra*), the confusion of similar and dissimilar plaintiffs' claims was compounded, in the defendants' view, by the diverse motions for leave to amend which were argued and allowed early in 1974. Defendants argued at that time that domestic insurance company and union welfare fund plaintiffs had no reason to raise allegations of exclusionary and anticompetitive conduct in foreign markets, which allegations had first been made by a competitor plaintiff having substantial business in those foreign markets.

[56] *See* articles cited in note 14 *supra*.

[57] *See* articles by McAllister, O'Donnell, and Sawyer cited in note 16 *supra*.

[58] *See Panel Discussion*, *supra* note 15, at 511.

[59] The findings and conclusions of the first gypsum trial are reported in Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 & 357 F. Supp. 832 (N.D. Cal. 1971 & 1973); a summary of all proceedings is reported in *In re* Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974).

to the previous determination of liability against two defendants. The subsequent discovery focused upon the other four defendants' possible liability and issues of damages, and it was apparently pursued simultaneously along different tracks.

An important aspect of planning coordinated discovery is keeping a balance, not just among different cases, but between plaintiffs and defendants. Defendants' discovery must often center around local questions of knowledge and impact—matters that are usually far more diffuse than questions of liability.[60] Where the plaintiff is a large entity, it is likely that defendants will obtain adequate individual discovery; but where the plaintiff is a class of small claimants, the only discovery readily available is the general, theoretical, class-as-a-whole discovery that defendants have almost always found unsatisfactory in aiding their factual preparation and in affording them due process.[61] Despite the ruling in *Eisen v. Carlisle & Jacquelin* ("*Eisen III*")[62] against "fluid class recovery," it is still too early to determine the extent, if any, to which defendants will be allowed direct discovery against absent class members.

The final type of conflict in coordinated proceedings—involving the question of which cases are to be prepared and tried first, and which later—is perhaps the most fundamental. To ask this question is to assume that the various cases cannot be tried simultaneously but separately in their original forums, but such an assumption is often justified. So far, fewer than ten percent of the cases transferred under section 1407 have been sent back to their original forums.[63] This low percentage of remands is undoubtedly due to a feeling by transferee courts that remand of their work to judges unfamiliar with it is wasteful and unfair.[64] In any event, scheduling of trial preparation deadlines is essential even if the cases are eventually remanded, since such scheduling is the only way in which overlap and conflict in pretrial discovery and motions can be avoided.[65]

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[60] *See* O'Donnell, *supra* note 16, at 142.

[61] *See* Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 613-14 (1974).

[62] 479 F.2d 1005, 1016-18 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). *See* note 74 *infra*.

[63] *See* Note, *supra* note 17, at 1017.

[64] *See id. See also In re* Antibiotic Antitrust Actions, 333 F. Supp. 299, 307 (S.D.N.Y.), *mandamus denied sub nom.* Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971). Among prominent recent antitrust cases that have been remanded and tried in their original forums are North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), and Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla.), *rev'd*, 510 F.2d 894 (10th Cir. 1973), *cert. denied*, 423 U.S. 802 (1975).

[65] *See* 1973 MANUAL, *supra* note 18, at appendix §§ 2.31-3.00.

Furthermore, the order of pretrial proceedings, which is largely based on the intended order of trial, may effectively determine which actions are the "test cases" for the others. This factor was explicitly acknowledged and used by Judge Zirpoli in the gypsum litigation.[66] There, the test cases were chosen because they were the first filed, a relatively accidental factor, and because they involved direct purchases from defendants, a substantive factor.[67] It should be obvious that the first trial will to some degree impose the character of its plaintiff upon decisions of supposedly general applicability. If "offensive estoppel" is to be allowed, the pretrial court owes it to all parties to decide well in advance which group of cases can best and most fairly determine generally applicable issues, as well as which group can most quickly adjudicate the largest number of major issues.[68] The process should not be haphazard.

In sum, it appears that coordinated proceedings in multiparty/multidistrict antitrust actions generally allow, if not demand, the approaches enumerated at the beginning of this section. Such proceedings permit early and effective control by pretrial courts. They compel an awareness of exactly what the parties must prove and how they intend to do so, and such proceedings greatly enhance the prospects for overall efficiency and speed. Coordinated proceedings work best if the pretrial court is *accurately* abreast of the material facts, the real contentions, and the true interests of the parties.[69] These values are the *raison d'etre* of coordinated pretrial proceedings, and coordination without them is mere confusion.

B. *Class Action Management*

The class action device has had a dramatic impact upon the pace and scope of antitrust litigation. In fiscal year 1973 some 157 new antitrust actions alleged class status, and in fiscal year 1974 the number of such filings was 114.[70] There has been considerable

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[66] *In re* Gypsum Cases, 386 F. Supp. 959, 963-64 (N.D. Cal. 1974).

[67] *Id.* at 963.

[68] For strong arguments against nonmutual application of collateral estoppel, notwithstanding the Supreme Court's decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), see the dissenting opinions in the *en banc* decision of Katz v. Carte Blanche Corp., 496 F.2d 747, 766-67, 770-71 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974). However, a recent decision which appears to minimize the distinction between offensive and defensive use of collateral estoppel is *In re* Yarn Processing Patent Validity Litigation, 360 F. Supp. 74 (S.D. Fla. 1973).

[69] The coordinated pretrial procedures made possible by 28 U.S.C. § 1407 are, according to one eminent antitrust scholar, a rather signal success. Handler, *supra* note 31, at 15.

[70] ADMIN. OFFICE REP. 1974, *supra* note 27, Table 63, at 259. The Administrative Office did not report class action figures before 1972, and hence a more historical view (percentage of increase since 1966, for example) cannot be attempted.

debate whether class actions are necessary to aid small claimants and to constrain corporate miscreants,[71] or whether they amount to "legalized blackmail,"[72] strike suits on a gigantic scale, and a "Frankenstein Monster" threatening the judicial system.[73] Recently some answers have been emerging. The celebrated *Eisen* litigation has led to a Second Circuit decision condemning the concept of "fluid class recovery"[74] and to a Supreme Court decision that class representatives, regardless of their poverty or their claim's merit, must pay for nothing less than the best practicable class notice.[75]

Despite the failure of the Supreme Court's *Eisen* decision to adequately define "manageability," and despite continued ferment on this issue, it seems clear that unwieldy antitrust class suits are being reduced in size or eliminated altogether.[76] This is being accomplished through determinations regarding "common questions of law or fact," the "superiority" of the class method, the existence of sufficient "numerosity," the adequacy of the intended representative party, and general "manageability." Each of these methods will be briefly discussed in turn.

First, a number of antitrust plaintiff classes have recently been

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[71] *See, e.g.*, Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 1006 (1971); Kohn & Kaplan, *The Antitrust Class Suit: A Manageable Instrument for Social Justice*, 41 ABA ANTITRUST L.J. 292, 300 (1972); Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973).

[72] Handler, *supra* note 31, at 9.

[73] Eisen v. Carlisle & Jacquelin ("Eisen II"), 391 F.2d 555, 572 (2d Cir. 1968) (dissenting opinion, Lumbard, C.J.). *See also* Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 365-68 (1972); Malina, *The Search for the Pot of Gold*, 41 ABA ANTITRUST L.J. 301, 320 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

[74] Eisen v. Carlisle & Jacquelin ("Eisen III"), 479 F.2d 1005, 1017-18 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

There is some dispute as to whether the Supreme Court actually reversed that portion of the Second Circuit ruling dealing with "fluid class recovery" or whether, as is more likely, that crucial issue was ignored in the concern over notification and certification procedures. *See* 417 U.S. at 177-79. For a view that the Supreme Court did not support the Second Circuit on "fluid class recovery," see *Eisen IV: Don't Believe the Headlines*, 1974 BNA ANTITRUST & TRADE REG. REP. No. 679, at B-1 (Sept. 10, 1974).

[75] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[76] It is possible, of course, that some extra judicial time is being consumed in the adjudication of individual actions that are brought because of the sparing use of Rule 23 devices. *See, e.g., In re* Nissan Motor Corp. Antitrust Litigation, 385 F. Supp. 1253 (J.P.M.L. 1974), *discussed in* 1974 BNA ANTITRUST & TRADE REG. REP. No. 693, at A-13 (Dec. 17, 1974). The Panel, in that ruling, transferred to the Southern District of Florida some nine class actions concerning alleged price-fixing on Datsun automobiles. The transfer may be seen as obliquely overruling an earlier decision of the transferee judge that only certain local classes would be allowed in the Datsun proceedings then before him. *See* P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973).

refused certification in whole or in part because of the court's determination that "questions of law or fact common to the members of the class" did not "predominate over any questions affecting only individual members," and hence the requirements of Rule 23(b)(3) were not met.[77] Actions by ultimate purchasers have been held impermissible on the ground that individual questions as to "passed-on" damages predominated over common issues of liability.[78] Several actions by disgruntled franchisees have been disallowed on the ground that individual issues—*e.g.*, whether coercion amounted to a "tie-in"—predominated over common issues regarding the behavior and intention of the franchisor.[79] Class actions by alleged competitors have also been rejected on the ground

[77] *E.g.*, *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Transit Co. Tire Antitrust Litigation, 1975 CCH TRADE CAS. ¶ 60,144 (W.D. Mo. 1975); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); DiCostanzo v. Hertz Corp., 63 F.R.D. 150 (D. Mass. 1974); Gneiting v. Taggares, 62 F.R.D. 405 (D. Idaho 1973); Gulf Wandes Corp. v. General Elec. Co., 62 F.R.D. 377 (E.D. La. 1974); Kinzler v. New York Stock Exch., 62 F.R.D. 196 (S.D.N.Y. 1974); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Thompson v. T.F.I. Companies, Inc., 64 F.R.D. 140 (N.D. Ill. 1974); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973); National Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973); Shaw v. Mobile Oil Corp., 60 F.R.D. 566 (D.N.H. 1973); Yanai v. Frito Lay, Inc., 61 F.R.D. 349 (N.D. Ohio 1973).

[78] *E.g.*, *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) (individual users of hotel telephone services); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (individual purchasers of automobiles).

[79] For examples of actions where class status was denied, see DiCostanzo v. Hertz Corp., 63 F.R.D. 150 (D. Mass. 1974); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331 (N.D. Ill. 1974); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Thompson v. T.F.I. Companies, Inc., 64 F.R.D. 140 (N.D. Ill. 1974); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973); Yanai v. Frito Lay, Inc., 61 F.R.D. 349 (N.D. Ohio 1973).

Perhaps the most important of the cases denying class status is Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976), *reversing* 68 F.R.D. 65 (E.D. Pa. 1975). In the *Dunkin' Donuts* case, the district court allowed a class suit to proceed on franchise "tie-in" issues because, upon the most painstaking analysis, it decided that a showing of individual coercion would not be necessary to prove an illegal tie-in, if proof of a company policy of coercion were made. Therefore, in the district court's analysis, common issues did predominate on the tie-in claims. The Third Circuit reversed and, in an opinion explicitly rejecting the view of the court below, held that where no reliance was placed on express contractual tie-ins, each plaintiff franchisee would individually have to prove coercion.

Franchise cases where class status has been wholly or partially allowed include: Aamco Automatic Transmissions, Inc. v. Tayloe, 67 F.R.D. 440 (E.D. Pa. 1975) (standardized contracts required each franchisee to purchase certain equipment from franchisor); Hawkins v. Holiday Inns, Inc., 1975 CCH. TRADE CAS. ¶ 60,153 (W.D. Tenn. 1975) (involvement of trademark obviated need for individual coercion proofs); Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974) (each class member raised at least one of 18 primary issues).

that individual questions of market definition, intention, and defendant's allegedly abusive conduct predominated over common issues.[80] Of course, classes are still being certified in the antitrust area, but it appears that only classes of direct purchasers alleging price-fixing or classes of franchisees suing on provably standardized franchise agreements stand a ready chance of success.[81]

Second, there have been recent cases finding the class device to lack "superiority" on rather interesting grounds.[82] It has been held, for example, that forming classes of distributors of a defendant manufacturers' products was not a superior device where potential class members possessed strong reasons for wanting to control and expedite their own cases.[83] In another suit by a purported class of individual Datsun automobile purchasers, only a local class was allowed because of the excessive cost of notice to a larger geographical class[84]—a result presaging the remarks of Mr. Justice Douglas in the Supreme Court's *Eisen* decision.[85]

The recent Ninth Circuit decision in *Kline v. Coldwell, Banker & Co.*[86] is also of interest as a statement on superiority. The court there had very harsh words for a proposed class of up to 400,000 Los Angeles area homebuyers. Noting that approximately 2,000 realtor defendants were involved, some of them very small operators, the court decided that the proposed class would be un-

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[80] *E.g.*, Boston Pneumatics, Inc. v. Ingersoll-Rand, 65 F.R.D. 61 (E.D. Pa. 1974); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); Kinzler v. New York Stock Exch., 62 F.R.D. 196 (S.D.N.Y. 1974); Shaw v. Mobil Oil Corp., 60 F.R.D. 566 (D.N.H. 1973); National Auto Brokers Corp. v. General Motors Corp., 60 F.R.D. 476 (S.D.N.Y. 1973).

[81] *E.g.*, Barr v. WUI/TAS, Inc. 66 F.R.D. 109 (S.D.N.Y. 1975) (class of telephone answering service subscribers); Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974) (class of allegedly boycotted independent insurance adjusters); P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973) (class of individual automobile buyers); Albertsons, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459 (10th Cir. 1974) (limited class of direct purchasers); City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973), *aff'd in pertinent part*, 501 F.2d 639 (2d Cir. 1974) (class of 200-300 direct purchasers); Weit v. Continental Ill. Nat'l Bank & Trust Co., 60 F.R.D. 5 (N.D. Ill. 1973) (class of credit card holders); Forbes v. Board of Realtors, 61 F.R.D. 416 (D. Minn. 1973) (class of real estate customers).

[82] Rule 23(b)(3), in addition to requiring a predominance of common questions, requires that the class action vehicle be "superior to other available methods for the fair and efficient adjudication of the controversy."

[83] *E.g.*, J.M. Woodhull, Inc. v. Addressograph Corp., 62 F.R.D. 58 (S.D. Ohio 1974); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973).

[84] P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973).

[85] 417 U.S. at 179-86 (opinion dissenting in part).

[86] 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

manageable for purposes of proving the liability of individual defendants, that the suit lacked cohesion due to the problem of connecting so many individual "conspirators," and that it would be unfair to impose joint liability for potentially annihilating damages on the small individual defendants.[87] The concurring opinion of Judge Duniway was considerably more outspoken in its criticism of plaintiffs' attorneys and the posture of the litigation.[88]

Perhaps most interesting of all is the recent *en banc* ruling of the Third Circuit in *Katz v. Carte Blanche Corp.*,[89] a "Truth in Lending Act" case rather than an antitrust one, but very instructive nonetheless. The majority opinion in *Katz* held that because of unusual circumstances presented by the defendant, the district court should have delayed certification of the plaintiff class until after trial on the issue of defendant's liability.[90] The unusual circumstances arose from assertions by the defendant credit card company that pretrial notice to card-holding potential class members would greatly prejudice routine account collection and would unfairly coerce a settlement. The court of appeals stated that the district court should have withheld class certification, provided the defendant had been willing to waive (*1*) its seventh amendment right to a unitary jury trial on all issues, (*2*) its presumptive Rule 23 right to assert res judicata against non-"opt-out" claimants should it win at trial, and (*3*) its use of statute of limitation defenses against those who would have been included in the class had it been established earlier.[91] Under this procedure, the defendant would have obtained an early trial on liability, and had it lost, a class could then have been certified to take collateral estoppel advantage of that defeat.

The dissenters in *Katz* objected to the majority's unorthodox approach, pointing to the lack of statutory authorization for delaying certification and the lack of precedential authority for using "one-way estoppel" to benefit a subsequently formed class.[92] Although these objections have some force, the *Katz* decision constitutes a pragmatic approach to class certification which would not only prevent undue prejudice to defendants, but might also stimulate new thinking on how "test case" devices can be used to facili-

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[87] *Id.* at 233-34.
[88] *Id.* at 236-39.
[89] 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).
[90] *Id.* at 760-62.
[91] *Id.* at 762.
[92] *Id.* at 764-77.

tate earlier trials in large litigations. If complex class proceedings can be deferred until basic liability is determined, while maintaining adequate safeguards for those affected,[93] then such deferrals should be routinely ordered.

Third, courts have employed the rubric of "numerosity"[94] to defeat class standing in several recent antitrust actions. The problem here is one of too few potential class members, rather than too many.[95] The potential classes that have been held too small to merit class treatment were typically those proposed by business plaintiffs suing their franchisors, suppliers, or competitors.[96] It is hard to pin down an exact number, but proposed classes with less than one hundred members would appear to be in trouble, while classes with at least two or three hundred members will usually be approved.[97] Whatever the number, courts seem concerned to prevent the magnification of individual grievances through the class device, at least where the self-appointed representative can afford to go it alone.

Fourth, problems of numerosity have sometimes been intertwined with questions of whether the proposed class representative was typical of his class[98] or adequately able to protect its interests.[99] Most of the recent antitrust cases in which class standing has been denied on such grounds have, like the numerosity cases, involved suits among commercial litigants.[100] Proposed representatives have

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[93] One such device might be a proviso that if class status is sought, but is *judicially* deferred past a trial which the defendant wins, then class status will be denied to subsequent plaintiffs. This device might obviate criticism of the *Katz* approach as one-sided. *See* 88 HARV. L. REV. 825 (1975).

[94] Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable."

[95] The problem of too many class members is dealt with under the "manageability" requirement of Rule 23(b)(3)(D).

[96] *E.g.*, Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975); Thompson v. T.F.I. Companies, Inc., 64 F.R.D. 140 (N.D. Ill. 1974); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); J.M. Woodhull, Inc. v. Addressograph Corp., 62 F.R.D. 58 (S.D. Ohio 1974); Bill Minielli Cement Contr., Inc. v. Richter Concrete Corp., 62 F.R.D. 381 (S.D. Ohio 1973).

[97] *See* Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa 1974) (class of approximately 300 certified); City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973), *aff'd in pertinent part*, 501 F.2d 639 (2d Cir. 1974) (class of approximately 200 certified).

[98] Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class . . . ."

[99] Rule 23(a)(4) provides that representative parties must "fairly and adequately protect the interest of the class."

[100] *E.g.*, Boston Pneumatics, Inc. v. Ingersoll-Rand, 65 F.R.D. 61 (E.D. Pa. 1974). But see P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973), where the court held that the plaintiffs, who were individual buyers of Datsun automobiles, could only

been held to be nontypical because of perceived conflicts among class members[101] or because, despite his representations, the plaintiff was simply not similarly situated to those whom he purported to represent.[102] The perception of conflicting interests among potential class members may also mean that no plaintiff will be deemed qualified to protect the interests of all, and therefore the action, at least as defined, cannot proceed. Finally, proposed representatives have been turned down because of their apparent complicity in the conduct complained of[103] or their involvement in other shady dealings.[104] Here again, a plaintiff cannot magnify his own grievance to class proportions merely by the asking, and the grounds for denial of class status are entirely pragmatic, both as written and as applied.

Finally, some courts have denied class status to antitrust claims in whole or in part because of a perceived lack of general manageability. Other courts have been more optimistic in their expectations of manageability.[105] *Boshes v. General Motors Corp.*[106] repre-

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adequately finance and conduct litigation on behalf of local consumers, and therefore the classes would be reduced to such dimensions.

[101] *E.g.*, Thompson v. T.F.I. Companies, Inc., 64 F.R.D. 140 (N.D. Ill. 1974); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); DiCostanzo v. Hertz Corp., 63 F.R.D. 150 (D. Mass. 1974).

[102] *E.g.*, Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 64 F.R.D. 159 (D.N.J. 1974) (not an antitrust action, but paralleling earlier, already settled antitrust claims); DiCostanzo v. Hertz Corp., 63 F.R.D. 150 (D. Mass. 1974).

[103] *See* Bill Minielli Cement Contr., Inc. v. Richter Concrete Corp., 62 F.R.D. 381 (S.D. Ohio 1973).

[104] *See* J.W.T., Inc. v. Joseph E. Seagram & Sons, Inc., 63 F.R.D. 139 (N.D. Ill. 1974).

[105] *Compare* P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973), *with* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973). The former court allowed two local classes of passenger car purchasers to proceed, while the latter found that even one local class of auto buyers would be unmanageable.

Perhaps reaching a compromise position, several district courts have recently held that problems regarding the ultimate manageability of uncommon liability issues or of individual damage claims should not defeat a class certification intended explicitly or implicitly for the determination of common liability issues alone. The intent of such decisions is that separate trials be held, first, on the common issues, and second, on the individual matters. *See In re* Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975); Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974). While one must admire the pragmatic determination of these courts to get on with the determination of basic issues, it seems that the individual claims and defenses have been treated rather breezily. Nonetheless, if the problems inherent in this type of bifurcated procedure are fully and explicitly dealt with, quite possibly the entire proceedings will be handled more carefully, although loud and strong objections will undoubtedly continue that bifurcation of the issues favors the plaintiffs. The court at least has the duty to balance and defuse that advantage while adjudicating the major common issues.

[106] 59 F.R.D. 589, 601-02 (N.D. Ill. 1973). *See also* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (rejected class of 400,000

sents the former view. In that case the court held that a potential class of up to forty million passenger car purchasers was simply too large in view of the notice and transactional proof problems involved. On the other hand, in *Forbes v. Board of Realtors*[107] the court approved a proposed class of some 100,000 real estate purchasers, concluding that "the complexities of judicial administration presented by this action are not sufficient to overwhelm the organizational capacity vested in the Court by . . . Rule 23."[108] In at least two cases, the request for a jury trial (made by defendant in one instance, by plaintiff in the other) was significant in prompting a finding of unmanageability.[109]

Perhaps epitomizing the problem of manageability is the well-known litigation *In re Hotel Telephone Charges*,[110] which involved over six hundred defendants and up to forty million potential class plaintiffs. The court concluded that the proposed class suit would literally take decades to try and would really only benefit the attorneys involved. It went on to denounce the "fluid class recovery" concept, stating that the purposes of the Clayton Act are compensatory rather than punitive and that neither justice nor antitrust regulation would be served by the proposed class action.[111] The court found nothing in the Supreme Court's *Eisen* decision to contradict this view.

Like the opinions of Chief Judge Lumbard[112] and Judge Medina[113] in *Eisen*, and the decision in *Coldwell, Banker & Co.*, the *Hotel Charges* opinion strongly asserts that vast accumulations of small antitrust claims are inferior in their deserts and impossible in their procedures as compared to substantial claims by discrete groups of truly injured parties. Such assertions have probably been neither vindicated nor undercut by the Supreme Court's *Eisen* decision. They go to the very heart of such issues as the purposes of federal courts, the purposes of antitrust laws, and the need for real defendants to be opposed by real plaintiffs. It is apparent that only

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real estate sellers); Marks v. San Francisco Realty Bd., 69 F.R.D. 353 (N.D. Cal. 1975) (rejected class of 13,000 real estate purchasers).

[107] 61 F.R.D. 416 (D. Minn. 1973).

[108] *Id.* at 418.

[109] Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974) (defendant requested jury); Gneiting v. Taggares, 62 F.R.D. 405 (D. Idaho 1973) (plaintiff requested jury).

[110] 500 F.2d 86 (9th Cir. 1974).

[111] *Id.* at 91-92.

[112] 391 F.2d at 570 ("Eisen II," dissenting opinion).

[113] 479 F.2d at 1005 ("Eisen III," majority opinion).

Congress can resolve such issues.[114]

On the whole, current class action procedures can meet the criteria for effective pretrial proceedings laid out earlier. But certification disputes demand early and effective supervision by the court if they are to be resolved at all. They also demand an awareness of the merits in the sense that real issues and likely methods of proof must be discerned at an early stage. Moreover, efficiency and speed are, under Rule 23(b)(3), part of the necessary judicial determination that the class vehicle is superior. Where classes are refused certification, efficiency is served only to the extent that numerous separate actions do not commence instead, although the possibility of chaos can still be minimized through section 1407 and other coordination devices. Where classes are certified, efficiency may or may not be served depending upon the accuracy of the court's certification determination and upon its imaginative use of subclass, test case, and other devices.[115] Ultimately, a concern for accuracy in factual determinations lies behind the requirements that "common issues" predominate and that certified classes be manageable. Certainly truly careful use of Rule 23 procedures can serve not only to control class issues, but also to focus upon the real substantive issues.

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[114] In a study released in June 1974, the Senate Commerce Committee examined the current role and possible future revisions of class action-type remedies. SENATE COMM. ON COMMERCE, 92d CONG., 2d SESS., CLASS ACTION STUDY (Comm. Print 1974), *reprinted in* 1974 BNA ANTITRUST & TRADE REG. REP. No. 670, at G-1 (July 2, 1974). The study appears to endorse the concept of "fluid recovery" in actions involving large numbers of small claims. It further suggests that most class actions, save for the very type that merit "fluid recovery," are proceeding through the courts quite expeditiously indeed and that "fluid recovery" could significantly expedite otherwise unmanageable actions. Other than suggesting that an early "mini-hearing" on the merits might be useful in eliminating less deserving class suits—a device explicitly condemned for now by the Supreme Court's *Eisen* decision—the study makes no real effort to address potential problems of managing the novel type of class suits which it proposes. The study, in particular, fails to consider the impact upon the courts of a truly large volume of "two dollar" claims, and yet it is just such a large volume that the study appears to desire.

In a more recent legislative move—the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (enacted just as this Article went to press)—*a parens patriae* authorization section is included. Earlier versions of this law included a section concerning the expediting of complex antitrust cases brought by the United States (*see* S. 1284, 94th Cong., 1st Sess. § 702 (1975)), but the enacted version does not do so. Once again, a schizoid indifference/concern about judicial management of antitrust claims has been demonstrated. The actual impact of this new legislation may well be detrimental to judicial management. *See* notes 232-35 and accompanying text *infra*.

[115] For other discussions of this point, see Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973), and Note, *Litigating the Antitrust Conspiracy Under Amended Rule 23: Seigel v. Chicken Delight, Inc. and School District v. Harper & Row Publishers, Inc.*, 54 U. VA. L. REV. 314 (1968).

C. *Pleading Devices and the Pretrial Conference*

It would not be an exaggeration to say that precise "issue definition" was *the* original reason for pretrial conferences and proceedings in the federal courts.[116] Certainly it was the focus of most of the early attention upon managing "big cases."[117] Despite the many other matters that have been engrafted onto the pretrial stage of complex litigations, delineation of true and false, supported and unsupported, material and immaterial issues is still the essence of pretrial work. Appraisal of the issues is vital to all manner of pretrial proceedings, because without it nothing can be finally adjudicated. The basic tools that the Rules provide for issue definition include discovery devices (Rules 26-37), pleading devices (Rules 8, 12, and 15), and the pretrial conference itself (Rule 16).

It is as true now as it was twenty-five years ago that Rule 8 cannot even begin to support careful delineation of the issues. Special pleading in antitrust cases had some support in the late 1950's,[118] but with some trivial exceptions,[119] has not been required[120] and sometimes has not been allowed.[121] Consequently, issue definition bears only a rather loose relation to the original pleadings. This state of affairs has been widely recognized and accepted, perhaps in the optimistic belief that other devices can carry the burden.[122]

The pleading motions provided under Rule 12 are devices to which litigants often resort, but in the antitrust area such motions are of particulary limited utility. Motions for more definite statements are largely useless, and motions to strike or to dismiss for failure to state a claim do not generally fare well.[123] The prevailing

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[116] *See* 3 J. MOORE, FEDERAL PRACTICE ¶ 16.02 (2d ed. 1974).

[117] *See* notes 1-13 and accompanying text *supra*. *See also* the decision and protracted colloquy on issue definition reported in Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561, 566-75 (D. Del. 1952).

[118] *See* Dawson, *The Place of the Pleading in a Proper Definition of the Issues in the 'Big Case,'* 23 F.R.D. 430 (1958). *But see* Clark, *Comment on Judge Dawson's Paper on the Place of the Pleading in a Proper Definition of the Issues in the 'Big Case,'* 23 F.R.D. 435 (1958); Clark, *Special Pleading in the 'Big Case,'* 21 F.R.D. 45 (1957). *See generally* Freund, *supra* note 43, at 555-60.

[119] *E.g.*, Oak Distrib. Co. v. Miller Brewing Co., 370 F. Supp. 889, 895, 898 (E.D. Mich. 1973).

[120] *E.g.*, Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); Brett v. First Fed. Sav. & Loan Ass'n, 461 F.2d 1155, 1157-58 (5th Cir. 1972).

[121] *E.g.*, Fulton Co. v. Beaird-Poulan, Inc., 54 F.R.D. 604, 609 (N.D. Miss. 1972).

[122] *See* 2A J. MOORE, FEDERAL PRACTICE ¶¶ 8.02, 12.18[1] (2d ed. 1975); Clark, *supra* note 118 (both references).

[123] *See* 2A J. MOORE, FEDERAL PRACTICE ¶ 12.21 (2d ed. 1975). *See also* Battle v. Liberty

wisdom is that antitrust actions are too complex, too circumstantial in their nature, and too full of possibly telling factual innuendo to allow them to fail merely because of deficient pleadings.[124] Rather than grant a motion to dismiss, courts routinely give plaintiffs time to develop factual bases to sustain their claims and defendants time to develop factual proofs showing the nonexistence of material factual disputes. In effect, resolution of dubious claims is deferred until presentation of full-blown summary judgment arguments under Rule 56.[125]

Despite the prevailing view that pleadings, particularly antitrust pleadings, do not mean very much, a good deal of struggle can take place over motions pursuant to Rule 15(a) for leave to file amended pleadings. Notwithstanding the admonition of the Rule itself that leave to amend "shall be freely given when justice so requires,"[126] strong agruments sometimes arise over the prejudicial nature of proposed amendments. The seemingly intense aggravation of one party at having to "start all over" when another party makes lengthy "eleventh hour" amendments has sometimes led to judicial action against such amendments. Where considerable time has elapsed, much or all of the pretrial work has been accomplished, and trial is at hand, amendments that attempt to enlarge the issues (and hence discovery) have often been denied.[127] Courts

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Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); Brett v. First Fed. Sav. & Loan Ass'n, 461 F.2d 1155 (5th Cir. 1972); Allied Elec. Supply Co. v. Motorola, Inc., 369 F. Supp. 133 (W.D. Pa. 1973). In some cases courts have perceived a probable failure to state a cognizable claim and, instead of attempting to meet this issue head on, have moved to nudge the plaintiff out of court by other means. This appears to have been done, for example, by refusing to certify class standing in cases of extremely dubious merit. *See* Ott v. Speedwriting Publishing Co., 64 F.R.D. 13 (E.D. Tenn. 1974), *aff'd*, 518 F.2d 1143 (6th Cir. 1975); Gulf Wandes Corp. v. General Elec. Co., 62 F.R.D. 377 (E.D. La. 1974); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973). One wonders how much trouble is saved by jumping from one conceptual quagmire to another.

[124] *See* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); Umdenstock v. American Mtg. & Inv. Co., 495 F.2d 589 (10th Cir. 1974); Brett v. First Fed. Sav. & Loan Ass'n, 461 F.2d 1155 (5th Cir. 1972); Material Handling Indus., Inc. v. Eaton Corp., 391 F. Supp. 977 (E.D. Va. 1975); Allied Elec. Supply Co. v. Motorola, Inc., 369 F. Supp. 133 (W.D. Pa. 1973). *But see* Vermillion Foam Prods. Co. v. General Elec. Co., 386 F. Supp. 255 (E.D. Mich. 1974); Oak Distrib. Co. v. Miller Brewing Co., 370 F. Supp. 889 (E.D. Mich. 1973).

[125] It is only when the parties couch their dispute in the form of a truly abstract legal issue that judgment on the pleadings will succeed. Assertions that the pleadings are "conclusory," "vague," "contradictory," or "far-fetched" will usually not prevail against a request that the court first allow the facts to be developed.

[126] *See generally* 3 J. MOORE, FEDERAL PRACTICE ¶ 15.08 (2d ed. 1974).

[127] *E.g.*, Kirby v. P.R. Mallory & Co., 489 F.2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974) (amendment delayed three years, therefore denied); Wainwright v.

have found that amendments prejudice the opposing party's case where they threaten to delay adjudication,[128] increase expenses,[129] or disrupt existing class notices.[130] Where the court perceives that the movant could easily have included the proposed amendment in his original pleadings, a finding of prejudice is even more likely.[131]

The reason for these intense disputes goes beyond the tactical aggravation of having to defeat the opponent's newest, shiniest allegation. It is a simple matter of organization and timing—of the right to finally "go to the mat" on a finite number of issues. To prepare and then reprepare would, if uncontrolled, become a Sisyphean labor indeed. The need to settle every conceivable dispute and to have every possible theory and fact presented must be balanced by the need for a final resolution.

It is at this point that Rule 16 may be invaluable. Although the purpose of Rule 16 is to assist counsel in making admissions and agreements that delineate issues and proofs, it also permits judicial control over uncooperative and unimaginative counsel. The rule does not merely provide a pretrial referee; it provides, particularly in conjunction with Rules 12 and 56, for actual pretrying to the extent that the court can eliminate immaterial or uncontroverted issues and immaterial or redundant proofs.[132]

Kraftco Corp., 58 F.R.D. 9 (N.D. Ga. 1973) (amendment to expand period of liability backwards four years denied); McPhail v. Bangor Punta Corp., 58 F.R.D. 638 (E.D. Wis. 1973) (amendment seeking to expand four-year-old action denied). *But see* United States v. IBM Corp., 66 F.R.D. 223 (S.D.N.Y. 1975) (amendments to expand six-year-old antitrust action as to markets and conduct allowed just weeks before trial); Wendkos v. ABC Consol. Corp., 379 F. Supp. 15 (E.D. Pa. 1974) (amendment changing legal theory as to "tying" arrangement allowed); Penn Galvanizing Co. v. Lukens Steel Co., 65 F.R.D. 80 (E.D. Pa. 1974) (amendment alleging predatory pricing allowed in light of plaintiff's lack of prior knowledge); Key Pharmaceuticals, Inc. v. Lowey, 373 F. Supp. 1190 (S.D.N.Y. 1974) (change of patent fraud claim to patent misuse claim allowed in light of public interest); *In re* Antibiotic Antitrust Actions, Civil No. 71-435 (D. Minn., filed 1971), Misc. Order 74-32 (Feb. 25, 1974) (amendments to expand time period and product line allegations allowed shortly before trial); Glazer Steel Corp. v. Yawata Iron & Steel Co., 56 F.R.D. 75 (S.D.N.Y. 1972) (amendment adding antitrust allegations to two-year-old case allowed).

[128] *E.g.*, McPhail v. Bangor Punta Corp., 58 F.R.D. 638 (E.D. Wis. 1973).

[129] *E.g.*, Johnson v. Sales Consultants, Inc., 61 F.R.D. 369 (N.D. Ill. 1973).

[130] *E.g.*, Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D. Ga. 1973). *But see In re* Antibiotic Antitrust Actions, Civil No. 71-435 (D. Minn., filed 1971), Misc. Order 74-32 (Feb. 25, 1974).

[131] *E.g.*, Kirby v. P.R. Mallory & Co., 489 F.2d 904, 912-13 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974). *But see* Wendkos v. ABC Consol. Corp., 379 F. Supp. 15, 19-20 (E.D. Pa. 1974) (defendant could not claim genuine suprise).

[132] *See* 3 J. MOORE, FEDERAL PRACTICE ¶¶ 16.02, .04, .11 (2d ed. 1974). *See also* Life Music, Inc. v. Broadcast Music, Inc., 31 F.R.D. 3, 6-8 (S.D.N.Y. 1962) (upheld judicial power to compel agreement to undisputed facts), *discussed in* Note, *Federal Civil Procedure—Federal Rule 16—Definition of Issues by the Pre-Trial Judge*, 61 MICH. L. REV. 1566

The methods that a pretrial court can use to narrow disputes have often been discussed, and many practical suggestions have been put forward, particularly by federal judges themselves. Suggested measures include the use of pretrial factual statements or briefs,[133] proposed factual findings and counter-findings,[134] proposed stipulations, and counter-stipulations,[135] and informal, in camera, factual discussions by judge and counsel.[136] Which devices are actually used depends, most likely, on the preferences and style of the judge involved. The *Manual* makes few concrete recommendations in this area, suggesting only the early disposal of peripheral issues through Rule 12 and 56 motions, and judicial encouragement of factual stipulations and evidentiary agreements.[137] Such advice has little practical value, although it does at least legitimize objectives that timid or old-fashioned judges might otherwise be loath to pursue.[138]

(1963), *and* Note, *The Role of the Court in Simplifying the Triable Issues at Pre-Trial Conference*, 72 YALE L.J. 383 (1962). *But see* Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) (pretrial orders used as "bludgeons" to dispose of cases held improper).

[133] *See* Carter, *Judicial Control of the Case and Limitation of Discovery*, 23 F.R.D. 406, 407 (1958); Decker, *Timing of the First Pre-Trial Conference, Definition of Issues and Control of Discovery*, 23 F.R.D. 592, 595-96 (1958); *Handbook*, *supra* note 12, at 387; Holtzoff, *Trial of Protracted Cases*, 24 F.R.D. 235, 236 (1959); *Resolutions Adopted at [the N.Y.U.] Seminar on Long Cases*, 21 F.R.D. 519, 520 (1957); *Resolutions Adopted at the [Stanford] Seminar on Protracted Cases*, 23 F.R.D. 614, 615 (1958); Ridge, *The Organization of the Big Case—The First Pre-Trial Conference*, 21 F.R.D. 406, 411 (1957); Smith, *Defining the Issues and Establishing a Plan for Trial*, 23 F.R.D. 412, 414 (1958).

[134] *See* Pollack, *supra* note 23, at 463-65.

[135] *See* Murphy, *Ground Rules for Documentary Evidence*, 23 F.R.D. 445, 449 (1958); Wright, *supra* note 13, at 149.

[136] *See* McDowell, *supra* note 13, at 680-82; Pollack, *supra* note 23, at 461-62; *Procedural Problems*, *supra* note 2, at 290-91; Yankwich, *supra* note 1, at 66-68 (arguing that informal conferences should be followed immediately by pretrial orders summarizing agreements and positions).

[137] *See* the following sections of the 1973 MANUAL, *supra* note 18:

§ 1.20—preliminary trial briefs not advised;

§ 1.80—early determination of "special questions" advised;

§ 3.30—final pretrial briefs should limit issues;

§ 3.60—court should promote factual stipulations;

§ 4.20—court should encourage written offers of proof;

§ 4.57—court should limit proofs to material and noncumulative items.

The various editions of the MANUAL have explicitly moved away from the position that was widely held in the late 1950's and espoused by the *Handbook*, *supra* note 12, that early written statements of the issues (preliminary trial briefs) were advisable. That this move may be unwise will be discussed later in regard to limitations upon discovery. *See* note 144 and accompanying text *infra*. For a careful and not very flattering critique of the 1968 MANUAL, see Note, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303 (1969).

[138] In Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405 (N.D.N.Y. 1973), the court

Insofar as pretrial conferences and resultant pretrial orders can control the issues in a large antitrust case, they can also prevent the surprise and prejudicial delay that amended pleadings often create. To a considerable extent, pretrial orders supplant the pleadings as the real platform for the parties. Once made, they need be modified only upon a showing of good cause or good faith.[139] Since at the very least their modification is appropriate only where amended pleadings would be appropriate,[140] Rule 16 gives a court discretionary control equal to and beyond that provided by Rule 15.

Thus, by early and continued use of pretrial orders a court can do much to master and then limit disputes between the litigants. Suffice it to say here that procedures carried out under Rule 16 both permit and demand the following: early and effective control of the substantive issues by the court, a full appreciation of what are and are not the salient contentions and proofs, and efficiency by both court and counsel.

D. *Limitations on Discovery*

Discovery is vital to any fair and sensible adjudication of antitrust cases and is essential to issue definition under Rule 16, but discovery activities and disputes often protract and undermine pretrial procedures. It has been said that the rise of treble-damage actions, which really only came into their own in the 1950's, was due in large part to the discovery opportunities provided by the new Federal Rules of 1938.[141] Such a development cannot be faulted in itself, but the failure of courts handling large antitrust actions to control the timing and scope of discovery can indeed be

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denied not just a motion for summary judgment but also the alternative request that, pursuant to Rule 56(d), the court specify those facts raised by the motion which appeared to be uncontroverted. The court stated that in a complex patent case like the one before it, it was not obliged to service the parties by helping them frame the issues. Such an abdication of discretionary responsibility may be proper enough, but it is hardly exemplary.

[139] *See* 3 J. MOORE, FEDERAL PRACTICE ¶ 16.20 (2d ed. 1974). *But cf.* Wendkos v. ABC Consol. Corp., 379 F. Supp. 15, 19 (E.D. Pa. 1974) (amended complaint and pretrial orders allowed where justice so required); Rea v. Ford Motor Co., 355 F. Supp. 842, 861-62 (W.D. Pa. 1973), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974) (deviation from pretrial order allowed where no prejudice or real surprise shown).

[140] *Cf.* Matlack, Inc. v. Hupp Corp., 57 F.R.D. 151 (E.D. Pa. 1972). There the court refused to allow a party to change its theory of liability, even though the theory would have fallen within the original pleadings. This refusal was justified on the basis of prejudicial delay and, the court said, was within its power under Rule 16 by analogy to Rule 15.

[141] Collen, *supra* note 31, at 1001; Kirkpatrick, *Introductory Remarks*, 38 ABA ANTITRUST L.J. 4, 5 (1968).

criticized. Although every early discussion of managing the "big case" insisted that control and confinement of discovery was essential,[142] courts have frequently allowed discovery to proceed with relative abandon, causing delays, raising peripheral issues to the forefront, and exacerbating relations among the parties.[143]

In many cases, the failure to limit discovery is simply a matter of the court not exercising the powers afforded it, but this failure is sometimes the result of deliberate policy. In particular, the *Manual* explicitly disavows the position taken by the *Handbook* that discovery should be stayed until initial pretrial efforts to define the issues have commenced.[144]

Obviously the question of issue definition versus discovery activity is a "chicken and egg" problem, especially if one believes that initial issue definition must be complete and detailed. Nonetheless, the first pretrial step in a large litigation should be to organize the litigation; allowing discovery to commence without a clear concept of relevance or materiality is to encourage confusion. As has oft

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[142] *E.g.*, Connelly, *supra* note 2, at 145; Decker, *supra* note 133, at 593; *Handbook*, *supra* note 12, at 386-90, 436; Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55, 61 (1957); Kaufman, *supra* note 26, at 115-16; McAlister, *The Judicial Conference Handbook on Procedures for the Trial of Protracted Cases*, 47 A.B.A.J. 568, 569-70 (1961); *Procedural Problems*, *supra* note 2, at 291; Withrow, *supra* note 25, at 428-29; Yankwich, *supra* note 1, at 83.

[143] On the matter of delay, it is hardly disputable that modern discovery emphasizes truth before absolute efficiency, as well it should. *See* Columbia Law School Conference, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479 (1968). The number of abuses possible under discovery procedures, however, makes quite a catalog. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02[3] (2d ed. 1976). Most significantly, "liberal" discovery has at times confused the parties when they might otherwise have been disposed to settle. It has been claimed that this was true in the electrical equipment cases (*see* notes 14-20 and accompanying text *supra*), where the National Coordinating Committee not only controlled discovery but, in effect, also initiated it. Sawyer, *supra* note 16, at 511-12. Certainly uncontrolled discovery can lead to hostility and impasse between parties, as was the case in Ferguson v. Ford Motor Co., Civil No. 44-482 (S.D.N.Y., filed Jan. 8, 1948), which remains one of the most protracted antitrust cases ever litigated. On the belated and frustrating efforts to undo the damage caused by extensive and unmanaged discovery in that case, see Marsh, *supra* note 2, at 403-12; Noonan, *supra* note 2, at 394-400.

[144] 1970 MANUAL, *supra* note 18, at § 1.3; 1973 MANUAL § 1.20. The MANUAL asserts that discovery must precede issue definition because "[o]ne of the purposes of discovery is to discover information leading to amendments of pleadings narrowing or broadening the issues." 1973 MANUAL 2 n.3, *citing* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). The *Perma Life* case, however, had many words about the *in pari delicto* defense, but few about discovery. It in no way precludes preliminary outlining of the issues, any more than does the reasoning of the MANUAL. In fact, the "first wave" discovery which the MANUAL proposes is to be limited to identification of files, witnesses, and transactions. By the time "second wave" discovery (discovery on the merits) commences, the pretrial court is supposed to have sufficient familiarity with the case to prevent discovery into uncontroverted and immaterial areas. 1973 MANUAL §§ 2.30, 2.40.

been emphasized, discovery in large cases should ideally be confined to *material* (not vaguely relevant) types of conduct, periods of time, and areas of geography.[145] What is and is not material must be weighed in the context of an informed judicial understanding of contentions and proofs. In short, discovery cannot be allowed in large cases merely on the rationale that it is relevant to the pleadings or that somehow, something may turn up.[146] The need for discovery must be appraised more coldly than that.

Such a chilly appraisal is permissible under the discretionary and relatively unreviewable standards of Rules 26-37.[147] As Judge Weinstein said in *Dolgow v. Anderson*:

> A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense.[148]

Despite some possible prevarication, the *Manual* recommends avoiding discovery into truly doubtful areas,[149] and other authorities are in accord.[150]

A good example of the control that ought to be exercised is *Professional Adjusting System of America, Inc. v. General Adjustment Bureau, Inc.*[151] In that 1972 treble-damage action, plaintiffs alleged

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[145] Examples of recent cases setting such limits are Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1974) (imposed limits on inquiry into capability of plaintiff to thrive in its industry "but for" alleged injuries); Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 373 F. Supp. 1225 (S.D.N.Y. 1974) (imposed geographical and temporal limits); Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd on other grounds*, 510 F.2d 894 (10th Cir.), *cert. denied*, 423 U.S. 802 (1975) (imposed geographical limits); Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971) (imposed general cut-off on discovery). For an interesting earlier antitrust case, which limited the scope of discovery to a relatively narrow set of issues, see United States v. Watchmakers Information Center, Inc., 168 F. Supp. 904 (S.D.N.Y. 1958).

[146] Recent antitrust cases endorsing a broad concept of relevance for discovery purposes include: United States v. IBM Corp., 66 F.R.D. 180, 186, 215 (S.D.N.Y. 1974) (three separate orders); Maritime Cinema Serv. Corp. v. Movies En Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973); and Natcontainer Corp. v. Continental Can Co., 362 F. Supp. 1094 (S.D.N.Y. 1973). A recent case apparently relying on the "something may turn up" theory of discovery is Allied Elec. Supply Co. v. Motorola, Inc., 369 F. Supp. 133 (W.D. Pa. 1973). Nonetheless, it should be remembered that relevance in discovery does not depend upon the pleadings alone, but rather looks to the real subject matter of the dispute. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.56[1] (2d ed. 1976).

[147] That discovery rulings are discretionary, at least where the outside limits are being framed, is generally recognized. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.56[1] (2d ed. 1976).

[148] 53 F.R.D. 661, 664 (E.D.N.Y. 1971).

[149] 1973 MANUAL, *supra* note 18, at § 2.40.

[150] *E.g.*, 4 J. MOORE, FEDERAL PRACTICE ¶ 26.56[1] (2d ed. 1976).

[151] 373 F. Supp. 1225 (S.D.N.Y. 1974).

a conspiracy lasting from 1930 to 1971, and asked for interrogatory answers going back to 1952. The court held that to take discovery back to 1952, despite the even longer chronology of plaintiffs' allegations, would unduly burden the defendant. It therefore required answers only back to 1964, with the proviso that if discovery revealed a need for still earlier discovery, then an appropriate request would be considered later. As for the plaintiffs' request for nationwide document production, the court decided that a more appropriate geographical area would encompass only defendant's New York headquarters and its branch offices in localities where it competed with plaintiffs.

Another useful example, involving overreaching requests by an antitrust defendant, is *Carlson Companies, Inc. v. Sperry & Hutchinson Co.*[152] There, the court set the outside limits of relevance and denied detailed discovery into a seemingly peripheral damage area where general discovery was already available.

The import of *Professional Adjusting*, *Carlson*, and other cases is that discovery should go no further than is necessary to support or defend each claim and defense. Discovery can hardly serve its purpose of helping to define triable issues if it ranges too often into peripheral areas.[153] Of course, knowledge of the pertinent facts is necessary to frame issues, and such knowledge may be obtainable only through discovery. The emphasis, however, should be upon framing known issues—narrowing and clarifying them—not upon finding merely colorable new issues. Discovery can best clarify key issues when it is focused on those issues alone, as in discovery to fend off summary judgment[154] or to prepare for a separate trial on less than all claims.

It is difficult to appraise the efficacy of discovery in large cases, as we have attempted to do for the other pretrial devices,

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[152] 374 F. Supp. 1080 (D. Minn. 1974).

[153] One might contrast the case of Sperry Prods., Inc. v. Aluminum Co. of America, 171 F. Supp. 901 (N.D. Ohio 1959), *modified*, 285 F.2d 911 (6th Cir. 1960), *cert. denied*, 368 U.S. 890 (1961), where lengthy discovery as to a party's foreign licensing arrangements netted a number of interesting details but nothing of an admissible nature vis-à-vis domestic "patent misuse" charges, with Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd on other grounds*, 510 F.2d 894 (10th Cir.), *cert. denied*, 423 U.S. 802 (1975), where discovery was confined to United States markets *ab initio*. The *Telex* case is discussed in notes 188-89 and accompanying text *infra*.

[154] Rule 56(f) permits limited discovery for purposes of opposing a motion for summary judgment. Courts must be careful that such discovery does not hinder general discovery where lengthy adjudication of the summary judgment motion seems likely. *Cf.* Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965), *aff'd sub nom.* Waldron v. Cities Service Co., 361 F.2d 671 (2d Cir. 1966), *aff'd sub nom.* First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968), *discussed in* note 46 *supra*.

because of the obvious and perpetual tension between the need for knowledge of facts and the need for organization and resolution of issues. It is easy enough to see that without early and regular control by the court,[155] discovery can become a morass which is neither speedy nor ultimately fruitful. We believe that such control is more readily achieved through informal rather than formal procedures. For instance, it has been suggested before[156] and is now frequently the rule[157] that counsel must discuss their discovery disagreements with each other before bringing them before the court. It has also been suggested that discovery discussions before the court might better proceed on oral argument alone, in hopes of encouraging flexibility and candor rather than mere posturing for the record.[158] Of course, thoughtfully prepared motion papers do serve an educational function not readily duplicated by oral discussion, but the limitations of paper arguments must still be recognized. The "give and take" of compromise discussions, especially when conducted before the court, can and do achieve a great deal in stripping cases to their true essentials.

E. *Summary Judgment*

In several respects summary judgment under Rule 56 is the heaviest "artillery" in the pretrial system. It can be used to eliminate peripheral issues or even all issues with more freedom and confidence than can orders to dismiss or strike under Rule 12. It can be used to back up the court's pretrial authority under Rule 16, and can itself be employed as a pretrial device for framing triable issues[159] and trial proofs.[160] Of course, if summary judgment is

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[155] Supervision of discovery by special masters rather than by the court has often been suggested (*e.g.*, Biggs, *A System of Masters*, 23 F.R.D. 563 (1958)), sometimes tried (*see, e.g.*, Marsh, *supra* note 2, at 403-04), and sometimes opposed (*e.g.*, Decker, *supra* note 133, at 597-98).

[156] *Handbook*, *supra* note 12, at 385; *N.Y.U. Seminar Resolutions*, *supra* note 133, at 521; *Stanford Seminar Resolutions*, *supra* note 133, at 616.

[157] *E.g.*, C.D. CAL. R. 3(1); D. MINN. R. 5.

[158] Doskow, *Procedural Aspects of Discovery*, 45 F.R.D. 498, 503-04 (1968).

[159] *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 56.20 (2d ed. 1976).

[160] See Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974), wherein the parties pared down the entire record in order to prepare summary judgment exhibits, with the intention of using the exhibits as a major part of the trial evidence if summary judgment were not allowed. A similar procedure was used in the Bethlehem-Youngstown steel company merger case, United States v. Bethlehem Steel Corp., 157 F. Supp. 877 & 168 F. Supp. 576 (S.D.N.Y. 1958), and reportedly greatly shortened the time actually spent in trial. *See generally* Bromley, *supra* note 13; McDowell, *supra* note 13; Reycraft, *Practical Problems Presented in the Trials of Recent Merger Cases*, 4 ANTITRUST BULL. 635 (1959).

used without careful regard for its overall impact on the litigation, considerable delay and wasted effort may result.[161]

Summary judgment has been a regular topic in the literature on the "big case." In the past it was frequently asserted that courts should be more willing to employ summary judgment to dispose of unworthy claims and cases,[162] and it is still said that early decisions on peripheral issues are desirable, at least where the court exercises due caution.[163] This demonstrates one of the key problems with effective use of summary judgment: namely, timidity about finding matters ripe and suitable for summary adjudication. Such timidity is based in part on a sort of gambler's logic that just one more bit of discovery might save a party's case.[164] It may also be based upon uncertainty about the rather arcane summary judgment standards, at least as they apply in antitrust cases.[165] Despite such difficulties, however, summary judgments are granted fairly frequently in antitrust cases.[166] The real question is whether they

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[161] Summary judgment, so it is said, should not delay a real trial by substituting a "trial by affidavits." 6 J. MOORE, FEDERAL PRACTICE ¶ 56.11[1-2] (2d ed. 1976). Trial by affidavit would seem desirable enough as a time-saving device, however, were it not for the ready reversibility of summary judgments.

[162] Dooling, *Cooperation Between Counsel in Simplifying Protracted Cases*, 23 F.R.D. 460, 465 (1958); Freund, *supra* note 43, at 574-77; Hays, *The Use of Summary Judgment*, 28 F.R.D. 126, 135 (1960); Searls, *Methods of Shortening Trials*, 23 F.R.D. 603 (1958). *See also N.Y.U. Seminar Resolutions, supra* note 133, at 520.

[163] 1973 MANUAL, *supra* note 18, at § 2.11.

[164] *See, e.g.*, Littlejohn v. Shell Oil Co., 456 F.2d 225, 229 (5th Cir. 1972). *But see* Searer v. West Michigan Telecasters, Inc., 381 F. Supp. 634, 638 (W.D. Mich. 1974), *aff'd mem.*, 524 F.2d 1406 (6th Cir. 1975).

[165] *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 56.16 (2d ed. 1976).

[166] Recent antitrust cases granting full summary judgment for defendants include: ALW, Inc. v. United Airlines, Inc., 510 F.2d 52 (9th Cir. 1975); Coniglio v. Highwood Serv., Inc., 495 F.2d 1286 (2d Cir. 1974), *cert. denied*, 419 U.S. 1022 (1974); Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974); Golden v. Kentile Floors, Inc., 475 F.2d 288 (5th Cir. 1973) (summary judgment for one defendant only); Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Mogul v. General Motors Corp., 391 F. Supp. 1305 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976); Bay City-Abrahams Bros. v. Estee Lauder, Inc., 375 F. Supp. 1206 (S.D.N.Y. 1974); Goldinger v. Boron Oil Co., 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd mem.*, 511 F.2d 1393 (3d Cir. 1975); Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n, 380 F. Supp. 1382 (D. Conn. 1974); Romac Resources, Inc. v. Hartford Accident & Indem. Co., 378 F. Supp. 543 (D. Conn. 1974), *aff'd sub nom.* Modern Home Institute, Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975); Searer v. West Michigan Telecasters, Inc., 381 F. Supp. 634 (W.D. Mich. 1974), *aff'd mem.*, 524 F.2d 1406 (6th Cir. 1975); Oak Distrib. Co. v. Miller Brewing Co., 370 F. Supp. 889 (E.D. Mich. 1973).

Cases granting partial summary judgment for defendants include: Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54 (D. Ore. 1973).

might be granted yet more often under different standards.

The current standards in antitrust cases are based on four leading Supreme Court decisions: *Poller v. Columbia Broadcasting Systems, Inc.*,[167] *First National Bank v. Cities Service Co.*,[168] *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*,[169] and *Adickes v. S.H. Kress & Co.*[170] Three of these cases reversed summary judgments for defendants, while the fourth, *First National Bank*, upheld a summary judgment entered on behalf of one defendant. One commentator has suggested that *First National Bank* is *sui generis* because of its apparent deviation from the rule that summary judgment is proper only where no available proof or inference refutes the claim or defense being asserted.[171] Despite some ambiguity, it appears that the majority in *First National Bank* did announce a lesser standard—that of deciding upon the most probable inference rather than requiring the absence of alternative inferences. Such a lesser standard may be tempting in lengthy and protracted cases such as *First National Bank*, but it is not the earlier standard, as enunciated in *Poller*, nor the later standard, as enunciated in *Norfolk Monument* and *Adickes*. All three of those cases held that any failure by the movant to conclusively disprove a disputed material fact or factual inference must defeat the motion. This standard is not as readily applicable as might appear, however, and if mechanically applied, it may be unnecessarily restrictive.

Recent antitrust rulings granting or denying summary judgment have generally recited the absence or presence of a material factual dispute.[172] However, a number of these opinions contain

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Cases granting partial or full summary judgment in favor of plaintiffs include: Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54 (D. Ore. 1973); Anderson v. Home Style Stores, Inc., 58 F.R.D. 125 (E.D. Pa. 1972).

[167] 368 U.S. 464 (1962).

[168] 391 U.S. 253 (1968).

[169] 394 U.S. 700 (1969).

[170] 398 U.S. 144 (1970).

[171] 10 B.C. IND. & COMM. L. REV. 196, 201 (1968).

[172] *E.g.*, ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 667 (2d Cir. 1974); Coniglio v. Highwood Serv., Inc., 495 F.2d 1286, 1291 (2d Cir. 1974), *cert. denied*, 419 U.S. 1022 (1974); Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974); Good Inv. Promotion, Inc. v. Corning Glass Works, 493 F.2d 891, 893 (6th Cir. 1974); Umdenstock, v. American Mtg. & Inv. Co., 495 F.2d 589, 592 (10th Cir. 1974); Golden v. Kentile Floors, Inc., 475 F.2d 288, 291 (5th Cir. 1973); Bushie v. Stenocord Corp., 460 F.2d 116, 118-19 (9th Cir. 1972); Littlejohn v. Shell Oil Co., 456 F.2d 225, 229 (5th Cir. 1972);

remarks that appear to refine, if not alter, the general rule.[173] One of the most interesting articulations of a precise standard appeared in *Romac Resources, Inc. v. Hartford Accident & Indemnity Co.*,[174] a case involving a disappointed supplier to the insurance company defendants. In granting summary judgment for defendants, the district court held that as to plaintiff's particular proofs: (*1*) an unsupported hope to discredit defendants' witnesses was not enough to withstand summary judgment; and (*2*) the existence of deliberate, parallel conduct was not, of itself, an antitrust violation or sufficient proof of conspiracy. The court concluded that there could be no reasonable doubt as to the merits, and therefore a jury decision would be improper.[175]

Another interesting evaluation was made in *Goldinger v. Boron Oil Co.*,[176] a case brought by an alleged "distributor" of defendant's products. Defendant insisted that plaintiff was in fact its employee, and moved for summary adjudication. The court granted the motion, stating that no dispute as to credibility existed, and that the only disputes extant concerned the meaning of a few unambiguous documents. The interpretation of the documents was held to be purely a question of law. Similarly, in *Bay City-Abrahams Brothers, Inc. v. Estee Lauder, Inc.*,[177] another case of a terminated "distributor," the court held that however the factual disputes might be resolved, there was no legal theory upon which an antitrust violation could be based.

In each of these cases, the judge apparently felt that no reasonable merit existed in the plaintiff's claim and that further argument as to which "facts" could or could not be disputed was

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Mogul v. General Motors Corp., 391 F. Supp. 1305, 1307 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976); Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n, 380 F. Supp. 1382, 1389 (D. Conn. 1974); Searer v. West Michigan Telecasters, Inc., 381 F. Supp. 634, 643 (W.D. Mich. 1974), *aff'd mem.*, 524 F.2d 1406 (6th Cir. 1975); Seligson v. New York Produce Exch., 378 F. Supp. 1076, 1089-90 (S.D.N.Y. 1974); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 60-61 (D. Ore. 1973); Oak Distrib. Co. v. Miller Brewing Co., 370 F. Supp. 889, 895-97 (E.D. Mich. 1973); Elektra Indus., Inc. v. Honeywell, Inc., 58 F.R.D. 118, 120 (N.D. Ill. 1973).

[173] *E.g.*, ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); Mogul v. General Motors Corp., 391 F. Supp. 1305, 1307-08 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976).

[174] 378 F. Supp. 543 (D. Conn. 1974), *aff'd sub nom.* Modern Home Institute, Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975).

[175] The court of appeals affirmed, citing *First National Bank* as authority. 513 F.2d at 109.

[176] 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd mem.*, 511 F.2d 1393 (3d Cir. 1975).

[177] 375 F. Supp. 1206 (S.D.N.Y. 1974).

therefore immaterial. In other recent cases, however, clearcut instances of empty claims or per se liability have been diverted from the summary judgment route by judicial insistence that more facts be developed before the merits are finally considered.[178]

It is true that the standards for summary judgment are semantic formulations with a certain elasticity in complex antitrust fact situations. Nonetheless, to the extent that they are actually adhered to, they unnecessarily restrict the trial process if they do not permit the disposal of obviously invalid or unprovable claims. Although summary judgment should not be used where a real chance exists of the challenged party discovering substantial evidence for his claim or defense, we strongly assert that it is a waste of time and an encouragement of arbitrary results to refuse to dismiss claims that, even if supported by a jury verdict, would likely be set aside on a motion for a new trial.[179] It is for the court to determine what constitutes a sustainable claim, jury trial notwithstanding. The only possible effect of pressing the right to a jury trial is repetition of trial after trial until either the court gives in and allows what

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[178] *E.g.*, Good Inv. Promotion, Inc. v. Corning Glass Works, 493 F.2d 891 (6th Cir. 1974); Umdenstock v. American Mtg. & Inv. Co., 495 F.2d 589 (10th Cir. 1974); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972); Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1974); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 894-95 (S.D.N.Y. 1974).

[179] This proposed standard for summary judgment is not accepted at this time. As Professor Moore, a stout devotee of a very restrictive rule, states:

> The court may not properly grant summary judgment to the movant on the belief that if the case went to trial and the opposing party obtained a verdict the court would, in the exercise of a sound discretion, set the verdict aside as against the weight of the evidence and grant a new trial.

6 J. MOORE, FEDERAL PRACTICE ¶ 56.15[6] (2d ed. 1976). Since Professor Moore also has a very strict standard for granting new trials—such orders are proper only where the jury verdict is a "seriously erroneous result" amounting to a miscarriage of justice (6A *id.* ¶ 59.08[5])—it is difficult to see why, in his view, summary judgment is not desirable in cases where a jury verdict could not be sustained.

An interesting recent article asserts, similarly to Moore, that in certain instances the standard for summary judgment should be the same standard as would be applied if the party were requesting a directed verdict on the issue after trial. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748-49 (1974). Nonetheless, the Louis article propounds a serious suggestion for strengthening summary judgment motions, and it is difficult to see how the suggestion, if logically followed, would not approach the standard for summary judgment suggested here. The basic premise of the Louis article is that a party moving for summary judgment, if he would not have the burden of proof at trial, should not have the total burden of proof during summary judgment proceedings. Once such a movant has presented a prima facie defense against one or more essential premises of the opponent's claim, the latter must come forward and present his own prima facie case or a good excuse for not doing do. In this format, summary judgment would test whether a claimant has a chance of meeting his burden of proof and therefore deserves a full trial.

amounts to a miscarriage of justice, or else a jury finally decides the factual questions in what the court considers a rational manner. Given the many tools of the judiciary for expediting and refining cases, summary judgment procedures should not be held in abeyance by excessive fear of trespassing upon merely theoretical jury trial rights.[180] It has often been remarked,[181] and may well remain true, that summary judgments are too sparingly used in large cases. If so, the use of more liberal, more realistic, and above all, more probative standards might help.

Of course, the net impact of summary judgment motions upon the expeditious handling of large litigations greatly depends on their timing. A summary judgment motion made before discovery had been effected may simply delay or distort the course of discovery.[182] Used in conjunction with pretrial schedules and procedures, on the other hand, a summary judgment motion may be quite useful in sharpening issues and proofs.[183] Coming at the end of pretrial proceedings, such motions may indeed become the core of the trial itself if the summary judgment proofs are transformed into trial proofs when the motions themselves fail. This latter situation has been especially common in nonjury cases where the summary judgment process has occasionally created an almost complete trial record and has honed down the trial itself to a quick analysis of credibility.[184] The important point, whether or not a jury trial is contemplated, is that the parties be discouraged from bringing premature summary judgment motions. They should be required to work within an overall pretrial schedule.

Summary judgment completes the pretrial process. It is both the most potent instrument and one of the principal goals of pre-

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[180] In fact, the summary judgment proposals of the Louis article (*see* note 179 *supra*), if carefully exercised, would expose weak cases in time to defeat a request for jury determination and would strengthen those cases which truly merit a jury trial.

[181] Dooling, *supra* note 162, at 465; Freund, *supra* note 43, at 574-77; Hays, *supra* note 162, at 135; Kohn, *supra* note 16, at 504; *N.Y.U. Seminar Resolutions, supra* note 133, at 520; *Stanford Seminar Resolutions, supra* note 133, at 615.

[182] *See, e.g.*, Umdenstock v. American Mtg. & Inv. Co., 495 F.2d 589 (10th Cir. 1974); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972); Waldron v. British Petroleum Co., 38 F.R.D. 170 (S.D.N.Y. 1965), *aff'd sub nom.* First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968), *discussed in* note 46 *supra*.

[183] *See, e.g.*, Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers Ass'n, 380 F. Supp. 1382 (D. Conn. 1974); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54 (D. Ore. 1973).

[184] Such was the procedure used in United States v. Bethlehem Steel Corp., 157 F. Supp. 877 & 168 F. Supp. 576 (S.D.N.Y. 1958), where the trial lasted only 18½ days and was conducted largely on a prepared record. *See* note 160 *supra*.

trial work. Next to trial itself, a summary judgment proceeding is the most thorough possible adjudication of the merits of an action, and if it cannot dispose of some or all important issues, it can frame the final trial of those issues. To recapitulate, if used with judicious timing (via pretrial timetables), summary judgment (*1*) enhances and completes judicial control of the large action, (*2*) demands an awareness of the merits in advance of possible trial, (*3*) promotes efficiency and speed, even if partially or fully denied, and (*4*) demands accurate assessments in order to be fair, effective, and (most pragmatically) immune from subsequent reversal.

IV

A Summary of Judicial Control

The discussion above posits that early, firm, active, and continuous judicial control is the sine qua non of successful adjudication of large cases. This view is not new, nor is it unique; it is, in fact, something of a homily by now.[185] When one gets down to the details of its application, however, one finds it to be a view that many judges and attorneys avoid. The fear of chilling the adversary nature of our jurisprudence, the fear of squelching free discovery, the fear of eliminating an issue before it faces the supposedly unique chemistry of jury evaluation, and the refusal to separate the material from the immaterial, save in the last resort, have all led to a continuing reluctance to apply the ethic of control. Yet there is no choice. So long as issues and proofs remain overlapping, redundant, and confused, a fair adjudication cannot be had without considerable judicial intervention. This has been said before and is hardly a surprise to the antitrust bar, either defendants' or plaintiffs'.[186]

But how has control worked in practice, in the "real world" of everyday litigation? One way to begin answering this question is to consider several large antitrust cases. The samples chosen here are three computer industry cases, the gypsum wallboard cases, and the antibiotics industry (tetracycline) cases.

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[185] "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and managements." 1973 Manual, *supra* note 18, at ix. "There are no unmanageable cases. There are only lazy judges." Hon. Miles W. Lord, D. Minn., *quoted in The $175 Million Rx*, Time, March 4, 1974, at 86.

[186] *See generally* Blecher, *The Plaintiff's Viewpoint*, 38 ABA Antitrust L.J. 50 (1969); Bromley, *supra* note 13.

A. *The Computer Cases*

The first of the computer cases, *Telex Corp. v. IBM Corp.*,[187] began with the filing of a complaint in the Northern District of Oklahoma in January 1972, was tried on the merits in 1973,[188] and was reviewed on the merits by the Court of Appeals for the Tenth Circuit in late 1974 and early 1975. Backtracking slightly, in April 1972 the case was transferred to the District of Minnesota for coordinated pretrial proceedings with two other actions. In those other cases, one filed in 1968 and the other in 1970, the parties had nearly completed their discovery proceedings, and Telex was able to avail itself of a considerable portion of that work. In January 1973 the *Telex* action was remanded to Oklahoma, and in April a comprehensive pretrial order was entered, enumerating issues, documents, and witnesses for trial. The trial itself, without jury, was held during a six-week period in April and May. Post-trial proceedings took place in the summer and fall, and a final set of findings and conclusions was issued in November 1973. Of course, the court of appeals reversed the major decision of the trial court, but on a point of substantive law (definition of the relevant markets) rather than on procedural infirmities. Thus, this large and well-known case went through most if not all of the litigation process, on the merits, within about three years.[189]

Honeywell, Inc. v. Sperry Rand Corp.,[190] the second computer case, began in May 1967 with two separately filed actions, which were consolidated in the District of Minnesota in May 1968. Amended and expanded complaints were allowed at that time and in August 1969, and pretrial orders were issued in July 1970 and March 1971. The trial, without jury, ran some 135 days, from June 1971 to March 1972. It reportedly involved some seventy-one "live" and eighty "canned" witnesses, over 30,000 marked exhibits, and over 20,000 pages of transcript. Comprehensive findings and conclusions were entered in October 1973.[191] Thus, the case consumed roughly six and one-half years from filing to trial court decision on the merits.

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[187] 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir.), *cert. denied*, 423 U.S. 802 (1975).

[188] *Id.* See the district court opinion for this and other aspects of the case's progress.

[189] Telex and IBM recently agreed to terminate their actions against each other, with neither side making payment of any kind. N.Y. Times, Oct. 4, 1975, at 33, col. 5.

[190] 1974-1 CCH TRADE CAS. ¶ 74,874 (D. Minn. 1973).

[191] *Id.*

In the third computer case, *United States v. IBM Corp.*,[192] the suit began over seven years ago, on January 17, 1969, and finally commenced an anticipated one to two-year nonjury trial on May 19, 1975.[193] The case originally languished with little or no activity until early 1972, when it was assigned for all purposes to Judge Edelstein of the Southern District of New York. During the past three years a considerable amount of discovery has apparently taken place, but much of it has involved a fierce dispute about the destruction of alleged "work product" materials.[194] In July 1973 IBM sought and was refused an early separate trial on the definition of the "relevant markets" concerned; Judge Edelstein held that such a trial would not lead to complete resolution of any of the counts of the United States' complaint.[195] However, in January 1975 the United States sought and obtained leave to file an amended complaint adding allegations similar to those found to be true by the district court in the *Telex* action.[196] By this measure, it brought in issues as to the "plug compatible peripherals" market which had been litigated in Oklahoma, while retaining its original issues as to the larger data-processing business. Ironically, just after the United States moved into the "peripherals" area, the collateral support for that move was destroyed by the Tenth Circuit's reversal of the *Telex* district court's market findings. As of this writing, then, the United States' *IBM* case is well past its seventh birthday, not only without having been fully tried, but also without having reached the stage of clearcut issue definition.

B. *The Gypsum Cases*

As for the gypsum wallboard cases, it should first be noted that this price-fixing litigation has involved not one plaintiff but many, and not only single litigants but class actions as well.[197] The first gypsum cases, filed in 1966 in the Northern District of California, were brought by dealers (direct purchasers). Subsequent cases were

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[192] *See* Civil No. 69-200 (S.D.N.Y., filed Jan. 7, 1975) (adding new allegations as to markets and conduct).

[193] "The nonjury trial is expected to take a year to complete. Judge Edelstein . . . is expected to take another year to reach his decision." N.Y. Times, May 20, 1975, at 53, col. 8.

[194] *See* United States v. IBM Corp., 62 F.R.D. 530 (S.D.N.Y.), *appeal dismissed*, 493 F.2d 112 (2d Cir.), *cert. denied*, 416 U.S. 995 (1974) (one of several "work product" opinions).

[195] *Id.*, 60 F.R.D. 654, 658 (S.D.N.Y. 1973).

[196] *Id.*, 66 F.R.D. 223 (S.D.N.Y. 1975).

[197] Aspects of the gypsum cases are discussed in notes 59, 66-68 and accompanying text *supra*.

transferred to Judge Zirpoli in the Northern District of California and those not involving dealers' claims were put on a "back-burner" status as to discovery and trial. In October 1969 the "pilot" trial of the dealer actions began. Heard without jury, it encompassed only issues of liability and impact, and concluded less than five months later in mid-March 1970. A complete decision was handed down exactly one year later.[198] Since that decision resulted in a finding of liability, a further nonjury trial on damages was commenced in December 1971. Final findings and conclusions on damages were released in the spring of 1973.[199] Meanwhile, Judge Zirpoli had indicated that his liability findings would be given collateral estoppel effect in a subsequent trial of the "back-burner" cases. Later in 1973, before the decisions in the dealer cases were appealed or any further trial was commenced, settlements involving very substantial sums were finalized.[200] The total time from commencement to settlement was roughly seven years for the oldest cases and as little as one year for others.

C. *The Antibiotics Cases*

The final example is the complex, marathon, antibiotics litigation. Beginning with an FTC investigation and complaint in the late 1950's,[201] continuing with an indictment brought in 1961, tried first in 1967 and again in 1973,[202] the antibiotics litigation picked up its first treble-damage action in 1964. Other actions came later, particularly in 1968, with some cases being filed as recently as late 1974—right up to the presumed running of the statute of limitations.

In 1968 coordinated pretrial proceedings commenced in the Southern District of New York before Judge Inzer Wyatt,[203] and various class actions were settled in 1969 and 1973. In the interim, the Honorable Miles W. Lord was designated a judge of the Southern District for purposes of continuing the "nonsettling" pretrial proceedings.[204] In the spring of 1971 Judge Lord transferred most

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[198] Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971).

[199] *Id.*, 357 F. Supp. 832 (N.D. Cal. 1973).

[200] *See In re* Gypsum Cases, 386 F. Supp. 959, 961 n.1 (N.D. Cal. 1974). *See also* Furth & Burns, *supra* note 31, at 886, 897.

[201] *See* American Cyanamid Co. v. FTC, 363 F.2d 757, 761-62 (6th Cir. 1966).

[202] *See* United States v. Chas. Pfizer & Co., 426 F.2d 32 (2d Cir.), *modified*, 437 F.2d 957 (2d Cir. 1970), *aff'd per curiam by an equally divided court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973).

[203] *In re* Antibiotic Drugs Antitrust Actions, 295 F. Supp. 1402 (J.P.M.L. 1968).

[204] *Id.*, 320 F. Supp. 586 (J.P.M.L. 1970).

of the pending cases to his home forum, the District of Minnesota.[205] There certain remaining actions (the United States' damage claims, the claims of insurers and union welfare funds, and those of several competitors) were consolidated for trial. Trial commenced in November 1974 before two juries—one for the "purchaser" actions, another for the "competitor" ones. Today the saga of this case continues apace, but it hardly provides any insight into the effective management of large antitrust litigations. Indeed, a mistrial was declared in August 1976, although the main competitor case was settled in August 1975.[206]

Meanwhile, in early 1973 a North Carolina class action was remanded to its home forum and tried without jury later that year.[207] The claims of foreign government plaintiffs, however, still remain to be adjudicated. Aside from the more recently filed actions, the litigation has run for roughly nineteen years; it has been twelve years since the first civil suit was filed and eight years since coordinated pretrial proceedings began.

D. *The Practical Lessons of Large Cases*

What lessons, if any, may be drawn from this small sampling of large cases? Perhaps it should first be noted that most were tried (or are being tried) without a jury. To be sure, these nonjury trials have run the gamut in length from six to twenty weeks, with a trial duration of up to two years being predicted for *United States v. IBM*. Nonetheless, it must be conceded that each of these trials was completed more quickly than would have been possible with a jury. The time spent before and after these nonjury trials in marshalling proofs and arguments may be considered part of the overall trial time, but such chores would have been needed for a jury trial too, along with a good many others. Spared the formal, sometimes theatrical presentations of a jury trial, the participants were presumably able to devote considerably more time to reflection upon and discussion of the substantive issues.[208]

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[205] *In re* Antibiotic Antitrust Actions, 333 F. Supp. 299 (S.D.N.Y.), *mandamus denied sub nom.* Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971).

[206] *See* N.Y. Times, Aug. 15, 1975, at 49, col. 1 (settlement); Wall St. J., Aug. 18, 1976, at 7, col. 2 (Judge Lord cited effect of prejudicial pretrial publicity on jurors in declaring mistrial).

[207] North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974).

[208] For an example of the sort of reflection sometimes engaged in by an antitrust jury, see Hospital Television, Inc. v. Wells Television, Inc., 462 F.2d 417 (8th Cir.), *cert. denied*, 409 U.S. 1024 (1972). The case consumed 13 days of trial and 30 pages of instructions; the

The absence of a jury, however, does not alone guarantee expedited proceedings; witness the immobility of *United States v. IBM*. The *Telex* trial, in contrast, was fairly speedy, but at least three other factors distinguish that case from *United States v. IBM*. One was the lack of tangential issues in *Telex*. As the decision in that case notes,[209] trial issues were from the beginning geographically confined to domestic American sales. On the other hand, it appears that *United States v. IBM* has been and will remain bogged down in peripheral matters. Between the inordinate attention paid to "work product" discovery and the Justice Department's belated interjection of a whole new market category in order to track the district court's decision in *Telex*, the *IBM* litigation has had considerable difficulty focusing upon even its own very broad issues.

A second factor making for speed in the *Telex* trial was an apparently thorough-going pretrial order. The order came just days before trial, and on each day of the trial, preparatory discussions were held to insure organizational continuity. As was stressed in the McAllister article of a quarter century ago, proofs and issues must be confined at some point to discrete bundles or neither can possibly be evaluated.[210] It is the goal of a good pretrial order to do just that.

A third expediting factor, which initially lies outside the control of the pretrial court, is the attitude of the attorneys involved. If, as in *Telex*, both sides truly desire a prompt determination, then speed will very likely result. If, however, as in *United States v. IBM*, one side or the other expresses rather minimal interest in preparing its case, then progress will be harder to achieve.[211]

In addition to the three factors distinguishing *Telex* from *United States v. IBM*, other factors making for efficient and accurate adjudication are apparent in our case sample. In speaking of the role of the parties, consider again the gypsum cases. Use there of the "test case" device along with a bifurcated first trial undoubtedly let all concerned, "front" and "back-burner" parties alike, make the most thorough possible evaluation of their positions. Preparation and settlement of the many class actions proceeded to an unusual

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jury, however, required but 20 minutes of deliberation to reach a verdict for the defendant. The speedy verdict was upheld on appeal.

[209] 367 F. Supp. at 258, 268.

[210] *The Big Case, supra* note 2, at 55-57.

[211] *Cf.* United States v. IBM, 66 F.R.D. 223, 228-30 (S.D.N.Y. 1975) (rejecting IBM's charge that United States' belated motion for leave to amend constituted bad faith).

extent in light of the facts and not in any darkness.[212]

Finally, perhaps the most critical factor of all is the extent to which pretrial procedures are integrated with the trial proper, so that the entire litigation becomes an efficient process for narrowing and resolving disputed issues. In three of the sample litigations discussed, it is obvious that the entire course of the litigation was effectively "the trial." In *Telex, Honeywell,* and the gypsum cases, determination and resolution of material issues occurred before, during, and after the formal trial period itself. Even in the antibiotics cases, it is probable that the pretrial airing of damage theories was instrumental in encouraging the numerous settlements and in formulating the remaining issues.[213] In *United States v. IBM*, however, despite the strong and experienced efforts of Judge Edelstein, it seems that pretrial maneuvering may have become an end in itself, not integrally related to resolution of the issues.

In sum, we reject the view that judicial control is to be feared. The real work in disposing of complex cases on their merits comes largely in the pretrying and settling processes. Unfortunately, this work—unlike a full, formal trial—has never been considered a wholly legitimate part of Anglo-American adversary jurisprudence. Yet, the only rights likely to go by the boards under strong judicial control are the illusory tactical "rights" to obfuscate and to stall.[214] Issues and proofs must be refined at some point, and to the extent that pretrial proceedings accomplish that, counsel have done their traditional job well. As for the right to a jury trial, good pretrial work should at least insure that the jury's task will be limited to true jury issues and be accomplished with a minimum of fatigue and duress.

The true conflict over firm judicial control of large cases is of a different philosophical order. The deductive mind takes predefined legal principles and attempts to shape the pertinent facts to those principles. The inductive mind sweeps the ground for all possible facts and only then considers the legal categories into

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[212] It is not clear, however, that test cases can be used in conjunction with collateral estoppel to summarily dispose of complex litigations, at least absent the consent of all concerned. *See* notes 89-93 and accompanying text *supra*.

[213] *See* the March 21, 1974, order approving the settlement of the six pending state class actions. Order, Kansas v. Chas. Pfizer & Co., Civil Nos. 4-71-392, 393, 395, 397, 399, 400, 401 (D. Minn.).

[214] On the other hand, some psychological tests indicate that the traditional adversary trial process—involving a passive rather than active judicial role—fosters objectivity on the part of judges. *See* Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking,* 86 HARV. L. REV. 386, 397-401 (1972).

which they should be grouped. There is, of course, much to be said for both of these approaches. But our judicial system, which seeks the timely resolution of legal disputes, must tend to favor the first sort of truth seeking over the latter. Given the finite resources of parties and courts, this is for the better. An antitrust litigation is an adjudication, not a roving legislative or literary investigation, and efficiency must remain an important value to judges, lawyers, and litigants alike.

V

THE "BIG CASE" AND SUBSTANTIVE ANTITRUST LAW

Perhaps the ultimate philosophical conflict in the antitrust area arises in the class action/*parens patriae*[215] sphere discussed earlier. The more a court processes millions of "two dollar" claims,[216] the more it becomes like an administrative body and less a finder of specific legal and factual truths—particularly as to impact and damages.[217] Of course, to the extent that a court can expeditiously dispose of class allegations as improper under Rule 23, or effectively table them until the merits have initally been determined,[218] class action claims possess a certain manageability. But the question often raised in recent opinions[219] and discussions[220] remains; namely, whether it is better to concentrate on the adjudication of large damage claims or small ones.

A true concern for the small claimant might suggest the desirability of more preventive antitrust work and less obsession with small cures. The stiffer criminal penalities for antitrust violations recently enacted under the Antitrust Procedures and Penalties Act[221] are a positive step in this direction. The current interest in ending the federal regulatory agencies' often negative impact on

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[215] *See* note 114 *supra*.

[216] For a case literally involving two dollar antitrust claims, see Laveson v. TWA, 471 F.2d 76 (3d Cir. 1972).

[217] *See* Collen, *supra* note 31, at 1056.

[218] Two cases which effectively tabled many class allegations past initial determinations of liability were *Katz* and the gypsum cases. *See* notes 89-93, 197-200 and accompanying text *supra*.

[219] Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Hotel Tel. Charges, 500 F.2d 86, 91 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin ("Eisen III"), 479 F.2d 1005, 1018-20 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

[220] *Symposium on Antitrust Class Actions, supra* note 24, at 321-50.

[221] 15 U.S.C. §§ 1-3 (Supp. V, 1975).

competition is another,[222] although any tightening of antitrust immunities that now exist because of agency action could stimulate new areas of litigation.[223]

Perhaps the ultimate in preventive measures is the oft-introduced, never-passed, Industrial Reorganization Act authored by Senator Hart.[224] This legislation seeks to restructure allegedly concentrated industries by way of special proceedings in an "Industrial Reorganization Court." Such proceedings would ostensibly be remedial rather than penal in character and would turn upon the establishment or rebuttal of certain key presumptions regarding the existence of "monopoly power" in a given "line of commerce." Procedures would be flexible, with emphasis on judicial intervention in the calling of witnesses and experts, and review would be quite limited.

Would any of this really result in significant and reasonably attainable competitive changes? One can be skeptical for a number of reasons. First, it is not clear just how investigations and complaints under the "reorganization" process would affect other litigations concerning the same subject matter. Second, the very procedural flexibility granted to the Industrial Reorganization Court might encourage endless wrangles about the procedures to be used.[225] Third, the supposedly simple presumptions of monopoly power are not clear in their impact on the burden of proof[226] and would not prevent extensive and complex investigations into mitigating and exculpatory rebuttal proofs.[227] Fourth, the hope that "reorganization" cases would focus upon remedies rather than liability[228] has little chance of realization, especially since innovative

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[222] *See, e.g.*, Testimony of Thomas E. Kauper on airline deregulation before the Senate Administrative Practices Subcommittee (Feb. 6, 1975), *reported in* 1975 BNA ANTITRUST & TRADE REG. REP. No. 700, at E-1 (Feb. 11, 1975); Bureau of National Affairs interview with Mr. Kauper, *id.* No. 705, at AA-1 (Mar. 18, 1975).

[223] Of interest here is the recent Hart-Kennedy bill, S. 2028, 94th Cong., 1st Sess. (1975), which would authorize the FTC and the Antitrust Division to review federal agency action appearing to have an anticompetitive impact. If enacted, S. 2028 would allow some antitrust disputes to be thrashed out on their merits through prompt, informal action.

[224] Reintroduced most recently on June 17, 1975, as S. 1959, 94th Cong., 1st Sess. (1975).

[225] *See* National Association of Manufacturers, Legal Analysis of S. 1167, *in The Industrial Reorganization Act, Hearings on S. 1167 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 93, 97-106 (1973).

[226] *See* Note, *The Industrial Reorganization Act: An Antitrust Proposal to Restructure the American Economy*, 73 COLUM. L. REV. 635, 670-73 (1973).

[227] *See Industrial Reorganization Act Hearings, supra* note 225, at 353 (statement of Hon. Philip Neville).

[228] *See* Hart, *Restructuring the Oligopoly Sector: The Case for a New "Industrial Reorganization Act,"* 5 ANTITRUST L. & ECON. REV. No. 4, at 35 & 6 *id.* No. 1, at 47 (1972).

decrees have not been a strong point of recent governmental enforcement actions.[229] In light of its vague standards and unwieldy procedures, the proposed Industrial Reorganization Act would simplify very little.

A better approach would be to establish a study group to propose specific changes for industries in need of reform. Under this format, carefully tailored reorganizational legislation would be deferred until after completion of the preliminary analysis.[230] Attorney General Levi has recently advanced such a proposal, based on a plan for a five-year commission which would examine in depth without examining indefinitely.[231]

Another legislative proposal with ample potential for encouraging protracted proceedings is the *parens partriae* bill enacted by Congress and signed by the President just before this Article went to press in late 1976.[232] This legislation, which is part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, makes an end run around current limitations upon antitrust suits brought by amorphous aggregations of claimants who neither desire nor qualify for class status under Rule 23. As was pointed out by the former head of the Antitrust Division, Professor Thomas Kauper, this law has a negligible practical "interface" with existing Rule 23 procedures,[233] and the litigation of conflicts may be prodigious. Despite minimal notice and "opt-out" provisions, conflicts of interest between the state attorney general and the individuals protected by him may also produce a host of procedural snarls.[234] Moreover, the assessment of aggregated damages will undoubtedly face initial due process challenges.

Of course, such objections would not be dispositive if the other goals of the law were clear. Protection of individual consumers is an oft-professed goal, but existing Rule 23 procedures already provide protection for claims of any substance, with safeguards for all concerned. The *parens patriae* provisions of the new law encour-

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[229] *See* National Association of Manufacturers, Legal Analysis, *supra* note 225, at 121-24.

[230] *See* Note, *supra* note 226, at 675.

[231] *Reported in* 1975 BNA ANTITRUST & TRADE REG. REP. No. 719, at A-5 (June 24, 1975).

[232] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

[233] Remarks of Mr. Kauper before the Senate Antitrust and Monopoly Subcommittee (May 7, 1975), *reported in* 1975 BNA ANTITRUST & TRADE REG. REP. No. 713, at D-1 (May 13, 1975).

[234] *See* remarks of Milton Handler, Esq., before the Senate Antitrust and Monopoly Subcommittee (June 3, 1974), *reported in id.* No. 718, at D-1 (June 17, 1975).

age states to collect upon insubstantial and difficult-to-prove damage claims by offering a windfall to state treasuries and outside counsel. The provisions also provide an extra measure of deterrence. The former is not usually considered a legitimate goal of the antitrust laws, while the latter, as has been discussed above, is better served by more direct measures. Thus, the *parens patriae* law supports "two dollar" claims without carefully considering fundamental antitrust objectives, much less secondary matters such as efficient antitrust adjudication. Indeed, the entire Act makes virtually no effort to address considerations of judicial economy, and even those few procedural improvements found in earlier versions[235] have been dropped.

The import of this discussion, obviously, is that legislative or judicial changes regarding purely substantive antitrust questions may have highly significant procedural ramifications. Central to the problem of complexity of procedure is complexity of proof, and crucial to the latter problem is the degree to which a court can classify challenged conduct as illegal per se. The more a court is required to ascertain reasonableness, particularly in complex questions of monopoly under section two of the Sherman Act and diminution of competition under section seven of the Clayton Act, the lengthier and denser become the pretrial and trial proceedings.[236] This is not to suggest that all categories of conduct should be tested with simple "per se" touchstones—although such a development might actually aid business planning—but it is to suggest that trade-offs always exist between accuracy and speed where a *total* analysis of a situation is desired. A further question is whether the courts are adequately equipped to assess economic and social reasonableness, at least on a national scale.[237] Such assessments may be more appropriate for special study bodies, as suggested above.

Perhaps the important point to remember in considering the impact of new antitrust provisions is that the courts cannot do it all. They cannot be expected to unscramble every snarl without some delay, confusion, and frustration resulting. Legislative foresight

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[235] *See* S. 1284, 94th Cong., 1st Sess. § 702 (1975).

[236] *See* Dissent of Louis B. Schwartz *in* ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 390, 392 (1955); Schenefield, *Annual Survey of Antitrust Developmnts—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 344-45 (1975).

[237] *See* National Association of Manufacturers, Legal Analysis, *supra* note 225, at 115-24.

and careful drafting are needed if new laws are to deliver either substantive or procedural reform.

VI

SOME PROPOSALS

Some modest specific suggestions have already been made in the course of separately discussing coordination of multiple actions, class suits, discovery, and summary judgment. Other more general suggestions have been made or implied throughout this Article. In essence, we advocate early organization and control of large cases, with control of the issues as a foundation for control of discovery. Pretrial and post-trial activities must be seen as a continuum with the trial itself. Moreover, we believe that greater use of "test case" devices would expedite the handling of complex litigations.

Three further proposals deserve mention. First, it would seem sensible to amend 28 U.S.C. § 1407 to allow transfer of actions for all purposes, not merely for pretrial proceedings. The de facto power sometimes exercised by section 1407 transferee courts to retain and try cases should be made de jure.[238]

Second, greater use should be made of Rule 68, which provides in part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

The offeree has ten days to accept the offer, after which it will be deemed withdrawn. However,

> [i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Offers may also be made in the same manner and to the same effect after a determination of liability, but before a determination of damages. The penalty provided in Rule 68 is similar to that in

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[238] Such is the suggestion made in Note, *supra* note 17, at 1036-40. *See also* J.P.M.L. RULE 11(b), 28 U.S.C. § 1407 nt. (Supp. V, 1975).

28 U.S.C. §§ 1131-1132 (failure to meet jurisdictional amount) and in Rule 37(c) (failure to admit).

It has been stated that the purpose of Rule 68 is to "encourage settlements and avoid protracted litigation."[239] Under Rule 68, however, an offer must be "unconditional" [240] and must include all costs to date; thus, the Rule may be insufficiently flexible to work with the complex settlement offers made in large antitrust litigations.[241] Perhaps judicial interpretation will rise to the occasion, but a better solution would be to amend the Rule so as to encompass conditional offers and offers excluding some or all accrued costs. The principle would be the same, but more readily followed. Certainly a claimant should be obligated to consider a reasonable settlement offer before rejecting it out of hand, and a good faith offeror should not bear the brunt of the offeree's rash rejection.[242]

Third, further efforts should be made to eliminate jury trials in antitrust cases. A jury demand complicates almost every facet of pretrial management and causes the trial to loom as an artifically segregated, theatrical, and prolonged experience. Nonetheless, the seventh amendment guarantees a jury trial in antitrust damage actions,[243] and only an unlikely constitutional amendment would remove the right. Other measures, however, might be used to make a jury trial less desirable. Informal pressures from the bench and the desire to "get things done" have already caused parties to waive their right to a jury in some large cases. Since a major obstacle to such a waiver is the fear of possible judicial bias,[244] nonjury trials would be encouraged if parties were allowed one peremptory recusal as to the presiding judge. This suggestion, recently advanced by Chief Judge Devitt of the District of Minnesota,[245]

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[239] 7 J. MOORE, FEDERAL PRACTICE ¶ 68.01[4] (2d ed. 1975), *quoting* the 1946 Committee Note on the amended version of Rule 68. *Accord*, Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969).

[240] *See generally* 7 J. MOORE, FEDERAL PRACTICE ¶ 68.04 (2d ed. 1975).

[241] *See, e.g.*, the description of the 1969 antibiotics settlement in West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1082-85 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

[242] For an exploration of more radical techniques for forcing settlements through judicial action, see Dole, *supra* note 71, at 1000-06.

[243] Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See also* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.37[2] (2d ed. 1976).

[244] *See, e.g.*, Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972).

[245] Devitt, *Federal Civil Jury Trials Should be Abolished*, 60 A.B.A.J. 570 (1974). Judge Devitt further suggested that the recusal statute be amended to allow recusal for cause whenever impartiality can reasonably be questioned and that jury fees (taxable as costs) be levied. In response to Judge Devitt's article, one author has asserted that while the Judge's

would require an amendment to 28 U.S.C. § 144. Although this procedure might temporarily detract from continuity, it would more than compensate by encouraging the calm and expeditious adjudication of facts and law.

CONCLUSION

The experience of the last twenty-five years has confirmed the wisdom of the early studies in calling for aggressive pretrial management of large antitrust cases. Speed and efficiency in adjudication have significantly increased through improved judicial handling of such pretrial devices as multidistrict transfers, class action certifications, pretrial conferences, and summary judgment motions. Still better control could be achieved if attorneys and judges would squarely face the fact that the pretrial period is where the merits of most cases are decided. Excessive deference to the concepts of adversary jurisprudence, wide-open discovery, and trial by jury serves only to impede the issue clarification necessary for fair and expeditious adjudication of complex cases. Since the vast majority of cases never reach trial, justice is better served by pretrial attention to the actual worth of the claims presented. For those few cases that do reach trial, the pretrial process can greatly simplify the jury's task by narrowing the issues to those basic factual questions truly in dispute. Ultimately, the large antitrust case should be viewed as a continuum of defining, refining, and resolving factual and legal issues. The pretrial period should be the formative part of the trial, not something apart from the trial as such. A case handled in this manner will be determined more quickly, or at least more smoothly and soundly.

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premises as to the low value of jury trial were wrong, his ideas about recusal still made sense. Janata, *Federal Civil Jury Trials Should Not be Abolished*, 60 A.B.A.J. 934 (1974). *But see* Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970). On recusal and disqualification in general, see Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).