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Judicial Notice in the Trial of Complex Cases - The Sherman Act 1 Per Se as a Testing Ground

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JUDICIAL NOTICE IN THE TRIAL OF COMPLEX CASES—THE SHERMAN ACT § 1 PER SE AS A TESTING GROUND

by

*William J. Flittie**

> *I am puzzled by the notion that because the Courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such argument and erect it into a rule of per se illegality.*[1]

SINCE the publication of an earlier companion article questioning the validity and desirability of the Sherman Act § 1 per se concept as it has developed,[2] the first instance of Supreme Court abandonment of a per se category has occurred.[3] Vertical territorial and customer restrictions, regardless of passage of title, have been restored[4] to rule of reason treatment after ten years of per se dispositions. The Court's reasoning casts doubt on whether that other recent addition to the per se categories, horizontal territorial restrictions, despite that they are not imposed by the supplier but horizontally agreed to among potential competitors, will continue to receive per se treatment by the Court.

Unfortunately, the new decision, *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[5] further muddies an already embarrassingly uncertain area of law by stating, at the close of the opinion,

> [W]e do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pacific R. Co.* But we do make clear that departure from the rule of reason standard must be based on demonstrable economic effect rather than—*as in Schwinn*—upon formalistic line drawing.[6]

Nor does Mr. Justice White aid the integrity of the per se concept when, at the end of his reasonable but unsuccessful effort in a concurring opinion to narrow the category and thereby preserve the core of this per se, he concludes that each Sherman Act case must be decided on the particular facts disclosed by its record,[7] citing in support a case that predates emergence of the per se concept. What the Court fails to perceive is that the per se concept simply cannot be made intellectually compatible with sui generis case treatments.

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1. GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 1030 (9th Cir. 1976) (Duniway, J., dissenting).
2. Flittie, *The Sherman Act § 1 Per Se—There Ought To Be a Better Way*, 30 Sw. L.J. 523 (1976).
3. Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).
4. This category was removed from rule of reason and placed in per se status as of 1967 or 1972, more probably the latter. *See* Flittie, *supra* note 2, at 525 n.13.
5. 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).
6. *Id.* at 2562, 53 L. Ed. 2d at 585 (emphasis added).
7. *Id.* at 2569, 53 L. Ed. 2d at 593.

This judicial confusion over the proper application of the Sherman Act § 1 per se concept plunges judges, lawyers, and scholars ever more deeply into a morass best exemplified by the tying per se.[8] One wonders how an attorney now can advise businessmen, the ultimate test for the utility of antitrust case precedents. Further, it must not be forgotten this is a criminal as well as a civil statute, with the attendant risk of substantial felony jail sentences. Such sentences are now urgently being sought in some instances by the Justice Department.[9]

The conclusion is inescapable that recent case law is creating a shadowland that obscures the per se concept as correctly enunciated (though unfortunately applied) in the uncompromising terms of *United States v. Topco Associates, Inc.*[10] The per se concept increasingly incorporates exceptions and complex inquiry formulations[11] which actually enter the zone of rule of reason inquiry. The end result is that, except in the crudest direct price fixing situations, no attorney today can advise a client with the precision to which the client is entitled regarding whether defensive evidence will be heard.[12]

I. CONTINENTAL T.V., INC. v. GTE SYLVANIA, INC.

In *Continental T.V.* Sylvania, reduced in market share to a relatively insignificant one percent of national television sales, abandoned conventional wholesale distribution for a system of direct dealing with strong, franchised title-taking retailers who were limited in retail operations to designated locations. Under this arrangement Sylvania retained the power to designate additional franchised retailers at locations of Sylvania's sole choosing. Sylvania selected such a location in San Francisco approximately one mile from Continental T.V., one of its most successful franchisees, whereupon relations between the two soured. Continental T.V. demanded a Sacramento franchise but was refused because Sylvania believed that Sacramento already was adequately served. Continental T.V. nevertheless proceeded to stock a Sacramento store with Sylvania sets from the inventory of its authorized operations. The franchise thereupon was terminated by Syl-

8. Flittie, *supra* note 2, at 542-48.

9. See, *e.g.*, Memorandum from Assistant Attorney General Baker to Staff Attorneys and Economists (Feb. 24, 1977) concerning sentencing guidelines for felony cases under the Sherman Act. Deep concern with this matter is shown in Federal District Judge Joiner's opinion in United States v. NuPhonics, Inc., 433 F. Supp. 1006 (E.D. Mich. 1977), wherein he says that with Sherman Act violations having become felonies, a process must begin to insure that the same protections are given as with other felonies. The per se violation of price fixing is charged in *NuPhonics*.

10. 405 U.S. 596, 607-08 (1972); Flittie, *supra* note 2, at 526.

11. These issues are discussed at length in Flittie, *supra* note 2, at 526.

12. It cannot be avoided that customer and territorial restrictions can be used to accomplish price fixing, and virtually must, in varying degrees, have that effect. Nevertheless, the *Continental T.V.* case allows their use if not abused; on the facts found in *Continental T.V.* the use of price fixing was held legal. 97 S. Ct. at 2568, 53 L. Ed. 2d at 593 (White, J., concurring). Presumably the possibility of illegality is the majority's reason for reserving the possibility of per se treatment in other applications. *Id.* at 2562, 53 L. Ed. 2d at 586 (White, J., concurring). But to do so is to enter deliberately the very shadowland by which the per se concept is becoming so distorted as to be increasingly shorn of meaning, and the phrase a mere editorial epithet. The problem is especially prominent in alleged indirect price fixings. *See* Flittie, *supra* note 2, at 533-35.

vania and this lawsuit[13] pursuant to the title passage precedent of *United States v. Arnold, Schwinn & Co.*[14] resulted in a trebled damage award in the district court of $1,774,515. The trial judge had given a plain *Schwinn* per se instruction to the jury.[15] The Ninth Circuit Court of Appeals reversed the per se disposition, distinguishing *Schwinn* on the basis that the customer and territorial restriction in *Schwinn* need not control a mere location restriction that contained much less potential for harm.[16]

The Supreme Court refused to rest its decision on narrow, distinguishing grounds, stating, "[W]e are unable to find a principled basis for distinguishing *Schwinn* from the case now before us."[17] The Court further believed that: "The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis . . . . 'Realities must dominate the judgment . . . . The Anti-Trust Act aims at substance.' "[18] Then, in a decision replete with concessions of recent analytical error which stare decisis was not here permitted to enshrine in the law, the majority in effect adopted Mr. Justice Stewart's dissent in *Schwinn*,[19] and proceeded, after just ten years, to return these vertical non-price restrictions to the rule of reason category. This case concedes the infirmities of making permanent Sherman Act § 1 per se dispositions once a per se category has been set, a problem pointed out in the earlier article.[20]

A troubling aspect of the case is that if the trial court had rigidly recognized the per se situation that these facts indicated, and had made the record in pure per se fashion, the result would have been an abbreviated record that did no more than identify the narrow business tactics involved, without evidence of business setting or justification. [21] Thus, for the typical per se

13. Actually the initial suit was for money owed by Continental T. V., and the Sherman Act § 1 issue was injected by the defendant through cross-claims. 97 S. Ct. at 2553, 53 L. Ed. 2d at 574.

14. 388 U.S. 365 (1967).

15. The judge's instruction was as follows:

> Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions.

97 S. Ct. at 2553, 53 L. Ed. 2d at 574.

16. GTE Sylvania, Inc. v. Continental T. V., Inc., 537 F.2d 980, 989-91 (9th Cir. 1976). This narrowing would have done no great damage to the *Schwinn* per se's "bright line," 97 S. Ct. at 2555, 53 L. Ed. 2d at 577; the majority even conceded that it never had given plenary consideration to the proper disposition of location restrictions. *Id.* at 2554 n.11, 53 L. Ed. 2d at 575 n.11.

17. 97 S. Ct. at 2556, 53 L. Ed. 2d at 578.

18. *Id.*

19. *Id.* at 2559 n.21, 53 L. Ed. 2d at 582 n.21.

20. Flittie, *supra* note 2, at 548-52.

21. An offer of proof by a defendant would be unlikely to fill such a gap; rarely is a court going to permit such intricate matters actually to be tried out in the absence of the jury for the sole purpose of making a memorial of what is proposed to be shown. In addition, a prepared, written offer of proof usually will be expressed in terms too self-serving for it to be given credence by a reviewing court other than possibly as a basis for remanding the matter for a new trial—which is a most unlikely handling for per se dispositions. And rarely will a party, governmental or private, alleging a Sherman Act § 1 violation, acquiesce in a stipulation of business setting which the victim of the per se disposition would find acceptable.

case, the Supreme Court seems to have placed itself in a position from which it can be extricated only when a trial court, in some violation of a main purpose of the per se concept, provides in the record enough evidence of business setting and effects to allow the reviewing court to make a rule of reason review.

The evasions of per se dispositions by the lower federal courts were dealt with in much detail in the prior article, but enough of interest has accrued since to merit some additional treatment here. The Eighth Circuit, in *Mackey v. National Football League*,[22] avoided the boycott per se by pronouncing "the unique nature of professional football renders it inappropriate to mechanically apply per se illegality rules."[23] Likewise, the Fifth Circuit has refused a per se boycott treatment in a case involving the refusal by the American Quarter Horse Association to give quarter horse registration to an animal of undoubted breeding background, but deemed deficient by reason of excessive white coloration.[24] The following language by the Fifth Circuit is indicative of the struggle in the lower courts to avoid wooden per se dispositions: "Thus . . . the per se theory . . . should not be invoked without at least a minimum indicia of anti-competitive purpose or effect."[25] This struggle is considerably dignified by the Supreme Court's abandonment of *Schwinn* in *Continental T.V.* As further evidence of the extent of confusion that abounds, consider *Heatransfer Corp. v. Volkswagenwerk, A.G.*,[26] in which the Fifth Circuit purports to make a per se disposition. Against the background of "a record of giant proportions,"[27] there resulted a determination that a "best efforts" clause, whereby Volkswagen franchisees agreed to push their franchisor's air conditioners, had worked to the detriment of the plaintiff, who also manufactured air conditioners adapted for Volkswagen installation. The conclusion was that there existed a tying per se. The reasoning, however, is not persuasive. The court did not find coercion, a precedent-recognized element of tying. Instead it based its per se disposition on a finding of effective foreclosure of the independent manufacturer from access to the franchisees.[28] The court determined that, in this application of a "best efforts" clause, there was shown an unreasonable restraint of trade and hence there was a per se violation[29] despite that "best efforts" clauses were acknowledged not to be inherently illegal. Although called a per se, this

22. 543 F.2d 606 (8th Cir. 1976), *cert. granted*, No. 76-932 (Jan. 5, 1977).

23. *Id.* at 619. The Rozelle Rule, which, by agreement among the member clubs of the League, restricts the freedom of players in seeking employment, in this case was found invalid under rule of reason analysis. This reviewing court noted that a reason for its adoption of a rule of reason approach was that the court below had in part made a rule of reason record at trial. *Id.* at 620.

24. Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977).

25. *Id.* at 653. This view, of course, flies squarely in the face of the 1972 Supreme Court *Topco* case pronouncement. *See* Flittie, *supra* note 2, at 526. These multiplying exceptions often make great good sense, but at the same time diminish the per se concept as a useful predicter of the line between legal and illegal business behavior. *See generally* Las Vegas Sun,. Inc. v. Summa Corp., 5 TRADE REG. REP. (CCH) ¶ 61,556 (D. Nev. 1977).

26. 553 F.2d 964 (5th Cir. 1977).

27. *Id.* at 969. Apparently the unchecked adversary processes of trial record-making produced this record even though the opinion states that the facts were largely uncontroverted. *Id.* at 978.

28. *Id.*

29. *Id.*

disposition has to be classic rule of reason analysis; it was based on a determination that the clause in the particular circumstances was unreasonable and hence violative of Sherman Act § 1.[30]

This sort of judicial confusion over what a per se disposition involves, combined with multiplying exceptions to what should be per se dispositions if the concept had integrity, indicates that per se has become loose cargo smashing about in an unpredictable fashion that is often senseless and sometimes destructive.

II. THE PROBLEM

The pretense that the courts cannot adequately deal with economic litigation, which is used as a justification for per se dispositions, was dealt with in the earlier companion article. It is a straw man argument. But no straw man is the immense effort that goes into trying economic business behavior cases on an adversary basis. The difficulties in trying these cases are coming under increasing scrutiny.

Among the proposals designed to cope with this problem currently under consideration by the Justice Department are solutions which would: (1) lodge rulemaking powers in the Antitrust Division; (2) create special antitrust courts; (3) amend the law to ease the Government's burden of proof; (4) restructure specific industries by specific legislation; and (5) develop expedited pretrial and trial procedures.[31] These proposals seem directed at Sherman Act § 2 monopolization situations. Nevertheless, their potential applicability to Sherman Act § 1 per se situations becomes apparent with the realization that a current chief objective of the Justice Department is to prove monopolization violations with no more evidence than the identification of ologopolistic business structures accompanied by consciously parallel patterns of pricing.[32] These in effect would be structural per ses.

Further expansion of the administrative law type of solution is undesirable. The method should be contracted, not expanded.[33] Administrative law dispositions lodge too much power in the hands of politically committed zealots who, in attaining their "expertise," have, at best, lost most semblance of an even-handed approach, and, at the worst, sometimes are conscious or unconscious enemies of the economic system they are supposed to

30. Under the instructions given the jury, the unreasonableness had to be in the requirement that the franchisees accept inventories of air conditioners in such volumes as to foreclose competing suppliers, with no justification shown. *Id.* at 977-78.

31. Wall St. J., Apr. 12, 1977, at 3, col. 2; Wall St. J., Aug. 29, 1977, at 3, col. 2; U.S. NEWS & WORLD REPORT, Aug. 15, 1977, at 39-40. *See also* testimony of former Antitrust Division Chief Donald Turner, *reported in* [1977] 814 ANTITRUST & TRADE REG. REP. (BNA) A-1.

32. Interview with Attorney General Griffin Bell, *reported in* U.S. NEWS & WORLD Report, May 16, 1977, at 70, col. 2.

33. There are current proposals, strenuously resisted by the Federal Trade Commission, to consolidate antitrust enforcement in the Antitrust Division of the Department of Justice. If, as a result, all such litigation would then be tried by the usual civil standard of "preponderance of the evidence," then such a consolidation might be desirable. If it would result in the administrative law's standard of "reliable, probative and substantial evidence" (Administrative Procedure Act § 7 (c), 5 U.S.C. § 556(d) (1970)) invading the court system, then it should be resisted. Many think the distinction between the standards is of no importance because the review criteria for civil cases ("not clearly erroneous") and administrative cases ("some substantial evidence") are so close. This belief suggests, however, that triers of fact have no integrity beyond what is compelled upon them by review standards.

make work. Frequently men of intellectual brilliance, they fail realistically to deal with a stubbornly imperfect world which will continue always imperfect as long as individuals of ability selfishly struggle for advantage. Plato's Republic has proved an unattainable dream for more than two millennia. It is a reasonable assumption that it will continue to elude us.

On a modified level this same criticism can be addressed to the proposal for special antitrust courts, although the sources and tenures of the judges are important variables not yet revealed.

One can only shudder at the prospect of bringing a specific industry before the Congress for restructuring.[34] Imagine the savage struggle for partisan advantage that would result as legislators, the varying products of the most recent elections, attempted to gauge the impact of their individual and party positions on the next election. The damage would be comparable to making the Federal Reserve Bank system wholly vulnerable to political processes.

Anyone who ever has participated in major Sherman Act litigation knows that the Government's burden of proof scarcely needs to be made less. Instances in which defendants in Sherman Act cases have been willing to chance resting their cases immediately after the Government has rested its case in chief, regardless of how inadequate, probably do not exist; certainly this writer knows of none.[35]

There is an important potential distinction between discharging the burden of proof and the problem of making a record that contains an adequate factual background for findings which will be dispositive of the case. Although the two are bound into one at the present time, they should not be. The desirable, modest, and adequate solution to the trial of antitrust cases is to separate them through a process of expedited pre-trial and trial procedures. At the very least these possibilities should be fully developed before more radical solutions are attempted.

III. THE PRESENT TOOLS FOR USE IN COMPLEX LITIGATION

The new Federal Rules of Evidence,[36] effective July 1, 1975, represent improved procedures in many instances, but do not significantly change the record-making problem. Rule 703, which permits expert testimony without laying an elaborate predicate unless the trial court under rule 705 requires otherwise, will end quibbles which have wasted time—although such quibbles already are generally unsuccessful in antitrust cases. Rules 803(6) and 803(8), making admissible private and public records, reports, statements, and data compilations of public offices and agencies, will help to alleviate

34. Wall St. J., Aug. 29, 1977, at 3, col. 2: "Last April, he [Attorney General Bell] suggested . . . that very large antitrust cases perhaps should be resolved in Congress as legislative matters. Congress could hear the evidence and find the facts as to the existence of monopoly or the need for a remedy in a monopolistic situation . . . ."

35. This does not include motions for directed verdict at the conclusions of plaintiff's case in chief. FED. R. CIV. P. 50 does not put the movant at hazard of chancing the ultimate outcome of the case since upon failure of the motion a defendant may proceed to present defensive proofs in exactly the same fashion as if the motion had not been made.

36. 28 U.S.C. app. at 2312-74 (Supp. V. 1975).

the record-making problem. Likewise, catch-all rules 803(24) and 804(b)(5), authorizing federal trial judges to admit trustworthy hearsay not expressly enumerated in the 803 and 804 exceptions, should be particularly useful in antitrust litigation. But while these rules help, they nevertheless continue to contemplate adversary proof. Our problem is inherent in the very nature of adversary proofs.

The reason the last statement can be made with some certainty is that the evidence rule modifications noted, even before 1975, largely had been incorporated in the Federal Judicial Center's Manual for Complex Litigation;[37] yet the problem remains. This advisory manual recommends early assignment of a case to a single judge for all pretrial and trial purposes. Thereafter, the sequence of proceeding is broken into four segments, each preceded by pre-trial conference. The chief concerns are recommendations for successive waves of discovery, reduction of voluminous data to simplified form, development of sampling procedures, use of computerized records, and ultimately, efforts to obtain stipulations that will eliminate or modify issues, thus identifying and narrowing the remaining issues for trial. It has not worked very well.[38]

This problem is highlighted in an extensive report[39] by Bureau of National Affairs investigators based on interviews with seventy-five persons involved in or giving close attention to two major antitrust cases in progress. One is the Federal Trade Commission's *Exxon* case,[40] which seeks to break up the largest oil companies on a horizontal function basis. The other is the huge *IBM* case,[41] in which the Justice Department seeks to persuade a New York federal district court that the International Business Machines Corporation is a single company monopolization which should be broken up. Both are monopolization cases, hence larger and more complex than any Sherman Act § 1 case. Nevertheless, this report offers the best current disclosure of the difficulties in which antitrust enforcement is embroiled and is worthy of close reading in its entirety. Its essence is a conclusion that if counsel would abandon adversary attitudes where these are not justified by the nature of

37. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (3d ed. 1975), *reprinted in* 1 MOORE'S FEDERAL PRACTICE pt. 2 (2d ed. 1976). The foreword gives an abbreviated background history of the efforts leading to the *Manual*. It was the Prettyman Report, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1951), that first collected the ideas and experiences of courts, counsel, and scholars relating to the trial of complicated cases. Thus, the effort still is quite new and tentative.

38. In the words of Ira M. Millstein, an experienced practitioner, the *Manual for Complex Litigation* is wrong in its basic approach because "it doesn't think about the issues. It thinks about rounds of discovery." [1977] 812 ANTITRUST & TRADE REG. REP. (BNA) A-19. *See also* McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 SW. L.J. 649, 680-85 (1977). There is no evidence of satisfaction with the effectiveness of these procedures. It does not need much imagination to perceive that many waves of discovery, entrusted, or essentially entrusted, to the conduct of contending adversary counsel, are guaranteed to complicate, not simplify complex antitrust cases unless procedures are devised to narrow controversies severely to matters truly meriting discovery efforts.

39. [1976] 786 ANTITRUST & TRADE REG. REP. (BNA) AA-1.

40. *In re* Exxon Corp., 83 F.T.C. 233 (1973), seeks to break up the largest integrated oil companies on a horizontal basis and multiply the number of business entities handling that industry.

41. United States v. International Business Machs. Corp., Civil No. 69-200 (S.D.N.Y., filed Jan. 17, 1969).

the subject matter, improvement would be marked. In short, stipulations could make antitrust cases manageable.

It is, however, more than a little optimistic to expect lawyers voluntarily to give up advantages the law allows in the representation of clients who have hired them to win, or, failing that, to minimize and confine the damage to the greatest extent the law permits. Antitrust cases are tried with the same attitudes that other litigation is tried, but their complexity exacerbates what is bearable in the framework of ordinary cases. Anyone who doubts this fundamental kinship should take himself down to the nearest federal or state court of general jurisdiction. There one will observe the tedious processes by which relatively unimportant and essentially indisputable facts are introduced into evidence. But these are cases that typically take only a day or two of trial because of the relative simplicity of the subject matter.

Government counsel *do* overtry cases, and it is not simply caution that impels them to do this. Armed with complex records that are no more than fishing expeditions when measured against the existing body of antitrust law, sometimes even in the teeth of apparent settled standards, they seek to expand the frontiers of antitrust enforcement. This is considered an honorable effort, certainly one that has been indulged by all administrations.[42] Sometimes, simply through sheer volume of record, proved with seeming great effort through adversary methods of proof, they seek to persuade a trier of fact that there must be a good case lurking in so great a mass.[43] Of course, such adversary effort invites and often results in equally elaborate counter-proofs by counsel for defendants who can afford it. So ingrained is this instinctive adversary counter-thrust that defense counsel, seeking to sustain a challenged merger, have argued that the merger they were supporting produced no economies likely to benefit consumers![44]

Counsel representing defendants have plenty of warts, too. They engage in dilatory tactics for varying reasons, including economic advantage to a client through continued use of the challenged practices although ultimate loss of the case is predictable. Continued use, until finally forbidden after long years of litigation, often results in economic advantages worth millions of dollars. Also, in private treble damage litigation there are more than a few instances where a long purse has outlasted a short one, the chief tactic being that of forcing the short purse to bear the burden and brunt of fully adversary tactics.

42. An example of this tactic, with overtones of attempting an end run around the burden of proof by manipulation of an immense record is described in Flittie, *Pretrial of Antitrust Cases—The Holland Safeguard and Judicial Notice*, 17 SW. L.J. 1, 20-22 (1963). In the words of FTC Bureau of Competition Director Alfred F. Dougherty, Jr., the strategy "is to push the perimeters of the law as far as we can until the Courts say 'No,' " then seek legislation. U.S. NEWS & WORLD REPORT, Aug. 15, 1977, at 39, col. 1.

43. Government counsels are not the only ones to use this obfuscating tactic. It is used by private counsel too, and in many areas of the law other than antitrust. But it is much less bearable in the antitrust area where the complexities of the litigation and the resources often available to support litigation on both sides aggravate the difficulties visited upon the judicial system.

44. Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV.. 422, 455-57 (1965).

If men were angels, if counsel on all sides would stipulate freely all facts not really in substantial dispute, thereby paring a case down to the nucleus of truly controverted issues, antitrust trials would become manageable. But the folk wisdom teaches, "You can lead a horse to water, but you can't make him drink," and so with stipulations. Chief Judge Edelstein, trying the seemingly interminable *IBM* case reluctantly recognized this, saying, "I can't force stipulations. That unfortunately is left to the cooperation and good will of counsel" and "[T]he efforts I have sought from both sides in the hope of getting cooperation have been freighted and weighted down by the essential desire to achieve an advantage."[45]

To be fair, however, it must be noted that stipulations are absolutely binding upon parties. Attorneys, government and private, justly dread an adverse decision that appears to turn on a stipulation they entered into, even though the fact was certain to be proved against them. This is not so much because they have lost; attorneys are philosophical about that for it happens to them all the time. Rather, stipulations are feared because it is all but impossible to convince a losing client in hindsight that the point should have been yielded voluntarily.

We need better tools to perform the function now left to the too often unattainable stipulation. Furthermore, these tools should not compel opposing counsel to be initiators in identifying what is not to be controverted. The proper person for this role is the life tenured federal district judge, and the only remaining tool (if court trials are to remain the primary forum for antitrust litigation) is an expanded use of judicial notice.

Before discussing that subject, recall that in the earlier article it was suggested that the close kinship of elements between the per se of tying and rule of reason-measured exclusive dealing suggested rule of reason overlapped per se dispositions.[46] The close kinship necessarily shows that rule of reason dispositions are not beyond the intellectual capacities of the federal courts. Methods for expediting trial of rule of reason cases were left for this Article.

IV. ELEMENTS OF A RULE OF REASON TRIAL

Rule of reason analysis involves examination of three basic variables: (1) balancing positive economic effects (improved efficiencies) against negatives (anti-competitive restrictions upon the free play of market forces); (2) the economic power of the parties in the markets they serve; and (3) the motives underlying the conduct.[47] The first variable depends upon a finding of fact[48] in which the trier of fact can be aided by expert testimony.[49] It

45. [1976] 786 ANTITRUST & TRADE REG. REP. (BNA) AA-17.
46. Flittie, *supra* note 2, at 555.
47. Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971).
48. The task of a trier of facts is to proceed from basic (sometimes called evidentiary or subsidiary) facts to ultimate facts. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2579 (1971), for a description of the process. Complex antitrust cases tend to be characterized by an "intermediate" stage, since adverse or favorable findings on one or more of the three items may be overborne by findings concerning one or more of the others, all of which is balanced out in ultimate finding.
49. FED. R. EVID. 706 now expressly authorizes, with compensation at the expense of the parties, court-appointed experts. This should go a long way to relieve the plaint that the courts,

would not be reasonable that evidence of this category, expert or otherwise, should enter the record by other than adversary processes. Likewise, direct or circumstantial evidence of motive should enter the record through adversary processes. There is no real difficulty here as both categories are manageable in terms of proof in an adversary climate.[50] It is in the second category, regarding economic statistical-structural proof, where antitrust cases tend to become unmanageable.

Standard Oil Co. of California v. United States[51] was an exclusive dealing case in which the defendant's exclusive dealings, under the particular circumstances of the case, obtained, but failed to withstand, rule of reason analysis. The decision was based on Standard's anticompetitive foreclosure of competing suppliers despite that the company's motives were not predatory.[52] Mr. Justice Frankfurter, writing for the court, laid out the second category of economic proofs, which condemned the arrangement under rule of reason analysis, as follows:

> The Standard Oil Company of California, a Delaware corporation, owns petroleum-producing resources and refining plants in California and sells petroleum products in what has been termed in these proceedings the "Western area"—Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. It sells through its own service stations, to the operators of independent service stations, and to industrial users. It is the largest seller of gasoline in the area. In 1946 its combined sales amounted to 23% of the total taxable gallonage sold there in that year: sales by company-owned service stations constituted 6.8% of the total, sales under exclusive dealing contracts with independent service stations, 6.7% of the total; the remainder were sales to industrial users. Retail service-station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage; the remaining retail sales were divided between more than seventy small companies. It is undisputed that Standard's major competitors employ similar exclusive dealing arrangements. In 1948 only 1.6% of retail outlets were what is known as 'split-pump' stations, that is, sold the gasoline of more than one supplier.
>
> Exclusive supply contracts with Standard had been entered into, as of March 12, 1947, by the operators of 5,937 independent stations, or 16% of the retail gasoline outlets in the Western area, which purchased from Standard in 1947, $57,646,233 worth of gasoline and $8,200,089.21 worth of other products. Some outlets are covered by more than one contract so that in all about 8,000 exclusive supply contracts are here in issue. These are of several types, but a feature common to each is the dealer's undertaking to purchase from Standard all his requirements of one or more products. Two types, covering 2,777 outlets, bind the dealer to purchase of Standard all his requirements of gasoline and other petroleum products as well as tires, tubes, and batteries. The remaining written agreements, 4,368 in number, bind the dealer to

lacking expertise, need per se rules to be freed of the burden of deciding complex economic issues. Consider, for example, complex medical and patent issue cases. No one has suggested a like need for per se rules here, although the courts' lack of expertise is probably even more glaring.

50. Care, however, must be exercised by trial judges to suppress demands that proofs properly in the second category be heard as first or third category proofs on an adversary basis. It is a transition easy to urge, and, without vigilance, slip into.

51. 337 U.S. 293 (1949).

52. *Id.* at 299.

> purchase of Standard all his requirements of petroleum products only. It was also found that independent dealers had entered 742 oral contracts by which they agreed to sell only Standard's gasoline. In some instances dealers who contracted to purchase from Standard all their requirements of tires, tubes, and batteries, had also orally agreed to purchase of Standard their requirements of other automobile accessories. Of the written agreements, 2,712 were for varying specified terms; the rest were effective from year to year but terminable 'at the end of the first 6 months of any contract year, or at the end of any such year, by giving to the other at least 30 days prior thereto written notice . . . .' Before 1934 Standard's sales of petroleum products through independent service stations were made pursuant to agency agreements, but in that year Standard adopted the first of its several requirements-purchase contract forms, and by 1938 requirements contracts had wholly superseded the agency method of distribution.
>
> Between 1936 and 1946 Standard's sales of gasoline through independent dealers remained at a practically constant proportion of the area's total sales; its sales of lubricating oil declined slightly during that period from 6.2% to 5% of the total. Its proportionate sales of tires and batteries for 1946 were slightly higher than they were in 1936, though somewhat lower than for some intervening years; they have never, as to either of these products, exceeded 2% of the total sales in the Western area.[53]

With the possible exception of the oral exclusive dealing arrangements, which hardly could have been critical to the decision, not one of the items identified in this lengthy quotation is very likely to have been subject to dispute beyond minor quibbles as to magnitudes. From the reported decision of the case in trial court, however, it appears most of this evidence was introduced on a fully adversary basis, thus generating a huge record.[54]

This economic structure case is representative of the real problem. Is there a way to confine adversary procedures in antitrust, and perhaps other complex litigation to those portions of a case where such procedures are necessary to a fair trial? In the final analysis, this is the extent of respectable justification for adversary procedures.

V. JUDICIAL NOTICE

As long ago as 1898, Professor Thayer, the nation's first great commentator on the law of evidence, said of judicial notice,

> [I]t is an instrument of great capacity in the hands of a competent judge; and it is not nearly as much used, in the region of practice and evidence, as it should be . . . . [T]he failure to exercise it tends daily to smother trials with technicality, and monstrously lengthen them out.[55]

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53. *Id.* at 295-97. That this case was decided under Clayton Act § 3 intead of Sherman Act § 1 does not reduce its analytical utility here. *See* Flittie, *supra* note 2, at 543 n.129.

54. United States v. Standard Oil Co. of Cal., 78 F. Supp. 850 (S.D. Cal. 1948). These must be exactly the sort of facts the authors of the FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, *supra* note 37, hoped would be stipulated. In practice, however, they rarely will. Consequently, there results an enormous pre-trial effort to get these facts into provable form, followed by ponderous direct and cross-examinations at trial. Note, however, that in strict representation of a client's interest most attorneys, left to their own devices, will conceive that they are virtually compelled to insist on strict adversary procedures if there is any possible advantage to the client.

55. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 309 (1898). *See also* 9 J. WIGMORE, EVIDENCE § 2583 (1940); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 294 (1944).

Unfortunately, little general progress has been achieved in the eighty years since that admonition.

Most reported cases deal with what might be termed "simple" notice situations. By way of identification, a few of the subjects judicially noticed have been the changing value of the dollar,[56] the existence of a world-wide financial crisis,[57] an extraordinary stock market collapse,[58] widespread unemployment,[59] and the recent energy crisis.[60] Somewhat more sophisticated is the judicial notice of the accuracy of testing devices that quantify percentages of alcohol in the blood stream,[61] devices for measuring the speed of vehicles,[62] and blood tests that negative paternity.[63] None of these examples are particularly helpful to the problem of judicially noticing in some detail economic statistics and business structures.

There are, however, a few cases which dramatically depart the usual judicial notice precincts of what is generally known or capable of accurate and ready determination from sources whose accuracy cannot be questioned.[64] The first instance was the dissent of Mr. Justice Brandeis in *Jay Burns Baking Co. v. Brown*[65] in which he (as a practicing attorney originator of the "Brandeis brief" technique for arguing extra-record facts) went outside the record to research and report details of the commercial bread-making business, including questionable business tactics.[66] Next was *Parker v. Brown*, [67] in which the Supreme Court noticed a quite elaborate collection of industry data concerning the depressed California raisin industry, including prices, production, supply carryovers, and sales at less than the cost of production. The purpose was to uphold state legislation designed to ameliorate these conditions.

Two examples of judicial notice being taken of detailed facts are fairly recent major antitrust cases. In *Tampa Electric Co. v. Nashville Coal Co.*,[68] to establish the real and minimal economic impact of a long-term contract to supply all coal to a Florida utility, the Supreme Court said:

> We take notice of the fact that the approximate total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market. Of the latter amount some 78,716,000 tons were sold to electric utilities. We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons 1,100,000 of which were used by electric utilities, and the sources of

56. O'Meara v. Haiden, 204 Cal. 35, 268 P. 334, 339-40 (1928).
57. Bolivar Township Bd. of Fin. v. Hawkins, 207 Ind. 171, 191 N.E. 158, 164-65 (1934).
58. Great Northern Ry. v. Weeks, 297 U.S. 135, 149 (1933).
59. Jennings v. City of St. Louis, 332 Mo. 173, 178-79, 58 S.W.2d 979, 981 (1933).
60. Mullis v. Arco Petroleum Corp., 502 F.2d 290, 297 (7th Cir. 1974).
61. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 209 (2d ed. 1972).
62. *Id.* § 210.
63. *Id.* § 211.
64. FED. R. EVID. 201(b) sets forth the conventional foundation as follows: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."
65. 264 U.S. 504 (1924).
66. *Id.* at 517-34 (1924). Justice Brandeis was joined in his dissent by Justice Holmes.
67. 317 U.S. 341 (1943).
68. 365 U.S. 320 (1961).

> which were mines located in no less than seven states. We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on par with prior years. In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including presumably the coal used by the petitioner.[69]

Also, the Court in *Philadelphia National Bank v. United States*[70] used judicial notice to draw into the case a mass of reference materials defining and explaining the very complex business of commercial banking. Citation to these materials, which includes many governmental reports and learned treatises, covers more than thirty lines of fine footnote print in the Court's official report of the case.[71]

The furthest extension of the use of judicial notice is the 1954 case of *Brown v. Board of Education*.[72] As the basis for its decision the Court in *Brown* relied entirely on extra-record sociological studies concerned with the effects of school segregation upon the development of black children.[73] Extensive research finds no other example of judicial notice asserted by any court in the Anglo-American legal system which has gone so far. Certainly the notice in *Brown* is far beyond any that will be urged here.

The federal trial courts and intermediate appellate courts have undoubted authority to use judicial notice. Indeed they now are commanded to do so under the new federal rules if a party, able to make the conventional showing of a fact not subject to reasonable dispute, so demands.[74] Examples of judicial notice by the lower federal courts do not approach the scope of judicial notices taken in the above cases by the Supreme Court;[75] some are more than garden variety judicial notices.[76]

A. *Judicial Notice of Adjudicative and Legislative Facts*

Although the discussion of judicial notice thus far has been general, Federal Rule of Evidence 201, the only judicial notice section in the new rules, is limited in application to so-called adjudicative facts.[77] These are

69. *Id.* at 332.
70. 374 U.S. 321 (1963).
71. *Id.* at 324-25 n.2.
72. 347 U.S. 483 (1954).
73. *Id.* at 494 n.11.
74. FED. R. EVID. 201(b), (d).
75. While the powers of federal courts from the district to the Supreme Court level to take judicial notice are the same, in practice the circuit courts of appeals go further than the trial courts and the Court of ultimate appeal the furthest of all. The psychology inherent in inferior hierarchical status undoubtedly operates to inhibit the lower courts. Also, the trial court has the alternative of demanding the production of evidence.
76. Rogers v. Westhoma Oil Co., 291 F.2d 726, 731-32 (10th Cir. 1961), concerned leasing and utilization practices of the oil and gas industry. Durham v. United States, 214 F.2d 862, 872 (D.C. Cir. 1954), concerned current medico-legal measures for the proper test of insanity. Potts v. Coe, 145 F.2d 27, 28, 31 (D.C. Cir. 1944), concerned the nature of modern organized corporate research. United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D. Utah 1962), concerned the practices of the profession of pharmacy. United States v. Salzmann, 417 F. Supp. 1139, 1159-60 (E.D.N.Y. 1976), concerned the notice of matters adverse to the Government's claim of diligence in prosecuting an individual who refused induction into the army.
77. FED. R. EVID. 201(a).

facts not subject to reasonable dispute because notorious or subject to ready determination by resort to sources whose accuracy cannot be questioned.[78] The Supreme Court cases discussed in the previous section, however, demonstrate that important judicial notices which do not fit so narrow a description had been taken long before rule 201 was adopted.

The Advisory Committee which proposed these rules appears to have placed other noticed facts in a separate category denominated legislative facts, explaining,

> Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.[79]

These definitions are more than a little opaque, though somewhat shored up by actual examples in the Advisory Committee note.[80] A recent evidence text, in terms not much more helpful, explains the legislative fact concept (with reference to the Brandeis-brief technique) as one in which judges, abandoning the subsilentio approach of the past, openly acknowledge the less-than-certain social and economic facts that form the foundations of both statute and common law.[81]

There are several possible interpretations of the adjudicative-legislative facts dichotomy posed. The first is that facts not adjudicative within the narrow definition of the new rules are legislative. This interpretation fails, however, in cases where such facts, though debatable, were plainly very central to decision in the particular case, as, for example, in the two Supreme Court antitrust decisions previously discussed. A second possible interpretation is that a fact initially legislative assumes adjudicatory status (where it would be unusable for lack of certainty) after an initial decision establishing an extension or contraction in the reach of the law. But this, in addition to inviting narrow sui generis case developments so as not to lose the utility of legislative fact notices in future cases, collides with the proposition that the new Federal Rules of Evidence are not structured and do not purport to overrule prior case law such as the several Supreme Court precedents noted in the previous section. ***Brown v. Board of Education*** particularly well demonstrates that the Supreme Court two decades prior to the new rules had pushed judicial notice far beyond the adjudicatory fact limits of the new rules. This raises a peculiar situation because the rules pertaining to judicial notice are only a statutory cumulation upon existing law. Further, there are facts which, in particular contexts, fit into both the adjudicative and legislative categories. In such instances the present state of the law appears to be that facts which fall short of requisite adjudicative certainty in terms of the new rules continue to have the authority of the

78. *Id.* 201(b).
79. Rules of Evidence for United States Courts and Magistrates—Amendments to the Federal Rules of Civil Procedure—Amendment to the Federal Rules of Criminal Procedure, 56 F.R.D. 183, 202 (1972).
80. *Id.* at 201-04.
81. C. MCCORMICK, *supra* note 61, § 332.

Supreme Court for being noticed through a test that is considerably less demanding than that of the new rules.[82]

The adjudicative-legislative facts dichotomy has its origins in a 1942 article by Professor Kenneth Davis.[83] While Professor Davis reviewed a number of court cases in support of his views, the article is addressed to supporting more facile introductions of extra-record proofs in administrative cases. The definitions of legislative and adjudicative facts noted above fit reasonably well into administrative proceedings in which a basis is sought to support or attack legislation or its applications by an administrative agency. This is particularly the case when it is recognized that the federal administrative process contains a procedure known as official notice.[84] This procedure permits notice and use of facts less than certain so long as elemental fairness is observed.[85] Indeed, official notice is said to be concerned only with the processes of proof, not evaluation of the evidence.[86]

It has been suggested that legislative facts are limited to peripheral matters not too near the focus of controversy.[87] But this barrier, if it ever did exist, was hurdled long ago by the Supreme Court in the cases discussed. In at least three of the cases examined in the previous section, *Tampa Electric, Philadelphia National Bank*, and *Brown v. Board of Education*, the less-than-certain facts noticed were at the very focus of, and the bases for dispositions of, the controversies involved.

It would be desirable for the Supreme Court to use the continuing powers lodged with it by Congress to supervise and modify the new Federal Rules of Civil Procedure[88] to clarify this rather anomalous situation. It is suggested the best solution would be to restate the confusing legislative-adjudicative dichotomy, continuing the current rules treatment for facts certain or capable of being made certain, and developing new procedures for facts having high reliability, but which are less than certain. In this last situation, if a federal district judge determines to proffer a fact for notice, or one of the parties so proposes and he agrees, the judge should be authorized, in proceedings at the pretrial stage, to determine whether or not the fact will be noticed. The judge should also be authorized to determine the extent and manner in which he will permit such a fact to be controverted if noticed.[89] In

82. Under the common law as developed, a fact may be judicially noticed without affording an opposing party the opportunity to be heard. The common law, in fact, is without means of affording it where the notice occurs in appellate stages of litigation.

83. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942).

84. Administrative Procedure Act § 7(d), 5 U.S.C. § 556(e) (1970); *see* C. MCCORMICK, *supra* note 61, § 357; Davis, *Official Notice*, 62 HARV. L. REV. 535 (1949).

85. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 43.

86. *Id.*

87. McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 315 (1952).

88. 28 U.S.C. § 2076 (Supp. IV 1974).

89. The short answer to the anticipated contention that this is too much power for the trial judge to hold is that this is a limitation upon, not an expansion of the enormous judicial notice powers the Supreme Court decisions indicate the federal courts already hold. For a more reasoned approach it is suggested the latest evidence text, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (2d ed. 1972), be generally perused. The several authors responsible for this composite text repeatedly stress the discretionary powers of the trial court. So viewed this is a very modest extension of powers, always subject to review for abuse.

essence this is a suggestion that the Thayer-Wigmore-Davis view permitting contest of noticed facts, even though less than perfectly certain, prevail over the McNaughton-Morgan-McCormick view that only indisputable facts be noticed, with contest forbidden.[90]

It would be desirable for the federal appellate courts to yield their present power to notice facts that are less than certain when such facts are sufficiently central to the litigation to be dispositive of a particular controversy. The power to notice facts that are certain and those which, though uncertain, are peripheral to the controversy, should be retained—*i.e.*, the type of facts commonly assumed sub silentio in the older law. Fairness demands, however, that less-than-certain noticed facts which are both adjudicative and legislative in application be subject to reasonable adversary challenge at the trial court level. This will require remand for record development of less-than-certain facts central to the controversy that are identified at the appellate level and were not noticed in trial. This should not often be necessary if the trial courts will expand notice taking in the direction of the already existing Supreme Court precedents.[91]

B. *A Plan for Record Development of Disputable Noticed Facts*

At the outset, let us be clear on this: Reasonably disputable facts where the magnitude of spread between party positions could be significant to the result reached should not be the subjects of judicial notice. On the other hand, facts such as those disclosed in the lengthy excerpt from *Standard*, and the previously discussed antitrust decisions of the Supreme Court, should be proper subjects for judicial notice, for business and economic structural facts such as these ought rarely to disclose any considerable gulf between opponent positions. Here would be facts for stipulation except for the psychological and tactical barriers raised by adversary attitudes and adversary caution. Unfortunately, decades of experience make it clear that opposing counsel will prove unable to accomplish this unless pushed. If there is to be a solution better than the present tedious processes, it must be found in providing trial judges with tools for forcing such facts into the record on a non-adversary basis. The underlying theory is that if a neutral enters the fact into the record, the likelihood of challenge, even though permitted, will be dramatically lessened, and, in most instances, parties will not maintain most challenges into the trial.

There are two, and in complex litigation three, levels of facts to be established. At the base of the proof pyramid are the basic, sometimes called evidentiary or subsidiary, facts. Next are the facts which depend on basic facts for their underpinnings. These are called ultimate facts, inferences and deductions reached by the trier of fact from the basic facts.[92] For the purposes of this Article these ultimate facts will be divided into a lower stage called "intermediate facts" and a higher stage retaining the name

90. The opposing authorities in this long standing controversy are collected at 56 F.R.D. 201-07 (1973).

91. Resolution of this problem, however, is not essential to the proposals hereafter made in this Article.

92. *See* note 48 *supra*.

"ultimate facts." Both, of course, are ultimate in the sense that they are derived from basic facts regardless of whether the basic facts are openly stated in formal findings of fact.[93]

Party contentions outlining what is sought to be proved are commonly used in the pre-trial stage of antitrust cases. For example, in the giant *Exxon* case now before the Federal Trade Commission, Contention No. 284 is the simple single basic fact proposition that gathering pipelines transport crude oil from the leases to the trunk pipelines.[94] On the other hand, Contention No. 449 is the proposition that, "By their acts and practices, and because of their vertically integrated and concentrated structure, respondents have been responsible for substantial misallocations of society's scarce resources and for the imposition of substantial costs upon America's consumers and taxpayers."[95] No. 284 is a contention for a single fact not likely to be in serious dispute. No. 449, however, is a contention which assumes the existence of two revealed basic facts (vertically integrated structures and concentrated structures), an indeterminate number of unrevealed basic facts ("their acts and practices"), and, from these, seeks to infer two intermediate facts (misallocation of resources and imposition of societal costs).

Another example of this process, drawn from incidents in a "kitchen sink" monopolization case in which the writer participated, demonstrates these three stages of proof. Further, party counsel in this case asserted a right to control presentation of proof which must yield to control by the trial judge if antitrust cases are to become manageable:

> Plaintiff does not claim that there has been any express agreement among defendants that they would enter into exchange agreements between or among themselves as above set forth, or that they would refuse exchange agreements with independent refiners unless there was a direct and substantial benefit to a defendant. Plaintiff does contend that the acts of defendants above described constitute acts in furtherance of the combination and conspiracy to suppress and eliminate competition among and between themselves and with independent refiners in the production and purchase of crude oil and the refining of petroleum products, and have been acts promoting and extending defendants' monopoly control over crude oil production and purchase, and the refining and marketing of petroleum products. Plaintiff claims that said acts were a part of the conspiracy and monopolization charged.[96]

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93. *Cf.* Golf City, Inc. v. Wilson Sporting Goods Co., 555 F.2d 426, 433 (5th Cir. 1977) (trial courts findings of facts should be sufficiently detailed to aid the reviewing court in understanding the basis of the trial court's decision and its reasoning and to assure that the basic facts have been ascertained).

94. [1976] 786 ANTITRUST & TRADE REG. REP. (BNA) AH-7.

95. *Id.*

96. Outline of Plaintiff's Contentions, Jan. 10, 1957, United States v. Standard Oil Co. of Cal., Civ. No. 11584-C (S.D. Cal., filed May 12, 1950). The actual contentions in this case filed February 4, 1957, numbered 224, and ranged from basic to complex intermediate to ultimate facts. In order that the reader may have examples of these stages, such are set forth hereafter. No. 219 is an intermediate fact contention and No. 224, the last contention, is one of ultimate fact which, if found, would justify a conclusion of law that the Sherman Act had been violated.

> (219) Control by defendants over facilities for low cost transportation of refined petroleum products, and the use made thereof, discussed in subsection C, has limited and impaired independent refiners' access to and ability to compete in markets distant from their refineries which are served by pipeline or

Counsel also stated:

> Now, I don't know that in the order of proof the plaintiff would first introduce proof as to all matters set forth under Part VI and Park VII [categories of evidence which, in plaintiff's view did prove the conspiracy] before it introduced any matters under Part VIII [the category related to the contention just described which did not, presumably, tend to prove the conspiracy]. But plaintiff does contend, and it will present evidence from which we will ask the court to find, that there was a definite agreement among the defendants to suppress and eliminate competition among themselves and with the others by the operation of the two-pronged program originating in 1936, and we will ask the court to infer or to find from that that the defendants did agree among themselves to suppress and eliminate competition among themselves and with others by means of the two programs which we have set forth in Part VI and Part VII.
>
> Now it has been our contention that, having established that there was a conspiracy among these companies . . . when each . . . follows a course . . . in promotion of the same objectives . . . the acts which are performed individually which may help to prove the extent of the monopolization should be considered by the court also in determining the scope . . . of the conspiracy . . . . [T]hese activities . . . become acts in furtherance of that conspiracy and help explain the scope of the conspiracy. Therefore, acts of the nature which we have specified become acts, we contend, in furtherance of that conspiracy and from the performance of those acts we will ask the court to infer that there was an agreement among the defendants that they would perform those acts because they were acts in furtherance of the conspiracy and become a part of the conspiracy.[97]

Ultimate facts, including the intermediate variety, are disputatious and conclusory. All that is here proposed to be done with them at pre-trial is ensure that there is not lurking in them some unstated basic fact contentions. If found, these should be stated separately and individually.[98]

Discovery in a case is in order once issue is joined and may turn up significant lines of evidence not theretofore identified. Discovery also may, however, grind over a great deal of territory concerning which there is no real factual controversy because, as procedures presently work, the proponent of such facts knows he has the burden of proving them by adversary processes. Appropriate preparations must be made, therefore, with due regard for the unlikelihood of stipulations.

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water transportation facilities of defendants, thus further limiting and restricting the ability of independent refiners to disturb or affect the price structure on refined products established by defendants.

(224) The cumulative effects of defendants' conspiratorial and monopolistic activities since 1936 have enabled defendants to achieve and to exercise an overwhelming and self-perpetuating power to suppress and eliminate competition in, and to monopolize, the trade and commerce in the production, transportation, refining, and marketing of crude oil and refined petroleum products in the Pacific States Area.

97. Pre-Trial Transcript at 498-501, United States v. Standard Oil Co. of Cal., Civ. No. 11584-C (S.D. Cal., filed May 12, 1950).

98. The intermediate or ultimate fact contentions where identified need not be restated, as multiple statements of basic facts are only redundant. Separate statements of basic fact contentions also should be required where, though basic, they are compound. Again, to avoid argument, there is no need to require expungement of compound fact contentions when the individual basic facts are broken out and separately stated.

An antitrust complaint worthy of taking up trial time begins with a theory based on known or suspected facts and should not be motivated merely by the desire to go on a fishing expedition.[99] A complaint proponent should be able to state his complete pattern of contentions immediately after issue is joined, subject to future modifications which should not prove extensive.

To avoid needless discovery, it is proposed that the very first step after joining issue should be to require the complaining party to state his overall contentions in terms of basic, intermediate and ultimate facts, none of these to be binding until after discovery is completed and final contentions are made. Next, the intermediate and ultimate contentions should be examined by the trial judge and opposing counsel at informal pre-trial conferences to ascertain whether they contain basic contentions not separately stated. The objective of this procedure is a complete set of singly stated, basic fact contentions. Beyond this, intermediate and ultimate contentions would not be further considered at pre-trial.

Having reduced basic contentions to single statement status, the trial judge should dispose of each basic fact in one of the following ways:

1. The parties immediately find they can stipulate.
2. The parties, after some exploration of a fact contention in the presence of the judge, find they can stipulate. Often they may feel pressed to do so to avoid the third disposition.
3. The parties cannot stipulate, but the judge determines from what he has learned in conference (in which he will have required research from the parties to aid his learning) that there is no significant spread between party positions, or alternately, there is but one acceptable fact resolution (not necessarily that espoused by either party) which, although less-than-certain, has a high probability of accuracy. In these situations the judge will proceed to take judicial notice of such facts. Pursuant to Federal Rule of Evidence 201 he also will take judicial notice of facts which are certain but were not stipulated in the first two stages.[100]
4. Facts where there is not enough certainty for notice must be proved by usual adversary procedures. This category will include virtually all items of evidence, direct or circumstantial, which tend to taint with illegal purposes the generality of otherwise quite neutral facts brought into the record by one of the prior procedures. Also, it will include those business structure and statistical facts where requisite certainty was not established in the course of the pre-trial conferences.

In all instances appropriate opportunities must be afforded to add such additional basic fact contentions as may suggest themselves through discovery or through increased familiarity with the elements of the case. Also, there must be a stage for a defendant's countering contentions in which may

99. This is particularly true in the governmentally-brought civil cases (usually the largest) since adoption of the Antitrust Civil Process Act in 1962, 15 U.S.C. §§ 1311-1314 (1970), now amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, which authorizes the Department of Justice to engage in extensive civil pre-complaint inquiry. Since 1975 the Federal Trade Commission has had comparable authority through 15 U.S.C. §§ 46, 49 (Supp. V 1975).

100. The distinction between the judicial notices will be that less-than-certain notices may be further contested while the certain notices, under FED. R. EVID. 201(g) may not.

be identified, for similar dispositions, a number of basic facts not covered in a proponent's complaint contentions.

Further concern here is limited to that part of the third category of facts where judicial notice has been taken based on facts that are highly probable but less than certain. Challenge to this type of facts cannot be foreclosed, but the challenge can be controlled. Pre-trial procedures should be developed which standardize the processes for challenging less-than-certain noticed facts and will permit the trial court to terminate a challenge as soon as it becomes evident that it has run out of steam because significant evidence has been exhausted. Obviously, a record must be made of these challenges for review by appellate courts in instances where a challenge continues to be asserted in the trial stage. Challenges should not begin until all, or at least most, notices have been taken or rejected.

At pre-trial a party desiring to contest a noticed probable fact should first identify it to the court and opposing counsel. Thereafter, it would be his obligation to come forward with his strongest evidence first. At such point as the challenge loses force the court would terminate further presentation of evidence, afford an opportunity to make a written offer of further proof (which necessarily would be very weak unless a party had played fast and loose with the requirement of presenting the strongest evidence first), then rule on whether the fact remains in noticed status or is to be relegated to adversary contest.[101] Since the effect is merely to put a contended-for fact into adversary contest, there would seem no need to permit much countering effort from parties desiring to support the notice taken.

At trial the court should require the party supporting a contention of intermediate fact, or related groups of these, to specify the basic facts (stipulated, noticed, and the subject of adversary proofs) which are offered in support of the contention. The court then would proceed by adversary procedures to supervise evidentiary record development of those contentions which were not stipulated or noticed. The requirement upon the party supporting contentions again would be to come forward with the evidence most strongly supporting his contentions first, with presentation to be terminated by the court when proofs become inconsequential or cumulative. Opportunity would be afforded for written offers of further proof, which again should be very weak if the party has obeyed sequence of presentation instructions.

As to less-than-certain challenges a party maintains into trial, the court would, at the appropriate point in trial, insert the pre-trial record of the contest into the trial record. The court then would move the case on to the next contention or group of contentions.

The type of evidentiary offerings most commonly anticipated to remain in adversary proof status will be evidence with the sort of "sex appeal" that tends to color otherwise largely neutral stipulated and noticed facts. One may anticipate such things as evidence of secret meetings among com-

101. Pre-trial abbreviated hearings going to the merits have been recognized in the context of class action certification. McElroy, *supra* note 38, at 686.

petitors, suspicious price movement patterns, or suspicious circumstances in cutting off or refusing to supply a customer.

In an effort to avoid the strictures of these controls it is conceivable that a party, proponent or defendant, might attempt to move the whole body of its case contentions for trial en bloc, seeking thereby to regain from the court control of presentation of its evidence. Trial judges need not stand for this. It is axiomatic that a federal district judge is entitled to control the case before him. The answer to the to-be-expected plaint that he is forcing trial of a case piecemeal, is that, given the limitations of human communication, all cases where adversary proof becomes necessary are, to that extent, tried piecemeal. There is a special need in complex litigation for the court to assert a control over the parties that is not present in ordinary litigation. The mosaic, if there is one, cannot emerge until sufficient pieces are separately presented. The issue, therefore, is whether the judge or the parties are to have final say in the extent and sequence of presentation.

In any presently foreseeable situation, ultimate facts, as that term has been used in this Article, will be inferred from the background of basic and intermediate facts. There is no need for control procedures to be implemented for ultimate facts since they are matters for concluding arguments.

In instances of jury trial a jury need not be permitted to know the contentions to which proof is directed. Thus, to jury members the trial would appear as any other trial containing stipulations and judicially noticed facts in addition to adversary proofs. It is difficult, however, to see how trial of a complex case would be other than improved by the jury's hearing contentions relating to a manageable segment of it before evidence going to proof of that segment is presented.

The procedures proposed need strong judges, always a requirement for successfully trying complex cases. Judicial performance is strengthened when judges are supplied with developed procedures to follow. Conversely, judges appear weak if, without guidance, they are forced to enter into an area of complex litigation in which they are without significant experience.

VI. A Modest Proposal

The control procedures discussed, after refinements developed in application, could be useful in much more than antitrust litigation. Even within the antitrust area, means for expediting trials are more needed in the enormous Sherman Act § 2 monopolization and Clayton Act § 7 merger cases than in Sherman Act § 1 restraint of trade cases. But let us proceed modestly, on a testing basis, remembering it is the objective here to seek a cure for Sherman Act § 1 per se confusion.

It is proposed that these procedures initially be confined to the governmentally-brought, judge-tried Sherman Act § 4 statutory equity injunction cases resting solely upon Sherman Act § 1 allegations.[102] If at first only these

102. It sometimes may be necessary for trial courts to determine whether allegations in addition to Sherman Act § 1 violations are seriously made, for a tendency to incorporate additional allegations in an effort to maintain access to per se dispositions and avoid rule of reason record makings could develop. Motions to strike, to dismiss, and for partial summary judgments are possible devices for testing and eliminating added allegations suspected of

cases have rule of reason records, refinements in procedures will be more readily accomplished. Significantly, the same proponent, the Antitrust Division of the Department of Justice, will be the supporter of all complaints and the repository of accumulating experience. With the experience so gained it should be possible to evaluate the extent to which procedures such as these can be useful in other classes of complex litigation. Further, despite that these will be trials to the court, some evaluation of their impact on jury-tried cases should be possible.

As a minimum gain these procedures can provide the Supreme Court with a method for recurring review of the per se categories they have declared. In this manner the Court can determine if some should be modified, or perhaps returned to rule of reason status.[103] It is not sound that per se cases now come before the Court for effective review only when a trial court, in some defiance of per se instructions, makes a record adequate to the purpose.

The Supreme Court has made itself the final arbiter of what shall be severed out of rule of reason treatment and accorded per se status. To police its per se categories intelligently, the Court should take the opportunity in its next Sherman Act § 1 decision to pronounce two things. First, it should direct that Sherman Act § 1 governmentally brought injunction cases be tried with rule of reason records even though the trial court is precedent-bound to honor and apply a presently valid per se rule in making its disposition. This does not mean that making a rule of reason record will be in the control of the parties, for many situations—direct price-fixing, for example—do not merit full scale rule of reason inquiry for condemnation, and never did. They can be disposed of on rule of reason records that approach in brevity true per se records. The existence or absence of special considerations should emerge in the contentions made; and it is the business of the judiciary, despite protestations of counsel, to cut through self-serving posturings to the core of a case. In the end, as always, all depends on the trial judge, acting with integrity and subject to correction on review for abuses of discretion.

The second thing the Supreme Court should do is indicate to the Judicial Conference of the United States that a review of its *Manual for Complex Litigation* is desirable for the purpose of expediting record making in Sherman Act § 4 antitrust cases resting on Sherman Act § 1 allegations. The suggestion would be in order, too, that there be continuing studies to ascertain if, and the extent to which, the experience of these cases is transferrable to other kinds of complex litigation.

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having this purpose. It is believed that defendants may be relied on to make these motions if the prize in an appropriate case is a rule of reason record to take on appeal.

103. Since 1975 direct Expediting Act appeals to the Supreme Court of Sherman Act § 4 cases have been eliminated by 15 U.S.C. § 29(b) (Supp. V 1975). The trial judge, however, can certify for direct appeal if the matter is considered "of general public importance in the administration of justice," and it is assumed he would do so in these cases. The Supreme Court retains power to deny direct appeal, and it is assumed would do so in instances where the record made did not present an issue deemed worthy of evaluation. Thus, the suggested procedures need not become unduly burdensome to the Court.

VII. CONCLUSION

The first of these Articles was written to demonstrate that the per se categories of Sherman Act § 1 are neither well-defined nor consistently practiced. All too frequently there have been unreasonable results in terms of the stated objectives of the antitrust laws. This Article proposes a means whereby the per se concept eventually might be entirely eliminated from the law. Failing that, it at least might be subjected to an effective review process, now lacking. If, in seeking these limited objectives, it turns out that there could be larger applications, so much the better.