PREPARING THE PLAINTIFF'S ANTITRUST CASE

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I. INTERVIEWING THE PLAINTIFF

A. Theories of Recovery

It is dangerous to prepare yourself, mentally and emotionally, for a trade regulation claim exclusively. Often you must put your antitrust expertise aside long enough to approach your initial interview with a mind—and a conference—open for consideration of other theories of recovery. Consider common law claims of fraud, breach of contract, and breach of fiduciary duty. Many antitrust franchise cases, for example, involve each of those three elements, in addition to a federal claim. Pendent jurisdiction[1] is also still very much alive and kicking.

B. Identifying the Client

When you interview the client, the first thing you want to know is, whom do you represent. Do not take the client's word for it when he tells you, for example, that his corproation, the X company, owns the franchise which is the subject of litigation. *He* might say that the corporation owns the franchise, but the franchisor might not agree. There may never have been a novation or an assignment from the individual client to the corporation which he later formed to operate the franchise.

Such attention to detail is especially important to you as plaintiff's counsel, facing (and attempting to impress, for settlement purposes) the finest of defense attorneys. You don't want to look sloppy. You don't want to name the wrong plaintiffs if you do have to file suit. If you represent a proprietorship, a partnership, or a corporation, obtain authorization from the other partners or from the board of directors of the corporation. Do not leave yourself vulnerable to the argument of a minority shareholder or silent partner that you do not represent the named plaintiffs at all.

C. Statute of Limitations

Always assume the worst with respect to the statute of limitations.[2] If you do, you will avoid handling matters that consume and depreciate your energies without any reward. In assuming the worst, you assume

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[1] The doctrine has been greatly expanded by the unanimous opinion in United Mine Workers v. Gibbs, 383 U.S. 715, 725-28 (1966).

[2] Clayton Act § 4(B), 15 U.S.C. § 15(b) (1970).

that your client knew or should have known of the antitrust violation immediately when the injury occurred.[3]

There is not time to explore the multiple substantive and procedural issues which surround the tolling of the statute of limitations. Suffice it to say that we are all equally uncertain whether, in a continuing conspiracy case, the statute is tolled once the plaintiff knows or should know of the existence of the conspiracy.[4] In other words, the continuing conspiracy approach may not be of help to the plaintiff in a private action. Also, the last overt act theory might by dying.[5]

When you have calculated the effects of the potentially least favorable situation with respect to the statute of limitations, fully inform your client of his position. Reduce your opinion on this issue to writing in your very first communication, so that the client cannot later claim surprise should the case fail because of the statute. Such firm, open communication is essential to avoid malpractice suits—a problem to which antitrust counsel must be particularly sensitive. Attorney's liability insurance just is not enough to protect you should the stakes attain the level of potential antitrust litigation.

If a potential class action is contemplated, make certain that you understand the obligation to toll the statute of limitations by filing the case for those people whom you do not represent but whom you feel are in the class.[6] In other words, your ethical obligation may require the filing of a class suit.

As you know, a government action will toll the statute until one year after the final conclusion of the government's case.[7] At times the client may come to you in the development of his claim, when the statutory deadline is approaching; and, from your discussions with the defense, you may find that your opponent is anxious to avoid litigation. The basis for this disposition might be an imminent stock underwriting, or negotiations leading toward a merger or an acquisition. Under such circumstances, you should consider obtaining a written waiver of the statute of limitations.[8]

If you do consider a waiver, in addition to making certain that it is

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[3] Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962), in which the two opinions embark on an extensive analysis of legislative history, and the dissenting opinion of Judge Thomas P. Moore argues that all claims for the doctrine of fraudulent concealment under the antitrust laws derive purely from emotion.

[4] Picoult v. Ralston Purina Co., 1969 Trade Cas. ¶ 72,681, at 86,433 (S.D.N.Y.).

[5] Baker v. F & F Inv., 420 F.2d 1191, 1200 (7th Cir. 1970).

[6] *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D. Minn. 1968) (case under federal rule 23(b)(3)).

[7] Clayton Act § 5(b), *as amended*, 15 U.S.C. § 16(b) (1970).

[8] United States v. Krueger, 121 F.2d 842, 844 (3rd Cir. 1941), *cert. denied*, 314 U.S. 677 (1941); Collins v. Woodworth, 109 F.2d 628, 629-30 (6th Cir. 1940) (no consideration required to validate written waiver); Monarch Indus. Corp. v. American Motorists Ins. Co., 276 F. Supp. 972, 979 (S.D.N.Y. 1967) (Carriage of Goods by Sea Act § 3(6), 46 U.S.C. § 1303(6) (1970)).

airtight, you should forbid the defense lawyer's putting any conditions or restrictions on it. You may encounter such approaches as, "Because we are bargaining in good faith with you, we are waiving the statute of limitations." But that could mean that if you take a non-negotiable position on one point of your settlement bargaining, you are no longer bargaining in good faith, thereby nullifying the waiver. Frankly, I am dubious in general about waivers of the statute. Only once have I relied on one, and not totally without repercussions.

D. Effect of Prior Release

Ask the client whether he signed a release. While that may sound rather elemental, many times I have asked the question of a client, only to learn of the infamous document from defense counsel. Not only will such discovery embarrass you, but you may then be forced to retract 95 percent of what you told the client at the initial interview. If a release has been signed, take a retainer. This is not meant to imply that you should take no retainer in any event, but you ought to insist upon it even more firmly and more immediately if a release has been signed, since there are few situations in which you can set aside a release. Basically, your burden would be to prove that the release was actually part of a Sherman Act § 1[9] conspiracy,[10] which is rarely sustainable.

E. Obtaining the Facts

Try to acquire all the relevant facts within your client's knowledge during the initial interview, for two reasons. First, because you have set the time aside and you are in the mood to get it all, but more importantly because you want to organize your file and the documents and exhibits you receive in accordance with a theory of proof. Therefore, it is helpful to learn all of the facts as early as possible.

Armed with this information, you should then set up proof categories. On the basis of these proof categories, you will organize your documents and other information. This organizational task should be done shortly after the initial interview, before you get bogged down in the vagaries of discovery.

One method of insuring a good interview is to take a set of interrogatories filed by a good antitrust defense lawyer and use the questions therein as the basis for extracting information from the client. Once you are in a position to answer all of the defendant's questions, you probably have exhausted much of your client's fund of knowledge.

Of course, you should discuss obtaining financial proof of damages

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[9] 15 U.S.C. § 1 (1970).

[10] *Compare* Carter v. Twentieth Century Fox Film Corp., 127 F. Supp. 675 (W.D. Mo. 1955), *with* Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173 (8th Cir. 1955).

right away. Preferably, you should arrange with your client to acquire financial data from his bookkeeper or his accountant directly, especially if your client is as bad with the pencil and graphpaper as are most of us.

The client should leave with you any documents that he has brought with him. And I hope that you told him before he came to bring everything with him that he thinks might be at all relevant, because if you let the client decide what documents you should look at, you are in trouble.

Also obtain the names and addresses of potential witnesses during that first interview. Make clear your client's responsibility to pay your out-of-pocket expenses. Now, I separate that consideration from the fee discussion because, if you and your client have done your work well, you will begin soon after the interview to photocopy numerous documents and to get data by long distance telephone. It is therefore perfectly in order to discuss at the initial interview the out-of-pocket expenses you anticipate. Request a deposit from your client, which you should put in an appropriate special account, and not in your general office account, to cover expenses.

F. Arranging the Fee Contract

Explain the fee arrangement thoroughly on the first interview, and if you anticipate a class action, you should be paid well for the extra headaches. Thus your retainer should be substantial if your case is a potential class suit. Another reason for the larger fee in class suits is that there are more participants to draw from in collecting your retainer.

An appropriate retainer, if the suit is not a class action will, of course, depend on how your office operates. There is one two-man law firm that is notorious for handling cases without a retainer or at most a very small one, frequently expending their own money for expenses; and the firm has hit the jackpot often enough to accumulate a war chest for the future representation of antitrust plaintiffs. If you have that type of practice, keep up the good work, but I do not encourage the adoption of that procedure.

You should obtain a retainer fee that will take you through roughly the first one hundred and fifty hours of work at your usual rate. If your contract calls for a contingent fee, spell it out. In all fairness, the retainer should be a credit on any contingency that you collect, but your fee contract might provide that this credit will only apply if the contingent fee exceeds a pre-established minimum. Also, you should indicate that if there ultimately develops a lawsuit and a court-awarded fee, and if the fee is substantial (and you can define "substantial" in your fee contract), the retainer given to you will be credited against the fee awarded.

If you contemplate a class suit, you ought to draft a memorandum summarizing the fee arrangement and have the client who is in your office

at the time initial it. You might call it a "Memorandum of Understanding" or something of similar ilk.

If you have a non-class suit, make a fee contract and have it typed and signed while the client is in your office. The fee contract should show explicitly and by example the method of calculating your basic charge, whether an hourly rate or flat fee, contingent fee, or combination thereof. Indicate also that your services on appeal will be covered separately, and the fee to be charged for appellate work.

A forwarding counsel who does no substantial work, and who does not cover your expenses, does not deserve more than a one-third fee. You will work too hard for your part of the fee to give him more than that. The Association of Trial Lawyers of America, which is pressing ever further into this commercial litigation field, regards it as unethical to offer a forwarding counsel any more than one-third of the total fee if he is not scheduled to perform substantial services.[11] I add the caveat, however, that if your forwarding counsel has agreed to cover part or all of your out-of-pocket expenses because your client cannot afford to do so, forwarding counsel is entitled to some consideration for his gamble; and that consideration may be reflected in the forwarding fee.

II. MULTIPLE PLAINTIFF CONSIDERATIONS

A. Gathering the Plaintiffs

To avoid accusations of champerty in rounding up class or co-plaintiff support, you should avoid arranging the initial meeting with other potential plaintiffs or members of a plaintiff class.[12] Permit your first client to arrange the meeting in which you will first meet these persons, and do not make the calls or rent the meeting room yourself. Rather, be invited to the meeting by a communication to the effect that: (1) the client talked to you on a certain date; (2) about a specified problem; (3) you indicated that it is possible (or probable) that the members of the group may have a cause of action under the antitrust laws (or other appropriate theories); (4) you discussed with your intial interviewee the potential propriety of a multiple plaintiff or a class action suit; and (5) you are being invited to attend a meeting to answer certain questions about this process. For that purpose, establish yourself as the group's attorney for the meeting, providing information that the members of the group desire while preserving for them an attorney-client privilege. On the other hand, you will not be soliciting them as clients.

At the meeting, all tape recorders must be removed from the room, not only to avoid future embarrassment and destruction of attorney-client

[11] *ATL Adopts Ethics Rule on Lawyer Referral Fees*, TRIAL, Jan.-Feb. 1972, at 6.

[12] *Suggested Procedures for Pretrial and Trial of Complex and Multidistrict Litigation*, MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION § 1.61, at 48 (CCH 1970).

privilege, but also to control implanted defense sympathizers. *Mission: Impossible* can become wonderful training for antitrust lawyers. Explain to the group the various alternatives: separate actions, class actions, multiple plaintiffs, and intervention. Sometimes in franchise cases the franchise agreement will provide for arbitration of disputes; and it is possible, according to one recent case, that antitrust disputes might be arbitable by advance agreement.[13] Often times the antitrust count is not the strongest count in a franchise case, and frequently fraud or breach of contract issues are more worry to a franchisor. Arbitration of those issues can present a tremendous clout by disposing of a problem at the outset which may work collateral estoppel in favor of a large number of franchisees.

If the group is going to decide whether or not to select an attorney to represent them and to take appropriate action, that matter should be the subject of a secret ballot. Assuming that the vote as to legal action is favorable, you should insist upon a separate secret ballot on whether to retain you as counsel. Certainly, you should not be present in the room when this last vote is made. You do not want to be in the position to be subject to a later claim that you solicited this group to hire your services after neutrally informing them of their rights, or that you pressured them to do so in their voting. Have the secretary of the meeting make a list of all those present, record the vote, and make up minutes. The purpose of a secret ballot is to avoid pressuring the timid, but this list may also be your only chance to find out for certain the minimum number of people in the class you are to represent.

Once you have passed that stage, you can then (if it is a class action) prepare a fee contract and have it signed by those who purport to take the forefront in representing the class. And I would suggest at your meeting that you have a legal committee or litigation committee appointed by a majority of those present, to act as liaison between yourself and the group. This committee will cut down on your long distance calls and mailing expenses, and it will avoid your spending unnecessary dozens of hours on the telephone.

B. Class Action Criteria

Subdivison (a) of rule 23 lists four criteria or standards, all of which must be satisfied before the court will certify an action as a class action. These four criteria are: (1) numerosity, to the extent that joinder of all members of the class in one action would not be practicable; (2) the existence either of common questions of law or fact; (3) typicality of the claims (or defenses, if the class is a class of defendants) of the representative parties; and (4) a finding that the representative parties will fairly and adequately protect the interests of the class. For the purposes of subdi-

[13] Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1215 (2d Cir. 1972).

vision (a), the representative parties are the parties named as plaintiffs in the case.

Turning first to criterion (a)(1), there has been a tremendous variation in court determinations of the minimum number of persons which will satisfy the element of numerosity. Cases have held that as few as 25 people are sufficient[14] and that as many as 100 are insufficient.[15] It all depends upon the circumstances[16]—and no one knows for certain what that means.

Note that, with respect to the subdivision (a) prerequisites, the question either of common questions of law or fact is a quantitative one. In other words, if there are *any* questions common to the members of the class, whether of law or of fact, criterion (a)(2) has been satisfied. If subdivison (a) is fully satisfied, on the other hand, and you proceed to bring your class suit under the theory of subdivision (b)(3), you will encounter a qualitative test—that is, whether the common questions of law or of fact predominate over questions affecting only individual members of the class.

Criterion (a)(4) represents two sides of the same coin. What the rulemakers actually are asking is, Can the plaintiffs whom you name as class representatives achieve that high degree of fiduciary function which is required of class representatives under rule 23?[17] Are they honest people? Do they have criminal records? Are there skeletons in their domestic closets? Have they received at any time, with any degree of substantial interest, an offer to compromise the interests of the entire class in order to satisfy their own personal interests—or have they solicited such an offer? In other words, make certain that your class representatives have not attempted to use the threat of a potential class suit as leverage in order to obtain concessions for themselves from the defendant. Fair and adequate representation also, of course, includes your skills and ability.

Do not permit this last criterion, insofar as it is oriented toward the skill of the attorney, to discourage you from handling a potential class action merely because you have never handled a class suit before. I know many attorneys whose first efforts in a class suit were quite successful—because they did their homework and were not overawed by their opponents. If, however, the unknown frightens you, obtain trial co-counsel. There is adequate talent available in this field.

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[14] Philadelphia Elec. Co. v. Anaconda Amer. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). "I see no necessity for encumbering the judicial process with 25 lawsuits, if one will do." *Id.* at 463.

[15] William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp., 1970 Trade Cas. ¶ 73,211, at 88,807 (E.D. Pa. 1969) (460 people might not be sufficient).

[16] Richland v. Cheatham, 272 F. Supp. 148, 153 (S.D.N.Y. 1967).

[17] Jacobs v. Bache & Co., 1972 Trade Cas. ¶ 7,398, at 92,090 (S.D.N.Y.) (antagonism of class members, however, does not necessarily preclude representation); Herbst v. Able, 45 F.R.D. 451, 453 (S.D.N.Y. 1968) (Securities Act—failure to promptly file motion to certify class indicates lack of representative capacity).

Having satisfied those four difficult criteria of subdivision (a), you may consider subdivison (b). Subdivison (b) sets forth three alternative theories for a class action. The satisfaction of any one of these theories, in combination with the four elements of subdivision (a) discussed above, will lead to the certification of your lawsuit as a class action.

Alternative (b)(1) is itself divided into two co-equal parts, with the headings (A) and (B). In other words, in combination with the four criteria of subdivision (a), satisfaction of alternative theory (b)(1)(A) or (b)(1)(B) will create a class action.

Although alternative theory (b)(1)(A) is the most complex in language, the concept is, in reality, quite simple. If individual actions were brought in your case, and if such actions would result in the creation of a standard of conduct which the defendant must follow, then there is at least the risk that different adjudications might create incompatible standards. It is the existence of that risk, or the weighing of its probability, toward which alternative (b)(1)(A) looks.[18]

Alternative (b)(1)(B) covers situations in which the prosecution of separate individual actions would result in prejudice to the other members of the class, by substantially impairing or making difficult the ability of the other members of the class, who are not involved in litigation, to protect their interests. Such a case would occur, for example, if the plaintiffs are attacking a specific fund which is not adequate to satisfy the claims of all of the potential claimants, should their theory prove to be correct.[19]

Alternative theory (b)(2) applies if the defendant has acted or refused to act on grounds applicable to all members of the class. Suppose, for example, that a supplier refuses to sell to a distributor on the ground that the distributor, like many other distributors of the same supplier, carries competing lines. Further, assume that there is a genuine dispute as to whether such refusal to sell violates § 1 of the Sherman Act[20] or § 3 of the Clayton Act,[21] and part of the relief requested is an injunction and declaratory judgment. If the supplier's policy with respect to your transaction is uniform as to all distributors, then the supplier has refused to sell to each distributor on the same ground, and a class action may

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[18] *See In re* Plumbing Fixture Cases, 298 F. Supp. 484, 493 (Judicial Panel on Multidistrict Litigation, 1968).

[19] The Federal Rules Advisory Committee Staff note on the 1966 amendment to rule 23 cites, for example, actions by shareholders to compel dividends or recognition of other rights, since those members of the class not participating would otherwise have no representation on an issue dispositive of their interests. Under the antitrust laws, an analogy might be drawn for franchise cases in which, as part of the violation, the franchisor seeks to control his franchisees by insisting on collecting and distributing gross receipts from the customers of the franchisees, and the franchisee seeks enforcement of his right to collect from such customers, while some other franchisees might prefer to have that collection service performed for them by the franchisor. FED. R. CIV. P. 23, 28 U.S.C. 7763 (1970).

[20] 15 U.S.C. § 1 (1970).

[21] 15 U.S.C. § 14 (1970).

well be appropriate.[22] Note particularly, however, that alternative theory (b)(2) is geared toward injunctive or declaratory relief, and not actions for monetary damages. Therefore, squeezing an antitrust case into the mold of § (b)(2) may well be difficult.

Most class actions are certified on the basis of the four prerequisites set forth in subdivision (a) plus application of alternative theory (b)(3), the wordiest and the most easily satisfied in most antitrust cases. When the Federal Rules of Civil Procedure were amended in 1966, alternative (b)(3) was designed specifically for the purpose of broadening the base for class actions under the ancient "spurious class suit" theory.[23]

There are, however, rewards for being able to bring your suit within §§ (b)(1) or (b)(2). Under alternative (b)(3), the class members must be notified of the class action, and they must be given an opportunity to "opt out"—a fancy way of saying, an opportunity to elect not to participate as members of the class and, if they wish, proceed with their own action through their own counsel. If your class numbers several thousands of people, the preparation, printing and mailing of notices, the publication of notices in newspapers or the use of mass communication media to provide notice—all of which, in the discretion of the court, can be ordered—may well be very expensive. In other words, if you can use alternatives (b)(1) or (b)(2), in order to satisfy your class action theory, do so.

Alternative (b)(3) requires that the court find that questions either of law or fact common to members of the class predominate over any questions affecting individual members. Further, the court must find that a class action is superior to other available methods (such as individual suits, multiple plaintiff suits, or ordinary intervention) for the fair and efficient adjudication of the case.

The rule makers were considerate enough to tell the courts what facts would be pertinent to the findings required by alternative (b)(3). These four relevant findings, lettered (A) through (D), are conclusory in nature. Finding (A) refers to individual interest in bringing separate actions. Have members of the class already shown that they are willing and able to file individual antitrust cases, without being protected by class representatives? If so, there may well be no need for a class suit. Finding (B) concerns itself with the extent and nature of litigation already commenced by the class. If you are already involved in a mare's nest of existing litigation respecting the same issues against the same defendants, the court will have very good reason for not certifying the class action. Thus we see the advantage of being early with your litigation—and if your client is not soon enough, you are not to blame. Finding (C) asks about "the

[22] *See* Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1951), *cert. denied*, 344 U.S. 820 (1952).

[23] Federal Rules Advisory Committee Staff Notes (1966), FED. R. CIV. P. 23, 28 U.S.C. 7767 (1970); Eisen v. Carlisle, 391 F.2d 555, 565 (2d Cir. 1968).

desirability or undesirability of concentrating the litigation of the claims in the particular forum." Here we have a type of *forum non conveniens* consideration with a reverse twist. Primarily looking toward efficiency in judicial administration, the rule makers have suggested that a series of individual actions is not judicially economical if just one would be adequate. Here we particularly see the importance of the representative element stated in subdivision (a)(4). The final finding, which fits well with (C), relates to difficulties in managing the class suit. In many potential class actions, although liability easily can be determined on a class basis, damages must be proven individually and will vary in amounts. Oftentimes, unless the plaintiff's lawyer can develop a satisfactory statistical formula, the court may be open to the presentation of claims by hundreds or even thousands of people. Such a prospect will frighten many trial judges into denying certification of the class.

Many plaintiffs' attorneys forget that rule 23(c)(1) creates an obligation upon the court to determine, as soon as practicable after the action is filed, whether or not the case should be certified as a class suit. The certification may be conditioned on certain factors, such as developing proof that the members of the class can be ascertained, and such certification may be altered or amended later at the discretion of the trial court. In any event, as the plaintiffs' class action lawyer, you should be the one to file the motion first. Do not wait for the defendant to file a decertification motion, which is at best embarrassing and at worst a severe strategic disadvantage; if you demonstrate sufficient ineptness by not filing a rule 23 (c)(1) motion, the court may later have a good reason to decline certification on the ground that you cannot adequately represent the class.

As admonished previously, rule 23 (c)(2) requires, for cases in which certification is based upon subdivision (b)(3), that "the best notice practicable under the circumstances" shall be directed to the members of the class by the court. Such notice might take the form of mass media communications—but whatever the form, they can be extremely expensive. I presently am involved in a class action in which the members of the class might run as high as four and one-half million persons. Should the court inform me that an appropriate theory for my bringing a class suit would be subdivision (b)(3), I might be required to expend hundreds of thousands of dollars in order to notify the members of the class without even knowing my chances of winning on the issue of liability. If you should face such circumstances in the future, the recommended procedure would be to attempt early discovery and, if the facts and law permit, to file a motion for summary judgment, asking the court to rule on that motion before it rules on the issue of class certification.

Of course, if the motion for summary judgment is not granted, you should then begin thinking about dismissal of the action as a class action,

particularly if your only theory under subdivison (b) is (b)(3). Please notice, however, that the court has discretion to decline the dismissal of a class suit and to refuse to accept a compromise thereof, pursuant to subdivision (e). The risks, therefore, are quite great in § (b)(3) cases in which the number of members in the class is very large.

C. Some Observations on Class Management

It is important to analyze the management problems for the attorney as well as for the court. How determined are the named plaintiffs? Will they stick with you when the going gets rough? Will they be ready and willing to appear for days upon days of deposition and to turn over their offices to you for perusal of documents? Will they assist you clerically when you need help? Can they overcome certain selfish tendencies and look to the good of the class as a whole?

Managing a group of multiple plaintiffs is like coaching a very large football team without the benefit of assistant specialists. Many plaintiffs' lawyers have observed that individual plaintiffs who are representing a class sometimes develop a feeling of power, thinking that they can control the class. That feeling might tempt the individuals to convert their position into a lever for settlement, acquiring a good deal for themselves despite a lack of benefit for the other members of the class. And should the plaintiffs determine that they are able to control you and your judgment as an attorney, you really have problems! Thus what started out to be a good, representative plaintiff within the meaning of subdivision (a)(3) could become a greedy Frankenstein. Such proclivities are another reason for the suggestions made earlier that you name more than one lead plaintiff and that you have the group select a committee of persons to assist you in managing the action.

D. Discovery

I would begin with this warning: Avoid the disclosure of your trial and discovery strategy in mass meetings. Only discuss such matters, if you do discuss them at all, with your legal committee, because such a practice will help to control the effect of defense sympathizers. In all fariness, I wish to point out that my defense friends are not being accused here of any form of espionage. Spying, or relating the results of plaintiffs' meetings to the defendant, frequently are unilateral on the part of those engaging in such a practice. This is done, not because the defendant or his attorney wants it, but because the sympathizers themselves feel that by bringing the story to the defendant, they will receive some extra business concession.

When you begin formal discovery, be sure to check the escrow fund that was discussed earlier. Do you have money there to cover your depo-

sitions? It does not take long to run up a $5,000 bill for discovery and photocopying. In fact, only a couple of weeks or less of hard work will suffice, and this is particularly true in multiple-plaintiff litigation.

III. GATHERING INFORMATION

In addition to discovery, which it is not my intention to explore in detail here, there are many available sources of information. For example, fairly recent registration statements filed with the Securities and Exchange Commission are a good source for learning of other lawsuits pending against the defendant. By checking into those other suits, even though they might not involve antitrust litigation, you may obtain lists of potential embittered witnesses, leads to important documents, and financial data useful in proving damages. On the same subject, it would not be at all amiss to contact other attorneys who are handling private litigation against your defendant either in the antitrust field specifically or in the commercial area of litigation generally. Conferences with those attorneys could prove very helpful to you.

The Department of Justice, Antitrust Division, develops certain internal material that is normally not disclosed to private attorneys, such as memoranda of evidence. Nor are you likely ever to view responses to Civil Investigative Demands[24] or to Preliminary Inquiries. However, grand jury evidence and probation reports can prove very useful and, under certain circumstances, will be made available to private litigants.[25] Again, it is not my province to explore that subject today.

Transcripts of legislative and administrative hearings often provide useful information for the private litigant. Having once testified before a committee of the Federal Trade Commission that was considering franchising guidelines, I was delighted to stay and listen to the other speakers. Some splendid admissions against interest frequently can be heard there, and the FTC does publish lists of persons appearing before it with the general subject of their testimony, and court reporters are present. Also, the FTC often offers disposition of complaints on an informal basis. Usually though, such informal disposition, in the form of affidavits of voluntary compliance, is invoked at the outset of the investigation when the potential respondent is first contacted, or does not apply at all.[26] Generally such affidavits are available for inspection and copying. However, the FTC has authority to provide these affidavits with confidential treatment, in which case you cannot obtain them. Such confidential treatment, however, can only occur if the respondent requests it and the FTC chooses to grant

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[24] Antitrust Civil Process Act § 4(c) 15 U.S.C. § 1314 (1970).

[25] ABC Great States, Inc. v. Globe Ticket Co., 309 F. Supp. 181 (E.D. Pa. 1970) (strong showing of necessity is required before such documents may be obtained).

[26] FTC Procedures and Rules of Practice, 16 C.F.R. § 2.21 (1972).

it—confidentiality is not automatic.[27] Under the old stipulation procedure, formerly applied by the FTC and abolished in mid-1961, the stipulations were public records and were not an admission of a legal violation.[28] However, since the stipulations are admissible as evidence in formal FTC proceedings, they might be admissible in private antitrust cases as well. FTC cease and desist orders are given similar treatment.[29]

A federal statute known as the Publicity in Taking Evidence Act,[30] enacted in 1913, provides that in a government antitrust injunction suit, depositions must be open to the public, and that a court may not issue any valid and enforceable order restricting public availability of discovery or other court proceedings in such a case. Therefore, if you know of the pendency of that type of action, you may want to be there and not just wait for the transcript.[31]

In your discovery procedures, I suggest that you begin with the co-conspirators or the least important defendants. Obtain documents, preferably by motions under federal rule 34 for production, using answers of interrogatories as the basis for describing the documents which you desire. Also be certain that you obtain photographs, tape recordings, policy descriptions, salesmen's manuals, and salesmen's reports. Salesmen, like lawyers, are a great source of admissions; they often speak off the record about policies that are the basis for antitrust violations.

In organizing your file as information is received, you should attempt to set up an index in accordance with the proof categories developed from your initial interviews, as described above. Your documents, memoranda to the file, exhibits, and deposition transcripts may then be indexed with a number on the upper right corner of the document, divided into two parts, either by a hyphen or decimal point. The first number might be your client code. For example, all the documents submitted by or relating to interviews with or depositions of Mr. Jones of Little Rock, Arkansas, could have the number six. These numbers should have nothing to do with the alphabetical order of the names of the persons submitting information, for obvious reasons of coding. The second part of the number could well be your subject code. For example, proof that the franchisor refused to test and approve competitive products might be subject category number seven. Thus if a document bears on the upper right corner the number

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[27] FTC Procedures and Rules of Practice, 16 C.F.R. § 4.9(f) (1972). A member of the public may request disclosure of confidential records of the FTC, but the application must be in writing, under oath, and must include a description of the purpose for which the material is intended to be used. *See* 16 C.F.R. §§ 4.9(b), 4.11(a), (b).

[28] *See* Coro, Inc. v. FTC, 338 F.2d 149 (1st Cir. 1964).

[29] 3 TRADE REG. REG. REP. ¶ 9,595, at 170,907 (March 20, 1972).

[30] 15 U.S.C. § 30 (1970).

[31] *See* U.S. v. Procter & Gamble Co., 356 U.S. 677, 683 (1958), in which the Court held that this statute was proof that the government may not use criminal procedures to elicit evidence in a civil court.

6-7, you will know that Mr. Jones sent you a document which tends to proves that particular issue.

IV. Multiple Defendant Practice

When you begin to approach the parties themselves for discovery upon cross-examination, you should begin with the defendant who appears to be least adamant in opposing your claim—or, from another point of view, the defendant who appears to be most interested in settlement. As to secondary or co-conspirator defendants generally, I suggest a high degree of cooperation. Cultivating good relationships with such defendants and their attorneys, and acceding to matters of convenience when such are involved, may reap dividends later, particularly if such defendants or their counsel may be the nucleus for settlement negotiation with the primary defendants.

Generally speaking, individual defendants should not be named unless doing so would be strategically appropriate. Adding such individuals after already having named corporate defendants bears the danger of looking like over-kill. However, particularly with respect to individuals who are skittish about testifying and who have positions of power, an exception to that rule might well lie. The same exception would carry forward to key witnesses who obviously will be reluctant to provide information, and for whom cross-examination upon deposition will be advantageous.

V. Conclusion

In many respects, the information provided above is one man's view. Your experiences and personality may frequently dictate different approaches. The important point to bear in mind is that private antitrust litigation for the plaintiff deserves the most careful consideration. And, when you are representing a large group of plaintiffs, your duty is even higher. There is no need, however, to be over-awed by this type of case. As with all aspects of life, your best security is your own self-confidence and ability.