DECEMBER 10 SPEECH

The private treble damage remedy was contained as Section 7 of the original Sherman Act in 1890. In 1914, it was "moved" to become Section 4 of the Clayton Act In that same year Congress added, for the first time, Section 16 of the Clayton permitting private suits for injunctive relief.

By the way, Congress is often accused of indiscretions, but in doing this historical review, we should note in passing that the principal author of the Sherman Act was in fact Senator H-O-A-R of Massachusetts. So Congress wasn't so stupid in insuring that we all didn't labor enforcing the HOAR act.

In the early years the treble damage provision was rarely used. In the forty years from 1899 to 1939 there is a record of only 157 private suits, an average of about 4 per year. The plaintiffs recovered in only 14 of those case, less than 10% and the total recovery was less than $275,000 about $20,000 per victory.

The Trenton Potteries decision in 1927 started a movement toward per se condemnation of various practices. There were also expansive interpretations in predatory pricing cases such Mead's and Utah Pie. Litigation brought by competitors seemed to be encouraged.

Along with these substantive expansion there was similar expansion on the procedural side. Poller condemned summary judgment in private cases and Bigelow relaxed the standard for proving damages. Hanover Shoe rejected a pass on defense while Klors and Radiant Burners negated any requirement to demonstrate "public harm" or what we now call "antitrust injury."

These were the halcyon days for treble damage litigants and their lawyers.

Antitrust was deemed, in this era, to reflect, as Han Thorelli put it, an "economic egalitarianism" seeking to promote both economic opportunity and competition to prevent controlling aggregations of wealth and thereby insure political freedom. .In this era private antitrust litigation exploded. Between 1946 and 1949, a total of 399 cases were filed, or 80 per year and between 1950 and 1054, the number leaped to over 1000 or more than 200 per year. This multiplication continued through the 1960s but the statistics are misleading because nearly 2000 electrical equipment cases were brought in that period. By 1978 some 1400 antitrust cases per year were being filed and now 95% of the them were private cases.

In the early days of the glory years, there were a handful of lawyers who did the bulk of the cases: Joe Alioto in San Francisco; Ferguson & Burdell in Seattle; Lee Freeman in Chicago and Harold Kohn in Philadelphia. Each of these men were vigorous advocates and intellectually sophisticated. In general, their cases and arguments paralleled consumer welfare and were consistent with antitrust as it was then understood. Class actions had not yet materialized. All was well with the world.

1977 seems to have been the turning point. The Supreme Court decided the Brunswick case establishing a requirement of antitrust injury and invigorating the concept of consumer welfare which, looked solely or almost solely to "economic efficiency" and changed the calculus of antitrust from civil rights type legislation to consumer protection legislation. Plaintiffs' argument in Brunswick stood antitrust on its head arguing that Brunswick should be liable for preserving competition rather than leaving it expire. In 1986 the Supreme Court decided Matsushita encouraging the use of summary judgment to resolve private antitrust disputes and announcing that

predatory pricing was not rational or plausible behavior. And in 1992 ARCO expanded the notion of antitrust injury to defeat a private claim based on per se violation when metaphysically one would think antitrust injury would flow inexorably from the proven per se violation.

These early losses were in cases brought by one or at most a few competitors or potential competitors, it was evident that the Court felt the pendulum – at least procedurally -- had swung too far in favor of plaintiffs and needed to be more grounded in economic reality. In 1984 Judge Easterbrook observed that "many plaintiffs are interested in restraining rather than promoting competition." And as recently as 2001 Judge Posner observed that "the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one." Still until last past four years the Court did not seem committed to an agenda which would emasculate private antitrust enforcement. In 1992 Image Technical Services the court narrowed what it saw as an epidemic of summary judgments in private antitrust cases and earlier in Aspen it insured a defendant would not escape liability when its conduct completely lacked pro-competitive justification. The decisions in this period clearly ended the halcyon era but did not spell total disaster for private antitrust.

The nuclear explosion devastating antitrust in all 10 decisions for defendants over the past 4 terms was mainly reserved for class actions. The decisions in Dagher, Trinko, Credit Suisse and Twombly seemed to be premeditated murder of private class antitrust litigation which was not a follow-on to a prior government case. The well-grounded fear that class action antitrust litigation could, even in the thinnest cases, extort huge settlements often with no serious benefit to the class seems, clearly to have

driven the court to these ugly decisions. The damages in each of those cases would been hundreds of millions or even billions and to allow juries to decide these issues became an unacceptable risk. The stakes of treble damage litigation had suddenly catapulted beyond manageability.

Today many of the same firms which do securities class actions and toxic tort class actions and product liability class actions, prosecute antitrust class actions. The judiciary perceives class action antitrust as a business calculated to produce settlements, often without any substantial benefit to the class. In short, class actions are often for the benefit of lawyers. This has cast plaintiffs antitrust lawyers in a bad light and has produced hostility and skepticism by the courts; how do we get out of this mess.

Our road to redemption will be long and arduous. I suggest we take stock of ourselves and recognize that our collective greed has killed the goose that aid the golden egg. Can we restore private antitrust to the hallowed level of Justice Marshall's analogy to the "magna carte "of the free enterprise" and what, in times past, has been referred to as the "bulwark" of antitrust enforcement?

I believe the task before us is straightforward. We must demonstrate that we are not driven solely by greed and are not indifferent to the effects of our cases on both class members and antitrust policy. "Just win baby" isn't going to do it anymore. There is no simple panacea. But I pose a few items for your consideration:

1. Elect a president who cares about competition.

2. Use state laws which are, for the most part, more receptive to antitrust and related claims. Take advantage of state antitrust and unfair competition laws and

even consider converting what in years gone by would be an antitrust case to an intentional interference with prospective business advantage.

3. Engage in more intense case evaluation. Evaluate whether a case has, in light of the trends of antitrust law has a reasonable prospect of success with the trial judge, with the appeals court and with the S. Ct. Avoid cases which will likely produce more decisions narrowing both the substantive and procedural antitrust law. Class actions pushing the envelope won't cut it.

4. Evaluate whether the claims asserted in a class action will produce a result, by settlement or by trial, which will substantially benefit the class as opposed to the lawyers. If not, either don't bring the case or seek only injunctive relief which could produce a significant class benefit but a lower fee. In other words, act responsibly.

5. Organize through AAI or otherwise a bar like group which can be used to educate the lawyers to these new requirements. Otherwise survival is questionable. An organized bar can, by itself or with AAI also educate the essential role competition plays in our society and the function antitrust enforcement (including private enforcement) plays in maintaining competition, particularly in and with small business. Perhaps the major function of an organized plaintiffs' bar would be to spearhead a campaign of seeking to limit or even overrule some of the bad precedents. As an illustration, we all remember how the courts of appeal did not like the Supreme Court's Schwinn decision and almost uniformly proceeded to ignore. We have an opportunity, acting together, to forge that kind of process for example with Twombly. Some judges see Twombly as a great docket-clearing tool to replace or supplement antitrust injury. But others are concerned Twombly could throw out the baby with the bathwater. We

can provide briefs and anecdotes, by working together, to expedite and enhance the process to limit Twombly.

6. Promote use of neutral court-appointed experts.

7. Conscious that Prof. Lande has written cogently that duplicative recovery is merely a theoretical concept, the judiciary perceives this as a danger and we should confront it. Judge Posner calls the direct and indirect claims "cluster bombs" and we need to convince him and others that we are not really arguing for six or nine fold damage awards. As these perceptions persist, we find as Bill Kovacic has said that the courts "equilibrate" by narrowing standing, expanding the reach of antitrust injury, by new and narrower substantive rules and by heightened evidentiary requirement so that prospects of recovery are ever smaller. We're just kidding ourselves by not confronting and solving these things which are causing a judicial revulsion.

Today, there is simply a much smaller number of winnable cases given the present substantive and procedural rules. Antitrust boutiques are likely to disappear over time. Class actions will continue to be brought although on a reduced level. Fees will continue to be awarded but in fewer cases. In the short run, we shall feel the impact of recent decisions.

Teddy Roosevelt said that

> "Aggressive fighting for the right is the
> noblest sport the world affords"

Our cause is just and noble.

Our challenge will be to prove that we have learned the lesson of excess, that we can and will respond as responsible lawyers less driven by self-interest and more intent on achieving protection for our true constituency – the consumer.