Pleading and Pre-Trial of an Antitrust Claim

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THE PLEADING AND PRE-TRIAL OF AN ANTITRUST CLAIM*

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The Federal Rules of Civil Procedure, by affording each party a most comprehensive opportunity to prepare for trial, seem to discourage trials. In the antitrust field, because pre-trial preparations may be monumental, only patient and affluent parties, the United States included, are likely to take the full journey through pre-trial, to say nothing of trial and appeal. In recent years, the number of civil antitrust cases which reached judgment during or after trial has averaged only 26 per year.1 In contrast, the comparable figure for like cases disposed of during the pre-trial phase by settlement or motion is 211 per year.2 While antitrust trials may be relatively infrequent, the amount of pre-trial activity in antitrust suits is disproportionately large,3 not only because of the customary complexity of fact and economic issues, but also because of the frequent joinder of numerous parties. The abundance of pre-trial activity derives from a basic recognition that, whether or not the case is eventually tried, knowing and skillful application of pre-trial procedures can do much to shape its disposition.

Diversity of facts and dissimilarity of exposures prevent any single pre-trial technique or formula from universally serving the varying needs of antitrust actions. Instead, a sound objective is the wasteless application of the knowledge of pre-trial procedure to the needs of the given litigation, thereby minimizing time-consuming and unrewarding steps. In this light, the focus here shall be upon several of the procedural facets with which antitrust counsel in civil litigation are typically concerned.

I. PLEADING

Determination of the content of the "claim for relief" is an initial step in most every suit. The Federal Rules of Civil Procedure require:

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* This article is based on a speech delivered by the author before the section of Antitrust Law of the American Bar Association.
† See contributor's section, masthead p. 579, for biographical data.
1 The author is indebted to the Administrative Office of the United States Courts for supplying the statistics referred to in this paragraph and the footnotes thereto. The average was computed on the basis of figures for the five fiscal years ending June 30, 1960.
2 Likewise, this average was computed on the basis of figures for the five fiscal years ending June 30, 1960. Consent judgments and consent dismissals account for about 81% of such dispositions.
3 As of June 30, 1960, there were 688 civil antitrust cases pending in the United States District Courts. About two-thirds of these were in the District Courts of New York, Pennsylvania, California, Missouri, Illinois and Massachusetts. In the five fiscal years ending June 30, 1960, an average of some 270 civil antitrust cases were commenced per year. This is to be compared with 61,795 cases per year, the average number of federal civil cases of all kinds commenced in the same period. 1956-1960 Annual Reports of the Director of the Administrative Office of the United States Courts, Table C 1.
A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

As applicable to antitrust, it is perhaps surprising that the meaning of these requirements, in effect since 1938 has engendered spirited debate among the judiciary in recent years.

It is generally accepted that antitrust suits tend to be protracted, that in order to accelerate their progress control of discovery is vital, and to that end early definition of the issues is needed. For the avowed purpose of facilitating the issue identification process, some district judges required "special" antitrust pleadings of a kind containing allegations of greater factual detail than needed merely to satisfy the so-called "notice" function of pleading. This approach, however, has been rejected in some Courts of Appeal. The opponents of "special" antitrust pleadings have questioned whether the more elaborate factual detail helps to define the issues or just adds volume. They asserted that the Federal Rules contemplate only a kind of notice pleading that identifies the issues broadly, without describing the specific instances, which are left for discovery to unveil.

In this connection, the Second Circuit has stressed its preference for a "lean and terse allegation in sequence of events as they have happened . . ." and the Tenth Circuit speaks of a concise, "generalized statement of the facts. . . ." But the Federal Rules governing pleading

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5 See notes 8 and 9, infra.
11 New Home Appliance Center Inc. v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957).
never use the word "fact,"[12] and the Complaint Forms to the Rules[13] evidence a mixture of allegations of ultimate facts and conclusions of law. Thus, a happier compromise would seem to be a brief, but informative, statement of events or facts, plus the addition of some conclusions interspersed to mark the legal theory upon which the claimant relies. Not only would this aid the "issue" development, but it would avoid the unwanted "allegation of details."[14]

It is not easy to cull from the semantics[15] an operative standard that tells the draftsman of a claim just how much he should say.[16] On the one hand, a judge may strike a badly prolix and unclear complaint,[17] but motions to strike are not generally encouraged, and usually a court will not prune a pleading unless it contains immaterial matter that prejudices the answering party.[18] On the other hand, a sketchy complaint invites action by judges who, knowing the burdens imposed on those defending

12 See Fed. R. Civ. P. 8-10, 12-13. In upholding the Sherman Act complaint in United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188 (1954), the Supreme Court did not find it necessary to distinguish between whether charges were "allegations of fact" or "mere conclusions of the pleader." In Conley v. Gibson, 355 U.S. 41, 47 (1957), an action under the Railway Labor Act, the Court stated:

the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

13 Fed. R. Civ. P. 84; see, e.g., Appendix of Forms 5, 8, 9, 11, 16.


15 Some circuits even differ as to the relationship, if any, between the term "claim" as used in Fed. R. Civ. P. 8(a) and 54(b), and the traditional "cause of action." Compare Steiner v. 20th Century-Fox Film Corp., 220 F.2d 105 (9th Cir. 1955), 232 F.2d 196, 193 n.3 (2d Cir. 1965), and United Artists Corp. v. Masterpiece Prods. Inc., 221 F.2d 213, 215-16 (2d Cir. 1955). But see the pending amendments to Fed. R. Civ. P. 54(b), 29 U.S.L. Week 3308-09 (April 18, 1961).

16 However, the path of a plaintiff through the mountains of anti-trust pleadings is a treacherous one. If the plaintiff is lengthy, he is being redundant, vague or evidential; if he is or attempts to be concise, he has no case or is pleading conclusions only. . . . Hathaway Motors, Inc. v. General Motors Corp., 21 Fed. Rules Serv. 8a. 464, Case 2 (D. Conn. March 1, 1955).

17 See, e.g., Hershel Cal. Fruit Prods. Co. v. Hunt Foods, 16 F.R.D. 547 (N.D. Cal. 1954); Metropolitan Theater Co. v. Warner Bros. Pictures Inc., 12 F.R.D. 516, 518 (S.D.N.Y. 1952) ("The instant [55 page] complaint is a gross violation of Rule 8. It will, therefore, be stricken, with leave to plaintiff to file an amended pleading which contains simple, concise and distinct averments, and conforms to Rule 8. The amended complaint should avoid characterizations, lectures, dissertations, unnecessary evidence and flights of literary fancy, all of which permeate the complaint as it now stands.") Fed. R. Civ. P. 8(e) requires that: "Each averment of a pleading shall be simple, concise, and direct . . . " and Fed. R. Civ. P. 10(b) requires: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; . . . Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

an antitrust claim, quite properly strive to weed out the frivolous suits before the harm is done. For Sherman Act, Section 1, cases, it is too often judicially stated to be ignored that a general allegation of conspiracy to restrain trade without a statement of the facts constituting the conspiracy, its object and accomplishment, is but an allegation of a legal conclusion insufficient to constitute a cause of action. However, after accounting for amendments to pleadings and appeals, it is a signal feat for a party to enjoy permanently the fruits of a dismissal for failure to state a claim.

Judges occasionally advise that "the profession would do well to accept the fact that little can be accomplished by motions on the pleadings." The Judicial Conference has apparently recognized that courts have not insisted that pleadings be the vehicle for framing issues in the protracted case. Accordingly, the Conference recommended that counsel be directed, early in the pre-trial proceedings, to submit statements elaborating and clarifying the positions taken in the pleadings.

Undoubtedly, general and undetailed pleading is motivated by a desire to retain maximum flexibility—at least until discovery clarifies and exposes the factual contours. However, it is questionable whether this transitory benefit is worth the risk of burdensome intervening motions.


20 For example, in Radiant Burners, Inc. v. American Gas Ass'n, the district court dismissed, successively, the complaint, 1957 Trade Cases ¶ 68,909 (N.D. Ill. 1957), an amended complaint, 1958 Trade Cases ¶ 69,173 (N.D. Ill. 1958), and a second amended complaint, 1959 Trade Cases ¶¶ 69,310, 69,311 (N.D. Ill. 1959); dismissal of the last was affirmed by the Court of Appeals, 273 F.2d 196 (7th Cir. 1959), and then reversed by the Supreme Court, 364 U.S. 656 (1961), which noted, for Sherman Act, Section 1, that: "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." Id. at 660. In McElhenny Co. v. Western Auto Supply Co., 1960 Trade Cases ¶ 69,850 (4th Cir. 1960), cert. denied, 29 U.S.L. Week 3261 (U.S. March 7, 1961), the Supreme Court recently denied certiorari after the Fourth Circuit, reversing the District Court, sustained the second amended treble damage complaint which followed the Circuit Court's dismissal of the first such amended complaint, 269 F.2d 332 (4th Cir. 1959). See also Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). On the other hand, notwithstanding a liberal attitude toward antitrust pleadings which finds some reflection in Radovich v. National Football League, 352 U.S. 445, 453 (1957), the Supreme Court denied certiorari in Holensee v. Aktou Beacon Journal Publishing Co., 277 F.2d 359 (6th Cir. 1960), cert. denied, 29 U.S.L. Week 3165 (U.S. Dec. 6, 1960), which had upheld the lower court's dismissal of a treble damage complaint and its refusal to allow a proffered amended complaint to be filed. See also Kinneer-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891 (5th Cir. 1954), cert. denied, 348 U.S. 912 (1955).


to the pleadings. Moreover, if supplementary statements are utilized to focus upon the genuine issues, so as to set advance limits upon discovery, the loose pleader may have done little but defer his work from the pleading stage to a pretrial conference shortly thereafter.

In contrast, there can be procedural advantages to the more informative statement of claim. Plaintiff must consider both that his adversary may be entitled to the first discovery and that his interests normally lie in expediting the proceedings. To avoid undue burdens and delays, plaintiff should lean toward narrowing issues consistent with his own needs for discovery from the other side. Looseness in the complaint may give defendant the option of a broader discovery than would be relevant to a more carefully drawn document and, with the door thus opened, plaintiff may find that he cannot gracefully withdraw.

Not to be overlooked, therefore, is the use of the pleading as a vehicle for exercising a firmer measure of initial control over the issues. Unambiguous pleadings that add flesh to bareboned allegations can frame issues which minimize the need for further pre-trial clarification. Tactically, while courts may neither insist upon nor even encourage artistic pleading, the antitrust practitioner does well to preserve the art as the means of persuasively reflecting, at the outset, the substance of his client's position while at the same time shaping the issues to a preconceived mold.23

In some treble damage cases, recognition of the problems presented by ambiguous complaints has prompted stipulations among counsel for the deferral of answers until defendants have had some discovery from plaintiffs.24 This procedure has been employed where defendants have availed themselves of the opportunity to obtain priority of discovery.25 However, this deferral is generally inapplicable where a plaintiff has priority and needs to be apprised of new issues that defendant may raise in answer so that plaintiff's initial discovery may embrace the full subject matter of the action.

The purpose in deferring the answer is to permit defendant, having

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23 Hence, on the subject of indefinite pleadings, I think our panel would pretty much agree on this message to the judges:
First, there isn't any excuse for vague, general pleading in Government cases. As a rule, the Department of Justice has had a great deal of discovery before a complaint is filed, either through Grand jury subpoenas or through voluntary disclosure. Second, where a private case is filed, based largely on a previous Government case, there is similarly no excuse for vagueness. In both these situations the courts ought to enforce Rule 8(a).


25 See text at notes 52-56, infra.
priority of discovery, to use discovery to gain a clearer conception of the allegations to which he must address his response. While this practice has been criticized as encouraging "interminable delay in the orderly progress of a case to trial,"\(^2\) a premature answer requirement may be at least as unsatisfactory. Doubtless, it is desirable that affirmative defenses which may be dispositive or may narrowly limit issues should be raised by motion, heard and decided early,\(^2\) but insistence upon a premature answer does not necessarily serve these ends. Rather, it may tend to proliferate issues and motions by forcing the statement of defenses before their value can be accurately appraised.

If pressed to an early answer, ignorance and caution lead a defendant to deny quite freely, and to state, for fear of waiver and to protect broad discovery, all his conceivable defenses. Since defenses need be pleaded with no greater particularity than claims,\(^2\) a plaintiff may be prompted to test their legal sufficiency by motion. Issues may thus be tendered, argued and defended which discovery, had it preceded answer, would have relegated to less consequential status. Moreover, to the extent that pre-trial conference statements and orders substitute for the answer in the issue joining process and in controlling discovery in the protracted case, forcing an early answer is even more pointless.\(^2\)

Consequently, courts and counsel should not overlook advantages in delaying answers past discovery. Such a practice may encourage the hearing of sound, well-prepared motions invoking affirmative defenses when they are ripe for dispossession. Also, factual discovery tends toward a greater willingness to admit, by reducing fear of the unknown, and discovery promotes a voluntary limitation to defenses that still look respectable in the light of a better understanding of the case; the effect is to narrow and define issues and to simplify trial.

II. DISCOVERY

In the field of discovery, the case law suggests a few preliminary comments. The dimension of most antitrust actions necessarily imposes large discovery burdens upon the respective parties and has stimulated frequent resort to the courts. The resultant flow of precedent, coupled with the broad discretion with which courts are invested in the discovery area,

\(^{27}\) See Handbook, 43 25 F.R.D. 394 (1960). By the same token, separate trial or hearing of particular segregated issues may be a valuable tool in shortening the protracted case. Handbook, 51-2, 25 F.R.D. at 403-4. See Fed. R. Civ. P. 12(b), (c), (d); 56.
\(^{29}\) Of course, the answer serves to cut off plaintiff's right to amend the complaint "as a matter of course," but "leave of court" to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).
usually permits authority, direct or analogous, to be marshalled to support
most any point. In the consideration of discovery motions, the court’s
discretion stems from at least three sources: (a) its general equity
powers; (b) the portion of Rule 1 providing that the Federal Rules
“shall be construed to secure the just, speedy, and inexpensive determi-
nation of every action”; and (c) the portion of Rule 30(b) providing that
the “court may make any other order which justice requires to protect
the party or witness from annoyance, embarrassment, or oppression.”
Discretion, of course, does not mean that a court is free “to modify, re-
vote, or disregard the plain terms of a rule made for its guidance.”
However, while the denial of discovery may constitute grounds for
appeal from an adverse final judgment, appeals on such basis are rarely
successful. Besides establishing the abuse of discretion, appellant may
have to persuade the court that access to the information from which he
was foreclosed would probably have produced a different result below.

To stem the flood of discovery motions, there has been some judicial
resort to a more insistent application of stare decisis. The Supreme
Court’s Advisory Committee on Rules for Civil Procedure, in its October,
1955, report, observed a tendency of discovery rulings to become rigidi-
fied. However, the Committee’s recommendations of amendments to
the Rules which would have re-emphasized the discretionary power of the
courts were not adopted by the Supreme Court.

A different judicial path toward the reduction of discovery motions has

32 E.g. Roth v. Bird, 239 F.2d 257, 259 (5th Cir. 1956).
33 E.g. Bell v. Swift & Co., 283 F.2d 407 (5th Cir. 1960); Bank of America Nat’l Trust & Sav. Ass’n v. Hayden, 231 F.2d 595 (9th Cir. 1955); Sher v. De Haven, 199 F.2d 777
(D.C. Cir. 1952) cert. denied, 345 U.S. 936 (1953); Newell v. Phillips Petroleum Co., 144
F.2d 338 (10th Cir. 1944).
34 See Bell v. Swift & Co., 283 F.2d 407 (5th Cir. 1960). For a discussion of possible
methods of obtaining interlocutory review of discovery orders, see Developments in the
Corp., 19 F.R.D. 271, 274 (S.D.N.Y. 1956) (“On a practice point such as this where there
is much to be said on both sides the rule of stare decisis should foreclose discussion when
once the question has been considered and resolved.”).
36 “[The Committee] noted the invariable tendency (accentuated by the reporting of
the striking or technical procedural decisions more extensively than of the merely
permissive rulings) of procedure to harden and become inflexible so as to be increasingly
unadaptable to developing needs in law administration and the cause of appeals else-
where, as to the legislative bodies, for reform or change.”
Reprinted in 1 Moore, Federal Practice, ¶ 0.228[3], at 5630 (2d ed. 1960).
37 See, e.g., Proposed Amendment to Fed. R. Civ. P. 30(b), reprinted in 4 Moore, Federal
Practice ¶ 30.01(6), at 92 (Supp. 1960). The present Advisory Committee (under the
Chairmanship of Dean Acheson), recognizing the conflicting views that have been expressed
concerning pre-trial discovery processes in the United States District Courts, has embarked
upon an extensive study of this subject, both analytical (in terms of the decided cases
and other literature) and empirical (in terms of field investigation of the actual operation
of discovery in federal litigation), with a view to recommending any changes of the pertinent
Rules that may appear advisable.
been to impose upon counsel the duty to confer, in good faith, to resolve
discovery differences before the court would do so on motion.\textsuperscript{38} In this
endeavor, the element of uncertainty, generated by the court's discretion
factor, probably promotes compromise.\textsuperscript{39}

As applicable to antitrust cases, the Federal Rules provide three prime
instruments for discovery between parties:\textsuperscript{40} depositions, oral and writ-
ten;\textsuperscript{41} interrogatories;\textsuperscript{42} and production, by motion\textsuperscript{43} or subpoena.\textsuperscript{44} Re-
quests to admit are also authorized,\textsuperscript{45} but whether they are truly a
discovery tool may be debatable.\textsuperscript{46} Since interrogatories, motions for
production, and requests to admit may be directed only to a party, de-
positions and subpoenas duces tecum are the pertinent discovery devices
for witnesses who are not parties.\textsuperscript{47}

By means of these various discovery procedures, the case is expected
to take form in the light of the disclosure, marshalling, and appraisal of
the available evidence. Helpful to the same end is the pre-trial con-
ference.\textsuperscript{48} Although not ordinarily considered to be a discovery device,
it frequently serves a fact-finding function and may, on occasion, sup-
plant the more formal discovery methods.\textsuperscript{49}

At the threshold of discovery is the question of priority, a matter which
the Federal Rules do not expressly resolve. The need for orderly schedul-

\textsuperscript{38} For example, Rule 9(f) of the amended General Rules of the United States District
Courts for the Southern and Eastern Districts of New York, effective Feb. 1, 1961, provides:
No motion [under Rule 26 through 37 inclusive of the Federal Rules of Civil Pro-
cedure] . . . shall be heard unless counsel for the moving party files with the court
at or prior to the argument an affidavit certifying that he has conferred with counsel
for the opposing party in an effort in good faith to resolve by agreement the issues
raised by the motion without the intervention of the court and has been unable to
reach such an agreement. If part of the issues raised by motion have been resolved
by agreement the affidavit shall specify the issues so resolved and the issues remaining
unresolved.

\textsuperscript{39} See Dooling, Cooperation Between Counsel in Simplifying Protracted Cases, 23 F.R.D.
460, 461 (1959).

\textsuperscript{40} Fed. R. Civ. P. 35 (Physical and Mental Examination of Persons) is omitted as not
of general application to antitrust litigation.

\textsuperscript{41} Fed. R. Civ. P. 26-32, 45(d).

\textsuperscript{42} Fed. R. Civ. P. 33.

\textsuperscript{43} Fed. R. Civ. P. 34.

\textsuperscript{44} Fed. R. Civ. P. 45(d).

\textsuperscript{45} Fed. R. Civ. P. 36.

\textsuperscript{46} See discussion at notes 80-83, infra.

\textsuperscript{47} See notes 41-43, 45, supra.

\textsuperscript{48} Fed. R. Civ. P. 16.

\textsuperscript{49} See Wessel, Federal Pretrial and Jury Trial Procedure (P.L.I. 1955). In Strayer, Dis-
covery in Pretrial Conference Procedure, 23 F.R.D. 347, 352 (1959), it is stated:
In summary I would say that as administered in Oregon, we have found that there
are two chief advantages in discovery at the pretrial conference. The first is that it
furnishes an easy and inexpensive way of disclosing many documents the other side
may have and developing further fields for possible discovery. It may dispense with
the necessity of taking depositions or filing interrogatories. Second, . . . it affords an
opportunity to inspect, without any depositions, interrogatories, motions or court argu-
ments all documents which the opponent intends to use at the trial.
ing of discovery procedures promptly led to court decision. A simple principle was judicially applied: First in time, first in right. The first party to serve notice to take depositions would be permitted to complete such depositions prior to being examined himself.

While counsel may divide on the value of obtaining the first discovery, plaintiffs for years have lamented their disfavored position produced by the "first notice" principle in combination with the language of Rule 26(a). Under the Rule plaintiffs, without court order, may not serve notice to take depositions until twenty days after commencement of the action. No such time restriction applies to defendants. Moreover, plaintiff will not be granted leave of court to serve such notice within the twenty-day period merely "to secure priority over a possible attempt on the part of defendant to take depositions." Rather, such leave will be granted only for exceptional circumstances, not related to priority, such as that "the prospective witness is about to leave the jurisdiction permanently, or for a long period; or if the prospective witness is infirm, it may be appropriate to expedite the taking of his deposition."

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A few months after the promulgation of the Rules in 1938 it was evidently thought incongruous for depositions noticed by plaintiff and depositions noticed by defendant to be conducted at the same time, and it was determined priority should be given to the depositions first noticed. [Citing Grauer v. Schenley Prods. Co., 26 F. Supp. 768 (S.D.N.Y. 1938).]


52 Fed. R. Civ. P. 26 (a) provides:

After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action.

The purpose of this provision, as explained in the Advisory Committee's note, is to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection." Reprinted in 4 Moore, ¶ 26.01[41, at 1009 (1950). Prior to the amendment of Rule 26 (a), effective March 19, 1948, defendant had even greater protection, the former Rule providing:

By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. (Emphasis added).


Through the years, plaintiffs have tried to overcome this obstacle to priority. Only a handful have succeeded against the diligent defendant who serves his own notice within the twenty-day period. That period, of course, starts to run from the filing of the complaint, not from its later service upon defendant.

The most frequently urged reason for overturning a defendant's priority in antitrust cases is that "plaintiff must necessarily seek to establish
many of its allegations by proof from the defendants themselves. This argument alone, once successful many years ago, is now held insufficient to provide the "unusual circumstances" courts require to reverse the normal rule of priority. Several years ago there was also an experiment with staggered depositions, each party being required to examine the other for alternating periods of equal duration. This approach, however, has not become prevalent.

Where lack of jurisdiction or improper venue is urged by defendant, a limited exception to the priority principle has arisen. Plaintiff may be permitted to examine defendant on such issues prior to defendant's taking of plaintiff's deposition on the merits.

58 Ibid. But see Auburn Capitol Theatre Corp. v. Schine Chain Theatres, Inc., 83 F. Supp. 872, 875 (S.D.N.Y. 1949) wherein the court says:

It is true that plaintiffs must establish their case by proof to be elicited, in large measure, from defendants, but by reason of the Government's anti-trust litigation they are fully advised of the nature, extent and availability of such proof. Defendants have been diligent; no special circumstances appear which would warrant taking from the 'Schine' defendants their priority of examination.

In Park & Tilford Distillers Corp. v. Distillers Co., 19 F.R.D. 169, 171 (S.D.N.Y. 1956), that plaintiff's proof would have to come from defendants was mentioned as one of a number of factors supporting the reversal of priority.

59 See Edwin H. Morris & Co. v. Warner Bros. Pictures, Inc. 10 F.R.D. 236, 238 (S.D.N.Y. 1950) where it is stated:

On the papers before me I can find no particular reason why the taking of one set of depositions should precede the other, unless I am arbitrarily to rule that in all triple damage suits under the antitrust laws the plaintiff is entitled to take his depositions first. And if this is to be so in actions of this type, it will be argued that some similar ruling one way or the other should be made in contract actions, negligence actions and so on. The mere type of action should not be so controlling; and I find no special circumstances here to justify changing the normal course of events under the notices as served. See also Reading-Sinram-Strait Coals v. Metropolitan Petroleum Corp., 21 F.R.D. 333, 334 (S.D.N.Y. 1958) wherein the court states:

as a general rule, it would be preferable that the defendant be afforded first right to take the deposition of the plaintiff. Under the present federal rules a plaintiff may serve a vague and general complaint and the defendant should have an opportunity early in the proceedings to find out the real basis upon which the plaintiff is proceeding, which can only be done by the deposition and discovery procedure, since bills of particulars are seldom, if ever, granted in the federal courts.


There are a few recurrent situations where, notwithstanding a party's service of the first notice, priority has not been obtained or has subsequently been lost. For example, if the first notice is defective or otherwise invalid, it does not secure priority. Also, where a witness is ill, or where the prior party fails to proceed with due diligence, priority may be lost.

It behooves a party, upon whom the first notice to take depositions has been served, to cross-serve promptly his own notice of the depositions he wishes to take. This action may limit his adversary's priority to the depositions of the persons specifically named or identified in the first notice, after which the depositions specified in the second notice may be taken. However, until such first-noticed depositions are completed, the party lacking priority is barred not only from taking depositions (S.D.N.Y. 1953). But cf. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 14 F.R.D. 189 (E.D. Pa. 1953).

Priority of discovery involves, at the minimum, the utilization of such discovery devices as are in aid of the taking of the first noticed depositions as, for example, a subpoena duces tecum under Fed. R. Civ. P. 45(d).

but also from utilizing other discovery devices such as interrogatories or production. 

Discovery need not commence by notice to take depositions. For interrogatories and requests to admit, the Rules prescribe no time limitation for defendant, but plaintiff may not serve either of them, without court order, until ten days after filing of the complaint. Rule 34 contains no time restriction upon parties with respect to a motion for production. If discovery is begun by one of these devices, it is questionable whether it confers any priority apart from the inherent right to a timely response to the particular demand made.

An ever-intriguing tactical question is the choice between oral depositions and interrogatories as the means for discovery of particular subjects. It is recognized that interrogatories, while normally much less expensive than oral depositions, are not always as effective because they lack the cross-examination feature. On the other hand, in matters of complex data, or where dealing with multiple parties or multiple representatives of parties each having only a partial segment of the total information, oral depositions can be equally, if not more, unrewarding. Interrogatories are especially useful where the data sought pertains to facts and figures that would otherwise be the subject of the production of voluminous documents. The answers to interrogatories may be used

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to the same extent as depositions, and there may be a continuing obligation on the part of the respondent to update replies in the event that original answers require modification in the light of subsequent events or knowledge.

Occasionally, a party served with interrogatories finds it less burdensome to produce documents than to compile answers to interrogatories founded upon such documents. In such instances, courts have authorized the submission of documents, in lieu of answers to interrogatories, upon timely objections to the interrogatories and upon showing that the answers would require compilations which would impose an undue and excessive burden upon the respondent, that there was no compilation in existence, and that the party did not intend to make such a compilation in preparation of its own case. Moreover, there is an enhanced likelihood that such objection to compiling answers from documents will be sustained if the relevant documents had been produced prior to service of the interrogatories. However, where the respondent does not timely object on the ground of burdensomeness, he generally will not be permitted to submit documents in lieu of answers to interrogatories.

There has been some controversy and confusion concerning the separate office served by requests to admit, as distinguished from interrogatories. It is undoubtedly true that a duplication of data will result from requiring answers to interrogatories on the same facts to be found in the documents defendant produced for plaintiff's inspection. This, however, does not preclude plaintiff's utilization of both methods. Rule 33 and 34 Fed. Rules Civ. Proc., 28 U.S.C.A., serve different functions. Defendant's answers to interrogatories via rule 33 give facts as it sees the facts, and have the effect of admissions. Production of documents pursuant to rule 34 gives plaintiff the primary source material without any limitation, explanation, or interpretation by defendant. In the absence of proof of harassment and oppressive burden, a party may utilize both rules. Electric Furnace Co. v. Fire Ass'n, D.C.N.D. Ohio, 10 F.R.D. 152; 4 Moore, Federal Practice, p. 2288 (2d ed. 1950); cf. Woods v. Robb, 5 Cir., 171 F.2d 569, 571. It is stated:

Where an interrogatory asks for specific figures it is no answer to the interrogatory to make records available so that the other party to the litigation can do the work of ascertaining the true answer to the interrogatories.

75 Fed. R. Civ. P. 33 ("Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party.")

79 Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302, 304 (S.D.N.Y. 1958) wherein it is stated:

Where an interrogatory asks for specific figures it is no answer to the interrogatory to make records available so that the other party to the litigation can do the work of ascertaining the true answer to the interrogatories.
Admissions are very little used. I think that Mr. Shafroth found in one of his studies that admissions were used in only three per cent of the trials. . . . I don't know why, except that perhaps the weapon is too potent. Perhaps it is because of the cost features which are attached, or the danger that admissions will be used in retaliation, but in any event there is little evidence of the use of admissions in the reported cases.

81 Fed. R. Civ. P. 37(c).

82 See, e.g., Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 917 (2d Cir. 1959) ("Rule 36 was designed to eliminate the necessity of proving, essentially undisputed and peripheral issues of fact."); Driver v. Gindy Mfg. Corp., 24 F.R.D. 473, 475 (E.D. Pa. 1959) ("The Rule cannot be employed as a substitute for discovery.").

applicable to the request itself. Conceivably, a request to admit may have the same consequence as a pleading allegation, being an admission of the proposition not only for purposes of the pending case but available for evidentiary purposes in subsequent cases. An interrogatory would stand in a different posture and might be the more appropriate procedure for the party hesitant about admitting, for all purposes, his own request.

The remaining discovery instrument is production and inspection of documents, which may be the most rewarding as well as the most burdensome procedure, in an antitrust suit. Where large corporations or corporate families are involved, with multitudes of files departmentalized and localized throughout the country, conscientious efforts to satisfy even well tailored requests for documents can be overwhelming. Unlike the other discovery procedures, a motion for production of documents requires a showing of "good cause." What will constitute "good cause" must vary as the needs of the parties differ from case to case. In antitrust actions of broad compass, "good cause" should inspire a close look at issue definition, relevance and specificity in view of the harsh burdens that an uncontrolled venture into documents may generate.

To avoid a showing of "good cause," disclosure of documents has been attempted by means of the other discovery instruments; for example, notices to produce appended to notices to take depositions.

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84 See Commentary, 1 Fed. Rules Serv. 661, 686-87 (1939). A party's complaint in another proceeding was received as an admission in each of the following cases: Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304, 310 (6th Cir. 1958); Great Am. Indem. Co. v. Rose, 242 F.2d 269, 271-2 (5th Cir. 1957); Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671 (D.C. Cir. 1956); Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956); Anderson v. Tway, 143 F.2d 95 (6th Cir. 1944), cert. denied, 324 U.S. 861 (1945); Douds v. Seafarers Int'l Union, 148 F. Supp. 953 (E.D.N.Y. 1957).

85 See Commentary, 1 Fed. Rules Serv. supra note 84; In Leonia Amusement Corp. v. Loew's, Inc., 19 F.R.D. 905, 909 (S.D.N.Y. 1955), the court stated that: With respect to a number of the interrogatories the questions seem to me to be requests for admissions of fact and there should be a provision in the order that plaintiff's use of defendants' answers to these should be limited as required by Rule 36(b), F.R.C.P.

86 Fed. R. Civ. P. 34.

87 4 Moore, Federal Practice ¶ 34.08 (2d ed. 1950).

88 In this regard, the procedure adopted by the court in United States v. Standard Oil Co., 23 F.R.D. 1, 3-4 (S.D.N.Y. 1958), should be noted. The court stated: Because of the monumental difficulties which would necessarily be imposed upon the defendants, particularly in the production of foreign documents, it would appear the most feasible course to order, at this time, the minimum discovery which is likely to provide sufficient information for, at least, a preliminary narrowing of the issues. After such preliminary narrowing, the balance of discovery can be measured against the frame of reference of the issues, as so narrowed, rather than against the broad frame of reference of the complaint which is the only one presently available. After the narrowing of the issues, much of the production presently sought might be determined not to be necessary. To effectuate the result sought, I deem it advisable to order, at present, only that the interrogatories . . . be answered.


89 Although it was Professor Moore's view that, as to parties, "designation in the notice to take depositions of the papers desired to have produced is sufficient," 4 Moore, Federal Practice ¶ 26.10, at 1052-53 (2d ed. 1950), and despite some early decisions supporting this position, Sekely v. Salkind, 10 F.R.D. 503 (S.D.N.Y. 1950) (treated notice as Rule 34 mo-
terrogatories seeking the contents of documents; and questions on oral depositions designed to require a witness, personally unacquainted with the subject, to read office files and report their contents the next day. Generally, these maneuvers have not succeeded against unwilling parties. Of course, apart from a Rule 34 motion, production may be compelled by a subpoena duces tecum under Rule 45(d).

However, while Rule
45 does not expressly require "good cause," upon a motion to quash it is now established that the proponent of the subpoena must satisfy the "good cause" requirement of Rule 34.\textsuperscript{94}

A fertile field of controversy is the scope of discovery. Briefly stated, the information sought by discovery must be relevant to the issues in an action or must be useful in uncovering the existence of such information.\textsuperscript{96} Within these wide limits, there are numerous exceptions—matters which are absolutely privileged, such as attorney-client communications;\textsuperscript{96} matters which have a qualified privilege that yields to a compelling need for disclosure, such as attorney's work product.\textsuperscript{97}

Republic Pictures Corp., 20 F.R.D. 625 (S.D.N.Y. 1957) where a showing of "good cause" was required although the proponent of the subpoena expressly disavowed any intent to inspect the documents, limiting the purpose of production to refreshing the memory of the witness. In courts which require the proponent of a subpoena, upon a motion to quash, to show "good cause," (see cases cited in note 94, infra), quaere whether such courts would require the proponent to bring a further motion pursuant to Rule 34, and make the same showing again, in order to examine the documents. See 4 Moore, Federal Practice ¶ 34.02(2) (b) n. 6, at 2426 (2d ed. 1950) wherein it is stated that:

If the scope of discovery under Rules 34 and 45 is the same . . . there would seem to be no basis for restricting the right of a party to inspect documents, etc. produced in response to a subpoena duces tecum rather than under Rule 34.


\textsuperscript{97} Hickman v. Taylor, 329 U.S. 495, 511 (1947), stating that:

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

or grand jury minutes; and matters respecting which a court may foreclose discovery or limit use of information where the discovering party's "need to know" does not outweigh the general interest in protecting the other party's trade secrets or other proprietary and confidential data. In the last category, when courts have been satisfied that trade secrets are involved, they have postponed disclosure until trial needs would more clearly require it, have allowed disclosure but imposed conditions for the protection of parties, or have denied complete disclosure because it was found to be unnecessary.

Since relevancy is the touchstone of the scope of examination, where issues have not been defined through pretrial conference and order, the problem arises as to what extent the pleadings govern. In such event, the statement of claim is the critical guide. The pleadings, however, need not contain language that has express and specific reference to every item of discovery, provided that each item may be logically related to the matters raised in the pleadings. The principle is oft-stated that relevancy is tested by the broad-gauged subject matter involved in the action in contrast to the possibly narrower issues raised by the pleadings. By the same token, discovery as to express pleading issues may be barred if the court concludes, on the basis of progress made in discovery, that such issues have evaporated in the light of the factual disclosures.

Somewhat anomalous is the frequent objection interposed to discovery inquiries on the ground that they do not probe facts but call, instead, for

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88 United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("This 'indispensable secrecy of grand jury proceedings,' must not be broken except where there is a compelling necessity.")

89 Fed. R. Civ. P. 30(b) authorizes a court to order "that secret processes, developments, or research need not be disclosed, . . ." See 4 Moore, Federal Practice § 26.22[3], at 1087, ¶ 34.15, at 2468-9 (2d ed. 1950); see also Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1017-18 (1961). In connection with the authority in Fed. R. Civ. P. 30(b) to order "that the examination shall be held with no one present except the parties to the action and their officers or counsel," such an order would be proscribed in certain government antitrust actions by 37 Stat. 731 (1913), 15 U.S.C. § 30 (1913).


a party's contentions, or opinions and conclusions. A large number of cases have sustained such objections, though Professor Moore's criticism has done much to reverse the trend. Indiscriminate upholding of such objections tends to run counter to the Supreme Court's view that it is a function of discovery to narrow and clarify the issues.

Some theorists will say that the place for disclosure of contentions is at the pre-trial conference—not in discovery. But this merely shifts to overburdened courts a function that, in many cases, could proceed without such formal supervision. There is a growing body of decisions which wisely permit interrogatories to explore contentions, conclusions and opinions. As for depositions, when the witness is knowledgeable and speaks authoritatively for a party, examination into contentions has been held to be equally appropriate.

III. SUMMARY JUDGMENT

It is unwise to proceed with discovery in an antitrust civil suit without evaluating summary judgment potentialities. Comment has


106 4 Moore, Federal Practice, § 33.17, at 2310-12 (2d ed. 1950).


108 Developments in the Law—Discovery, 74 Harv. L. Rev. 942, 1043 (1961). In United States v. Maryland & Va. Milk Producers Ass'n, 22 F.R.D. 300, 302 (D.D.C. 1958), the court states: It is not the purpose of discovery to ascertain what arguments the opposing party intends to use in support of his contentions. Accordingly, the objections to the interrogatory are sustained. Nevertheless, the subject matter of the interrogatory may appropriately be considered at a pretrial hearing.

109 Upon the concession by counsel that the disclosures would have to be made at the pre-trial conference, the Court required plaintiff to answer defendant's interrogatories calling for contentions in United States v. Continental Can Company, 22 F.R.D. 241, 247 (S.D.N.Y. 1958), a Clayton Act, Section 7, case.


been directed at a growing reluctance of courts to grant summary judgment motions, notwithstanding continued advocacy of their utility in the disposition of the protracted case. If summary judgment is a goal, it has to be aimed at from the beginning of discovery. Counsel who wander too far from the central core of conflict, building a vast discovery record that ranges far and wide over the conceivable areas of relevancy, will be ever enlarging the burden of showing that in such a record there are no triable issues.

The Rule 56 standard for summary judgment is the absence of a "genuine issue as to any material fact." The Rule, however, does not state by what measure the court must be convinced that there is no such genuine issue. The courts unanimously place the burden of persuasion upon the movant, and the test, as formulated in the various circuits, is strict. However, there is a danger that counsel may be misled by the verbalization of the standard in selected appellate decisions. Some cases say that the "slightest doubt" as to the facts will bar the motion; others note that any and all doubts must be resolved against the movant, but the doubts, it has been stated, must be reasonable, not fanciful or speculative; and still other courts insist that the truth be

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112 See Sears, Methods of Shortening Trials, 23 F.R.D. 603-04 (1959). In United States v. Bethlehem Steel Corp. 157 F. Supp. 877, 879-80 (S.D.N.Y. 1958), the Court did "not reach the classical summary judgment question of whether there is a genuine issue as to any material fact." Rather, the Court deemed "it sound judicial administration to permit a trial for such additional evidence and clarification as may be relevant." However, it was pointed out that the Court did "not intend to suggest that the summary judgment rule is inapplicable to antitrust cases simply because of their dimension.... The Court holds only that because of the unusual features of this case a trial is warranted...." See Life Music v. Broadcast Music, 23 F.R.D. 181, 182 (S.D.N.Y. 1959).


114 See Syracuse Broadcasting Corp. v. Newhouse, 236 F.2d 522, 526-27 (2d Cir. 1956) ("The record before us is far too confused and cumbersome to warrant an affirmance on this phase of the case.")

115 Fed. R. Civ. P. 56(c), states:
The judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

116 6 Moore, Federal Practice § 56.15[3], at 2123-33 (2d ed. 1950).

117 Associated Press v. United States, 326 U.S. 1, 6 (1945) ("Rule 56 should be cautiously invoked."); Evers v. Buxbaum, 253 F.2d 356, 357 (D.C. Cir. 1958); Avrick v. Rockmont Envelope Co., 155 F.2d 558, 571 (10th Cir. 1946).

118 Peckham v. Ronrico Corp., 171 F.2d 653, 657 (1st Cir. 1948); Arnest v. Porter, 154 F.2d 464, 470-01 (2d Cir. 1946); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135-36 (2d Cir. 1945).

119 Cameron v. Vancouver Plywood Corp., 266 F.2d 535, 540 (9th Cir. 1959); Griffeth v. Utah Power & Light Co., 226 F.2d 661, 669 (9th Cir. 1955); Sarnoff v. Claglia, 165 F.2d 167, 168 (3d Cir. 1947); Toebelman v. Missouri-Kan. Pipeline Co., 130 F.2d 1016, 1018 (3d Cir. 1942).

120 Chesapeake & Ohio Ry. Co. v. International Harvester Co., 272 F.2d 139, 142 (7th Cir. 1959); Caylor v. Virden, 217 F.2d 739, 741 (8th Cir. 1955); Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951); Dewey v. Clark, 180 F.2d 766, 772 (D.C.
"quite clear"

notwithstanding, and despite the complexity that frequently attends antitrust cases, the number of summary dispositions in whole or in part of government and private antitrust claims is impressive.

In this era of search for ways and means of expediting the protracted case, the mechanism of Rule 56(d) offers another reason for extending a warmer welcome to antitrust summary judgment motions. This Rule applies to those situations where the action is not fully adjudicated upon summary judgment motion and a trial is necessary. Notwithstanding such circumstances, it provides that the court, at the hearing of the motion, "shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." The order shall then specify the facts that appear without substantial controversy; these shall be deemed established at the trial. To follow this procedure is to accomplish one of the major objectives of the pre-trial conference.


124 Baron & Holtzoff, Federal Practice and Procedure § 1231 (1953).

125 Fed. R. Civ. P. 16(1), (3); See Griffeth v. Utah Power and Light Co., 226 F.2d 661, 670 (9th Cir. 1955).
status akin to a pre-trial order under Rule 16.\textsuperscript{126}

This is not to suggest that motions can be brought under Rule 56 which merely seek either partial summary judgment of a single, indivisible claim\textsuperscript{127} or a delineation of the controverted and uncontroverted fact issues.\textsuperscript{128} Rather, for those cases where a motion for summary judgment of the entire claim is unsuccessful, there can be useful salvage if the Rule 56(d) procedure is conscientiously employed.\textsuperscript{129} To this end, local court rules may facilitate this process, such as the one recently adopted in the Southern and Eastern Districts of New York,\textsuperscript{130} which is comparable to a rule in effect for some time in the Southern District of California.\textsuperscript{131} Such rules require the movant to file a statement of the material facts as to which he contends there is no genuine issue. The other side must list those facts which are urged to be in controversy. Unless so controverted, facts set forth by the movant are deemed admitted. With such statements from counsel it should be "practicable" in most cases for the court to enter a Rule 56(d) order, narrowing the trial issues, wherever summary judgment is not rendered upon the whole case or for all the relief requested.

IV. Conclusion

The aims of the Federal Rules of Civil Procedure are a simpler practice, lower costs, speedier determinations and more effective justice. The Rules contemplate that these aims are fostered by reduction in trial "surprise." But in many antitrust cases, by reason of their factual com-


The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.

\textsuperscript{127} Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959); Coffman v. Federal Labs., Inc., 171 F.2d 94, 98 (3d Cir. 1948).


\textsuperscript{130} Gen. R. 9(g), for Southern and Eastern Districts N.Y. (effective Feb. 1, 1961).

\textsuperscript{131} S.D. Cal. R. 3(d)(2).
plexities, the reduction of "surprise" may be accomplished only at enormous expense and after protracted proceedings.

To cope with this problem, the trend is toward recognizing a flexibility in the existing procedural apparatus which it is hoped will lead to a better accommodation of antitrust suits. The need is for machinery that will yield effective issue definition to provide a background against which discovery abuse may be detected and prevented. Over-discovery must be curbed; access to truly pertinent data must be facilitated.

The effort to achieve these goals under existing Rules embraces a disciplined and conscientious approach, by both counsel and the courts, to the particular needs of each antitrust action. For counsel, there must first be an appreciation of the interrelationship of the various pre-trial procedures; and, second, a recognition of the urgent need to develop early in each case a strategy that will effectively integrate and utilize the various procedural devices for trimming the cause to its essential issues, in order to render it manageable and capable of disposition. In this process, counsel's ingenuity has led to arrangements that simplify pre-trial processes and avoid some of the formalisms of the Rules. For the courts, there must be an equally imaginative approach, through pre-trial conference or otherwise, which encourages voluntary adoption of expeditious procedures. At the same time, courts must stand firm against excessive, unnecessary discovery while employing equal vigor to assure that no relevant matter is concealed.

Not every antitrust action is of such magnitude as to place a strain upon the normal workings of the Federal Rules, nor does every "big case" have an antitrust background. However, there is increasing recognition that most antitrust cases have a potential dimension that distinguishes them from the preponderance of federal actions, and that justifies a somewhat different treatment. True, the Federal Rules do not prescribe special procedures for such cases. For that very reason, however, there must be continued effort to utilize the flexibility inherent in the Rules to foster a procedural environment for the potentially protracted case in which the salutary aims of those Rules may be achieved.