1976

The Antibiotics Class Actions

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Charles W. Wolfram

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The Antibiotics Class Actions

Charles W. Wolfram*

I. INTRODUCTION

Anyone interested in the current doings of the antibiotics antitrust litigation in the spring of 1975¹ could easily have found seating in the public section of the courtroom of Judge Miles A. Lord in Minneapolis. An instantly striking aspect of the courtroom was that, in contrast to the scattering of young attorneys and an occasional curious onlooker in the public section, there were dozens of people crowded into the area around the central raised bench on which Judge Lord sits. Several attorneys represent the defendants—five of the major drug manufacturing companies in the United States. Numerous counsel for the plaintiffs were grouped around a large table to Judge Lord's right. Clerks, court reporters, and marshals sat beneath the bench. The most remarkable feature of the crowd, however, was the presence of two jury boxes containing two separate juries. In fact, two different trials in six different cases were proceeding at once. "Jury One" was hearing evidence in

*Professor of Law, University of Minnesota; Affiliated Scholar, American Bar Foundation. I wish to express my gratitude to Stephen D. Alexander, who served as my research assistant and collected much of the material upon which this article is based. Research was made possible through the Class Action Project of the American Bar Foundation under the general supervision of Professor G. William Foster, Jr., of the University of Wisconsin. Work during the summer of 1973 was made possible by a grant from the University of Minnesota Law Alumni Association.

From 1962 to 1964 I was an associate in the Washington law firm of Covington and Burling. During 1962 I was assigned by the firm to supervise a file search in the Kalamazoo offices of a pharmaceutical manufacturing client, the Upjohn Company. The file search involved a phase of the antibiotics litigation analyzed herein. My limited role in the file search did not permit me to form any judgment about the substantive allegations of any antitrust violations. Covington and Burling attorneys continue to represent the Upjohn Company in pending antibiotics litigation. I am no longer associated either with the law firm or with the client. My participation in the ABF Class Action Project was undertaken after communicating with the firm and on the understanding that interests of the client would not be prejudiced by the former representation.

1. The present article is based on data collected through May 1975, except where otherwise noted. A fuller account of the antibiotics class action, to its end, must await further research and will, it is hoped, be the subject of future publications.

actions brought by the United States, two national classes (one of insurance companies and the other of union health and welfare funds), and a California medical group. "Jury Two" was hearing evidence in suits brought in behalf of competitors of the defendant drug companies. For the most part, the juries were hearing evidence common to both sets of cases. When evidence was introduced that was relevant to only one set of cases, the other jury would be excused.

The innovation of double juries is only one of several remarkable developments in the ongoing history of the antibiotics litigation. This saga of litigation about the prices of antibiotic drugs now stretches over a period only one year short of a quarter-century. The history of the litigation has left a trail of long dockets, appellate intervention, criminal and civil trials, agency adjudication and congressional investigations, millions of dollars in settlements of civil claims, enormous fortunes for a few plaintiffs' attorneys, and handsome and seemingly endless fees for many defense attorneys. The end is not clearly in sight. It was originally hoped that the cases being tried to the double jury would be disposed of by early 1976. Speculation in the fall of 1975 is that the end will more likely come many months later. Nonetheless, it is possible at this juncture to discern and comment on some procedural aspects of the antibiotics litigation.

I have tried here to arrange the elements in the antibiotics litigation into an understandable narrative primarily to examine the uses to which the class action device has been put. I trace the earlier administrative and criminal proceedings against the defendants, then examine the filings of civil damage actions and settlements that to date have resulted in the payment of more than \$192 million to enormous classes of plaintiffs. I pay particular attention to how the class actions were generated, formed, and certified; the notification of class members; the filing of claims by consumer class members; and throughout, the behavior and compensation of the plaintiffs' attorneys. Because two active class actions are pending, it is not now possible to assert definitive statements about every one of these aspects. Most important, the ongoing litigation is being conducted by many attorneys who were engaged in earlier stages but whose present role precludes extensive discussion. A fuller picture must await a later report.

II. ANTIBIOTICS: THE BEGINNINGS

From the discovery of the "wonder drug" sulfonamide in the mid-1930s, one of the major advances of modern medical research has been the discovery of ways to fight disease through medication. In part

this reflects a growing conviction on the part of the business managers in the extremely lucrative drug manufacturing industry that large profits are a product of research and development of new, and patentable, medical discoveries. Both university-based research and company laboratories have generated the sulfa drugs, steroids, antihistamines, tranquilizers, synthetic vitamins, vaccines for most common children's diseases, as well as penicillin, tetracycline, and the other antibiotics.

Antibiotics are a principal grouping of medications that are highly effective against infections.² The basic antibiotics are produced by living microscopic organisms in fermentation vats. The discovery of new kinds of antibiotics involves the laborious process of growing new base microorganisms in a nutritive broth and testing the resulting mold for new healing substances. The object of the search since the 1930s has been to find new antibiotic drugs with two characteristics—the ability to destroy a broader range of harmful bacteria and the absence of deleterious side-effects to the body. Intensive research in the mid-1940s and into the early 1950s produced a series of such drugs—all useful for certain specific infections but some more effective for a greater array of infections. The new antibacterial agents could be grouped into two rough categories: the drugs (such as penicillin) that were effective against very specific families of bacteria but of limited value even for closely related bacterial classes; and agents that were destructive of a broad range of bacteria—the “broad spectrum antibiotics.” This latter group includes, most importantly, the family of five *tetracycline* drugs—tetracycline hydrochloride (usually called simply “tetracycline”), chlortetracycline, oxytetracycline, minocycline, and dosycycline. These drugs have accounted for most of the sales of broad spectrum antibiotics since the discovery of tetracycline in the early 1950s.

Tetracycline can be manufactured as a by-product of the process through which a previously discovered antibiotic, chlortetracycline, is produced. Chlortetracycline (under the name “aureomycin”) was first discovered and patented in 1949 by the American Cyanamid Company. Tetracycline, however, was discovered in 1952 by a scientist at a competing drug manufacturer, Chas. Pfizer and Company. One legal question this discovery evoked was whether tetracycline was patentable in itself, given the fact that it might be regarded as a natural product of a previously patented substance. If the tetracycline process could be

2. Among the diseases and infections for which antibiotics in their present state of development are useful are tuberculosis, rheumatic fever, bacterial pneumonia, endocarditis, bacterial meningitis, enteric infections, urinary tract infections, syphilis and gonorrhea, osteomyelitis, septic arthritis, and forms of streptococcal infection.

patented, then neither Cyanamid nor Pfizer could produce and sell tetracycline without violating the other company's patent.

The discovery of tetracycline produced a series of meetings and lawsuits between the two corporations over a period of years. The positions of the companies were later complicated by a claim asserted by a third drug manufacturer, the Bristol-Myers Company, that it had a right to produce tetracycline under its own patents. The three corporations resolved this conflict with an agreement that provided, in effect, that all lawsuits would be dismissed, that it would be acknowledged that Pfizer has priority in the discovery of tetracycline and thus would receive the patent on tetracycline (the "Conover patent"), and that Pfizer in return would license both American Cyanamid and Bristol to produce and sell tetracycline. Later, licensing agreements were also entered into with the Squibb-Beechnut Company (then a subsidiary of the Olin Mathieson Chemical Corporation) and the Upjohn Company permitting them to market under their own product names tetracycline that had been produced in bulk by Bristol. The last steps to this agreement were worked out in December 1955.

The beginning of broader legal difficulties for the five companies, however, predates the end of their difficulties among themselves. In 1951 the Federal Trade Commission began an investigation of Pfizer's pricing practices in marketing its "Terramycin" brand of oxytetracycline, an early broad spectrum antibiotic. The drug, which had been on the market a year when the investigation began, had been extensively promoted and sold at the then very high price of \$8.40 per hundred-capsule bottle. Pfizer provided extensive documentary material to the FTC in response to its requests. The FTC broadened its investigation in 1953 to include the pricing of all antibiotic drugs. Many more companies, including Cyanamid, Bristol, Squibb, and Upjohn, were brought into the investigation. Finally, in June 1968, the FTC issued its 360-page *Economic Report on Antibiotics Manufacture*.

Then, on July 28, 1968, the Federal Trade Commission issued a complaint charging Pfizer, Cyanamid, Bristol, Squibb, and Upjohn with three violations of the Federal Trade Commission Act: (1) that Pfizer had secured issuance of the Conover patent on tetracycline by fraud on the Patent Office and despite the fact that the drug was not patentable; (2) that all five defendants were parties to a conspiracy to benefit from the known fraud on the Patent Office and from the use of the patent protection on a known unpatentable drug; and (3) that by conspiracy the five defendants fixed prices and kept competitors from the market, monopolizing the market for broad spectrum antibiotics.

While the FTC proceedings were pending in 1959 and 1960 the

highly publicized Kefauver investigation of the drug industry was undertaken by Senator Estes Kefauver, chairman of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary. One focus of the investigation was antibiotics. After the examination of extensive documentary evidence and six days of nationally televised hearings, the Kefauver subcommittee in May 1961 made to its parent committee a highly critical report on administered prices in the drug industry.³

The FTC hearings on the 1958 complaint against the five antibiotics manufacturers continued during the Kefauver investigation. The FTC hearings lasted 86 days between January 1959 and February 1960 and produced 17,000 pages of testimony and exhibits. Shortly after the Kefauver report was issued, and in marked contrast to it, the FTC hearing examiner in the case issued a decision that completely exonerated the defendants on all the charges.

But the hearing examiner was reversed by the full commission on review of the hearing record. The commission held that Pfizer and Cynamid had committed fraud on the Patent Office and that the five defendants had conspired to fix prices for tetracycline. On subsequent petition for review to the Court of Appeals for the Sixth Circuit, the court vacated the commission's findings on the ground that serious procedural defects had tainted the commission's determinations. Further hearings were held in the FTC before a different hearing examiner. A finding was made, again, of fraud on the Patent Office by Pfizer and Cyanamid. The full commission, in September 1967, upheld this finding but, by a split vote, did not find that there had been a conspiracy to fix prices. Bristol, Squibb, and Upjohn were accordingly dismissed from the proceeding. The Sixth Circuit affirmed on September 30, 1968, on the narrow ground that there was substantial evidence to support the finding of misrepresentation before the Patent Office, but refused to pass on the question of the validity of the tetracycline patent itself. The court therefore affirmed the order of the commission requiring Pfizer and Cyanamid to license competitors to manufacture tetracycline for a fee of not more than 2½ percent of net sales.

Meanwhile, shortly after the issuance of the Kefauver report, a federal grand jury in the Southern District of New York handed down an indictment on August 17, 1961, charging criminal violations of the antitrust laws against defendants Pfizer, Cyanamid, Bristol, and certain named individuals who were officials of these three corporations.

3. Senate Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, Report, Administered Prices: Drugs, S. Rep. No. 448, 87th Cong., 1st Sess. (1961).

Squibb and Upjohn were named as unindicted co-conspirators. The indictment charged restraint of trade and monopolization in broad spectrum antibiotics. The particular acts charged were similar to the charges that had been filed three years previously by the Federal Trade Commission. After a trial to a jury before Judge Marvin Frankel of the Southern District, a verdict was returned on December 29, 1967, finding the defendants guilty on all counts. An appeal was taken immediately.

III. THE DAMAGE ACTIONS—CONSOLIDATION IN NEW YORK

The FTC proceedings and the indictment raised a number of questions about the validity of the Conover patent on tetracycline. It is not surprising, therefore, that Pfizer found itself frequently involved in litigation in defense of its patents. The first of these suits had been filed by Pfizer against Cyanamid and was settled as part of the larger agreement involving the Conover patent. But other suits followed, including one filed in the Southern District of New York on June 4, 1964, against the City of New York, charging that the city's purchases of certain Italian-made antibiotics infringed the Conover patent. (A separate chapter of the legal history of the antibiotics industry is the series of legal battles fought over the theft by former employees of antibiotics samples from some of the defendants in the 1950s and the emergence in foreign countries, particularly Italy, of competing sources of antibiotics not subject to the direct effects of United States patent laws.)

The City of New York filed an answer on July 1, 1964. It denied the allegation of patent infringement and asserted a counterclaim that recited word for word the allegations of the indictment for antitrust violations that had been filed against the defendants three years previously. Named as additional parties to the counterclaim were Cyanamid, Bristol, Squibb, and Upjohn. The counterclaim claimed treble damages under the provisions of the federal antitrust laws against each of the defendants to the counterclaim. In the intervening three years until the December 1967 jury verdict of guilty in the criminal antitrust action, three other actions were filed claiming treble damages for the same alleged antitrust violations. Two of the three actions requested relief in behalf of the suing plaintiff *and* in behalf of a class of consumers of antibiotics that allegedly were similarly situated to the plaintiffs in those cases.

The December 1967 return of the guilty verdict against the defendants in the Southern District of New York triggered nationwide filings of actions seeking the recovery of antitrust treble damages. Within a

little over a year some 140 similar actions were started; by the time the dust had settled entirely, over 160 actions would be filed. The complaints in these actions shared certain characteristics. Most used allegations copied from the original 1961 indictment in the criminal case. Many filings were handled by the same attorneys even though sometimes filed in different parts of the country (or, in the case of other attorneys, and other filings, were filed in the same federal court even though the suits were in behalf of states and other government entities from distant parts of the country). Many purported to be filed in behalf of large classes of antibiotics consumers—all retail consumers in a city or state or nationwide classes of retailers, or wholesalers, or, in a few filings, all consumers in the country. The cumulative damage requests in the individual actions were high, and none of the cases could be viewed by the defendants as trifling. Most important, the conviction in the criminal case, if it stood up on appeal, would very likely be applied as automatic, *prima facie* proof of liability in many of the civil actions.

It was also evident to the defendants that the rash of class action filings in different federal districts and circuits presented a distinct danger that different courts would reach conflicting decisions on the maintainability of class actions, including perhaps the creation of overlapping classes. Also, the class actions would be determined under the then new amendments that had significantly changed the federal rules on class actions. It would be far better to gather all the cases into one federal court where at least uniformity could be assured. There was a device ready to hand to achieve this. In the immediate aftermath of the massive filings of civil antitrust actions against General Electric and other manufacturers of heavy electrical machinery in the early 1960s, Congress had created the statutory framework to authorize the new Judicial Panel on Multidistrict Litigation to order a transfer of all similar cases to a single federal district to permit consolidated and unified pretrial decisions.

Transfer of the antibiotics civil damage cases was initiated by a motion filed with the Judicial Panel on Multidistrict Litigation on behalf of all of the defendants but Pfizer. The motion requested transfer of all the cases to the Southern District of New York, the same district in which the criminal convictions had been obtained. On its own motion, the Panel also asked the parties to consider in their briefs and arguments the transfer of the cases to a district or districts other than the Southern District. At the hearing in Washington, D.C., on September 18, 1968, all the then plaintiffs but the State of California and the municipalities of Los Angeles and San Francisco favored the transfer to the Southern District. California was handling its own case through its

attorney general. Thus, a transfer from Sacramento to New York would significantly increase expenses. Also, a problem was brewing because of the separate efforts of Los Angeles and San Francisco to assert their own claims (through different attorneys). Because state law, and state politics was involved, California would have preferred pretrial before a California federal judge.

The facts nonetheless heavily favored transfer to the Southern District. The actions that had been filed to date all involved tetracycline, which had been the basis of the government proceedings against three of the defendants in the criminal action in the Southern District. Sixteen of the 38 actions that would be immediately affected by a transfer order had originally been filed in the Southern District, far more than in any other district. The principal offices of four of the five defendants were in New York (Upjohn was in Kalamazoo, Michigan). The second case raising the damage issue (the counterclaim of the City of New York) had been filed four years previously in the Southern District. This and the 15 similar actions in the Southern District had previously been assigned to Judge Inzer B. Wyatt, who had already conducted pretrial work in those cases and was familiar with them. These cases had progressed further than cases elsewhere. Judge Wyatt and Chief Judge Sidney Sugarman of the Southern District had consented to the assignment of all the transferred cases to Judge Wyatt for consolidated pretrial preparation if the transfer were made. Partly because of work done in the New York civil actions and more importantly because of the collection of documents by the defendants and the government for the criminal trial, much material that would be useful in the civil actions was already located in New York. Also, useful evidence recorded in the criminal cases would naturally be more readily available in New York. Requests for class action determinations in several districts could create grave conflicts and confusion about coverage within classes of plaintiffs. This factor was accentuated as actions subsequently filed attempted to plead class actions in behalf of large national classes of alleged victims of the conspiracy. The actions all alleged antitrust violations similar both to each other and to the allegations in the government prosecutions in New York.

The Multidistrict Panel was persuaded that consolidation of all the transferred cases to a highly respected federal judge already familiar with the cases would expedite disposition. The Panel therefore issued an order on October 21, 1968, directing that all of the (then 23) civil damage cases from nine federal districts around the country be transferred to New York for assignment to Judge Wyatt. Supplementary orders on November 19 and November 22 transferred additional "tag-along" cases.

Even as the process of multidistrict transfer was leading to the order of October 21, 1968, other plaintiffs were filing new actions against the same defendants. The Panel issued additional orders on December 12, 1968, and January 28, 1969, directing counsel in these additional cases to show cause why their cases also should not be transferred to New York. Counsel for each of these additional plaintiffs opposed the transfer. They had carefully chosen the districts in which to file their actions (federal antitrust law is very permissive about allowing an antitrust plaintiff to select a district) and feared serious disadvantage in terms both of expense and of outcome⁴ because of the transfer. But the Panel once again found that the transfer of all related antibiotics cases to one court before one judge would provide the greatest convenience for witnesses and, in the last analysis, for all parties. The Panel also reaffirmed its opposition to having class action certification questions severed from other pretrial issues in the cases transferred to New York. The statute which permitted transfer, the Panel noted, does not authorize the transfer of only part of the pretrial issues in any case. In addition, the classes alleged in the several cases appeared to overlap at some points. Relegating the class action certification question to the several transferor districts would deprive the judge conducting consolidated pretrial of the opportunity to construct a uniform and consistent set of classes. Accordingly, on April 3, 1969, the Panel ordered that an additional ten cases from four federal districts be transferred to New York.

Among the April 3 batch of cases were four from Minnesota. One was a suit in behalf of a class of private hospitals that asserted claims very similar to, and thus clearly falling within the scope of, previously transferred cases. The Panel had no difficulty making a similar disposition, rejecting the suggestion (as it had in prior cases) that Judge Wyatt not be permitted to make class action certification orders in the case.⁵

4. Perhaps one of the most persuasive arguments against transfer away from the transferor forum was made by counsel for plaintiffs in *Lee's Prescription Shops, Inc. v. Chas. Pfizer & Co.*, which was ordered transferred to Judge Wyatt from the federal court for the Southern District of Florida. The complaint for this case asserted a right to recover because the price-fixing conspiracy violated the antitrust laws of the *State of Florida*. Resolution of questions of Florida state law thus might be bound up with the pretrial matters that might arise before Judge Wyatt. But the Panel pointed out that (a) the complaint alleged a factual basis for the state law claim identical to that alleged under the federal antitrust laws; and (b) the complaint attempted to allege a federal antitrust right of recovery in behalf of a class that purported to include all drug wholesalers and retailers in the United States. These two matters required that this case, like the others, be consolidated before a single federal judge for uniform pretrial treatment.

5. The hearing on this set of tag-along cases was in Washington, D.C., on February 28, 1969. As will be seen, the hearing thus occurred shortly after the terms of a February 6, 1969,

The other three Minnesota cases were, however, quite different from the previously transferred tetracycline cases. They asserted against the defendants for the first time⁶ claims in behalf of companies and individuals in the *agricultural* market (nonhuman consumption market, as it was sometimes called). These claims were chiefly asserted in behalf of manufacturers, sellers, and users of medicated livestock feed and animal health products. A critical difference was that the agricultural market used very little tetracycline; the principal antibiotics in the products were related compounds that, arguably, had not been involved in either the criminal prosecution in New York or in the proceedings before the FTC. Most of the antibiotics used in animal feed were contained in the mash left over after the antibiotic compound destined for human use had been extracted. The nutritious waste material, also rich in unextractable antibiotics, was a relatively inexpensive means of adding both to the diet and to the immunity of commercially raised animals. The metabolic resources of the animals thus spared from the process of fighting harmful bacteria were released to contribute to growth. From an antitrust perspective, the most important difference was that this manufacturing and market structure was quite different from the manufacture and sale in the human consumption market. Antibiotics for animal health care were also sold in dosage forms and markets quite different from the human consumption market.

While it was not, of course, argued to the Multidistrict Panel, an additional reason for resisting transfer of these agricultural cases from Minnesota was strategic. The cases had been assigned in the District of Minnesota to Judge Miles A. Lord, a former attorney general of the state who was well known locally as a very good judge for plaintiffs in litigation against big business. But the Panel was convinced that the agricultural cases were sufficiently related to the human consumption cases to warrant consolidating them with the others before Judge Wyatt. At least, the Panel believed, there were common questions of fact as to an alleged general conspiracy to fix prices of antibiotics. In recognition

"global" settlement offer of \$100 million had been communicated to attorneys for the various plaintiffs. By then it must have been obvious to many plaintiffs' attorneys that the terms on which their client, or the class it purported to represent, would be permitted to assert a claim against the settlement would depend heavily on the kind of class action certification that was approved by Judge Wyatt. Apparently, many attorneys would have much preferred to have their personally chosen federal judges decide this critical issue.

6. One of the cases transferred from the Southern District of California by the order of October 21 was *Bidart Bros. v. Chas. Pfizer & Co.* It had been brought as a class action in behalf of all raisers of livestock in California with respect to their purchases of livestock feed containing antibiotics. The differences between this case and the human consumption cases had not been noted at that time. After transfer the *Bidart Bros.* case was dismissed voluntarily by the plaintiff.

of the fact that there might be notable differences, the Panel stated in its opinion ordering transfer to Judge Wyatt that it might be appropriate for Judge Wyatt to remand these cases to Minnesota for trial when common discovery had been completed.

As it became obvious that a continuing tide of both human consumption and farm cases would be filed in districts all over the country, the Judicial Panel entered a conditional transfer order providing for the clerical transfer of any new case to the Southern District. Only if counsel in one of the automatically transferred cases objected would the Panel order a hearing. Under this procedure approximately 75 actions were transferred to New York during 1969. By the time the last case was filed, a total of approximately 160 cases seeking antitrust damage recoveries would either be transferred to or originally filed in the Southern District.

IV. NEGOTIATIONS FOR A "GLOBAL" SETTLEMENT

The flood of cases continued to funnel into the Southern District. The cases claimed damages for alleged antitrust injury to plaintiffs that were situated at all points along the chain of distribution of antibiotics. Alleged potential competitors claimed that the patent conspiracy found by the Federal Trade Commission had prevented their entry into the broad spectrum antibiotics market. Purchasers of all kinds and at all points of distribution alleged that the patent conspiracy, and the price conspiracy that the criminal case jury in the Southern District had found, had raised the price of broad spectrum antibiotics. The purchasers included the drug wholesalers and retailers that had purchased antibiotics directly from the defendants; but there were many more. Most significantly, a number of states had filed actions alleging that they and their subentities such as cities, counties, and hospital districts had paid inflated prices for antibiotics purchased for use in public hospitals and clinics. The state claims would later come to be known as the "CCS" claims (the "city, county, state" claims). They were paralleled by the federal government claims for purchases made for federally funded programs. In addition, several of the states and other government units purported to assert claims in behalf of all the residents of the state that had purchased broad spectrum antibiotics in the retail prescription market. Private hospitals had filed suit. Health and welfare funds of unions and similar groups claimed that they had borne special damages because of the higher cost of their reimbursement of patients who had received antibiotics. Finally, there were the claims of the agricultural purchasers. All in all, the specter loomed of a ruinously monstrous collection of lawsuits.

Several imponderables faced the defendants. They had seen a "dress rehearsal" of the civil trials come to a potentially disastrous pass in the return of the guilty verdict in the criminal cases. Several courts around the country were entering class action orders in other kinds of cases, the logic of which, if carried a bit further, would possibly permit all the several suits to band together into a unified structure that would develop a momentum that no scattering of individual suits could. The companies had been battling the charge of price-fixing for over 17 years since the announcement of the original FTC investigation in 1951. Continuation of the damage suits would hold before the public view a picture of the drug companies as grasping and superrich—an image that would not sit very well with companies whose continued high profits must rely on wide public acceptance of the humane goals of the corporations. Moreover, many (although not all) of the plaintiffs, even government entities, were represented by private attorneys, whose only compensation would be the contingent fees that they would collect in the event of a recovery.

A time-honored litigating tactic for a defendant encircled by multiple claimants is to weaken the total force of the attack little by little. The defendant first enters into settlements with the strongest of the plaintiffs. Then it faces the remaining plaintiffs, now isolated and abandoned, with the threat of long and lonely litigation to force a final round of settlements at terms favorable to the defendants. Secrecy is important to prevent plaintiffs who have been left out of the initial negotiations from counteracting the settlement efforts. The difficulty with pursuing such a tactic in the antibiotics cases, however, was that any settlement with the many plaintiffs who were asserting claims in behalf of a *class* had to be approved by the court before it would become effective. As part of the required approval process, notice must be given to the members of the class, and a public hearing held. Under these circumstances, it would be impossible to negotiate a legally binding settlement without alerting all other plaintiffs to the existence of the settlement offer. At the same time, it would do the defendants no good to persuade the particular plaintiffs facing them to drop their allegations of class representation in order to achieve a private settlement. Even if this were successful, other plaintiffs were filing actions in a steady stream, and there would be little chance of preventing all major class action allegations by settlements.

Given these tactical realities, the object of any settlement should be to encourage the greatest possible coverage, not to isolate plaintiffs. For this purpose the class action allegations could be presented to the court for approval along with other parts of a total settlement. In this

way the defendants would receive the umbrella protection of a settlement that would cover every possible member of the class. It was possible that the courts might permit some sort of class action proceeding against the defendants if they continued to litigate. It would be far better to strike preemptively before the mass of claimants had become further unified in their efforts and while uncertainty in class action law still worked in favor of the defendants.

For all these reasons, the defendants agreed that the wisest strategy would be to nip the burgeoning civil damage actions in the bud. They would try to reach an early agreement on a very attractive settlement of *all* of the cases. The negotiations would be conducted with the attorneys who thus far had the most time committed to their cases—primarily those whose cases had been initiated in the Southern District in 1964. If these attorneys, with their experience and general reputation, agreed to a settlement, the incipient damage action crusade would be deprived of its most effective leadership. The prospect of quick and lucrative return on contingent fee arrangements would be enough, it was hoped, to entice the latecomers among the attorneys to support the settlement.

There seemed to be obvious groups among the plaintiffs with whom to begin negotiations on settlement. The plaintiffs to date had done little independent pretrial discovery. Most seemed to be riding the coattails of the criminal action and the FTC proceeding. The plaintiffs with the strongest claims were the CCS entities, which had purchased antibiotics directly from the defendants without reselling them. Claims asserted by the CCS plaintiffs in behalf of individual consumers were more remote from the alleged antitrust conspiracy but nonetheless would have to be included in any settlement if only because the states could not politically accept a settlement that entirely excluded individual consumers. The private hospitals (and to a lesser extent the Blue Cross plan plaintiffs) also had claims with a firm legal basis. Finally, the drug wholesaler-retailers also had arguable claims; in any event they were direct and continuing customers of the defendants and could not be ignored in a settlement. On the other hand, the agricultural claims pretty clearly fell outside the reach of either the criminal case verdict or the FTC order and thus could be ignored; prosecution of their cases would require them to begin almost at the beginning to develop the evidence necessary to convince the defendants that their suits were a serious threat. And this, the defendants believed, the agricultural plaintiffs were not prepared to do.

The CCS plaintiffs, the private hospitals and Blue Cross plans, and the drug wholesalers and retailers would, then, be the groups that the

defendants would first attempt to attract to a settlement. The others, they believed, would be willing to pick up the scraps once the most substantial claims were committed to a settlement.

The remaining question for the defendants was which attorneys to approach, and how they should be approached. It was agreed that the negotiations would proceed on two fronts. On one, an effort would be made to deal with the CCS plaintiffs and the wholesaler-retailers. On the second, the defendants would deal with attorney Harold E. Kohn of Philadelphia, who had as CCS clients only two cities but who had alleged on behalf of a private hospital client a nationwide class action in behalf of all private hospitals. Initial contact was made in February of 1968, and for months negotiations were carried on with the two plaintiff groups. At the beginning the negotiations were carried on separately.

Negotiating on behalf of the defendants were attorneys representing the two largest defendants—Cyanamid and Pfizer. Roy W. McDonald, for Cyanamid, was a partner in the New York firm of Donovan, Leisure, Newton and Irvine. Representing Pfizer was attorney Charles E. Stewart, Jr., of Dewey, Ballantine, Bushby, Palmer and Wood in New York. Both were veterans of the litigation wars in which the companies had been engaged since 1951, having most recently represented the companies in the battle in the FTC and in the criminal case in the Southern District.

A figure who would have to be included in any group of attorneys representing CCS plaintiffs was David I. Shapiro, of Dickstein, Shapiro and Galligan in New York. Shapiro had been litigating the New York City counterclaim against the defendants for almost four years; from the beginning he was the dominant plaintiff attorney. He was assisted by his partner Arthur J. Galligan. In addition to the City of New York, Shapiro and Galligan represented the named plaintiffs in 19 other CCS actions—all alleged as class actions. Lee A. Freeman, of Chicago, represented plaintiffs in 9 CCS actions. Attorney Perry Goldberg, of the Chicago firm of Friedman, Koven, Shapiro, Salzman, Koenigsberg, Specks and Homer, represented 8 CCS plaintiffs. In addition, wholesalers and retailers were represented principally by the Schwartz and Alschuler firm of Beverly Hills, California, which had initiated claims (actually counterclaims) in California in 1967 in response to a patent infringement suit by Pfizer. Harold E. Kohn also had filed a suit in behalf of a national retailer class.

None of the negotiators in behalf of the CCS plaintiffs were state attorneys general, even though several attorneys general were either nominally of counsel or appeared on the record as co-counsel. State

attorneys general were at this time the sole nominal attorneys of record in only three CCS actions. The fact that private attorneys controlled the important stages during which the entire New York settlement was being shaped is not peculiar to this phase of the case. Throughout the antibiotics damage litigation, private counsel have taken the lead on almost every issue, with counsel from the office of the attorney general of California virtually the sole exception.

By September 1968 the negotiations with the Shapiro group of CCS plaintiffs and those with Mr. Kohn in behalf of the private hospitals had been brought together. Between October 15 and the following February 1, there were 15 to 18 meetings between the defendants' negotiators and some or all of the plaintiffs' lawyers involved in the negotiations.

The negotiations were themselves subject to a series of legal developments that affected the chances of success of the contending sides. By the end of 1968 the negotiators could pick out the following elements.

In December 1967 the defendants had been found guilty by a jury in the Southern District of New York on three counts of violating sections 1 and 2 of the Sherman Act. If these convictions withstood appellate attack, they would indisputably be treated as *prima facie* evidence of violations of the antitrust laws and thus would establish liability in the majority of the civil actions already filed. The defendants had appealed both the conviction and the February 1968 denial by the trial court of their motion to dismiss the prosecution because of prejudicial pretrial publicity. The outcome of the appeals was problematical and would not be known until the spring of 1970. In September 1968 the Sixth Circuit had affirmed the FTC's finding of a year earlier that the principal two defendants, Pfizer and Cyanamid, had committed fraud on the Patent Office in obtaining the patent on tetracycline. The chances of obtaining Supreme Court review of the Sixth Circuit holding were low. The decision was hardly "cert-worthy." It consisted of little more than a finding of factual sufficiency on a long and tedious record. While the defendants disputed whether the Sixth Circuit finding would be *prima facie* evidence of misconduct in the civil actions (a position that eventually was upheld as to later civil actions by Judge Lord in 1971), it doubtless added a very worrisome weight.

Meanwhile, the pending appeals from the convictions in the Sherman Act cases kept pressure on the plaintiffs to accept a settlement while they still had the arguing point that the convictions supplied. The plaintiffs had additional reasons for settling. If the criminal convictions were upheld on appeal, it would aid the civil litigants substantially by

establishing an antitrust violation. But a series of procedural obstacles might then bar the way to recovery of damages.

A basic problem was whether the CCS entities could assert claims in behalf of their resident consumers. Two theories were relied upon. First, some states were asserting claims in behalf of their resident consumers under the doctrine of *parens patriae*—a notion that a state could assert claims in behalf of residents much as a parent could assert claims for a child. A second theory was a class action theory: the states and other government entities were themselves consumers of antibiotics when they paid for antibiotics purchases at retail in behalf of welfare recipients. The problem with the *parens patriae* theory was that it had not been well received by the federal courts. Its advantage would be that its acceptance would permit the plaintiff states to offer proof of damage to consumers and to the state's economy through statistical or similar methods that would obviate the need to prove individual claims. Even here, however, the states would be required to accumulate much more factual data than they possessed to demonstrate the extent of injury. If the states were required to litigate as class representatives under the federal rules, serious—perhaps insurmountable—problems of management of the class actions would result. First, the defendants insisted that every consumer be notified of the states' attempts to represent their interests in litigation—a process that would be very expensive. Second, they insisted that each of the potential millions of consumer claimants be required to present proof of damages individually. However, if the states could convince the court of the merits of a "class" or "fluid" theory of damages, they would be permitted to prove injury to consumers by showing generalized statistical information (*e.g.*, the average consumer purchase or data concerning total retail prescription sales for a particular year). But the concept of a "class"—or fluid—theory of damages was essentially untried in the federal courts. Tempering some of the concern that this caused the plaintiff groups was the decision of the Second Circuit in March 1968 in the *Eisen II* case.⁷ The court's opinion and result seemed broadly favorable to the maintenance of consumer class actions.

7. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). The opinion by Judge Medina very expansively encouraged the lower courts to attempt innovative and experimental solutions to the procedural problems that confronted consumers or consumer groups attempting to maintain class actions of millions of members. Five years later the same Second Circuit reversed its attitude dramatically in the *Eisen III* decision in which serious obstacles were placed in the way of consumer class actions. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *rehearing en banc denied*, 479 F.2d 1020 (2d Cir. 1973). The Supreme Court agreed with the second decision of the court that federal rule 23 required that individual notice be sent to each member of the class, even if the class were composed of millions of consumers, before the class

A compelling financial consideration for all the plaintiffs was that none of them had undertaken—separately or cooperatively—any detailed and extensive discovery on issues of damages. The complex economics of the alleged antitrust violations had been essentially untouched. If a substantial settlement could be obtained without the enormous investment that this would entail, the plaintiffs would be financially far ahead. A related consideration was the matter of contingent fees. Several of the plaintiffs' attorneys had contingent fee arrangements with plaintiffs. Also, while some of the attorneys had arranged for client advances to carry the costs of litigation, others had agreed to bear personally most of the financial brunt of litigation (at least pending settlement). Even for those attorneys whose own resources were not directly involved in the action, the expenses of a law office could be met only by the proceeds of a contingent fee recovery. Once negotiations suggested the possibility of a settlement by the defendants, the incentives must have been great to cash in promptly before the financial strain had become too great on what were predominantly rather small law firms.

A troublesome issue of substantive law hung over some of the plaintiffs. In June 1968 the United States Supreme Court had decided *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 392 U.S. 481. The Court held unanimously that a plaintiff manufacturer who had purchased machinery from the defendant at a price inflated because of an antitrust violation could recover damages measured by the illegal overcharge even though the plaintiff may have "passed on" the increased cost to the ultimate purchasers of its products through higher prices. The Court had based its decision on two factors. First, proof that the purchaser-plaintiff had passed on some part of its damages and ascertainment of the extent of the passing on would be difficult and time consuming. But, the Court hinted—darkly for many of the antibiotics class representatives—a plaintiff who had passed on the overcharge under a fixed-markup arrangement might not be able to recover. Second, the Court noted that under the theory of the defendant in that case the actually injured persons were the ultimate purchasers of shoes; but these persons were not suing and as a practical matter were unlikely to sue. The Court thus believed that the policy of encouraging enforcement of the antitrust laws through private treble damage actions would be best fulfilled by letting the purchasing manufacturer recover even

could be certified. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). In 1968 these unfavorable developments lay far ahead, however. For the moment the early trend of decisions after the 1966 amendments to the Federal Rules seemed to be running rather strongly in favor of the plaintiffs.

though this might result in a windfall to it. *Hanover Shoe*, as the decision was called, created uncertainty for both sides in the antibiotics litigation.

The plaintiffs most severely affected by the *Hanover Shoe* decision were the middlemen, the drug wholesalers and retailers. There was strong evidence that druggists particularly were unaffected by price changes. Although the druggists would always deny it, evidence was accumulating that druggists applied a standard markup to drug purchases and, therefore, far from being injured by the elevated antibiotics prices, they in fact likely profited from them. Proof of such "passing on" was easier for the drug defendants (at least in the human consumption market) than it had been for the defendant in the *Hanover Shoe* case. The antibiotic products typically were sold to the ultimate consumers in the same bottles in which the products had been packed by the defendant manufacturers. Thus it would be relatively easy to trace any passed on price increase.

The CCS plaintiffs were most favorably affected by implications of the *Hanover Shoe* decision. They typically were seeking to recover for direct purchases for which they had, by and large, retained the records necessary for proof of damages. Because they had in many cases made direct purchases from the defendants and distributed the drugs without charge through welfare programs or through government-operated hospitals that often did not charge separately for drugs, they would not be subject to the "passing on" problems that *Hanover Shoe* portended for other middlemen. Moreover, the claims were quite large in comparison with the consumer claims that many of the states were also pushing. The CCS "classes" were in each case well within what other recent decisions had permitted for purposes of certification as class actions. Thus, questions of manageability and superiority of the class action device for the CCS governmental entities would not pose substantial problems.

A stumbling block to settlement was the potential clash between the claims of the CCS entities in behalf of ultimate consumers and the claims of the drug wholesalers and retailers. The claims obviously overlapped, and the defendants could argue that they were the same. The recoveries of either group remained very much in doubt because of uncertainty over how the courts would resolve the issue of the standing of the CCS entities to assert claims in behalf of consumers and the "passing on" issue of *Hanover Shoe*. Defendants had already filed motions to dismiss the claims of the consumers based on (a) lack of an adequate legal basis for the *parens patriae* theories; and (b) unmanageability of the actions under the class actions theories. Motions had also

been filed to dismiss the claims of the wholesalers and retailers on the basis of the *Hanover Shoe* “passing on” defense.

Had the court accepted the defense arguments against both sets of plaintiffs, the result would have been that neither group could have recovered. But judicial acceptance of this “whipsaw” position was extremely unlikely, particularly given the Supreme Court’s rather pointed language in *Hanover Shoe* supporting the social policy of enforcement of the antitrust laws through private treble damage actions. The more realistic problem was that a settlement by the defendants with only one set of plaintiffs—either the CCS plaintiffs with regard to consumer claims or the drug wholesaler-retailers—would expose the defendants to a later holding that the defendants had settled with the group that did not in fact have the right to assert the claims.

From the defendants’ point of view, the solution to these problems would be to get the two principal contending groups—the CCS plaintiffs representing resident consumers and the drug wholesalers and retailers—to agree to a common settlement that would be binding on the defendants only if the court approved it for both groups. The settlement fund would have to be large enough to encourage representatives of each group to make the compromises that each would be required to make to gain the acquiescence of the other. The defendants relied on two elements: (1) a “global” concept behind the settlement offer that required its acceptance by all the claimants (other than private hospitals and Blue Cross plans, which were being negotiated with separately); and (2) an amount—\$100 million in cash—that would provide significant incentive to the chief plaintiffs to accept the settlement offer.

V. CCS \$100 MILLION SETTLEMENT

A. Terms of the Original Offer of Settlement

A formal offer of settlement in writing was presented by the five defendants on February 6, 1969, and was amended by mutual consent on May 9, 1969. The written offer contained a number of features. Most significantly, the offer of \$100 million was “global”—conditioned on acceptance by “all plaintiffs” in two broad groups: (a) the CCS plaintiffs and the CCS entities in their capacities as *parens patriae* and rule 23 class representatives in behalf of their consumers; and (b) the wholesaler-retailers. Aside from the economic incentive it supplied, another reason for tying the continuation of the offer of settlement to its acceptance by “all” these classes of plaintiffs was that not all the states had yet filed suits, and several of the states that had filed actions had not been represented by counsel in the settlement negotiations.

Also, the settlement terms would have to be approved by the “client” states of the negotiating attorneys; in most instances this meant the approval by the attorney general in each of the states.

It was also evident to the defendants that the global feature of the offer presented weighty incentives to those plaintiffs’ attorneys who had negotiated the settlement to “sell” it to nonparticipating plaintiffs and to their clients. The law was clear that an attorney who negotiated a settlement in behalf of a class would be awarded as his fee a generous portion of the entire settlement fund even if the class had not been certified at the time that tentative agreement was reached (*i.e.*, even though no member of the class but the attorney’s client had authorized or approved the attorney to negotiate the settlement). The \$100 million settlement offer afforded the attorneys for the class representatives the possibility of asserting a claim for attorney fees against an immense fund, a fund undoubtedly never approached in magnitude in the history of representational litigation. With such incentives—and presumably with the conviction that the settlement was fair—one may assume that the participating plaintiffs’ attorneys abandoned further thoughts of examining the settlement critically.

This incentive to achieve a “global” acceptance of the settlement was strengthened by a clause that permitted the defendants to elect to proceed with the settlement even if it were rejected by some plaintiffs. One maverick plaintiff holding out for special treatment would not destroy the settlement. In fact, all parties must have realized that total agreement among such a large and diverse group of plaintiffs was unlikely. At the least, however, the threat of bringing down the entire settlement by obstinance probably was useful in bringing dissenters into line in the harried 30-day period of negotiating that followed the offer of settlement. The offer also provided that if the defendants elected to proceed with the plan with less than universal acceptance by plaintiffs (which in fact occurred), the fund should be reduced by the amount agreed upon by the remaining parties. (On May 9, the settlement offer was amended by a “most-favored-nation” clause that empowered the court to grant additional, equalizing relief to a settling plaintiff in the event that within two and a half years the defendants settled with a nonsettling CCS entity on more favorable terms.)

The broad terms of the offer proposed a payment of \$100 million to the CCS and wholesaler-retailer classes in exchange for a release of all claims against the defendants arising out of the alleged antitrust violations. Other terms of the settlement provided a negotiated-for procedural vehicle to assure that the release from liability would have the widest possible reach. The settlement was offered on the explicit “con-

templation" that the court would approve the creation of classes for: (1) all cities, counties, and states, to assure that all nonfederal government entities would be included; (2) consumer classes represented by each of the states or, if any state did not assert an independent claim, by a national class; and (3) a national class of all wholesalers and retailers. Procedurally, if the court accepted the class concept and approved the settlement, every person or entity that was included within one of these classes would be bound by the terms of the settlement unless they explicitly requested to be excluded from their class.

A vital feature was that the offer explicitly left to a future day the problem of allocation—who should get how much? All that was provided was a procedure: within 30 days after the latest time within which a class member could request exclusion from any class set up pursuant to the settlement, any plaintiff could submit to the court a proposal for allocating the fund. If (according to the May 9 amendment) conflicting plans were submitted, then good faith efforts were to be made to agree on a common plan, failing which the defendants could elect to proceed with one of the proffered plans. A plaintiff whose plan was rejected could, at this point, opt out of the settlement; if the number of such requests for exclusion was considered substantial by the defendants, they could abort the settlement. After the parties agreed to a plan of allocation, it would be submitted for approval to the court.

The settlement offer did not address directly the problem of the overlapping claims of consumers and wholesaler-retailers. But the provision for approval of the settlement by "all" plaintiffs prior to the tussle over allocation made it more likely that each of these groups could be attracted into the settlement mechanism. Another potential area of overlap—that between claims of CCS plaintiffs (either as representatives of other CCS entities or as consumer representatives), on the one hand, and claims of Blue Cross and similar insurers, on the other—was resolved by an indemnification agreement. The CCS entities agreed to hold in escrow for a period of two years 20 percent of the allocated funds (excluding welfare claims). These escrowed funds were to reimburse the defendants if they were forced to pay the Blue Cross insurers for overlapping claims.

In fact, the defendants simultaneously offered a settlement of \$20 million to the Blue Cross plan and private hospital plaintiffs. It was apparently negotiated entirely between the defendants and attorney Harold E. Kohn and included a side-arrangement under which Mr. Kohn's attorney fee claims would be separately reimbursed by the defendants. Every other plaintiff with claims within the scope of this settlement would reject it because it proposed an inadequate sum for

the class. But negotiations, from which Mr. Kohn was excluded, were immediately resumed and an acceptable settlement (for \$32.5 million) was eventually achieved. Thus, the CCS entities were never required to reimburse the defendants for any part of the Blue Cross claims.

The outlines of the two settlement offers—\$100 million to the CCS and wholesaler-retailer groups and \$20 million to the Blue Cross/private hospital groups—were first disclosed by Judge Wyatt at a meeting on February 3, 1969, three days before the written settlement offers were dated. The meeting took place in a locked courtroom at which a court reporter was not present and to which the press was not invited. The secrecy was to permit the parties to obtain some initial impression of the judge's reaction before the offer was made public—principally because of the likely serious effect on the stock market values of the defendants' publicly traded shares.

The avoidance of premature publicity does not adequately explain why no recording was made. Even if the participants were insufficiently trustful of the Southern District court reporters, it is strange that no one thought to tape-record the session. According to Judge Wyatt, all the "more active" plaintiff counsel were present at the secret meeting. While judges often meet "off the record" with counsel in a case, there were two factors that made the absence of a record here particularly unfortunate. First, while settlement is ordinarily a matter of private contract between the parties, class action settlements are subject to court approval. It is, therefore, regrettable that any discussion about the settlement occurred between the groups who had negotiated it (which did not by any means include all plaintiff counsel) and the judge without any record being made. Second, there was revealed to the judge at this time an utterly remarkable financial arrangement between the defendants and an attorney for a minor group of plaintiffs. On the whole, it does not appear that this arrangement had any bearing on the CCS and wholesaler-retailer settlement. It does bear heavily on the Blue Cross/private hospital settlement and will be separately considered.

B. Acceptance of the Settlement Offer

Shortly after February 6, 1969, the terms of the CCS/wholesaler-retailer settlement offer were communicated to all of the counsel for plaintiffs whose actions were within the classes set up in the offer. The offer gave plaintiffs 30 days to accept. Within that period, the offer was accepted by every state except eight—California, Hawaii, Utah, Oregon, Washington, Kansas, North Carolina, and Nevada. Nevada was the only state that had not filed an action against the defendants. In fact, it never would and was included in the settlement under a rather unique

procedural arrangement that will be discussed later. Essentially, then, only seven states refused to accept the settlement. They thought the offer was insufficient, particularly, as the states would later claim, because an insufficient amount was proposed (presumably in informal discussions at the time of the offer) to be allocated to consumer claims. These nonsettling states thus had (1) to build such a strong case that the defendants would settle within two and a half years at a higher figure and thus also pay the settling states additional damages at the higher rate (because of the most-favored-nation clause); or (2) to pursue their remedies for more than two and a half years, so that the defendants could settle free of the strictures imposed by the most-favored-nation clause. In fact, six of the seven states would not achieve a settlement until another four years of active trial preparation had transpired. One of them, North Carolina, would proceed separately and meet disaster.

Apparently the most critical difference between the accepting and the nonaccepting states was the percentage of the settlement that should be allocated to consumer claims. None of the attorneys for the nonaccepting states had been involved in the negotiations. But in the month after the offer was extended, intensive discussions were carried on between the negotiating attorneys and the attorneys for the nonaccepting states. The negotiating attorneys were preparing an allocation plan as the second step in the settlement (after acceptances and rejections were registered) that would allocate very little to consumer claims. This was justified on two grounds: (1) very little information was then available concerning the size of consumer claims in the several states; and (2) there was considerable doubt about the ability of the CCS entities, if the defendants had objected, to convince a court that a class action in behalf of consumers was a manageable class under rule 23. The seven nonaccepting states believed that extensive discovery from the defendants could provide a firm factual basis for the assertion of consumer claims of a much greater magnitude than the settling states were prepared to accept. They also believed that developments under rule 23 would make a consumer class action acceptable to the federal court.

By March it was clear that a number of states, including California with its very large CCS and consumer claims, would not accept the settlement. Nonetheless, the defendants elected to proceed with the settlement. Under the terms of the original offer, the rejections by the seven states would result in a diminution of the dollar value of the settlement of a size depending upon the amounts that would have been allocated to those plaintiffs under the plan of allocation that would

later be approved by the court. But it also was obvious that these rejections and the discontent among some plaintiffs who reluctantly acceded to the offer would make it virtually impossible to obtain agreement by all the consenting plaintiffs to the second major stage of the settlement—the uniform plan of allocation. Further negotiations among the parties still willing to live with the February 6 settlement offer resulted in a mutually agreed upon set of amendments to the original offer. The changes were dated May 9, 1969.

C. The May 9 Amendments to the Offer of Settlement

The original February offer had stated broadly that “the plaintiffs shall present to the court” a plan for allocating the global fund among the various classes and groups of plaintiffs. The May 9 amendment limited the right to submit a plan to those plaintiffs who had filed suit or intervened and had not requested exclusion from the class. This had the effect of locking accepting plaintiffs into the class action structure proposed in the settlement. If a plaintiff otherwise entitled to participate in the settlement requested exclusion from a class, that party would be precluded from proposing a distribution plan. Other than the creation of leverage on plaintiffs to accept the class action structure proposed in the settlement, it is difficult to see the purpose of this limitation.

The original offer provided that the plaintiffs were to submit a plan for the “distribution of the Fund to the various claimants and classes of claimants, including the allocation of the Fund among the claimants in classes.” This was amended to provide for a “Proposed Plan for the allocation of the Fund.” The purpose of this change was to make it clear that only the issue of allocation among classes should be addressed in any plan submitted. The defendants wished this matter to be divorced from such other potentially vexatious—but, to them, irrelevant—issues as the payment of fee claims of class attorneys, the allocation among classes of payments for distribution of the fund, and other problems of implementation. To obtain a *res judicata* obliteration of the antitrust claims of all potential plaintiffs, apparently the defendants thought that a fair lump sum settlement and a fair system for arriving at a plan of allocation would be sufficient.

The original proposal had sanguinely called for “the plaintiffs” to submit a plan of distribution and allocation. But no provision was made to cover the contingency—which in fact occurred—of conflicting plans of allocation. Despite the conflicts over allocation, apparently the different factions were not so far apart that the settlement would be rejected

in its entirety if allocation could not be agreed upon. This is reflected in the May 9 modifications, which provided in effect that "good faith" efforts should be made by the plaintiffs to resolve their differences over allocation, but if agreement were not reached, the defendants could use any one of the proposed plans or a modification thereof. If the defendants made that election, any plaintiff whose allocation under the elected plan would be less than that under its own proposal could withdraw from the settlement. No time limit, surprisingly, was imposed on such plaintiffs with regard to their right to withdraw. In fact, at least Los Angeles and San Francisco later withdrew from the settlement under this provision. If withdrawals by disaffected plaintiffs were "substantial and material," the defendants could withdraw from the settlement entirely. This potential disruption of the entire settlement must have been a powerful incentive to the plaintiffs to resolve their differences over allocation.

D. Creation of the Settlement Classes

On May 26, 1969, Judge Wyatt issued an order (the form of which had been agreed upon beforehand by the defendants and the settling plaintiffs' attorneys) to inaugurate the procedural mechanisms for the settlement and to provide notice to class members. The settlement itself covered basically three groups: (1) the CCS plaintiffs and class members—all nonfederal government entities; (2) the drug wholesalers and retailers; and (3) consumers. The order merged these three groups into two—the wholesaler-retailers and the CCS plaintiffs. From then on, the claims of consumers were to be carried entirely on the CCS vehicle.

The wholesale and retail druggists were gathered into a national class composed of all purchasers of broad spectrum antibiotics who bought for resale at wholesale or retail. All actions in behalf of class members that had already been filed were consolidated under the caption *Alpine Pharmacy, Inc. v. Chas. Pfizer & Company*. *Alpine Pharmacy* was chosen as the caption for the class action because it was first on the alphabetical list of filed wholesaler-retailer actions. The class representatives were the wholesale and retail druggists that had filed actions, apparently regardless of whether or not those actions had been designated as class actions when filed. The class was to be represented by a committee of counsel composed of the attorneys of record in the consolidated cases. The consolidation of the cases and the selection of the caption for the class action were probably of no consequence to the clients involved. The critical element was the creation of a "committee system" to permit all attorneys for class members who had already filed

actions to continue to take an active role in further proceedings. This could be justified on the ground that it provided a pool of talent to deal with legal problems that might arise in administering the settlement. More likely, the motivation was to give each attorney at least a nominal role to provide support at the end for substantial attorney fees regardless of the actual amount of work that the attorney had done. For some lawyers this arrangement doubtless meant an award of substantial fees for having done little more than file a complaint.

The CCS group included all of the states and their political subdivisions, the District of Columbia, and Puerto Rico. The order first created a "temporary" national class under the name case of *West Virginia v. Chas. Pfizer & Company*. This was an "umbrella" class consisting of every individual government entity that might be included within the CCS grouping. But, second, the order provided that a state could opt out of the national class and participate in the settlement by requesting the court to designate its separate action a class action covering the claims of CCS entities and consumers within the state. In fact, every state but Nevada had filed a separate action, and every state but Nevada later opted out of the *West Virginia* national class action. For unknown reasons, Nevada had never filed its own action, and its claims were handled out of the *West Virginia* case.

Permitting the states to opt out of the *West Virginia* national class was not remarkable, so far as procedural precedents were concerned, with regard to the claims of the state and its subdivisions. What was remarkable, however, was that the states were also empowered to "opt out" of the national class in behalf of persons for whom they clearly were asserting claims in a purely representative capacity—their resident consumers. It was only in this representational fashion that the states ended up representing their own consumers in actions and classes that were different for each state (other than Nevada). It is remarkable because at the time that the states were authorized by the order to opt their consumers out of the national class action, no state other than West Virginia had been certified to represent its consumers or any other class under rule 23. Even West Virginia's certification could be effective only after notice to class members and a hearing.

This power given to states extended far beyond procedural arrangements. California and the other six nonsettling states were empowered to reject the settlement in behalf of their consumers (and their political subdivisions), although these states were never certified as adequate representatives of their consumers for any purpose. In practical terms, this means that at no time while the \$100 million settlement offer was pending did California consumers receive notice under rule 23 of the

maintenance of a class action in their behalf, even though they were precluded by action of their class representative from participating in the settlement. This is difficult to square with the wording of rule 23. Had California and the other nonsettling states lost a judgment after rejecting the settlement without notice to consumers, it may be wondered whether the judgment might have been open to collateral attack by a consumer. For that matter, it is not entirely clear that the order that Judge Wyatt entered later delineating which interests were entitled to participate in the \$100 million settlement was not open to collateral attack on the same ground.

A similar issue arose in the State of Washington action, but the court's reaction was different. A number of Washington retail druggists objected to the wholesaler-retailer settlement after they received notice of it. At their request, the state sought to opt out of the wholesaler-retailer class all wholesalers and retailers in Washington. In its complaint, Washington had alleged what was known by class action attorneys as a "complete package" of claims—that is, CCS claims, claims in behalf of consumers, nonpublic institutions, nonhuman consumption purchasers, and wholesaler-retailers. Nonetheless, Judge Wyatt ruled that the state could not opt a statewide subclass of wholesaler-retailers out of the nationwide class. He ruled that only the class members themselves could opt out of the class. (He did allow those Washington wholesaler-retailers who had relied on the Washington attorney general's attempted withdrawal to file late claims against the wholesaler-retailer settlement fund.)

For states that opted out of *West Virginia* and proceeded with their own CCS class, Judge Wyatt's May 26 order provided that two separate subclasses would be established. One was composed of the state and all state, county, and city hospitals and other nonfederal institutions in the state that had purchased antibiotics. The second was composed of all "individual members of the consuming public" in the state who purchased antibiotics there. The state would in each case serve as the class representative.

This arrangement was complicated by the claims of political subdivisions, such as cities or counties, that had filed their own actions. The compromise was that cities that were also counties (*e.g.*, several plaintiff cities in California) could represent both the public institutions within their jurisdictions (other than state institutions) and consumers within the county. Cities that were not counties could represent only their public institutions; the consumers within those cities would be represented by the state as part of the statewide class of consumers. The rationale apparently was the belief that city-counties enjoyed a

form of “home rule” that made it more appropriate for them to represent consumers, whereas simple cities were better regarded as agents of the state. The logic of the latter position, of course, would suggest that it was most appropriate not to permit the city to maintain a separate action at all, but to force it under the umbrella of the parent state’s class action in behalf of all state entities. Two considerations argued against this. First, local politics often produced tensions between the governments and politicians of state governments and local governments that had filed their own actions. To have insisted that every city submit to the overall direction of the state in some cases would have required a wrenching rejection of political accommodations that had proved livable for other purposes of state government. Second, in every case the cities were represented by attorneys different from those who represented the states. The compromise permitted both sets of attorneys to remain in the action, and thus both sets of attorneys could share in the contingent fees. If the attorneys for the states had insisted on submission by the cities, it would only have produced strong resistance by the attorneys for the cities, including possibly an attack on the settlement itself.

Both the *Alpine Pharmacy* class and the CCS classes were created solely to deal with the settlement. If the settlement had fallen through—because of substantial rejections by class members or the like—there was no assurance that the court would have certified similar classes for active litigation. Later, however, Judge Lord entered orders that formed litigating classes in the nonsettled cases that corresponded closely to the classes that Judge Wyatt had first created.

E. Notice and Submission of Claims

Judge Wyatt’s May 26, 1969, order directed that notice be sent to the members of the settling classes as required by the federal rules. These notices would announce a hearing on the certification of the classes that had been set up for the settlement and on the fairness and adequacy of the settlement itself. Preparation of the notices took a month; they were mailed or published starting on July 1. Nominally, the notice was directed to every member of every class included in the settlement. The efforts to achieve total notice varied significantly, however, from one class to another.

Within the CCS subclasses, each of the government entities and institutions in the states (and Puerto Rico and the District of Columbia) were mailed individual notice. The addresses were supplied by each state attorney general’s office, which had canvassed eligible state entities and

institutions throughout the early stages of the litigation. The notice and copies of the settlement agreement were directed to the legal officer of the entity or institution involved and very likely achieved the purpose of notifying a responsible officer in each case.

Individual consumers in the 43 settling states were notified solely by publication. A media-placement agency in New York City placed one advertisement in every daily English and Spanish language newspaper in general circulation in each settling state. The published notice did no more than outline generally the major terms of the settlement. The audience chosen is highly significant. As no notice was given in any of the seven nonsettling states, the assumption was that no eligible claimants from the settling states resided there. This followed from the arbitrary solution to the "migration" problem (*i.e.*, some residents from the settling states doubtless had moved after purchasing antibiotics there during the period of the statute of limitations). Statistics developed in the nonsettling cases would later indicate that as many as 28 percent of a state's population were migratory during the time period covered by the settlement. This problem was dealt with in the New York settlement by keying consumer entitlement to the place of purchase. If a person now residing in a settling state had made purchases in a nonsettling state, these purchases would be disregarded. But if a person now residing in a nonsettling state had formerly made purchases in a settling state, reimbursement could be claimed for such purchases. But no separate effort was made to give notice to persons who had made eligible purchases but who now resided outside a settling state.

The consolidated national class in the *Alpine Pharmacy* case numbered some 23,000 wholesale and retail druggists. Each member was mailed notice of the hearing on the class certification and settlement offer. Addresses were obtained from a mailing list compiled by a commercial mailing firm, Clark-O'Neil, Inc., of New York. Members of the wholesaler-retailer class were not sent a copy of the offer of settlement. As with consumers, their notice simply stated that a copy of the offer of settlement could be examined in the office of the federal court clerk in New York.

The notices to the classes—CCS entities, consumers, and wholesaler-retailers—all stated that class members must file a request for exclusion from the class by August 1, 1969. This gave class members less than a month to decide whether to remain in the class. Notices of exclusion were received from 61 members of the 9,000-member CCS entity classes, from 42 individual consumers out of a potential class membership of approximately 75-100 million, and from about 1,500 members of the 23,000-member wholesaler-retailer class. The reasons (if

given) for the exclusions in the CCS entity class typically had nothing to do with the merits of the settlement. Some entities had not retained adequate records to file a claim or had not, in fact, made any purchases. Technically, the latter reason would not require the self-defined nonclass member to opt out; but opting out was both tidier and less cumbersome than remaining silent. It had been broadly reported that the wholesaler-retailer class would probably be allocated only a small percentage of the settlement fund. A high percentage of wholesaler-retailer class exclusions gave that as a reason for opting out. Some, however, were based on a lack of records or an expressed view that the defendants were being treated unfairly.

The small number of requests for exclusion caused the defendants to elect to proceed with the settlement.

The notices to the wholesaler-retailer class and to the consumer class members stated that members of each class were required to file verified claims by August 16, 1969. The notices also stated that any member of the class who did not request exclusion but who did not file a verified claim by August 16, 1969, would be barred both from claiming against the settlement fund and from bringing or participating in another action. In the case of the consumer class, such silence would be, in effect, an assignment of the consumer's claim to the attorney general of his state. The notice mailed to the wholesaler-retailer class contained an attached claim form that could be returned. The published notice to consumers contained no claim form.

The common assumption was that the great majority of the CCS entities would file claims and that the CCS portion of the settlement fund would be exhausted. It was thus assumed that some percentage share would have to be determined for distribution of the CCS portion among claimants. The same assumptions were entertained about the wholesaler-retailer portion of the settlement. But a special problem was presented with regard to consumer claims. A solicitation of consumer claims through a publication notice of the kind used in this settlement had never been attempted before. It was possible that the number and size of consumer claims submitted in response to the notice would not exhaust the consumer portion of the settlement. It would hardly do to have this undisbursed portion revert to the defendants. One solution would be to have the funds revert to the treasuries of the states. But, given the legal theory of class representation under which the states were representing consumers, it would have created too significant a conflict of economic interest to have the states benefit from the failure to distribute class funds more broadly.

The solution was to include in the published notice to consumers a

statement that failure to request exclusion or to file a claim would "constitute an authorization" to the attorney general of the state "to utilize whatever money he may recover as your representative for the benefit of the citizens of your state in such manner as the court may direct." In other words, any consumer who failed to file a claim or request exclusion would be "deemed" to have abandoned the value of the claim to whatever purpose the court would permit the state to undertake. The requirement of court approval preserved at least some elements of the pervasive notion that the court should control the class representative.

Claims were filed by approximately 38,000 individual consumers with a total of claimed purchases of antibiotics in excess of \$16.5 million. Some 4,100 members of the wholesaler-retailer class filed claims totaling \$345 million.

Several comments might be made about the notice and claims process. First, the original notice required druggists and consumers to file claims by August 16, 1969—less than six weeks after most of them would first have learned of the lawsuit and of their potential claims. The penalty for failure to file claims would be not exclusion from the class but a permanent bar from participation in the settlement even though the class member would be considered a member of the class for *res judicata* purposes. Given the short period of notice, it might have been objected that this effectually created an "opt in" arrangement, rather than the "opt out" arrangement adopted by the framers of amended rule 23. Two factors make the arrangement compatible with the spirit of the federal rules. First, as the published notice indicated, an active settlement offer had already been extended by defendants. It was reasonable to impose a time limit for the the submission of claims in order to proceed with the administration of the settlement fund. Second, the chief objection to an "opt in" requirement is that the predictable inertia of class members causes a failure to file claims that drastically reduces the size of the class. But here the failure to file a claim would not reduce the size of the class; its only certain effect would be (as stated in the published notice) to leave unclaimed consumer funds for future dispositions proposed by the class representatives and approved by the court.

A second, and more serious, question is raised by the marked difference between the forms of notice given to the CCS and druggists class members and that given consumers. The consumers were notified by publication only. The notice included nothing but a general description of the terms of the offer and no claim form was incorporated into the advertisement. The question is whether the notice to consumers was

minimally compatible with standards that the Supreme Court has insisted upon in related contexts.

Subsequent attempts to provide notice to a state's consumers in the nonsettling states' cases provide an interesting empirical comparison of different methods of notice to the same population. Los Angeles and San Francisco had originally agreed to the offer of settlement, although California had rejected it. Under Judge Wyatt's ruling setting up the tentative settlement classes, the municipalities represented all consumers within their respective jurisdictions. Later, both opted out of the settlement classes, but only after notice to consumers had been given in local newspapers. (Meanwhile, the settlement had allocated some \$2,313,645 for consumer claims in Los Angeles County and \$425,825 for claims in San Francisco County.) In response to the published notice, 541 claims with a face value of \$249,996 were filed by consumers in Los Angeles. Some 132 claims with a face value of \$37,418 were filed by consumers in San Francisco. In the subsequent settlement of the claims of states that had rejected the New York settlement a direct mail notice with an attached claim form was sent to each household in those states. As part of this process, mailed notice (together with media advertising) was directed during 1974 to each household in Los Angeles and San Francisco. The rate of return in these two counties in 1974-75 exceeds the combined rate of return in 1969 by several orders of magnitude. If the objective of notice is to permit a wide participation in a settlement fund by class members, it would seem that notice by publication as employed in the New York settlement is unsatisfactory even if minimally constitutional.

The treatment of the claims of Los Angeles and San Francisco consumers in 1969 is also noteworthy because Judge Wyatt in effect permitted a putative class representative (the California counties) to take an entire class out of the settlement without further notice to the class, even after the individual class members had received notice and 673 consumers had actually filed claims. California had strongly resisted the creation of separate classes headed by Los Angeles and San Francisco. Had the two counties participated in the \$100 million settlement, subtraction of their claims from those of the rest of the state would have reduced the consumer claims available to the state by 43 percent. When Judge Wyatt permitted the two counties to split off, the state had threatened to attack this ruling both under rule 23 and by means of mandamus actions in California state courts against the errant counties. Cooperation was achieved between the state and its counties some time after the notice to consumers was published.

F. Allocation Among Classes

From results of the notice to class members, the defendants knew that few serious objections to the general terms of the settlement offer would be raised by intervenors or present class representatives. The requests for exclusion were minimal, and their size in any one class did not present a significant threat that a "second wave" class action would be filed by members who had excluded themselves. Also, as the claims were computed, it became evident that the amount of claims did not outstrip the settlement fund that had been offered. This would emphasize to the court, when it was asked to pass final approval upon the settlement, that the total amount was reasonable.

One substantial hurdle remained: there was one additional point at which the defendants could abort the settlement. If the remaining plaintiffs in the class actions submitted conflicting plans for allocating the \$100 million and several plaintiffs withdrew from the settlement because the final allocation gave them less money than their own plan, the defendants could refuse to proceed further. The defendants realized that there was little serious likelihood of this occurring. Substantial, if informal, discussions about allocation had already occurred among the major class members, and the class members (such as the seven nonsettling states) with the strongest objections to their probable shares had already opted out of the settlement. Thus, there was good reason to believe that any jousting over allocation that might occur among class members who had submitted claims would not jeopardize the settlement.

Allocation required two major decisions: (1) how the settlement should be divided among the classes; and (2) how the share of an individual class should be allocated among class members. The parties were notified by Judge Wyatt that plans for allocation should be submitted by September 2, 1969.

Seven plans were filed by claimants by September 2. Six were filed by CCS class members, and a unitary plan was submitted by the committee of counsel in the consolidated wholesaler-retailer class. The druggists' plan provided a formula that would have allocated very little to consumer claims and a correspondingly large sum to druggists. Among the CCS groups, attorney Shapiro submitted a plan, the "Alabama Plan," in behalf of the State of Alabama, 29 other states, Puerto Rico, the District of Columbia, Chicago, New York City, Memphis, and Nashville. Different plans were also filed by Philadelphia (attorney Kohn), Vermont, and by Los Angeles and San Francisco counties prior to their withdrawal from the settlement. The several CCS plans proposed similar

divisions of the total fund among the major participating classes. They differed chiefly in their proposed schemes for allocating the total CCS recovery among the states. A number-of-hospital-beds formula was proposed by the Alabama plan and adopted by the court; the other plans argued for a division among the states based on population. For the purpose of dividing the total settlement among the CCS group and the wholesaler-retailers, however, these differences were irrelevant.

The Alabama plan proposed to allocate 50 percent (approximately \$50 million before reduction for states that had withdrawn) to the government entities. The claims submitted by the CCS class members were based on total antibiotics purchases of \$121,620,000. Thus, the Alabama plan would return approximately 40 percent of the total antibiotics prices paid by the states and their subdivisions. Second, 10 percent would go to the states to compensate them for payments they had made under "vendor reimbursement programs" of welfare assistance. This would also produce a recovery of approximately 40 percent of the total claimed purchases of \$48 million. The figure of 40 percent was arrived at in each instance by assuming an average overcharge by the defendants of $66 \frac{2}{3}$ percent, which was then reduced to 40 percent because of "uncertainties of fact and law." There was no trebling of the damages. The overcharge assumption was quite rough; there was little agreement, and less data, at this point on what the actual amount of overcharge per product per year might be. The Alabama plan proposed to allocate the remaining 40 percent of the settlement fund 37 percent to the consumer class and 3 percent to the druggist class. No calculations similar to those employed in determining the percentage of overcharge to the states were employed in calculating the damages to be allocated to the consumers. The 37 percent figure for consumers is very roughly double the \$16.5 million in claims that had been submitted by consumers following the publication of notice in July. The 3 percent figure for the druggist class seems to have been similarly plucked out of the air. Significantly, given the fact that only \$16.5 million in consumer claims had been submitted, it was clear that approval of the Alabama plan would give an additional sum of approximately the same size to the states under the "spillover" arrangement.

Of course, everyone concerned must have realized that the class of all consumers who had purchased antibiotics in the 43 settling states during the entire period of limitations must have greatly exceeded both what had been presented in claims and what had been purchased by the states. The claims of 37,000 consumers for a total of \$16.5 million assuredly was less than 1 percent of the total sales to consumers. If a system of allocation was used for consumer claims (whether filed or

not) similar to that employed for the states' own claims, it would have been roughly calculated that the consumer share of the fund should far exceed the states' claims.

What, then, justified the relatively small slice of the pie that was proposed to be allocated to consumers? The answer basically was twofold: (1) the procedural uncertainties concerning the viability of a consumer class for litigation purposes, and (2) a serious legal uncertainty—asserted by the druggists—over the standing of consumers to claim damages.

The chief procedural problem was whether a national consumer class action was a viable method of presenting claims. On the standard that the probable outcome of a contested trial—of both procedural and substantive elements—should govern the allocation of the global settlement offer, this position in mid-1969 was probably well founded. Two main problems presented themselves. First, there was the issue of notice. Some authorities argued that the class action rule required that every member of a consumer class receive individual notice because of the specific wording of rule 23 and, according to a minority, because of the dictates of the due process clause. Notice to all consumers purportedly covered by the CCS consumer claims would be much more expensive and unwieldy than the notice-by-publication system actually employed. Second, it was clear that in a contested case the defendants would take the position that damages could be ascertained for consumers only on a case-by-case basis. Here again, the problems of devising manageable systems for ascertaining damages were immense.

The major substantive problem was raised by the opposition of the druggists, who reiterated an argument already articulated by the defendants before the settlement offer was made. The druggists' plan would have allocated 60 percent of the settlement to the states—the same figure that the states were claiming—the entire remaining 40 percent (\$40 million) to druggists and nothing to consumer claims. This was consistent with the legal argument of the druggists that the *Hanover Shoe* doctrine precluded any recovery to the consumers because of their remoteness from the point at which the antitrust violations allegedly had occurred. The point threatened to undermine the entire concept of a global settlement, for without the participation of the druggists in the settlement, the defendants would be exposed to the potential of a double recovery in the event that a court should later agree with the druggists' claim that they, and not the consumers, were the injured parties.

Negotiations continued between counsel for the CCS plaintiffs and counsel for the druggists. The result was a modification of the Alabama

plan to provide that the settlement fund be placed immediately in escrow and that approximately a year's interest on the entire amount (about \$8 million) be added to the allocation for the wholesaler-retailer class. A majority (11 of 13) of attorneys in the wholesaler-retailer class committee of counsel agreed to the modification. The modification, of course, amounted to an amendment to the settlement offer and required the substantial cooperation of the defendants. Under the original offer of settlement the defendants were not obliged to pay any funds until ordered by the court, and in no event would they have been required to pay the full \$100 million because of the substantial withdrawals by the nonsettling states. (A year's interest on the nonsettling states' portion of the global amount would be in excess of \$2 million.) The defendants elected to proceed with this plan on October 20, 1969. This was an important victory for the CCS plaintiffs and, more important, for the consumers, whose claims would be recognized.

G. Approval of the Settlement

On February 24, 1970, the court directed that notice be sent to the various members of the classes that a hearing on the fairness of the proposed settlement would be held in New York on March 24, 1970. The consumer class members were to be notified of the hearing by publication in somewhat the same manner as the rule 23(c)(2) notice of certification ordered earlier. However, publication was limited to two general circulation newspapers in each state participating in the settlement. All 37,000 individual consumers who had submitted claims against the settlement were also to be mailed individual notices. As before, notice of the hearing was mailed to each CCS class member and to the members of the wholesaler-retailer class who had not requested exclusion. All the mailed notices contained a brief description of the plan of allocation; no such description was given in the published notice to consumers. In hearings that preceded the order the defendants had argued that the court should order a broader circulation of the settlement plan. In his February ruling, Judge Wyatt ordered that the above plan of notification be undertaken, with the cost to be paid out of the settlement fund; if the defendants thought that additional notice was necessary, they should undertake it at their own expense. The defendants were probably protecting the record for the future disposition of the nonsettling CCS cases; they would later argue that the nonsettling state class members must be given individual notice as part of their argument that a litigating consumer class was unmanageable. In fact, if the clauses of the settlement were valid providing that previously noti-

fied consumers who had not submitted claims were deemed to have assigned their claims to their state, then arguably no second notice of any kind (beyond the individual mailings to the 37,000 consumer claimants) would be necessary.

Little effective opposition to the settlement was registered. Written messages were received from a few otherwise unrepresented class members. Two letters were received from the wholesale-retail druggist class—one in favor and one opposed to the settlement. Three members of the consumer classes objected in writing—one because *any* druggist claims were permitted and two others because they feared excessive administrative costs.

The hearing was held on March 24 and continued the following day. Attorneys for three members of the consumer class made statements concerning the settlement. Two spoke in support, while the third was neither for nor against. Statements were made both for and against the settlement in behalf of the two factions within the druggist counsel committee. Statements in support of the settlement were given by counsel for the CCS entities and consumers and by counsel for defendants. One attorney, Paul D. Scanlon, of Virginia, purporting to speak on behalf of six hospital patients and a national consumer class, spoke at length against the settlement on the ground that it provided for an insufficient recovery for consumers. Other than Mr. Scanlon, no person present objected to the total amount of the settlement. Attorney Kohn, representing his scattering of CCS subentities, objected to the method of allocation. His own allocation plan was based on population; the modified Alabama plan used a hospital-bed formula that would not be quite as advantageous to populous states. Judge Wyatt would later disregard this as merely a casual disagreement with the settlement. Attorneys for the minority among the committee of counsel of the wholesaler-retailer druggist class objected that the \$3 million plus \$8 million in interest that was to be allocated to that class was insufficient.

As must have been a foregone conclusion, Judge Wyatt issued an opinion on June 24, 1970, that approved the settlement offer to be implemented by the modified Alabama plan. The portion of his opinion discussing the merits of the settlement opens by noting that approval of a settlement in a class action is discretionary with the trial judge and that the standard of "fair, reasonable and adequate" could not be measured "scientifically." The primary consideration, in his view, was to see to it that the interests of those who had been before the court only through class representatives were adequately protected. The most important factor to be considered in this regard was the strength of the plaintiffs' case on the merits as compared to the amount of the settle-

ment offer, in the light of the costs and risks of continued litigation. Unfortunately, he did not compare the amount of the settlement offer with the amount that might have been gained by continued litigation, as no figures were given for the amount of the claims the consumers might have established by successful litigation. Judge Wyatt's opinion does discuss the plaintiffs' chances of establishing liability in a contested trial. He concluded from a study of the records in the criminal case and the FTC proceedings that the chances of recovery in any of the class actions were at best 50-50 and probably should be called slight.

As has become traditional in other class actions, the judge also stated that he was giving weight to the views and judgment of experienced counsel for the classes who had been close to the case, the lack of substantial opposition by class members, and the nature and quality of the bargaining between the plaintiffs and the defendants. Judge Wyatt found that the negotiations for the CCS plaintiffs had been conducted by attorneys who were "able and aggressive antitrust law specialists." He concluded, based on affidavits submitted by the attorneys and his personal experience in the case, that the negotiations had been the "result of good faith bargaining at arms' length." With regard to those who had rejected the settlement or who now spoke in opposition, Judge Wyatt stated that they were overly optimistic and had exercised "questionable judgment" in determining to litigate rather than to settle. He did not think that the chances were very great that the nonsettling plaintiffs would recover more than the settlement offered them.

Judge Wyatt's discussion of why he had approved the modified Alabama plan's bed formula for allocation of the settlement among the states (rather than Mr. Kohn's population formula) was unilluminating. Judge Wyatt simply observed that while both formulas derived their data from "neutral" sources, the Alabama plan's method was supported by the great majority of plaintiffs and therefore should not be rejected.

The most hotly contested allocation item, of course, was the claim of the wholesaler-retailer druggist class. The CCS plaintiffs had originally opposed the allocation of any of the settlement to this class on the ground that it was a windfall. On the other hand, as has been seen, the wholesaler-retailer class had initially insisted that they were entitled to the entire \$40 million portion of the global fund not allocated to the CCS entities. Several considerations encouraged compromise. First, acceptance of the wholesaler-retailers' initial claim would have caused the entire settlement to fail after notice costs had been twice incurred and after the court had initially approved the fairness of the global amount. Second, the compromise reached in the modified Alabama plan had

been supported by the great majority of counsel, including 11 of the 13 attorneys in the committee of counsel for the wholesaler-retailer class. Third, Judge Wyatt expressed the view that the claim of the wholesaler-retailer class was doubtful on the merits. He felt that the case was significantly different from the situation in the *Hanover Shoe* case, in which the Supreme Court had approved a recovery for a middleman. Most important, the consumers were actually before the court in the present case. The product had passed directly from the defendants to the wholesaler-retailer class and then to the consumers without changing packages. Affidavits presented by experts in drug merchandising asserted that the overwhelming majority of drug stores charged a uniform 66 2/3 percent markup. The higher the retail price as a result of the price conspiracy alleged against the defendants, the higher the profits for the retail druggists. Thus, it was evident that they had not in fact been harmed and may even have benefited substantially from the defendants' alleged overcharges. Judge Wyatt also rejected the druggists' argument that they had suffered from the conspiracy because the higher prices had lessened consumer demand for antibiotics. This argument contradicted the fact that drugs of this kind were always prescribed and seldom shopped for; and the druggists had not provided any supporting data for this assertion. Judge Wyatt rejected arguments in favor of allocating the entire amount to the consumer classes (and thus denying any recovery to the druggists) and concluded that the question of entitlement to damages as between the two groups was an "open one" and that the \$11 million (\$3 million from the fund and \$8 million interest) allocated to the druggists represented the "nuisance value" of this claim in the suit.

In his June 24, 1970, order approving the settlement, Judge Wyatt noted that the court would be required to retain jurisdiction, despite approval of the settlement, to deal with issues that might arise in the course of the distribution. But, he predicted, the only issues that would arise would be issues "between claimants," matters of no concern to the defendants. Thus, the defendants should not be required to "involve themselves" in these matters. Accordingly, Judge Wyatt entered an order under rule 54(b) that permitted immediate entry of a final judgment approving the settlement and dismissing the actions of the settling plaintiffs as against the defendants with prejudice. For the moment, this meant that an immediate appeal could be taken, as some druggists had indicated they would. For the long range, it meant that the defendants were completely removed from such further activities as the assertion of claims against the settlement fund by attor-

neys seeking fees for their representation of members of the classes.

The dissatisfied faction among the druggists' committee of counsel appealed the order approving the settlement to the Court of Appeals for the Second Circuit, which rejected the appeal. The appeals court started from the premise that the trial judge's approval of a class action settlement was an exercise of the trial court's discretion and should be upset only on a clear showing of abuse of discretion. Most importantly in this connection (and as other cases had already established), the appeals court stated that the objecting plaintiffs could not prevail on appeal on a request for a dispositive resolution by the appeals court of legal issues that would have been litigated at a trial on the merits. The only responsibility of the trial court on the admittedly unsettled legal issues in the case was to arrive at a fair evaluation of the relative strengths of the arguments. On the most important issues—*Hanover Shoe*—the Second Circuit agreed with the trial court's analysis. The analysis of the appellate court did add the important statement that here, unlike *Hanover Shoe*, the consumers were before the court (as part of the CCS class actions) and had stronger claims to damages because it seemed more likely that consumers had suffered injury than that the class of cost-plus druggists had. This would prove important later as an argument in favor of the establishment of litigating consumer classes in the nonsettling states cases.

The second major attack of the dissenting druggists also resulted in a disposition favorable to the nonsettling states. The druggists argued that the states could not represent the consumers. The argument, if successful, would have resulted in an overwhelming victory for the druggists since under this head of their argument the strongly stated public policy in favor of vigorous enforcement of the antitrust laws emphasized in *Hanover Shoe* might require that the druggists be permitted to recover the entire amount of the overcharges for retail sales. (The argument assumed, in disregard of several asserted consumer class actions that had also been filed naming consumers as class representatives, that no other champion of the consumer classes would be available.) The Second Circuit rejected the druggists' arguments against the consumer class representation by the states. The court noted that the states were not required to assert the relatively untested *parens patriae* theory because Judge Wyatt had certified the states as class representatives under rule 23. Relying on the then expansive approach that the Second Circuit had recently taken in *Eisen II*, the court found that the states were proper representatives of the consumer class.

The third, and final, argument of the druggists was that the notice by publication to the consumer class violated both rule 23 and the due process clause. Rather summarily, the court simply noted that notice by

publication was reasonable under all the circumstances of the case.

In conclusion, the court rather testily noted that by appealing the approval of the settlement the wholesaler-retailer class would receive an additional month of interest (slightly less than \$700,000) and suggested that this might have been the real motive behind the appeal.

An ensuing petition for review by the Supreme Court was denied on October 12, 1971.

VI. THE \$32.5 MILLION PRIVATE HOSPITAL/BLUE CROSS SETTLEMENT

During the secret session in Judge Wyatt's courtroom on February 3, 1969, the negotiating attorneys revealed that, in addition to the \$100 million CCS and wholesaler-retailer offer, they had also reached agreement on an offer of \$20 million that was intended to dispose of all other civil actions that had been filed against them. The chief beneficiaries of this offer—private hospitals and Blue Cross plans—were believed to be the only other group of plaintiffs whose legal basis for a claim should be taken seriously. These plaintiffs stood on much the same legal footing as the public hospitals and other medical institutions included in the CCS classes. Because separate counsel represented these claimants and because the private hospital claims involved identifiably separate issues, the defendants had determined to treat these claims separately. The attorney with whom they chose to conduct the negotiations was Harold E. Kohn, of Philadelphia.

A. The Abortive Kohn Settlement

Mr. Kohn was involved in the antibiotics litigation as the attorney of record for a number of minor parties. He had filed several actions in 1968 in the Eastern District of Pennsylvania on behalf of Detroit and Philadelphia, in the CCS class, and on behalf of a variety of other clients, including a Florida private hospital. In his complaints for his municipal clients, Mr. Kohn had included far-ranging allegations asserting claims in behalf of a class consisting of all nonfederal government entities in the United States. A similarly cosmic claim in behalf of all private hospitals was asserted in the Florida private hospital action.

At some point during the separate negotiations between Mr. Kohn and the defendants over a private hospital class settlement, the defendants had agreed orally⁸ with Mr. Kohn to pay him out of their own

8. In a subsequent opinion, Judge Wyatt spoke of the terms of this contract as revealed in a letter of February 6. But Judge Wyatt failed to point out in his opinion (1) that this date is three days *after* the closed-door meeting at which the agreement was first revealed to Judge Wyatt and (2) whether the date of the written agreement was accurate or whether, to the contrary, there was a prior written agreement. It appears from some court documents that another letter of April 3, 1970, had amended the original agreement.

pockets (and not out of the settlement funds) the "fair and reasonable" value of his legal services to all the clients that he was representing in both the CCS and private hospital actions. No such agreement was made with any other attorney negotiating for any other plaintiff. The explanation given to Judge Wyatt for this astonishing agreement was that Mr. Kohn had stated that he would make a claim for legal services against any recovery that benefited *any* class within which he had filed an action for any client alleging a class action. Because Mr. Kohn's clients included plaintiffs within both the CCS and the private hospital groups, he was understood to be threatening to assert a claim for a share of the \$100 million settlement fund as well.

According to Judge Wyatt's later opinion, the defendants stated at the February 3 secret meeting that the assertion of this attorney fee claim by Mr. Kohn would have made it difficult for the defendants to "attract to the settlement" other plaintiffs in the pending actions. By making this side-arrangement with Mr. Kohn, the defendants prevented his potential fee claim from threatening the separate settlement fund. Judge Wyatt, in his words, "accepted" this explanation "as showing a major motivating factor" in making the agreement. The judge later pointed out that, alone among the negotiating attorneys, Mr. Kohn had no substantial client to whom he could look for the payment of a large fee. Mr. Kohn was contrasted, by name, with CCS plaintiff attorneys Shapiro, Freeman, and Goldberg, all of whom had such substantial clients. The judge surmised that because of this Mr. Kohn would have a much stronger incentive than the other three negotiating attorneys to make attorney fee claims in actions other than those in which he appeared as counsel of record.

Judge Wyatt also speculated later that there must have been a further motivation, apparently one not mentioned during the closed-door meeting on February 3. As the only attorney negotiating with the defendants in behalf of private hospital plaintiffs, Mr. Kohn was in a critically important position. As the judge blandly stated in his later opinion:

... undoubtedly, agreement with Kohn on such a settlement figure [\$20 million] could more easily be secured if Kohn had a guarantee that defendants would be answerable for his fee. At the same time, Kohn must have felt that a judge would be more generous in fixing the amount of fees to him if such amount were payable by defendants and did not in any way diminish the recovery of class members. Thus, the fee agreement was designed to secure the cooperation of Kohn.⁹

9. This and quotations in the succeeding paragraph are from *City of Philadelphia v. Chas. Pfizer & Co.*, 345 F. Supp. 454, 471 (S.D.N.Y. 1972).

Judge Wyatt noted that there had not yet been a determination that any private hospital action could be maintained as a class action, even though Mr. Kohn was purportedly negotiating in behalf of a class at the same time that he was negotiating about payment of his fee with the defendants. Judge Wyatt, whose capacity for toleration was apparently strained, later stated: "This seems to involve some conflict of interest." But, he concluded, "In the case at bar, there is nothing to indicate that the parties were conscious of any conflict of interest or self-interest which would affect the result. But the procedure seems wrong in principle and ought to be discouraged. Moreover, . . . the appearances are frequently unfortunate." He noted that the Corporation Counsel of New York City had complained about the arrangement and had pointed out that "some may feel that, except for such a fee agreement, the class recovery would be larger."

Apparently some such reaction was widely shared. Mr. Kohn alone among the hospital lawyers supported the \$20 million settlement offer that he had singlehandedly negotiated with the defendants. He alone among them was present at the February 3 closed-door hearing at which the settlement offers and his fee were discussed. The settlement offer to the hospitals was subsequently rejected by every other interested party and was eventually replaced with an offer that was more than half again as large—\$32.5 million.

While Judge Wyatt would later speak of "discouraging" such agreements, he nonetheless approved a payment by defendants to Mr. Kohn of \$600,000 out of a total claim of \$2 million in legal fees for which Mr. Kohn had petitioned. In his December 28, 1971, petition for allowance of fees from defendants, Mr. Kohn revealed that he had fee agreements with most of his clients for 25 percent of the recovery including, in one instance, an agreement for 33 1/3 percent which he had "voluntarily" reduced to 25 percent. One cannot escape the impression that the Kohn firm filed masses of identical pleadings in behalf of a plethora of similarly situated CCS class members, including filings far beyond the date of the February 1969 settlement offer with its provision for structuring classes. The impression is of manipulative filings to create an appearance of a substantial stable of clients and to carve out a subdivision of states that had already filed actions, in order to file motions to intervene that could later form the basis for a contingent fee claim by Mr. Kohn against his class "client." Motions to intervene were filed by Mr. Kohn or his associates in the cases of 12 scattered government entities. Nothing was ever done by him to bring these motions on for a hearing. Judge Wyatt characterized the handling of some of these cases as marked by "carelessness" and spoke at a later point of his own error

in permitting "the creation by Kohn of the procedural morass" of subentity CCS cases.

The judge found, despite all this, that Mr. Kohn should be awarded a fee of \$600,000 for his legal work.¹⁰ If the court refused an award, the judge reasoned, the defendants would profit from a wrong in which they also had participated to a certain extent—apparently the "wrong" of entering into the agreement to secure Mr. Kohn's cooperation. The defendants did not resist Kohn's petition for fees. Their acquiescence rested on the preposterous, but stated, rationale that Kohn's application for fees was "limited to" \$2 million. Judge Wyatt's conclusion that the fee arrangement resulted in no injury to the classes and clients Mr. Kohn purportedly represented is difficult to accept.

The defendants' offer of settlement with Mr. Kohn was reduced to a writing dated February 6, 1969, the same date as the \$100 million offer. It proposed that the defendants pay \$20 million in a settlement that would cover all "private hospitals, private Blue Cross plans, and all other claims of any kind whatsoever." The "all other claims" language was meant to be all-encompassing. After the principal claims of the private hospitals and Blue Cross plaintiffs had been satisfied out of the \$20 million, the remainder was to be distributed among all the other plaintiffs that had filed actions—competitors, health insurance companies, union health and welfare funds, and all the agricultural claims.

At the time of the settlement offer there were ten other actions involving the claims of private hospitals pending in the Southern District of New York. Also, there were numerous counsel representing other clients and classes that would fall within the "all other claims" coverage of the settlement offer. It appears that none of the counsel for the other private hospital or miscellaneous plaintiffs was involved in or informed of the negotiations leading to the settlement offer. Some of the counsel negotiating the CCS claims that resulted in the \$100 million settlement offer were aware of these negotiations because the defendants had negotiated in terms of a "package" approach to all claims filed. However, none of them represented a client with substantial interest in a private hospital recovery. Some had "all-citizen" claims included in very broad class action allegations, but these catchall phrases do not seem to have resulted in much attention being paid to the private hospital negotiations. Finally, there clearly appears to have been no CCS

10. Mr. Kohn stated in his 1971 petition for fees that attorneys Richardson Dilworth and Harry A. Kalish of the Philadelphia firm of Dilworth, Paxson, Kalish, Kohn and Levy would share in the fee. They were described as law partners of Mr. Kohn at the time of the February 1969 agreement with the defendants.

plaintiff who purported to represent Blue Cross plans, a group that was also within the terms of the \$20 million offer.

When the \$20 million offer was communicated to the private hospital and Blue Cross plan plaintiffs, it was promptly rejected by "all or nearly all" of them on the ground that the amount was entirely inadequate. It was then withdrawn by the defendants.

By the terms of the offer made to the CCS and druggist plaintiffs, the defendants were formally not entitled to withdraw from that offer of settlement because of the rejection of the separate \$20 million offer by the hospital plaintiffs. However, given that a significant number of CCS plaintiffs rejected the \$100 million offer, the defendants probably had a legal basis for refusing to proceed with any settlement upon learning the negative reaction of the hospital plaintiffs. That the \$100 million settlement nonetheless stayed in place gives eloquent testimony to the desire of the defendants to reduce the total claims asserted against them and their expectation that they could eventually settle with the hospital plaintiffs. The CCS plaintiffs had insisted that their claims be separated from the hospital claims, primarily because of the serious difficulties that would be created if the hospital plaintiffs and the CCS plaintiffs were required to negotiate an allocation plan among themselves. With the initial favorable reception of the CCS-druggist settlement offer, the defendants decided to proceed with the private hospital plaintiffs separately.

The continuation of the CCS-druggist settlement signaled an important advantage for the private hospital plaintiffs as it supplied a benchmark for measuring the strength of the defendants' position on important common legal issues. All the factors pressuring the defendants to settle the CCS-druggists claims—the convictions obtained by the government in the criminal actions,¹¹ the FTC findings, developments in class action procedural law, etc.—were also operating in the private hospital cases. Special factors gave the private hospital plaintiffs additional leverage. Most important, the Blue Cross plans and many of the private hospitals had both substantial resources and substantial individual claims against the defendants. Counsel for many of these plaintiffs—the Breed-Abbott firm from New York, the Arnold and Porter firm from Washington—were as experienced in the vagaries of long-distance and complex antitrust litigation as were the attorneys for the defendants. They also

11. One of the many ironies of timing in the antibiotics cases was that the second offer of settlement in the private hospital/Blue Cross cases was made only 13 days before the Second Circuit reversed the defendants' criminal convictions and remanded for new trials.

had the detailed records necessary to prove damages. Further, the size of the class was clearly manageable at least as to the issue of liability. In fact, before the inevitable second offer of settlement, every Blue Cross plan in the country had individually intervened in one or more of the pending actions, and thus this important collection of claims could easily have gone to trial without the necessity of treating the Blue Cross claims as a class claim.¹² The magnitude of the individual claims of most of the private hospital and Blue Cross class members was such that the difficult legal and procedural issues concerning "fluid" recoveries that were being discussed in the CCS actions were irrelevant.

A possible substantial defense available against the hospitals and Blue Cross plans was, again, the *Hanover Shoe* passing on argument that the defendants had also asserted against the druggists. The defendants pointed out that the hospitals and Blue Cross plans had not borne the ultimate costs of drug purchases—the patient or policyholder had. But the argument had special difficulties in these cases. First, there was no evidence that a standard markup had been applied, as was alleged concerning the druggists. In fact, especially in the case of the Blue Cross plaintiffs, the cost of drugs would only be a small part of the cost of the total service purchased by policyholders. The facts strongly resembled those in *Hanover Shoe* where, as the defendants were wont to forget, the Supreme Court had in fact permitted recovery and rejected the passing on defense. Similarly, the pricing practices of the hospitals varied, and many of them employed patient-cost pricing policies that were not keyed to individual components of patient care or service such as the prescribing of drugs. Some hospitals did not list separate charges for drugs; some listed separate charges but at a figure that represented only cost and did not include overhead; others sold the drugs to patients at a markup but claimed the profits were used to offset other, lower charges on the hospital bill.

B. The Second—\$32.5 Million—Offer

After the rejection and withdrawal of the original offer, new negotiations were commenced by counsel for the plaintiffs and defendants. They apparently started almost immediately, and the court was kept

12. Of the 27 private hospital and Blue Cross actions that had been filed by the time of the eventual settlement, only 19 alleged classes. All the Blue Cross plans in the United States had intervened and were actual parties. Eleven hospital associations had filed actions or intervened in behalf of all their member hospitals. They asserted no actual damage to themselves and probably served as little more than window dressing. They were not included among the plaintiffs in the settlement class that eventually was formed but accepted and supported the eventual settlement because their members accepted and supported it.

informed of their progress. Judge Wyatt's subsequent opinion approving the ultimate settlement states that "many meetings" were held between February 6, 1969, and April 5, 1970. It seems clear that Mr. Kohn took a back seat; he had been uniformly rebuffed in his attempts to sell the \$20 million offer to the other plaintiffs. In addition, Mr. Kohn's side-arrangement for fees was now common knowledge among the attorneys, and it would not be surprising to find that remaining plaintiff attorneys thought Mr. Kohn was too compromised to negotiate effectively. The subsequent negotiating was carried on by a *de facto* committee, principally composed of attorneys from firms representing Blue Cross plans and other private hospital clients.

The purpose of the negotiations was probably quite direct—to increase substantially the settlement offer. That an offer would eventuate seems not to have been a matter of much doubt. No discovery on the suits took place, and the private hospital and Blue Cross cases were kept separate from the other nonsettling cases for the purposes of pretrial administration.

On April 3, 1970, the defendants made a second written offer to settle the claims of a national class composed of all private hospitals and Blue Cross plans for \$32.5 million. There was no clause comparable to the "all other claims" scope of the original offer. The offer provided that, if it was accepted, the funds would be paid into an escrow account on a specific date (later computed to be April 9, 1971). Two-thirds of the total would be allocated to the private hospitals, and one-third to the Blue Cross plaintiffs.

By April 9, 1970, the settlement offer had been communicated to and accepted by nearly all of the plaintiffs who had filed actions that fell within the terms of the offer. The speed of acceptance indicates clearly that the *ad hoc* committee of counsel who had been negotiating on behalf of the hospital/Blue Cross plaintiffs had not only kept other plaintiffs in the group well informed, but also surely must have obtained their support prior to the actual announcement of the offer. Seven additional private hospital and Blue Cross actions had been filed by the time of the second offer in addition to the 20 that had been filed prior to the first offer. Some 21 law firms entered appearances for plaintiffs.

Several hearings were held on the settlement offer, all of which seem to have been addressed to the question of how to structure the classes of hospitals for the purpose of considering and, if approved, of distributing the settlement. On November 24, 1970, Judge Wyatt issued an order consolidating all 27 filed actions into a single national class for the purposes of settlement. On the same date, he entered a second

order that directed that 19 of the 27 actions be maintained as a consolidated class action in behalf of all private hospitals not otherwise represented. In sum, this class constituted a national class of approximately 5,150 private hospitals. All counsel of record in the 19 actions, or who represented plaintiffs who had intervened in these actions, were to constitute a committee of counsel to conduct the legal affairs of the class. Four actions brought by private hospitals contained no class action allegations; these were permitted to continue as individual actions not included within the class.

C. Notice, Hearing, and Approval of the Settlement

The clerk was directed by the second order of November 24, 1970, to mail to members of the private hospital class both rule 23(c)(2) notices—of the proposed certification of the class—and rule 23(e) notice—of the proposed settlement. The notice informed the class members of a hearing to be held on the establishment of the class and the fairness of the settlement on February 19, 1971. Notice was mailed directly to each of the 5,150 private hospitals in the country.

In response to these notices, 18 private hospitals sought exclusion from the class and 90 entered an appearance through personal counsel. As previously mentioned, every one of the Blue Cross plans in the country had by this time become individual plaintiffs. Thus the Blue Cross cases functionally were not class actions. Because only class action settlements require court approval, a notice, a hearing, and court approval of the Blue Cross settlement were legally unnecessary.

At the hearing held on February 19, 1971, it developed that none of the 90 class members entering an appearance through their own counsel in response to the notice objected to the proposed settlement. The Blue Cross plaintiffs also approved of the settlement, including the terms of allocation. Judge Wyatt approved it in an opinion issued on April 21, 1971.

Technically, Judge Wyatt was only empowered or required to pass on two-thirds (\$21,666,666.67) of the settlement proposal, as the one-third of the entire amount offered to the Blue Cross plans did not involve an offer of settlement to a class. Judge Wyatt found specifically that the one-third/two-thirds allocation was fair and reasonable. The matter had been negotiated between attorneys for the private hospitals and attorneys for the Blue Cross plans and officials of the two groups with little, if any, involvement of the defendants. It would have been extraordinarily difficult to have determined precisely, from hospital or Blue Cross records during the entire 1954-67 period, what antibiotics had been paid for by the hospitals and which had been reimbursed by

Blue Cross. Statistics showed that 35.6 percent of patient days in private hospitals during the period covered represented patients covered by Blue Cross plans and that 36.2 percent of total admissions to private hospitals during the limitation period were of patients covered by Blue Cross. It finally was agreed that if these figures were to be used to reflect the percentage of hospital expenditures for drugs that were reimbursed by Blue Cross, some downward adjustment was necessary because many hospitals that dispensed drugs to outpatients were reimbursed at a lower rate by Blue Cross. In addition, it was demonstrated that in some instances the full cost of drugs dispensed to inpatients was not reimbursed. The one-third/two-thirds division therefore bore some relation to a statistical method for dividing the entire settlement fund, assuming that the entire settlement fund represented a fair approximation of the total amount of damages suffered by the private hospitals and the Blue Cross plans.

The settlement opinion does not discuss, however, how the total amount was computed. Neither is there any discussion of such matters as the probability of successful recovery after extended litigation or the costs of such litigation. Judge Wyatt only stated generally that the reasons for approving the settlement were "generally the same" as those that had led him to approve the CCS-druggist settlement. He relied on the self-interest of the individual litigants, particularly, it would appear, the Blue Cross plaintiffs and the many (90) private hospitals that had entered appearances through private counsel, and on the reputations of the lawyers for the various plaintiffs. His opinion mentions that he had personally been kept apprised of the negotiations (this assertedly permitted him to gauge whether negotiations were being conducted "at arms length and vigorously" in the interests of the class members). Judge Wyatt also notes that most of the private hospital class members were of a size that regularly retained counsel available for advice in a matter such as the fairness of the settlement. These factors all amount to a determination that the "environment" for settlement was appropriate and therefore that the class members themselves could look to their own interests. Also emphasized, of course, was the fact that no class member had objected to the settlement.

Several significant matters are not mentioned in the opinion. First, there is no mention of the side-arrangement between attorney Kohn and the defendants during the negotiations that led to the first, rejected, settlement offer. It perhaps was thought irrelevant because that offer had been rejected and the second offer had been negotiated by a totally different group of attorneys from which, apparently, Mr. Kohn was excluded. Nonetheless, it would probably have been more reassuring to

those reviewing the settlement to have seen a discussion of the matter. Particularly, it would have been better had Judge Wyatt discussed more elaborately whatever statistics or facts were available to justify the amount of the second offer. There is no way of determining from anything in the settlement opinion the extent to which the original \$20 million offer might have been influenced by the fee arrangement; similarly, there is nothing inherent in the increase of the offer to \$32.5 million that insures that the possible corrupting influence had been entirely removed.

Second, the opinion does not mention the reimbursement clause in the settlement that provided for the plaintiffs to reimburse the defendants for any claims they might later be required to pay to hospital patients. This clause was apparently insisted upon on the theory that these were the same claims. The matter was discussed much later at the settlement hearing in Minneapolis on the six states claims in December 1973. The worth of the clause to the defendants is dubious. To collect on it would have required the erection, presumably, of a defendant class of all private hospitals in the country. The administrative costs of such an action would have been substantially less because of the agreed-upon allocation formulas for distribution of the settlement. Nonetheless, the costs of proceeding against the class would have been substantial. In fact, no successful claim was ever asserted in behalf of hospital patients.

Judge Wyatt also passed on the reasonableness of the plan for allocating the private hospital share of the settlement fund to each class member. The defendants had little to do with this plan. It had been worked out in negotiations among the counsel for the private hospitals and had been included by defendants in the offer of settlement at the request of these attorneys. The private hospital share of the fund was first to be divided by states on the basis of percentages of the total hospital admissions within the state during the period covered by the settlement, after eliminating the effect of admissions of patients in the state covered by Blue Cross plans.¹³ Blue Cross admissions were to be looked to by the Blue Cross plaintiffs in making their own allocations. The hospitals in each state were to prepare such statistics for each state, and for the District of Columbia and Puerto Rico, as it was known that the percentage of Blue Cross admissions varied significantly from one state to another. The statistics were to be generated from material pub-

13. The reduction for Blue Cross-covered admissions was approximated from figures showing the percentage of state residents covered by Blue Cross. Every private hospital was treated similarly, even though the character of patients and possibly the requirements for antibiotics therapy might be expected to differ between, *e.g.*, general admission hospitals and hospitals that specialized in an activity such as surgery or convalescence.

lished or collected by the American Hospital Association, among others. The percentage of the population in a state covered by Blue Cross would be obtained from statistics published by the Blue Cross Association. After these figures were produced, allocations were to be made among jurisdictions on the basis of the ratio that the total number of non-Blue Cross admissions in each jurisdiction bore to the total number of national non-Blue Cross admissions. After obtaining the portion of the settlement that was to be allocated to each jurisdiction, hospitals within each jurisdiction were to be allocated an individual portion based on the ratio of total patient admissions in the hospital during 1954-67 to total patient admissions in the state. This meant that differences between private hospitals within the same jurisdiction in the percentage of patients covered by Blue Cross were to be ignored.

An appeal was taken by an intervenor, California Physicians' Service, from Judge Wyatt's decision of April 21, 1971, approving the settlement. It was summarily rejected by the Second Circuit on the strength of Judge Wyatt's opinion.

VII. JUDGE LORD AND THE NONSETTLING CASES

A. Assignment of Judge Lord to the Nonsettling Cases

Judge Inzer B. Wyatt had complained increasingly of the burdens of contending with the massive and complex consolidated antibiotics cases. His health had not been good, and many suspected that the burdens of the antibiotics assignment, together with the pressures of dealing with other parts of the imposing caseload of the Southern District, were instrumental in leading to his request to be relieved of the nonsettling portions of the consolidated cases. He had been originally assigned to the cases by an order of March 13, 1968, by Chief Judge Sidney Sugarman, of the Southern District, who had ordered antibiotics civil damage actions transferred to Judge Wyatt from Judge Frankel, who had presided at the criminal trial. Judge Wyatt was now, in 1970, faced with the prospect of spending several additional years supervising the details of settlement and distribution in the CCS-druggist, hospital/Blue Cross actions.

At the same time, the number of nonsettling cases in Judge Wyatt's court was increasing periodically through automatic transfer orders of the Judicial Panel on Multidistrict Litigation transferring newly filed antibiotics cases to the Southern District. Plaintiffs in the nonsettling cases were becoming restive. Judge Wyatt understandably was devoting most of his attention to working out the details in the settlements that had been achieved. The nonsettling plaintiffs, particu-

larly those such as the farm plaintiffs, who had been virtually ignored in the settlement negotiations that led to the "global" settlement offer, began to realize that much time would pass before they could proceed with significant discovery. The nonsettling plaintiff groups were still engaged in internal struggles to determine which litigating classes should be created and how extensive their membership should be. The defendants were taking the position that until classes were certified (which they simultaneously opposed on manageability and similar grounds), it would be inappropriate to require the defendants to engage in substantial discovery. The defendants asserted that, after notification to class members, untold thousands of new plaintiffs might intervene and claim the right to appear and have a say in discovery. Such discovery as occurred was marked by delay, lengthy objections, hearings on objections, and similar problems. Judge Wyatt, by his own admission, had become a "bottleneck" because of the extraordinary demands of both the settled cases with their multitude of settlement and distribution issues and the nonsettling cases with their class certification and discovery questions.

As early as May 1969 some of the plaintiffs in newly filed actions were objecting to the Multidistrict Panel against transfer to the Southern District on the ground that Judge Wyatt was too busy administering the settled cases to deal effectively with the nonsettled cases. The Panel, without minimizing the burdens that the cases imposed on Judge Wyatt, noted that none of the nonsettling plaintiffs had requested Judge Wyatt to proceed with pretrial preparation and that there was no indication that Judge Wyatt could not proceed. By the time of the issuance of an opinion in January 1970, however, the tone of the Judicial Panel had changed. While still believing that overall efficiency would be served by transferring still another set of cases to Judge Wyatt, the Panel had become virtually apologetic about the imposition of new burdens on Judge Wyatt. Discovery had begun to pick up momentum, but Judge Wyatt had still not ruled on constructing litigating classes. Until this was done, it was not clear which parties and attorneys would carry the battle forward.

This situation was particularly galling to the farm plaintiffs, who had been ignominiously lumped together into a small nook of Mr. Kohn's \$20 million settlement offer. That settlement (principally addressed to private hospitals and Blue Cross plans) purported to dispose of "all" claims other than the separately dealt with claims of the CCS and druggist classes. Attempts by farm counsel to open settlement negotiations with the defendants at this stage were virtually laughed off by counsel for the defendants. The disdain of the defendants related to the

vastly differing legal status of the human consumption as opposed to the farm claims. The human consumption cases could rely on both the criminal convictions and, possibly, the FTC proceeding as clear proof of liability. But both these proceedings had dealt only with the alleged price-fixing conspiracy among the defendants in human consumption markets. The farm cases involved different products, different price structures, and different markets. In short, the farm plaintiffs would be forced to build a case of liability from the ground up. But until meaningful discovery could commence and litigating classes were certified, it was impossible for the work of building a case to progress very far.

Several of the more important farm cases had originally been filed in the United States District Court for the District of Minnesota and had been routinely assigned under that district's calendaring system to Judge Miles R. Lord. Along with the other antibiotics cases of all types from around the country, these cases had been transferred to the Southern District of New York for consolidated pretrial proceedings. As the Southern District proceedings dragged on, attorneys in the Minnesota cases approached Judge Lord to complain, in effect, about the lack of progress. Judge Lord contacted Judge William H. Becker, of the Western District of Missouri, who at that time was a member of the Multidistrict Panel, to request that the cases be reassigned to another judge to permit more expeditious handling of the nonsettling cases. Judge Wyatt either was informed of these initiatives or acted independently. In any event, he contacted the Panel in September 1970 and requested that another judge be assigned to the case. Whether these were coincident or separate moves, it is clear that Judge Wyatt wanted a second judge to deal with the nonsettling cases.

As a result, on November 30, 1970, the Chief Justice of the United States ordered that Judge Lord be temporarily assigned to the Southern District of New York to deal with further pretrial aspects of the nonsettling cases. The Panel entered an order on December 2, 1970, reassigning all 58 of the nonsettling consolidated cases to Judge Lord. The impact on the unsettled cases was immediate and substantial. Within a matter of weeks Judge Lord was talking about a trial on the merits on liability issues in July of 1971. The date might have seemed unrealistic, but the point was made—clearly a new tempo was being established in the nonsettling cases.

B. Certification of Litigating Classes

The overall plan that Judge Lord developed early was first to "pare down" the litigation and then to consolidate as many of the cases as would permit a joint trial on liability. To pare down the litigation

required dealing with the motions for certification of classes that had been pending since February 1970. Then the court could dispose of some of the more remote and questionable claims by calling for motions for summary judgment. With this clearing of the air, Judge Lord thought, it would be readily apparent which groups of cases could be combined for trial.

The most likely candidates for an early trial were the remaining human consumption cases, particularly the nonsettling CCS cases. The law seemed well settled that the states could maintain a class action on behalf of their government entities and could assert claims on their own behalf by virtue of their own purchases and the retail purchases of welfare recipients for which they had made payments under vendor reimbursement plans. The liability issues in these cases were similar to those in many of the other cases. Also, the facts and legal theory in the human consumption cases resembled those in the FTC proceedings and in the criminal trial in the Southern District of New York. This tracking of the FTC and criminal cases would simplify proof to a considerable extent. In addition, the exercise would provide a useful run-through that might expedite handling of the farm cases. The farm cases could also continue to develop any separate legal or factual theories through discovery that might be more time consuming than any remaining discovery required in the human consumption cases.

Judge Lord thought California was the most favorable place for a trial of the nonsettling CCS actions. It was clearly the state with the most at stake; claims of the other nonsettling states were much smaller. The attorney general of California had been active in pretrial preparation, and a document depository had been established in California. Work by the staff of the attorney general on an "economic brief" had already advanced to a point where ways could be suggested for dealing with proof of damages, if that became necessary. The defendants objected to California on the ground that it would be impossible to choose an unbiased jury in that state in an action in which California was a plaintiff, but Judge Lord was not persuaded.

In anticipation of a possible order that the seven nonsettling state claims, and perhaps others, would be transferred to California, Judge Lord secured the consent of the Chief Justice, the Judicial Panel on Multidistrict Litigation, and the chief judges of the Eighth and Ninth Circuits to an arrangement under which Judge Lord himself would be temporarily assigned to the Northern District of California so that he could commence a trial in San Francisco. The assignment gave a single judge the power to try the liability case in either the Southern District of New York, the District of Minnesota, or the Northern District of

California. Things were developing the way Judge Lord preferred to have them: he was in control of the situation. The next step was to bring on for hearing the class action certification motions that had been pending since February 1970.

Within a month after his assignment to the cases, Judge Lord was holding hearings on the class action motions. Then, on January 15, 1971, he entered the first of five class action orders establishing major classes. The orders were:

1. Class action order 71-1 (January 15, 1971) established a national class—the *Midwest Veterinary Supply* class—in behalf of all businesses that had purchased antibiotics at *wholesale for nonhuman use*. This class was frequently referred to as the “farm wholesaler” class.

2. Class action order 71-2 (January 15, 1971) set up a national class—the *Hoffert* class—comprising all *doctors of veterinary medicine* who had purchased broad spectrum antibiotics for nonhuman use.

3. Class action order 71-3 (January 21, 1971) established a national class—the *Doughboy* class—in behalf of all *manufacturers of medicated farm feed products* that had purchased antibiotics products in the same form as originally sold by the defendants. (The *Midwest Vet*, *Hoffert*, and *Doughboy* cases were all originally filed in the District of Minnesota. Together with other similar cases that were consolidated with these lead cases, this group makes up the “farm” cases.)

4. Class action order 71-4 (February 9, 1971) established a statewide class of government entities in each of the *seven nonsettling states*—California, Hawaii, Kansas, North Carolina, Oregon, Utah, and Washington. Following the pattern set by Judge Wyatt’s orders establishing the settlement classes in 1969, a separate class was certified for each of the seven states, and included within each class were all the agencies and political subdivisions of the state.

5. Class action order 71-5 (February 10, 1971) conditionally established within each nonsettling state a statewide class of all of the *human consumption consumers* who had purchased broad spectrum antibiotics at retail during the period 1954-66.

Left for subsequent treatment was a collection of cases that Judge Lord thought possibly might be consolidated into groups of classes at a later time. Included were the claims of: foreign governments (Kuwait, South Vietnam, the Philippines, and Iran); an asserted national class of all hospital patients; a national class of all United States health insurance companies; union welfare funds (two had alleged national class actions) for funds spent to purchase antibiotics directly or to reimburse union members for such purchases; and Thrifty Drug Stores (a large West Coast chain that had requested exclusion from the 1969 settle-

ment) for damages arising from antibiotics sales to consumers. Several alleged competitors had filed claims. In addition, claims were being asserted by the United States both with respect to its own purchases for federal medical facilities and with respect to purchases by foreign nations for which the United States had supplied the funds. Finally, there were several tag ends of cases in which the plaintiffs had requested exclusion from one of the settlements in New York, including several individual consumers and drug wholesalers and retailers.

Once the set of the five more obvious class actions had been certified, Judge Lord attempted to trim away some of the peripheral claims. Informal discussions were held with attorneys from all groups in New York on January 14-15 and in Minneapolis on February 9-10. By order of February 19, 1971, Judge Lord directed that motions and briefs be addressed to the question of which, if any, claims were too remote from the alleged antitrust conspiracy to permit the affected plaintiffs to recover damages. A hearing was held in San Francisco on March 23, 1971, on the defendants' motions for summary judgment with respect to several categories of plaintiffs. But the only set of claims that Judge Lord felt were clearly outside the reach of antitrust protection were the claims asserted in behalf of purchasers of finished animal feed products. Accordingly, on April 13, 1971, Judge Lord entered an order directing that these claims be dismissed. No other set of claims seemed susceptible of summary disposition. The conflicting interrelationship between the "lack of standing" defense under which only the farm end-users seemed clearly to fall, and the *Hanover Shoe* passing on defense under which immediate and intermediate purchasers from the antitrust conspirators might not be entitled to recover, made it necessary to have further factual development before any final dispositions were made.

The inability to eliminate the claims of any significant number of claimants left many potentially overlapping and conflicting claims, for example, between the union welfare funds and the private insurance companies, between the United States' claim for foreign aid drug purchase reimbursements and the claims of the Republic of Vietnam, between the United States' claims for its pro rata portion of funds that were used by states in state vendor-reimbursement welfare plans and the claims of states for these same purchases, between the *Thrifty Drug Stores* claims and consumer claims in the several western states. For the time being, however, Judge Lord believed that the cases would have to be moved closer to trial before greater clarity could be obtained on the complex question of entitlement to damages. In order to provide areas of focus, two additional litigating classes were created.

6. On April 20, 1971, Judge Lord created a class and a committee of counsel representing *private health insurance companies*. Attorney Richard W. Johnson, of Minneapolis, was appointed chairman, and attorney Hyman Edelman, also of Minneapolis, was named vice-chairman. The class was composed of all insurance companies that had compensated insureds for the cost of antibiotics purchases during the 1954-66 period. The lead case was *Mutual of Omaha v. Chas. Pfizer & Co.*¹⁴

7. A second order, of June 1, 1971, created a class of employee welfare benefit associations operated by labor unions. The class became known as the *union health and welfare* class. The Department of Labor supplied address labels for the mailing of notice to the class members, with the cost borne by the plaintiffs. Copies of the list were ordered to be delivered to the clerk and to Judge Lord but otherwise sealed, that is, not revealed to the attorneys representing the class. A subsequent order in August permitted a copy of the list to be turned over to the attorneys representing both the union funds and the defendants, but solely for the purpose of the antibiotics litigation. (Compared to other portions of the antibiotics litigation, unusual precautions were taken by Judge Lord in the union health and welfare cases to guard against solicitation of the otherwise unrepresented class members. This was in contrast to the liberality in communications that Judge Lord allowed in other classes. One of his earliest orders [administrative order 71-1, January 27, 1971] dissolved the portion of Judge Wyatt's pretrial order of April 1970 that had prohibited the nonsettling states from communicating with CCS class members.)

By early April, it had become obvious to Judge Lord that further clarification in the mass of cases would have to await a trial on the issues of liability. He turned from developing the nonsettling state cases as a test trial on liability to collecting all the human consumption cases into one forum where one judge could make decisions on recovery that

14. The *Mutual of Omaha* class was treated as virtually an opt in class. Members of the class were told in the notice of the creation of the class that they would be required to submit an estimate of purchase reimbursements. Failure to file the estimate would result in exclusion from the class. Similar treatment was requested by the defendants in others of the six classes that Judge Lord certified, but he resisted the effort everywhere but (a) in the insurance class and (b) with regard to an estimate of purchases by the institutional members of the CCS classes. The Second Circuit refused to grant mandamus to compel the consumers in the seven nonsettling states to submit claims prior to trial. *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971). The exceptions for the insurance class and the CCS damage estimate were explicable on the grounds that the class was small, that each member of this class had a sizable claim, and that the members of the class were likely to have the assistance of regular counsel in determining whether to request inclusion in the class or not. One hundred and ninety-five members of the insurance class eventually submitted claims totaling \$50 million.

would treat every set of plaintiffs fairly without creating overlapping recoveries. Judge Lord was willing to undertake the task himself. The problem was to find a common forum where all, or at least the great majority, of the cases could be tried. The main problems were two. First, did either he or the Judicial Panel on Multidistrict Litigation have the power to order a transfer of all or most of the human consumption cases to a common district? (It seemed obvious that the Panel's limitation to transfers for pretrial purposes precluded it from ordering multidistrict consolidations for trial.) Second, venue law precluded a transfer to any federal district except one where all of the cases sought to be transferred could have been brought as an original matter. Was there one such district in the country—and would it be a district in which Judge Lord could conduct the trial? The solution to these problems involved a judicial tour de force of the kind that Judge Lord relished.¹⁵ He would order a transfer to Minnesota.

C. Transfer to Minnesota for Trial

On April 5, 1971,¹⁶ Judge Lord directed all parties in the consolidated human consumption cases before him in New York to show cause why they should not be transferred to the District of Minnesota. A hearing was held on May 5, 1971, in New York. Only one plaintiff—Thrifty Drug Stores—objected to the transfer, but it was strenuously

15. The matter of a transfer for trial to Minnesota had been raised before Judge Lord actively entered the case. Attorney John A. Cochrane, counsel in one of the largest of the farm cases from Minnesota, had argued in June 1970 in a hearing before Judge Wyatt that three farm classes should be created (the suggested farm classes were identical to the classes later certified by Judge Lord) and that all the farm cases should be transferred to Minnesota. Judge Wyatt resisted the suggestion, thinking that "transfer" could occur only after the completion of pretrial. In no event, he believed, could he as the pretrial judge order transfer of cases that had not originally been filed in Minnesota.

16. The timing of Judge Lord's change of venue order is interesting. The Second Circuit had affirmed Judge Wyatt's approval of the settlement of the 43 settling states and the wholesaler-retailers on March 29, 1971, only 13 days after hearing oral argument on the appeal. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971). The ensuing petition to the Supreme Court for certiorari would not be ruled upon until October 12, when it was denied. *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971). But it was fairly certain after the Second Circuit ruling in late March that the Supreme Court would not intervene to upset the settlement at this late point. Judge Wyatt's order approving the private hospital/Blue Cross settlement was entered on April 21, 1971. *Hartford Hospital v. Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971). The ensuing appeal to the Second Circuit by California Physicians' Service was not considered a serious threat to the settlement. (It was rejected when the Second Circuit affirmed the order of approval in a per curiam opinion that simply adopted the opinion written by Judge Wyatt. *American Hospital Ass'n v. Chas. Pfizer & Co.*, 448 F.2d 790 (2d Cir. 1971)).

Certainly by April of 1971 it was fairly clear that the cases settled under Judge Wyatt would not be returned to the trial court for further proceedings, aside from implementing the distribution schemes. Thus there was little danger in April that a transfer of the unsettled cases to Minnesota for trial might leave a second great mass of cases in New York for trial.

resisted by the defendants. Judge Lord was not persuaded by the objections. Accordingly, in what was at that time an entirely unprecedented (and, according to the defendants, insupportable) order, Judge Lord, as the judge presiding in the Southern District of New York over the cases consolidated for the purpose of pretrial handling, entered an order on May 14, 1971, ordering most of the nonsettling human consumption cases¹⁷ transferred to the District of Minnesota for consolidated trial under section 1404(a) (administrative order no. 71-5). The entire set of farm cases was subsequently ordered transferred on August 9, 1971, after a show-cause order hearing in St. Paul on July 28.

Judge Lord's legal theories on transfer to Minnesota were, first, that he as the pretrial judge had the same power as would any other judge in the Southern District in an ordinary kind of case and this, concededly, included the power to order changes of venue under section 1404(a). He buttressed this argument by pointing out that neither the Judicial Panel nor the transferor forums from which individual cases had been transferred to New York had any such power during the pendency of the pretrial proceedings. Thus any other result would create an anomalous situation in which the power to change the venue of cases under section 1404(a) could not be used in precisely the kind of immensely complicated case where it would be most beneficial. As for the selection of the District of Minnesota, it was a forum where the great majority of the human consumption cases "might have been brought" as an original matter. This was proved by pointing to the single human consumption case that had, indeed, been filed in that district (*Mutual of Omaha*, the named case in the insurance company class) and in which the plaintiff asserted human consumption claims against all the defendants. In addition, all of the defendants were proper defendants in the farm cases, most of which had originally been venued in Minnesota.

17. The May 14, 1971, transfer order covered all the nonsettling human consumption cases, except several "competitor" cases and a few miscellaneous cases. The nontransferred cases presented special problems. The defendants objected to their transfer to the District of Minnesota because Minnesota was not an available transferee venue under the venue statutes. It was felt that the objection had greater weight in these cases.

In July 1972 the Chief Justice extended Judge Lord's temporary assignment to the Southern District for such indefinite period "as may be required to complete unfinished business." Judge Lord thus continued to "sit" in New York. By an administrative order (no. 71-12; August 6, 1971) Judge Lord had ordered that all filings and pretrial proceedings in the untransferred cases in the Southern District of New York were to take place in Minnesota. This effectively moved these cases to Minneapolis for pretrial purposes. Some of the competitor cases were transferred to Minnesota under section 1404(a) as late as July 11, 1974, for consolidated trial. Several related cases (involving patent claims) remain technically venued in New York or in other districts, preventing their joint trial with the transferred competitor cases. They will, however, probably benefit from whatever *res judicata* advantages are forthcoming from the trial of the transferred competitor cases.

Several considerations of trial convenience, in addition to the possibilities for achieving coherent results among the conflicting claims of the remaining human consumption claims, pointed to Minnesota as a convenient forum. All but one plaintiff supported the transfer. Minnesota would be as convenient as New York for many of the witnesses; in any event, the court would order that all trial witnesses be orally deposed prior to trial so that no problem would be encountered because of limitations on the effective reach of subpoena.¹⁸ The Minnesota federal docket was more current than the federal courts in any of the other 12 districts in which the human consumption cases were originally filed. In fact, stated Judge Lord, the parties should complete discovery on liability issues by June 15 and be ready for trial on July 1 (later changed to September 16, then still later). The plaintiffs' document depository had previously been established in Minnesota. Minnesota counsel had been retained by all of the defendants, and one of them would be trial counsel in the farm cases. Also, most of defendants' Minnesota counsel would likely participate in a trial wherever held. The orders by Judge Lord, he himself conceded, were also motivated in part by considerations of his own convenience. Attending to the consolidated cases required substantial time in New York and considerable travel with consequent interruption of his attempt to keep current with other cases on his calendar in Minnesota.

Simple convenience probably did not account for the strength of the defendants' resistance to the transfer. Of much more importance was the reputation of Judge Lord himself. By his order transferring venue, Judge Lord had done much more than merely designate a different place where hearings were to be held. He had also determined that he personally would preside at any trial of the remaining unsettled cases. With his known sympathies and past record in the courtroom, Judge Lord now loomed as a multimillion-dollar threat to the defendants in the future course of the nonsettling cases.

Not surprisingly, the defendants petitioned the United States Court of Appeals for the Second Circuit for a writ of mandamus, challenging both the transfer by Judge Lord of the cases to the District of Minnesota and the establishment of the consumer classes in the seven nonsettling state actions. The petitions for mandamus were denied on June 15,

18. An additional witness-gathering device to which Judge Lord later referred was to have a private plaintiff's witnesses subpoenaed as if those witnesses were to testify in behalf of the United States. The United States, unlike private litigants, has a nationwide reach of subpoena power in antitrust cases. In effect, Judge Lord cajoled the United States into serving as the conduit for reaching otherwise unavailable witnesses who were sought to be subpoenaed for trial by private litigants.

1971, and a petition for rehearing was denied on July 13, 1971. The Second Circuit substantially vindicated Judge Lord's position on his power to transfer under section 1404(a). It also approved the factors that he had listed in considering the motion to transfer.

D. Organization for Litigation: The Attempt to Recuse Judge Lord

The defendants' worst fears about the possible "tilt" of Judge Lord seemed to them to be increasingly realized in the months after transfer to Minnesota. Judge Lord was energetically pushing the process of completing the discovery necessary for a trial on liability. At the beginning of this new phase of discovery, efficiency and objectivity seemed to have the upper hand. But then, in their view, matters began to deteriorate.

Judge Wyatt's pretrial order number 1, of February 24, 1970, had designated a "Plaintiffs National Steering Committee" (PNSC) of counsel to coordinate pretrial efforts among plaintiffs. PNSC was an umbrella grouping of all plaintiff attorneys, whether representing classes or individual claimants, as in the case of the Department of Justice attorneys representing the civil damage claims of the United States. This system was retained and strongly relied on by Judge Lord. The PNSC's coordinated, pooled efforts gave the plaintiffs in the approximately 55 nonsettling cases the legal firepower necessary to prepare effectively for trial a series of extraordinarily complex and protracted cases. Various subgroupings, such as for discovery or settlement negotiation, were created as needed. National document depositories were maintained in New York (at defendants' expense), California, and Minneapolis as gathering places for literally millions of documents that document discovery would eventually unearth. A schedule of depositions was agreed upon for the hundreds of depositions to be taken by teams of PNSC and defendants' lawyers all over the United States and in foreign countries. Costs (*e.g.*, for the preparation of deposition transcripts) were allocated by an internal system of assessment among all the plaintiffs represented in the PNSC.

The defendants maintained a more informal coordination of efforts. Various attorneys representing one or another of the five defendants were assigned responsibilities by mutual consent. Lead counsel were delegated for hearings and depositions, although counsel for most of the five defendants almost invariably attended hearings.

A unique judicial organization proliferated around Judge Lord. As the evidence and arguments about theories of damages and liability became more complex, Judge Lord, on May 10, 1971, appointed two

experts as his personal consultants on economics and statistics,¹⁹ the costs to be shared equally by plaintiffs and defendants. On August 5, 1971, three discovery masters were appointed to rule initially on disputed questions of discovery, a matter that will be discussed below. On August 25, 1971, an order established a separate fiscal arrangement to cover the expenses of such adjunct persons. Irregular periodic assessments for the anticipated costs of the discovery masters and economic experts were levied by Judge Lord, sometimes orally from the bench. These assessments were to be paid by the parties to the clerk of the federal court in St. Paul.²⁰ The clerk was to maintain a special antibiotics trustee fund, essentially a checking account, in a designated local bank. The account could be drawn on only by Judge Lord or the clerk at his direction. This was outside the normal registry account of the court, which was considered too ridden with red tape and reporting requirements to serve the antibiotics cases adequately. On August 30, 1971, a special deputy clerk was appointed to deal solely with the antibiotics cases. Her office and the entire court files in the cases were moved to an anteroom near the chambers of Judge Lord. Later an "administrative master" was retained, eventually on a full-time basis. After settlements were achieved in some of the cases, settlement masters were appointed to deal with the management and distribution of the settlement fund. One of Judge Lord's two law clerks also devoted full time to the antibiotics cases.

As discovery in the various cases proceeded through the summer of 1971, Judge Lord was confronted with a number of motions and other signs of conflict about discovery. The plaintiffs filed very broad requests to produce documents, and the defendants responded with sweeping claims of privilege, primarily because of alleged attorney-client relationship, but also on trade secret and related grounds. Various privileges

19. Administrative order 71-2. The experts were Dr. Francis M. Boddy, Professor of Economics and Associate Dean of the Graduate School of the University of Minnesota, and Dr. John Neter, Professor of Quantitative Analysis in the School of Business Administration at the University. Their fees were approximately \$40-\$50 per hour. They played an increasingly active role, at a point holding hearings, receiving evidence, and listening to arguments.

20. The defendants submitted a single check through the Donovan firm. The plaintiffs submitted a single check through the treasurer of the Plaintiffs National Steering Committee. Collection for the PNSC was aided by judicial authority. On June 7, 1972, administrative order 72-20 provided that no plaintiff could dismiss or settle a case until after the PNSC had confirmed in writing that the party's assessed costs had been paid. The assessments by the PNSC were self-imposed and self-allocated, apparently on a calculation of potential recovery. Among the seven states, the following percentage basis for allocation was agreed to in September 1971: California, 61.61; Hawaii, 1.58; Kansas, 8.22; Oregon, 4.68; North Carolina, 12.76; Utah, 2.00; Washington, 9.15.

were claimed as to several hundred thousand documents. In order to deal with the issues that the objections raised, Judge Lord, on August 5, 1971, appointed a three-member team of discovery masters²¹ to make preliminary rulings on privilege and to make recommendations to him.

The strategy of the defendants, if there was one other than their belief in the soundness of their claims of privilege, eventually backfired. A particular group of documents relating to the 1953 application for the tetracycline patent clearly appeared to have been communications between attorney and client. But, claimed the plaintiffs, the documents were evidence of the commission of a crime—a criminal conspiracy to commit fraud on the Patent Office by making false statements in order to obtain a patent. The plaintiffs therefore urged the masters to find that the documents were discoverable under the exception to the attorney-client privilege for matters that were evidence of a crime in which the attorney and client were jointly engaged. After conducting hearings and examining documents *in camera*, the panel of experts determined that the documents were in fact outside the privilege for the reason asserted by the plaintiffs—there was substantial evidence that all of the defendants (and certain of their then attorneys) had been engaged in a criminal conspiracy to defraud the Patent Office. In an order entered October 1, 1971, Judge Lord upheld the masters' report on the defendants' request for review.²²

Much more was lost to the defendants than simply a dispute over the availability of documents for the eventual trial. The finding of the masters, especially when upheld by Judge Lord, meant that a possible

21. Administrative order 71-13, August 5, 1971. The order names as masters attorneys Leonard E. Lindquist of Minneapolis and Murray L. Galinson of Minneapolis. Payment of the fees of the masters (\$75 and \$50 per hour, respectively) was to be divided equally between plaintiffs and defendants. Administrative order 71-13A, August 25, 1971, added then Dean Douglas R. Heidenreich of the William Mitchell College of Law in St. Paul as the third master (at \$60 per hour). Administrative order 72-23 (September 25, 1972) replaced Galinson (who had moved from Minneapolis) with Professor Loftus E. Becker, Jr., of the University of Minnesota Law School.

At a hearing in St. Paul on July 28 at which the idea of discovery masters was discussed, the defendants offered to advance the full costs of the system. The offer was rejected by the plaintiffs, reportedly because they feared this would leave the defendants, who were paying the piper, too much in control. Rejection resulted in payment of the enormous fees of the masters being allocated equally to plaintiffs and defendants. The plaintiffs later conceded that they had unwisely rejected the defendants' offer to carry the entire cost.

22. Discovery order no. 71-15. Entry of the order on October 1 came several days after the defendants had filed (and Judge Lord had orally denied) a motion that Judge Lord recuse himself from the case because of bias and prejudice. The recusal motion might have been filed prior to, and in anticipation of, the unfavorable ruling in order to provide an additional argument on appeal that Judge Lord should not have entered the order approving the discovery masters' recommendations.

ground of liability of the defendants had already in a sense been ruled on in a manner favorable to the plaintiffs—at least favorable to the great majority of human consumption plaintiffs whose claims involved tetracycline. The defendants recognized that the “fraud on the Patent Office” issue was the area of their most serious exposure, primarily because of the FTC ruling to that effect, which had not been disturbed by the Sixth Circuit. The masters’ report, and Judge Lord’s acceptance of it, created a serious breach in an already weakened wall of defense.

The adverse discovery ruling came at a time when, the defendants would claim, it appeared that their chances of obtaining a fair trial by an open-minded judge were seriously in doubt. An escalating series of incidents had revealed what the defendants believed was a serious anti-defendant bias on the part of Judge Lord.

One of the persons acknowledged to be a key witness for the defendants on the issue of fraud on the Patent Office was Harvey W. Edelblute, an attorney employed by American Cyanamid, who had handled the tetracycline patent application. At his six-day deposition in August 1971, Mr. Edelblute was being asked questions about matters that had occurred 17 or more years earlier, matters that he had testified to on at least three previous occasions. It was recognized that his was key testimony. Also, Judge Lord anticipated that a number of evidentiary objections would be raised during the deposition and decided that it would be well for him to preside at the deposition to rule on objections. In the course of the deposition, Judge Lord became active in asking questions directly of the witness. Several comments by Judge Lord clearly indicated his disbelief of the witness’s testimony. He made comments that implied that the witness had been instructed by defendants’ present counsel to answer unclearly, and made thinly veiled threats to fine the witness. It appeared to the defendants that Judge Lord had joined counsel for the plaintiffs.

Nor was this all. In May Judge Lord had telephoned counsel for the State of Hawaii on learning that Hawaii had proposed to settle its claims on the same basis as the Wyatt settlement. Judge Lord called the attorney in California to state that he would refuse to approve the settlement if it were consummated. Further, at a conference in chambers on September 8 called to discuss a tentative settlement agreement between the United States and the defendants,²³ Judge Lord

23. The tentative argument would have settled the claims of the United States for \$14.3 million. In addition, the defendants would have agreed to dedicate the tetracycline patent to the public. The United States would have dismissed its complaint, but was prepared to deliver all its trial preparation material to the remaining plaintiffs. Judicial approval of the contemplated settlement was not required.

strenuously attempted to persuade the government not to settle. He complained that it would upset his "game plan" for trial of the other cases. In his exchange with the attorney for the United States, Judge Lord excoriated the Patent Office as "the sickest institution that our Government has even invented." He stated that the settlement would permit the defendants to "buy a monopoly." The United States withdrew from the settlement.

Matters were going from bad to worse for the defendants, and at a pace that threatened to accelerate. It appeared to many of the defense counsel that the trial judge had almost entirely abandoned any pretense of objectivity. Judge Lord was also strenuously pushing for an early trial. The plaintiffs were nearing completion of a trial brief and would insist on an early response from the defendants. A bold stroke, defendants decided, was called for.

On September 17, 1971, defendants filed a joint motion with supporting papers seeking to require Judge Lord to recuse himself from the case because of his demonstrated inability to be impartial. At a hearing held three days later, Judge Lord, after a short discussion, denied the motion "for legal insufficiency."²⁴ The defendants soon filed petitions for mandamus in the Eighth Circuit Court of Appeals, challenging both the ruling of Judge Lord refusing to recuse himself and his ruling upholding the discovery masters' refusal to find a lawyer-client privilege because of fraud on the Patent Office.

The defendants must have realized that because of the unfavorable state of the law their chances of succeeding before the appellate court were at best even. They must also have appreciated that, if Judge Lord were plaintiff oriented to start with, he probably would regard the petition for mandamus as one more foul deed by the defendants and perhaps harbor even more vindictive feelings than might now motivate him. But, at the least, the recusal motion would give events pause, as the appellate court would not likely permit Judge Lord to continue further with significant aspects of the cases while the recusal motion was pending.

If the strategy was to obtain breathing space, it worked. A disposition of the petitions was not obtained until February 1972 and a hiatus of almost a half year was created in the pretrial proceedings. But little

24. While the recusal motion was denied, some of the snap was gone from the flag. After attending to other pretrial administrative details at the same hearing, Judge Lord commented: "As I say, the haste has gone out of this now. We are settling down, as I see it, for a longer, more steady pull. And which, incidentally, the court will take some of the therapy that has been served in the form of a petition and will not be pushing the lawyers so hard, whatever the result of the petition."

else of direct benefit to the defendants was obtained from the court of appeals decision. In their rulings of February 15, 1972, the Eighth Circuit found that the record did not support the petition to force Judge Lord to recuse himself from the cases and found that the discovery rulings, at least if limited to Cyanamid and Pfizer, were not clearly erroneous. In the opinion, however, the court of appeals lectured Judge Lord on proper judicial deportment, coming close to warning that further outbursts or demonstrations of partisanship would result in a coerced recusal. Several of the episodes were spelled out in the published opinion, and the judge's conduct was characterized as "inappropriate," "perhaps even unfair," "unfortunate," "misconceived," "totally injudicious," "gratuitous and wholly extraneous," and in similarly scathing terms. But in the end these were merely descriptions, a caution to Judge Lord to behave more judiciously. Judge Lord remained the judge who would preside at trial.

E. Substantive Developments

During the interval immediately following the New York settlements in early 1969, the defendants' appeals of their criminal convictions in the Southern District of New York were also going forward. The defendants won a major victory when on April 16, 1970,²⁵ the Second Circuit ruled that the convictions could not stand because of errors in admitting and excluding evidence and in instructing the jury. The convictions of the individual defendants were reversed and their indictments dismissed. The convictions of the corporations were reversed but ordered back to the trial court for a new trial free of the procedural problems that had infected the first. On petition for rehearing, the Second Circuit narrowed the ground of its reversal, but nonetheless ordered a retrial under circumstances that eliminated the value of the original conviction to civil plaintiffs in the nonsettling antibiotics class actions. On the government's appeal of the Second Circuit reversal, the Supreme Court affirmed the Second Circuit by an equally divided vote on January 24, 1972.

More ill tidings for the nonsettling plaintiffs followed a year after the convictions were overturned. Judge Lord, soon after his appointment to the cases in late 1970, considered the relevance to the damage

25. The criminal appeals had been argued in the Second Circuit almost a year previously—on May 7, 1969. The record was extensive; the transcript of testimony and exhibits ran to 12,000 printed pages. Nonetheless, the delay was significant and doubtless had an impact on negotiations that were then under way in the private hospital/Blue Cross cases. A written offer of settlement was made by the defendants on April 3, 1970, 13 days before the Second Circuit opinion issued reversing the criminal convictions.

cases of the FTC finding of September 29, 1967, that American Cyanamid and Pfizer had committed fraud on the Patent Office in connection with Pfizer's 1953 application for a patent on tetracycline. On July 30, 1971, Judge Lord ruled against the plaintiffs. (Judge Lord's ruling could not have been unexpected. The defendants had claimed the right to a jury trial in most of the unsettled cases. To have used the agency findings as *res judicata* would have deprived them of this right on the vital issues of liability.) The FTC findings could not be used to establish *prima facie* the fact of an antitrust violation. While some of the FTC findings might be available as collateral estoppel on some subsidiary factual issues in a few of the pending cases, the plaintiffs now would be required to prove an antitrust violation from the ground up.

However, Judge Lord found in the same order that the FTC proceedings were sufficiently related to the damage claims of both the human consumption and farm cases to permit a tolling of the statute of limitations. In effect, this meant that claims in both the human consumption and farm cases could be made as far back as the beginning of 1954.

VIII. THE \$3.95 MILLION *Midwest Vet* SETTLEMENT

The first class that Judge Lord certified, on January 15, 1971, was the farm wholesaler class under the caption of the *Midwest Veterinary Supply* case. The certification order was the culmination of an informal conference held in Minneapolis on December 29 and 30, 1970, with a number of plaintiffs' and defendants' attorneys. The parties agreed that three national classes should be established—farm wholesalers, veterinarians, and farm feed manufacturers. The details of the class descriptions were subsequently negotiated, and Judge Lord certified classes of the resulting descriptions.

The order certified a class, under the caption of *Midwest Veterinary Supply Company v. Chas. Pfizer & Co.*, to include the following members:

All those individuals, proprietorships, partnerships, corporations, and other business firms and entities located in the United States or the Commonwealth of Puerto Rico who during a period beginning in or about 1953 purchased broad spectrum antibiotics and broad spectrum antibiotic products for resale at wholesale for non-human use and whose chief functions are to sell the products in question to industrial, commercial, institutional and professional users or to other wholesalers for non-human use or resale.

The class superficially resembled the wholesaler-retailer class established for settlement purposes by Judge Wyatt. But there were substantial

differences, including, according to the farm wholesalers, differences in the pricing structure in the farm wholesale market that weakened the defendants' *Hanover Shoe* passing on defense.

Class action order number 71-14 (April 13, 1971) directed that the members of the class be notified (in a form submitted by class counsel) of a hearing on the proposed certification. The notice was mailed to 1,689 potential members of the class; some 282 requested exclusion. Thirteen class members intervened through personal counsel.

Midwest Vet and the other farm cases followed the human consumption cases back to Minnesota three months later. The human consumption cases were ordered transferred to Minnesota by Judge Lord on May 14, 1971. Administrative order 71-11 (of August 9) ordered all the farm cases to Minnesota for trial as well.

A. Settlement Negotiations

Originally the defendants had tried to settle all antibiotics civil damage actions with the global settlement offers in early 1969 of \$100 million to the states and \$20 million to the private hospital and Blue Cross plaintiffs. In fact, the \$20 million purported to be offered to all other plaintiffs to settle "all" claims. The defendants regarded only the human consumption plaintiffs as serious opponents. Their disdainful attitude toward other plaintiffs, including the farm plaintiffs, indicated that a great deal of additional discovery would be required before the defendants would negotiate seriously with the nonhuman consumption plaintiffs.

The assignment of Judge Lord as the presiding judge and his transfer of the nonsettling cases to the District of Minnesota seriously undermined the defendants' overall strategy for dealing with the nonhuman consumption cases. In reaction, they assumed a very vigorous litigating stance, hoping perhaps to dispirit the plaintiffs (or enough of them) so as to offset the advantages that the new judge and the new venue might give them. Thus, in contrast to the situation in New York in 1967 and 1968, the defendants in Minnesota rejected any overtures concerning settlement, at least at the outset.²⁶

The Eighth Circuit's rejection of the defendants' recusal motion had made it clear that the defendants were likely destined to a trial on the merits before their proclaimed nemesis, Judge Lord. This softened their stance on settlement negotiations, but the change appeared slowly.

26. The proposed settlement offers by the defendants to Hawaii and to the United States that Judge Lord prevented from being consummated in May and September 1971 were not inconsistent with this attitude. Both offers involved only human consumption claims.

After the chastening by the Eighth Circuit, Judge Lord became relatively inactive in the case. The parties continued to prepare for trial but at a much more leisurely pace.

There is no indication of any settlement negotiations in the *Midwest Vet* class action until January 1973, but then they developed rapidly. The negotiators were attorneys Phillip M. Hammet, Julian O. von Kalinowski, Samuel W. Murphy, Jr., and Peter Dorsey for the defendants and Minneapolis attorneys Richard W. Johnson and Roger A. Johnson for the plaintiffs. The first meeting was held in Minneapolis on January 18, 1973, with two additional meetings on January 26 and 27. After these preliminary discussions roughly established the positions on both sides, more meetings occurred between Mr. Dorsey and Mr. Richard Johnson. On February 7, 1973, the amount of \$3,950,000 was agreed to, and an initial memorandum of agreement was prepared. Following further negotiations, a final agreement was signed on February 23, 1973, by all the original negotiating attorneys plus attorneys for the three other drug defendants.

At this point, less is known about this settlement than any other settlement. Few persons were engaged in the negotiations, and most of them are still active in related cases in trial. Moreover, as Judge Lord has stated at numerous hearings, he refuses to write elaborate opinions because they only "get me in trouble" in the appellate courts. Typically, his opinions and orders in the antibiotics cases have been virtually telegraphic and skeletal, conveying little detail and no background. Little authority is cited, and the discussion is of the flat and assertive kind. This tendency became more pronounced after the Eighth Circuit rejected the recusal motion. After the series of 1971 rulings that Judge Lord released for publication in volume 333 of the *Federal Supplement Reports*, no further opinions have been published. Also, no opinion of any kind will be written in the *Midwest Vet* settlement in support of the order perfunctorily approving the settlement. A draft opinion was written, but the judge decided not to issue it.

Despite the lack of evidence from participants and of an opinion from Judge Lord, it is apparent that several considerations must have contributed to the settlement. First, the prospect of a trial was not entirely attractive to the plaintiffs. The April 1970 reversal of the criminal convictions removed the only clear source of *prima facie* proof of an antitrust violation. In any event, the criminal cases involved tetracycline, which did not account for a substantial portion of nonhuman consumption sales. Further, most of the plaintiffs agreed that it was imperative to develop a stronger and more persuasive case than could be derived from the cold written records in the FTC and criminal proceed-

ings to prove an antitrust violation. In fact, Judge Lord had already ruled in July 1971 that the prior FTC action was not a proceeding "under the antitrust laws" as required by 15 U.S.C. sec. 16(a) and therefore would not be prima facie evidence of a violation for the purposes of trial in the damage cases. His opinion did reserve ruling on the question of the possible use of some of the findings of fact in the FTC proceedings as collateral estoppel in the civil actions, a matter complicated by the fact that jury trial had been demanded in the civil actions and had, of course, not been available in the administrative proceedings.

The farm plaintiffs could probably derive only limited value from the FTC proceeding or from the government's convictions even if the latter were upheld on appeal, since both had dealt only with the human consumption market.²⁷ The products were different, their market structure was different, and the defendants' behavior in allegedly monopolizing and controlling prices in the farm markets were all different from the human consumption market and the damage claims that had arisen out of it. The prior proceedings had dealt largely with tetracycline, a drug rarely used in the farm market (only 1 or 2 percent of the dollar value of antibiotics sold by the defendants in the farm market). Chlor-tetracycline and oxytetracycline were much more widely used, principally in cattle and poultry feeds and medications. And, as the defendants frequently noted, the most serious weakness of their defense was the FTC finding of fraud on the Patent Office in the procurement of the patent on tetracycline; no government agency had ever challenged the patents on chlortetracycline and oxytetracycline. The farm cases, therefore, had to prove a much broader conspiracy than any human consumption claim.

The most substantial legal problem confronting the *Midwest Vet* class was the "passing on" defense that the Supreme Court had dealt with in the *Hanover Shoe* case. The defendants were prepared to argue at trial that these plaintiffs had in fact suffered no damage at all as a result of the alleged illegal conduct because the amount of any illegal overcharge had been passed on to those who had purchased from the plaintiffs. Judge Lord had ruled in April 1971 that the farm end-users could not pursue claims, but many of the customers of members of the *Midwest Vet* class were still represented in other active classes in the

27. In fact, the FTC order on remand finding that the defendants had committed fraud on the Patent Office was amended by the commission at the suggestion of the defendants to make it explicit that the commission finding related only to the sale of tetracycline for human consumption.

litigation, primarily in the *Doughboy* and *Hoffert* classes. The problem for the *Midwest Vet* class had been made more acute by unfortunate language that appeared in Judge Inzer B. Wyatt's opinion approving the \$100 million settlement. In approving the relatively low percentage to be paid to the human consumption wholesaler-retailer class, Judge Wyatt and the Second Circuit both indicated, if elliptically, that a class of wholesalers would have difficulty proving that they had been injured by a price-fixing conspiracy among the drug manufacturers. While the remarks of Judge Wyatt were prompted by evidence that the *retailers* had charged a uniform price markup, in his opinion he said that it appeared "highly doubtful whether *wholesalers* or retailers suffered any damage whatever . . ." (emphasis added).

Also, the statute of limitations made it questionable that the recoveries of the *Midwest Vet* and other farm plaintiffs would be permitted to extend as far back as those of the human consumption plaintiffs. It seemed fairly certain that the human consumption claims could be made as far back as the originally alleged conspiracy in 1954. In fact, the New York settlements had been negotiated on this basis. The reason that actions filed in the late 1960s could extend back so far was that the FTC and criminal actions in the late 1950s and early 1960s had very likely served to "toll" the statute of limitations for private damage claims that were based on the same alleged conspiracy. But these actions had concerned only the human consumption markets and probably had not tolled the statute of limitations for the nonhuman consumption claims. Although Judge Lord had ruled in July 1971 that the statute of limitations had been tolled for both human and nonhuman consumption claims, the ruling was widely regarded as assailable in an appellate court. Judge Lord's pretrial order had not been in an appealable order, but no one doubted that the defendants would raise the point in any appeal from an adverse contested judgment in a farm market case.

Perhaps most disturbing to the plaintiffs was the constant and increasing drain of financial resources to support pretrial preparation. The costs of discovery had been enormous, and as the complexity of the case and the resistance of the defendants mounted, the monthly totals for all plaintiffs sometimes approached \$100,000. Although the plaintiffs in the 55 nonsettling cases had pooled their resources, for plaintiffs who were not enormously wealthy the costs were becoming burdensome. Also, many plaintiff attorneys had now been through four or five years of virtually full-time attention to the antibiotics cases—almost all on retainers that provided only for compensation on a contingent fee basis. While some plaintiffs periodically compensated their own

attorneys for out-of-pocket costs, most attorneys were "carrying" the expenses for a class or set of plaintiffs. Some of the lead attorneys had borrowed heavily to maintain their efforts in the case. Costs were likely to continue to climb and would remain very high during what promised to be a long trial requiring constant attorney attendance, daily transcripts, transportation and housing of staff and witnesses, and the like. For many attorneys, the pressure to settle and obtain an immediate assurance of compensation (very considerable compensation even if the settlements were on a par with the New York settlements) must have been enormous.

Several other timing factors played a part. Judge Lord had opposed the Hawaii and United States settlements in mid-1971, preferring a trial. But the defendants' mandamus petition and the consequent year's inaction in the cases had caused the antibiotics cases to languish for what was a very long time by Minnesota federal court standards. The four federal judges in the district were proud of the currency of their docket, despite one of the heaviest per-judge caseloads in the country. So long as the antibiotics cases lingered on the docket, Judge Lord would necessarily be absorbed in those cases to the detriment of the rest of his calendar. Despite assurances given when Judge Lord was originally assigned to the consolidated cases in 1970, transferor districts supplied little judicial assistance. The continual pressure of his docket doubtless would put Judge Lord in a mood more receptive to a request to approve a class action settlement. The slow pace of the antibiotics cases following the Eighth Circuit's chastising of Judge Lord made it clear that the cases would be time consuming if settlements were rejected. Also, settlements might remove some conflicts and overlaps with claims that were still pending.

In addition, unlike the two settlements before Judge Wyatt, negotiations on the *Midwest Vet* and other farm settlements commenced after extensive discovery, and the probable outcome of a trial on the merits could be predicted with some confidence. This, more than any other factor, permitted the plaintiffs to negotiate from strength. Whether there were sufficient data to convince a jury to find liability at a subsequent trial was debatable, but the plaintiffs clearly had more information than was available either to the FTC, to the government in its first criminal prosecution in New York, or to the plaintiffs in the 1969 and 1970 settlements in New York.

B. Terms of the *Midwest Vet* Settlement: Notice, Hearing, and Approval

The terms of the *Midwest Vet* class action settlement agreement signed on February 23, 1973, are quite simple. The defendants pro-

posed to pay the plaintiff class \$3.95 million in full and complete settlement of all of the class's claims, except for the few class members that had excluded themselves from the class. All costs of notice, attorney fees, and settlement administration would come out of the settlement fund. The funds were to be deposited after approval of the settlement by Judge Lord. Attached to the original agreement was a form of notice to the class members and a form for an order directing that notice be sent to the members. Judge Lord adopted verbatim both the proposed order and the proposed text of the notice. The settlement agreement itself provided that "promptly after the execution hereof, and no later than February 23, 1973, the parties hereto shall jointly recommend the terms of this memorandum of agreement to the court as a fair, adequate, and proper settlement of the action and shall at that time request the court's entry of an order in the form annexed hereto"

Because the *Midwest Vet* case had already been certified as a class action by Judge Lord in 1971, all that remained to be done was to obtain his approval of the settlement after notice was given to the nonexcluded class members. On February 26, Judge Lord signed class action order number 73-26 directing that the class members be notified of the proposed settlement and of a hearing on the settlement to be held in Minneapolis on April 26, 1973. The plaintiffs were authorized to print and mail the notice, with the cost of mailing to be paid by the defendants. (If the settlement had not been approved by the court after notice to the class, the settlement agreement provided that the costs of notice paid by defendants would be taxed as costs against the party that eventually lost the litigation.) The notice was printed and mailed on March 14 to the 1,407 members of the class who had not requested exclusion.

No member of the class entered an appearance as a result of the notice or objected to the settlement. Counsel for the *Midwest Vet* class and counsel for defendants submitted briefs and affidavits in support of the settlement. At the scheduled hearing on April 26, counsel on all sides, including the spokesman for the PNSC, again spoke in favor of the settlement. All initial statements from the parties asserted, of course, that the settlement was entirely fair and adequate and had been arrived at after hard bargaining conducted at arm's length.

Two unexpected snags developed. First, immediately after the settlement was announced on February 26, the Johnson, Thompson, Spring and Klaverkamp firm submitted a claim for attorney fees. The Johnson firm had served as the lead attorneys for the plaintiffs. Their brief statement indicated that two requests would be made—one for \$750,000 to be paid immediately for work done to date and a second

of up to \$750,000 for completion of the case. Expenses of \$35,000 to date were also claimed. At the April 26 hearing, Judge Lord expressed concern that the claim was excessive, given the size of the proposed settlement. The proposed fee of \$1,500,000 was close to 40 percent of the \$3.95 million settlement fund, and an additional portion would be taxed for administrative and other costs before the settlement fund was distributed to the class members.

Second, a question arose as to the status of claims of farm cooperatives. Were they "wholesalers," and thus within the *Midwest Vet* class? Or were they manufacturers or retailers and therefore within the as yet unsettled *Doughboy* class? At the hearing, counsel for the farm cooperative plaintiffs stated that he considered his clients to be members of the nonsettling *Doughboy* class, but the language of the settlement might be construed to settle some or all of his groups' claims. Thus, he felt constrained to file claims against the settlement fund to protect the interests of his class; this large additional group of claims would very likely make the amount of the settlement inadequate. Counsel for the *Midwest Vet* class argued that the farm cooperative claims were clearly not included within the settlement. But counsel for the defendants took the position that a farm cooperative might be included within the settlement depending upon the nature of the cooperative claimant's business and what was done with the products purchased from the defendants.

In view of the confusion over inclusion of farm cooperative claims, and because of his own concern over the size of attorney fee claims, Judge Lord ordered on his own motion that a second hearing, after an additional notice, be held. Notice was to be mailed to the members of the *Midwest Vet* class (but not to the farm cooperative members of the *Doughboy* class) informing them of a second hearing in Minneapolis on July 30, 1973, to consider again the fairness of the settlement, the appropriateness of the claim for "attorney fees" (not otherwise described in the notice), and which claims were covered by the settlement offer. Judge Lord also ordered that notice should be given through the PNSC that any other attorney who intended to file a claim for attorney fees against the settlement fund was required to submit a petition for an award of fees before the July 30 hearing.

At that hearing, again no one appeared in opposition to the overall settlement, although an attorney for one member of the *Midwest Vet* class, Ozark Farm Supply, Inc., had entered an appearance and filed a memorandum in opposition to the size of the attorney fees claimed. By the time of the hearing (after a look at the court files, principally the

monthly timesheets of the Johnson firm and some conversations with the attorneys for the class and other attorneys familiar with the antibiotics litigation), he felt that the fee requests were reasonable in light of the quantity and quality of work done.

The potential problem of conflicting claims was significantly deflated when Judge Lord indicated that he would have a difficult time finding that any claim of a farm cooperative in the *Doughboy* class action was barred by this settlement. The point, while not clear in the order approving the settlement or even from the transcript of the hearing, was made explicit in discussions in chambers in the presence of numerous counsel and the judge's administrative master.

On October 26, 1973, Judge Lord issued class action order number 73-35 formally approving the settlement and the petition for partial award of attorney fees and expenses totaling \$782,134.62. The order dismissed with prejudice the claims of the plaintiff class against the five defendants and retained jurisdiction to distribute the settlement fund.

IX. THE \$38.15 MILLION *Doughboy-Hoffert* SETTLEMENT

Of the roughly 160 civil case filings that followed the return of the guilty verdict in the criminal prosecution, some 21 separate actions were filed by veterinarians and manufacturers of medicated animal feed.²⁸ All these cases originated far from the Southern District of New York, mostly in the South and Midwest. They were consolidated along with the other civil cases in the Southern District. Subsequently, three additional plaintiffs in these groups asserted claims. It was chiefly through the efforts of counsel for these cases that the transfer was made to the District of Minnesota.

A. Configuration of the Classes

Judge Lord, on January 15, 1971, had certified a class of veterinarians under the title of *E. J. Hoffert v. American Cyanamid Co.*, the

28. Few actions had been filed by farm plaintiffs compared to the number of human consumption filings. The explanation of the discrepancy can hardly be found in the insignificance of the farm market for antibiotics. In the 13-year period after 1953, the defendants had agricultural sales of antibiotic products of a value between \$475 and \$500 million. Some of the claims within the farm group were represented in the *Midwest Veterinary Supply* case. But the great majority were represented in the *Doughboy* and *Hoffert* cases.

Hoffert class. The description of the class, adopted from recommendations worked out by counsel for both sides, was:

Doctors of veterinary medicine, whether doing business individually or as a partnership, corporation or association, who have purchased directly or indirectly, broad spectrum antibiotics and broad spectrum antibiotics products for non-human use during the periods covered by these actions, whose principal offices are located throughout the United States of America or the Commonwealth of Puerto Rico.

Named as the class representative of the *Hoffert* class was Dr. E. J. Hoffert. The order also named the counsel of record in the other four actions that had claims falling within the class definition as a committee of counsel for the *Hoffert* class.

The third national farm class, in addition to *Midwest Vet* and *Hoffert*, was a class of medicated farm feed manufacturers under the caption case of *Doughboy Industries, Inc. v. American Cyanamid Co.* *Doughboy* had been filed in the District of Minnesota in 1969, initially assigned to Judge Lord's calendar, and consolidated with the other damage actions before Judge Wyatt in New York. It was certified as a class action by Judge Lord on January 21, 1971, and was described as a class of

All persons or entities located in the United States or the Commonwealth of Puerto Rico who, during the periods covered by the complaints herein:

a) purchased for manufacture or use broad spectrum antibiotics or broad spectrum antibiotic products for non-human use directly from the defendants; and/or

b) purchased for manufacture or use, but not for the purpose of resale, broad spectrum antibiotics or broad spectrum antibiotic products for non-human use from wholesalers, including distributors and subjobbers, in the same form as originally sold by the defendants.

As with the *Hoffert* class, only the plaintiff in the lead case was named as class representative. The counsel of record in the 19 actions within the class definition were named as a committee of counsel to act in behalf of the national class. Attorney John A. Cochrane, of St. Paul, the counsel of record in the *Doughboy* case itself, was elected chairman of the committee and emerged as a dominant figure in the pretrial and settlement negotiations. In addition to the separate committee of counsel in each national class action, all of the attorneys in these actions were also members of the Farm Plaintiffs Committee of Counsel (FPCC), which in turn created a subcommittee to conduct the negotiations in these cases. The members of the negotiating subcommittee were Mr. Cochrane, his close associate Jack V. Chestnut, and Douglas Rigler.

The members of the FPCC were, under the terms of pretrial order number 1, members of the Plaintiffs National Steering Committee.

Originally some plaintiffs had sought to represent a class of purchasers whose claims were based on purchases of animal feed containing the defendants' products—the so-called end-users.²⁹ These were the approximately 2,800,000 farmer consumers of medicated feed. The defendants moved to dismiss these claims on the ground that the end-user claimants were too remote from the alleged conspiracy to have standing to assert a claim for damages. On April 13, 1971, Judge Lord had granted the defendants' motion. He reasoned that the products did not contain antibiotics in the same form as originally sold by the defendants and that the feed had been sold to the end-users in a second competitive market, the farm feed market. The second competitive market had insulated the end-users from the impact of the overcharges. The end-users could not, therefore, show the necessary causal relationship between any proven antitrust violation and the price they paid for the finished feed products. In a turn on the *Hanover Shoe* rationale, Judge Lord pointed out that his holding that the end-users did not have a claim did not mean that the defendants would elude liability for any proven price conspiracy because three other classes (*Hoffert*, *Doughboy*, and *Midwest Vet*) had already been created to deal with alleged price overcharges in the nonhuman consumption market.

Judge Lord also noted in his opinion that the defendants had offered in open court not to press a pass on defense against the certified classes of nonhuman consumption claimants if the court would grant their motion to dismiss the claims of the farm end-users. The defendants' strategy in making that offer is apparent. The smaller the number of claimants (despite the fact that the average size of claim might increase), the less likely the defendants would be required to make a "global" compromise like the \$130 million settlements in New York.

Technically, Judge Lord's dismissal of the end-user claims simply meant that the claims of the actual plaintiffs who had asserted these claims were dismissed. Because no end-user class was ever certified, that

29. Because of the clear conflict between the farmer end-users and the manufacturers or wholesalers from whom they purchased, the *Doughboy* and *Midwest Vet* class definitions were explicitly worded so as to cover, and then just in the *Doughboy* class, only those end-users who had purchased antibiotics products directly from the defendants. These were primarily large corporate animal feeders who purchased antibiotic products directly from the defendants and mixed their own feed. End-users who did not purchase directly would have had interests in conflict with the dealers from whom they had purchased because of the *Hanover Shoe* passing on and remoteness issues.

ruling did not directly affect the claims of end-users who had not yet filed individual actions. Realistically, however, in the absence of another plaintiff willing to file a separate action, there was no party in the consolidated lawsuits making any arguments in behalf of the end-users. Most of the *Doughboy* class representatives—none of whom were significant end-users themselves—were more than content to let matters lie.

Following certification of the *Doughboy* and *Hoffert* classes, Judge Lord ordered notices sent to the class members to permit them to request exclusion. No mention was made that end-users had been denied inclusion except to the extent that this could be inferred from the descriptions of the included classes. Some 17,790 notices were mailed to potential members of the *Doughboy* class, and 26,819 notices were mailed to potential members of the *Hoffert* class. In *Doughboy*, notice was also published in the June 1971 issues of 11 national farm journals. The order directing notice to members of the *Hoffert* class required the clerk to mail notice (paid for by the parties) to each veterinarian listed in the 1970 edition of the *Directory of the American Veterinary Medical Association* and to any other veterinarians whose names were submitted by counsel. The clerk was to obtain a post office box and to record responses from class members. The notices to both classes explained the right of class members to request exclusion or to enter an appearance through counsel. No claim forms were required to be returned in response to the initial notice.

B. Factors Leading to Settlement

The *Doughboy* and *Hoffert* actions were returned to the District of Minnesota on August 7, 1971, after Judge Lord had decided to conduct a coordinated trial on liability. By early 1973 the parties were fairly well along in pretrial preparation. Discussions that led to an eventual settlement in the *Doughboy* and *Hoffert* cases seem to have begun in earnest about the same time that the separate settlement was being negotiated in behalf of the plaintiffs in the *Midwest Vet* case. There does not seem to have been any connection between them, although it is likely that the *Midwest Vet* attorneys were keeping the PNSC informed. There was very close coordination between the discussions undertaken in behalf of the *Doughboy-Hoffert* classes and the nonsettling states classes. John A. Cochrane, chairman of the farm committee of counsel, was also the chairman of the Plaintiffs National Steering Committee. Attorney Thomas J. Greenan, one of the chief negotiators for the nonsettling states, was also a member of the farm committee because his state client, Washington, was also asserting claims in behalf

of members of the *Hoffert-Doughboy* classes who were Washington residents. In fact, with the exception of the attorneys for the United States government and an attorney representing a plaintiff in one of the competitor cases, all the active members of the PNSC were attorneys involved in the farm or nonsettling states cases. This interlocking committee system, as well as the coordination of pretrial preparation, meant that all PNSC attorneys were aware of the negotiations that were going on simultaneously with respect to several of the class suits.

The mutual knowledge produced pressure on each separate class to settle. The farm plaintiffs and the nonsettling states were closest to trial. The United States case and the competitor, union health and welfare, and insurance cases, while involving potentially large claims, were not ready for trial. If either the farm plaintiffs or the states settled, the other would continue in a battle that would have to be waged without their most powerful ally. The absence of one class would have substantially diminished the total legal experience and money that could be brought to bear against the defendants if trial were required.

Also, the defendants had insisted upon a right of jury trial as to the amount of damages suffered by each individual member of each class. The only way a jury trial would be affordable and manageable would be if the court adopted a "fluid damages" concept—a jury would return a verdict as to the total amount of injury to the class, and distribution to individuals would be handled as a nonadjudicatory administrative matter. The method was utterly revolutionary, although Judge Lord had hinted broadly that he believed that "imagination" and "cooperation" on all sides could generate an acceptable model of fluid damage jury trial. It seemed wishful thinking to suppose that these problems could be resolved without objection from the defendants.

Such problems would be resolved only after a very long and costly trial, even if simultaneous trials on liability could be managed in several of the nonsettling cases at once, as Judge Lord ultimately would attempt. With the trial imminent and discovery well advanced, these issues emerged sharply. The parties could determine the odds of particular outcomes on nonliability issues. The farm plaintiffs had also advanced in their pretrial preparation of damage materials to the point where they were prepared to submit their trial brief on the economics of the defendants' alleged price conspiracy and on the impact of this conspiracy upon the farm plaintiffs. Unlike the settling plaintiffs in New York, these plaintiffs could bargain armed with an immense store of factual ammunition and with less uncertainty about many of the important legal issues.

The economic incentives for the plaintiffs' representatives in the

farm cases to settle prior to trial have already been described in connection with the *Midwest Vet* settlement. The costs to the plaintiffs of continuing toward trial were awesome. Some of the attorneys had been engaged in this litigation on almost a full-time basis for five years, and no plaintiffs' attorney had yet received a payment of fees, at least from this particular litigation (though some had represented clients in the New York settlements). Most of the attorneys were also financing personally their plaintiffs' share of cost assessments. These assessments were mounting as the bureaucracy of masters and deputies grew, and there were other expenses, such as travel, lodging, and fees for expert witnesses and economists and statisticians; the total often amounted to thousands of dollars per month for an individual litigant. The enormous expenses of certification notice were also being borne personally by several attorneys.

The circumstances of the parties were ideal to permit settlement negotiations to succeed. They began in earnest in the early part of 1973.

C. The Negotiated Settlement

The negotiations that led to the *Doughboy* and *Hoffert* settlements were conducted in behalf of the plaintiffs by a team led by Mr. Cochrane. The plaintiffs' attorneys had agreed beforehand to give Mr. Cochrane authority to seek a final settlement on his own if this approach seemed more likely to succeed with the defendants' attorneys. In fact, several other plaintiffs' attorneys participated in the discussions at various stages. They included Jack L. Chestnut (Cochrane's constant ally); Floyd E. Boline, a junior partner to Mr. Chestnut; and Douglas Rigler and Ephraim Jacobs of the Washington, D.C., firm of Hollabaugh and Jacobs, who represented plaintiffs in the *Hoffert* class. Economic experts Dr. Dale C. Dahl and Dr. Richard C. Hoyt, who had assisted the plaintiffs with economics models and data, also participated in some of the discussions. Phillip M. Hammett and Julian O. von Kalinowski negotiated for Pfizer, and Samuel W. Murphy, Jr., Ralstone R. Irvine, and Peter Dorsey for Cyanamid. Mr. Murphy was the principal spokesman for the defendants, but Mr. Hammett negotiated the basic understanding with Mr. Cochrane that became the final settlement agreement.

The history of negotiations in the farm cases theoretically reach back to the abortive, and suspect, attempt by Harold E. Kohn to settle "all" claims in early 1969. It was assumed that the farm plaintiffs would participate in some slim leftover of the \$20 million offer. As part of the general settlement attempt made in February 1969, the defen-

dants, clearly as an afterthought, had on February 19, 1969, offered to pay the farm plaintiffs a total of \$200,000 for the "nuisance" value of their alleged claims. The offer was made to Mr. Cochrane, Mr. Chestnut, and Mr. Boline as counsel for the plaintiffs in the *Doughboy*, *Hoffert*, and *Minnesota Fur Foods* actions. The offer presumably was intended to settle all farm claims that had been filed. The offer was rejected. Some of the counsel who renegotiated the eventual \$32.5 million hospital settlement were also members of the committee of counsel in the farm cases, most notably Mr. Cochrane and Mr. Chestnut. They had made it clear in the course of negotiating the hospital settlement that they felt that the farm plaintiffs had substantial, separate claims of their own. The final settlement offer to the private hospitals was narrowly drawn to avoid including any possible farm plaintiff's claim.

Two other tentative settlements, the third and fourth, were attempted prior to the ultimately successful offers in early 1973. The third offer came shortly after Judge Wyatt had entered pretrial order number 1, which, among other matters, established the farm plaintiffs committee of counsel. That committee established a three-member farm negotiating committee that handled subsequent negotiations in behalf of the farm plaintiffs. These subsequent efforts appear to have occurred on and off throughout the period of pretrial preparation. Shortly after the farm negotiating committee was established, early in 1969, representatives of the three "minor" defendants—Bristol-Myers, Squibb, and Upjohn—sought to settle the claims against them separately from the claims against American Cyanamid and Pfizer. These attempts, which apparently did not result in an offer of substantial size, were rejected.

The fourth significant attempt at settlement occurred during August 1971. The negotiations resulted in an offer of settlement of a firm \$7.5–\$8 million and would have disposed of the claims of all farm plaintiffs. The offer was rejected as inadequate.

Following the remand of the cases to Judge Lord after his lecture from the Eighth Circuit in early 1972, the parties engaged in a lengthy period of intensive trial preparation. The accumulated data produced significant mutual insights into the respective strengths and weaknesses of the cases on both sides and gave the participating attorneys almost daily opportunities to reopen negotiations.

Tentative feelers resulted in a series of meetings beginning in December 1972 between Mr. Cochrane, representing all the farm plaintiffs, and Mr. Hammett, for the defendants. They outlined the "parameters of an acceptable farm settlement." Then, a larger group of attorneys engaged in very extensive and detailed discussions. These resulted in an offer from the defendants to settle all the farm cases on a "per-

centage of probable sales” basis. The parties were, apparently, not far apart on the sales figure, but disagreed on the figure to represent the percentage of overcharge. Also, the offer did not deal with the difficult question of allocating a settlement among class members. The offer was rejected by the plaintiffs because of these deficiencies. Nonetheless, the offer made clear that the defendants were prepared to offer substantially more than the \$8 million offered in late 1971. Therefore, the parties continued to negotiate.

These further negotiations produced another offer from the defendants—for \$25 million. It significantly raised the figure to reflect the amount of overcharge, but was still considered insufficient by the *Doughboy* and *Hoffert* attorneys. Again, however, the plaintiffs were confident that a settlement was not only possible but very likely. In an attempt to resolve matters, the plaintiffs authorized Mr. Cochrane to negotiate a final settlement. He then met with Mr. Irvine and they reached “certain parameters,” as Mr. Cochrane’s affidavit would later state. The defendants would pay the farm plaintiffs \$35 million plus one year’s interest at 9 percent (\$3.15 million). Mr. Cochrane and Mr. Irvine were to use their “best efforts” to persuade the other farm attorneys to accept this tentative agreement as the basis for settlement. Mr. Cochrane talked with the other plaintiff attorneys and general agreement was obtained.

Teams of attorneys representing both sides then met in New York on August 16, 1973, and mutually agreed to the settlement in principle. Subsequent negotiations were held on such matters as the language of the agreement, the dates of payment, the nature and form of the proposed notice to the classes of the settlement hearing, and the nature of the proposed order dismissing the claims of all class members and named plaintiffs after acceptance and formal approval of the settlement. Finally, with these essential details disposed of, a formal memorandum of agreement was signed by counsel representing all parties in the *Doughboy* and *Hoffert* classes, and the document was submitted to Judge Lord on September 20, 1973, to start the settlement approval process.

The final offer of settlement agreed to the payment of \$35 million plus \$3.15 million (a year’s interest at 9 percent)—a total of \$38.15 million. The sum was to settle all claims of all farm and veterinary plaintiffs. In addition to veterinarians, who clearly fell into the *Hoffert* class, the agreement would cover the claims of medicated feed manufacturers, wholesalers, and, for the first time, *retailers* of medicated feed. The inclusion of the retailers had apparently been insisted upon by the defendants to forestall a second wave of suits asserting such

claims if retailers were not clearly included within the *Doughboy* class. This is reflected in the fact that the defendants agreed to advance up to \$50,000 to notify members of the retailer class. The settlement was to cover "any and all claims of whatever kind arising out of purchases of broad spectrum antibiotics or broad spectrum antibiotic products, whether directly or indirectly from defendants or from others, for non-human use. . . ."

As in all the other settlements, all the costs of notification and administering the settlement, as well as attorney fees and expenses and costs of the plaintiffs' attorneys, were to come out of the settlement fund. The memorandum of agreement also stated that all the parties would petition the court for approval of the settlement, and that all the parties would urge the court to enter orders for class notice and dismissal of the claims against the defendants in substantially the form annexed to the agreement. As was his custom with other settlements that he approved, Judge Lord used these forms for his orders without changing a word.

D. Notice, Hearing, and Approval of the Settlement

Judge Lord examined the settlement agreement and then ordered notification of class members. Notice was mailed to 17,263 members of the *Doughboy* class, to 27,253 members of the *Hoffert* class, and to 32,708 farm retailers who had been unequivocally made part of the *Doughboy* class for the first time in the memorandum of agreement. Notice also was published in the June 1973 issues of 11 national farm periodicals.

The notices stated generally the terms of the proposal and set a hearing on the fairness and adequacy of the settlement for December 28, 1973, in Minneapolis. For more detailed information, class members were referred to the copy of the agreement in the office of the clerk of court in Minneapolis. They were informed of their right to be present at the hearing and to object to the settlement. Each notice also stated that "verified" claims by individual class members against the fund would be made pursuant to a procedure that the court would prescribe after approval of the settlement. The notice to the farm retailers included a provision that allowed those farm retailers who had not previously received notice—in either the *Doughboy* or, possibly, the *Hoffert* classes—of their right to opt out of the *Doughboy* class by requesting exclusion by writing to the court prior to December 21, 1973. Only 182 retailers requested exclusion.

No written opposition to the settlement was received from class members and no oral statements of opposition were made at the hearing

on December 28. The attorneys for the participants spoke briefly in favor of the settlement, which had been elaborately discussed with Judge Lord prior to the hearing in meetings in his chambers with attorneys from both sides. The attorneys generally referred the court to their previously submitted affidavits and written statements in support of the settlement. Interestingly, in view of the prior difficulties encountered with the Johnson firm's request for substantial fees in the *Midwest Vet* settlement and in view of the enormous size of the request for fees that eventually would be submitted by the Cochrane and Chestnut firms, there was no specific discussion of attorney fees at the public hearing. At the one-hour hearing, Judge Lord introduced to the parties a Minneapolis attorney, David Lebedoff, whom the judge was prepared to appoint as special master in charge of helping the court administer and distribute the settlement fund. This had been anticipated in prior discussions in chambers, including at least one in which Mr. Lebedoff participated. Judge Lord concluded by formally announcing that he would approve the settlement and issue a dismissal order and memorandum.

The memorandum approving the settlement was issued on February 11, 1974. In explaining why the settlement had been approved as fair and adequate, Judge Lord emphasized a number of factors. First, and apparently of greatest importance, Judge Lord emphasized the economic risks of litigation in light of the likelihood of recovering more than the settlement would provide. He noted the differences on theories of liability between the human consumption and the farm cases and, while describing the farm plaintiffs' chances of recovery as "far from negligible," he accepted the assessment that a recovery after a trial would probably not exceed the settlement. He described economic and statistical data indicating sales to the classes by the defendants in excess of \$400 million for the period 1954-66 and \$600 million for the period 1954-70. He also noted that the prices that the defendants had charged for farm antibiotics had declined over this period, a factor that presumably would contradict the theory of a price conspiracy. In summary form, Judge Lord found that the settlement fund was reasonable and was "fairly related" to the overall amount of purchases in the farm market and to the pricing schedules that had been in effect. As to the expense of further litigation, Judge Lord believed that even with the cooperation of all counsel, the farm cases would "still take up to three months to try"—a prophecy that probably would have been multiplied by four to eight in actuality, as the ongoing trial in the nonsettling cases (as of November 1975) would suggest. Even on the unrealistically low estimate of trial time, Judge Lord believed that any judgment in favor of the plaintiffs for an amount in excess of the settlement would

be appealed and the total additional expense would greatly exceed what expenses had been incurred to date without a trial.

Other factors mentioned were the experience and reputation of the attorneys who had negotiated the settlement, the fact that the negotiations were "at arm's length," and the fact that the negotiations were carried on against a background of extensive trial preparation. Also, no member of the classes had opposed the settlement, and it had been supported by the attorneys general of the nonsettling states, who had filed a memorandum supporting the settlement from the perspective of the interests of members of the farm markets within their respective states. (Three states—Kansas, Oregon, and Washington—had specifically pleaded claims in behalf of farm interests within their jurisdiction. Counsel representing these states had participated in the latter stages of the settlement negotiations.)

Judge Lord's settlement opinion concluded with a section that was clearly inserted with an eye toward a readership beyond the litigants. Judge Lord stated—as he had stated on several past occasions and would state during hearings in the nonsettling cases in the future—that the "manageability" of the actions had *not* been a negative factor in approving the settlement. According to Judge Lord, the actions were "manageable" both in terms of litigating the actions and in terms of distributing a settlement. While the matter was not pursued in detail, Judge Lord presumably was referring here to his indicated preference for trying several of the cases together on liability and for trying all damage claims on a "fluid" or aggregate basis. Judge Lord ended this discussion with the statement: "Even though the Court has found the classes would be manageable in the specific context of these actions, it notes generally that class size alone should never be used to permit wrongdoers to retain the fruits of their unlawful action."

X. THE \$39.6 MILLION SIX STATES SETTLEMENT

A. North Carolina Hangs Separately

Seven states had refused to accept the \$100 million settlement offer in 1969—California, Kansas, Utah, Hawaii, Oregon, Washington, and North Carolina. California and North Carolina were each actively represented by members of the office of the state's attorney general. A fair degree of cooperation and coordination seems to have been achieved by six of the states as it became apparent that the nonsettling states would have to prepare for trial. But North Carolina was possessed by private visions. When the other states were filing motions in early

1970 to have each state certified as a class representative of consumers or to be permitted to recover into the state treasury the amount of consumer damages under the *parens patriae* theory, North Carolina was arguing that it should be permitted to proceed under a North Carolina procedure for the appointment of a "receiver" for consumers' claims. The receivership concept was rejected. Eventually, however, North Carolina was accorded class representative status as were the other states.

In September 1971, soon after the human consumption cases were transferred to Minnesota, North Carolina moved to have its claims (both CCS and consumer) transferred to the federal court in North Carolina. The state's attorney general argued that he could try the case immediately in the North Carolina court—employing only the records compiled by the federal government in the New York criminal prosecutions and the record from the FTC hearing. Judge Lord resisted this effort for over two years. Finally, with the defendants also encouraging a transfer, he relented. He later stated that he thought that he had been mistaken to let the case be tried on the weak basis of the government's paper record in prior proceedings. But Judge Lord agreed to order a transfer only if a firm trial date were set in North Carolina, if the defendants (who did not object to the transfer) would agree that the separate trial would not result in any delay in the Minneapolis proceedings, and if all parties agreed that the result would not be *res judicata*. The order permitting the transfer was entered on March 13, 1973. Meanwhile, the other six nonsettling states were engaged in negotiations that would lead to a settlement in October.

The trial in North Carolina was conducted in the fall of 1973 in Raleigh before Judge Franklin T. Dupree, Jr., sitting without a jury. The state was represented by Deputy Attorney General Jean A. Benoy, who had always differed sharply with the other attorneys on the need for additional evidence to make out a broad enough conspiracy to permit recovery at a trial. Benoy depended almost entirely on materials in the record of the FTC and the New York criminal case.

Judge Dupree's findings on June 26, 1974, were a devastating vindication of those who had opposed the limited evidence concept. He found that North Carolina had failed to establish any antitrust violation on the part of any defendant. He found ample evidence that the defendants had vigorously competed for sales during the entire period of the alleged conspiracy, although he also noted that there were numerous instances of identical bidding on hospital contracts. As for the charge that Pfizer had committed fraud on the Patent Office, Judge Dupree found that the evidence would, at most, support differing opinions on whether Pfizer had made misrepresentations. On a fraud standard that

required showing of clear and convincing evidence of misrepresentation, Judge Dupree found that the patent had not been unlawfully obtained. In short, based on the record accumulated thus far, the defendants had been vindicated.³⁰ Consequently, the claims of all North Carolina government entities and consumers were dismissed. Whether additional evidence would change the outcome, and before a different fact finder in Minneapolis, remained to be seen.

B. Certification of the Institutional and Consumer Classes

The other six states continued pretrial preparation in Minneapolis. Two distinct groups developed—California and the remaining five states. California, which alone among these states then had an active and full-time staff devoted to antitrust matters within the office of the state's attorney general, was represented by attorneys from the office of the attorney general, under the leadership of Robert E. Murphy. California had approximately 60 percent of the population of the seven nonsettling states and clearly had the greatest dollar volume of claims.³¹ The other states, including whose whose attorneys general had entered appearances, were in fact principally represented by private attorneys under contingent fee contracts. Both California's state attorney and the private counsel for the other five states were active throughout the case, including both trial preparation and the negotiation of the eventual settlements, and closely coordinated their efforts.

The six states cases were settled by 12 separate settlements within 12 separate classes. One set of 6 classes had been created in Judge Lord's April 13, 1971, ruling setting up the litigating classes composed of each of the seven states—California, Hawaii,³² Kansas, Oregon, Utah, Washington, and North Carolina—representing their own claims and the claims of all state institutions (hereafter referred to as the *institutional*

30. North Carolina appealed the resulting judgment to the Fourth Circuit Court of Appeals. As of November 1975 the matter is in the process of briefing.

31. California's attempt to represent its institutional entities ran afoul of the aspirations of Los Angeles and San Francisco to represent themselves and their consumers. Both of these entities filed claims separate from those of the state. Judge Wyatt had certified each of these municipalities (as well as several other "breakaway" municipalities) as the representative of a class composed of the municipality's consumers. Los Angeles and San Francisco had originally agreed to the \$100 million settlement in 1969, but Judge Wyatt permitted both to withdraw from the settlement in February 1970 after they had reached an accommodation with the State of California.

32. Hawaii, like California, was afflicted by the "breakaway" tendencies of a constituent municipality. The City and County of Honolulu had brought a separate action before the state had filed its own. Honolulu then insisted on accepting its portion of the \$100 million settlement offer, despite Hawaii's rejection of it. Honolulu was permitted by Judge Wyatt to proceed separately, and it received a share from the 1969 settlement. Honolulu was, therefore, excluded from the class definitions of government entities and consumers within the state of Hawaii when Judge Lord later certified litigating classes. The excision of Honolulu cut the claim of the state almost in half.

claims). The other set of 6 class actions was composed of the claims of each state in behalf of consumers—the *consumer claims*. The creation of the institutional classes was not innovative. These had become almost common in antitrust class actions since the 1966 amendments to the federal rules had liberalized the rules on class actions in antitrust cases. Prior cases had permitted states to sue in behalf of themselves and their subentities—such as counties, cities, and special districts, as here hospital districts. Such actions had been brought and certified in antitrust claims involving the sale of asphalt, plumbing fixtures, school textbooks, etc. But few courts had hinted that a state could represent a class composed of all the state's consumers.

Not all the states had originally tried to represent their consumers. States that did based their representation on two theories, *parens patriae* and class representation. According to the *parens patriae* notion, the state was the natural guardian of its citizens and could sue without their consent in order to protect their common interest. *Parens patriae* had never been enthusiastically embraced by the federal courts, and while it had a certain appeal (e.g., it obviated the need to notify each consumer), it did not seem worth the risk of eventual rejection if a better theory were available.

It was generally agreed that a better theory was the class representation theory. The states would assert that they could serve as the representatives of their resident consumers under federal rule 23 since each state also had claims as a consumer itself and certainly would be an “adequate” representative in terms of legal experience, disinterestedness, and financial resources.

Once the seven nonsettling states—including states that originally had not tried to represent their consumers—agreed upon a common approach to consumer claims, they joined in a single motion in February 1970 to certify a consumer class in each state. In the hearings on this motion conducted in December 1970, Judge Lord asked the parties to brief the question of the manageability of such a class. After examining responses from both sides, Judge Lord determined that, subject to later developments, consumer classes were manageable in each state. On April 13, 1971, he certified each of the seven states as the representative of a consumer class composed of:

[P]urchasers within the state, who during the period 1954 through 1966 purchased or paid for broad spectrum antibiotic products for human consumption from public or private hospitals or from pharmacies, drugstores, or other retail outlets, including the state, on account of payments made therefor for the benefit of recipients of welfare programs.³³

33. The original certification of the consumer classes was in class action order no. 71-5 (Feb. 10, 1971), see 333 F. Supp. 278 (S.D.N.Y. 1971). Class action order no. 71-11 (April 13,

The wording of the last clause suggests the key to the court's reasoning in permitting the states to represent their consumers. The states had themselves been "consumers" of antibiotics through their reimbursements to retail druggists who had made retail sales of antibiotics to welfare recipients. In this view the states were asserting claims similar to the claims of resident consumers (required by the federal class action rule). Thus, the state could litigate its own and its consumers' claims without conflict of interest.

The class description also carefully included the claims of consumers who had purchased antibiotics as patients in "public or private hospitals." Early in the proceedings before Judge Wyatt, attorney Paul D. Scanlon, of Alexandria, Virginia, had attempted to assert claims on behalf of a separate national class of hospital patients. He argued that any other alignment (*e.g.*, hospital patients together with the hospitals themselves) would create a conflict of interest between the class representatives and the hospital patient members of the class. This would occur because if the defendants asserted a defense of "remoteness" against the hospital patients, it would be in the interest of the hospital representatives to support the defense. The hospitals would benefit under *Hanover Shoe* because they would not be forced to share a recovery with the dismissed patients. The same would be true, argued attorney Scanlon, if the representation was by the states. In a crunch the state would be tempted to forgo insistence upon favorable treatment of hospital patients to maximize the amount allocated to public hospitals, which were the principal members of the institutional class created in each state.

Judge Lord rejected the argument, which had also been addressed collaterally to the inclusion of hospital patient claims in the 1969 New York settlements.³⁴ Despite occasional urgings to the contrary by representatives of the states during subsequent hearings,³⁵ the hospital patients were left in the state consumer claims. Judge Lord was content to depend on the states to give due regard to the interests of public hospital patients.

The unprecedented aspect of Judge Lord's April 13, 1971, ruling creating a consumer class was that, for the first time, a federal court had ruled that a state could serve under rule 23 as the litigating class

1971), see 333 F. Supp. 291 (S.D.N.Y. 1971), amended the class definition, as above, to include hospital patients.

34. In one of his published 1971 orders, Judge Lord rejected attorney Scanlon's collateral attack on the New York settlement on the ground that he had represented his clients in the hearing on that settlement and thus was estopped. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F. Supp. 296 (S.D.N.Y. 1971). But the opinion stopped short of saying that the arguments were without merit. Judge Lord's ruling was affirmed per curiam by the Second Circuit. *Connors v. Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971).

35. See *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 286 (S.D.N.Y. 1971).

representative of all its resident consumers who had been injured by the same antitrust conspiracy that had allegedly inflicted injury on the state. Superficially, the order had been anticipated in Judge Wyatt's certification of the consumer classes in the 43 settling states. The profound difference, however, was that there the defendants had not contested the creation of the classes; before Judge Lord the defendants argued strenuously against the creation of litigating classes. Losing there, they tried to obtain an immediate reversal by mandamus in the Second Circuit, but the Second Circuit refused to consider the question of the validity of Judge Lord's order on the ground that the court of appeals lacked jurisdiction because the trial court's order was not a final judgment and, as far as mandamus was concerned, the order was not wholly outside the powers of the trial court. In the course of its ruling the Second Circuit did mention favorably the creation of the consumer classes, but its words were ambiguous as to whether the appellate court had made a definitive ruling. Instead the appellate court rather testily lectured the defendants on the uselessness, perhaps the impropriety, of attempting to obtain review of the class action order before the entry of a final judgment on the merits.

However, the defendants could hardly view creation of the consumer classes as just one more step leading toward a trial on the merits and an eventual judgment that could then be appealed to raise the class action issue squarely. The inability to obtain immediate and definitive review prior to completion of the trial meant that the defendants were locked into a process from which they could extricate themselves only with great risk and difficulty. Even if the best transpired—a trial with a verdict in favor of the defendants—vast sums in unreimbursed attorney fees and expenses would be spent. If the defendants lost a verdict at the trial court level, an appeal might result in a reversal of the adverse judgment on an appellate finding that the order creating the class was erroneous. But either course meant the expenditure of vast sums.

Realistically, such options were of little practical importance to the defendants, for Judge Lord's consumer class order had exposed the defendants to staggering consumer claims in the seven state cases. Under the Alabama plan these states would have received approximately \$17 million. However, sales in those states from 1954 to 1966 probably reached some \$300–\$350 million. If the 41 percent overcharge figure used in the settlement approved by Judge Wyatt were proved at a trial on the merits, the resulting damages would be as high as \$143 million. Treble damages (provided for under the antitrust statutes) would raise the figure to over \$425 million. Also, the law required a losing defen-

dant to pay all attorney fees and expenses of suit to the prevailing plaintiff, perhaps \$25 million. In short, the potential financial exposure from the consumer class action ruling alone approached a half billion dollars. The defendants would now have to include in the risk-benefit calculus not only the immense expense of going to trial, but also the financial catastrophe that would befall them if a liability anything like that claimed should be found against them.

C. Notice to the Class Members

As both the institutional class and the consumer class in each state fell under rule 23(b)(3), it was necessary to notify class members of the proposed creation of the classes to permit them to object to certification or to request exclusion.

Notice was mailed to each institutional class member in March 1971. Each government entity was advised of the pending class action and of its right to opt out. Also, each entity was required to submit a brief claim statement indicating the total amount of the claim that it intended to submit and to note whether the amount was based on actual available records or on an "estimate." In some of the states such data had already been gathered by the attorney general.

The consumer classes were notified in a unique way. Pursuant to Judge Lord's order, notice was mailed to the "occupant" of each household in the seven states. The list of "occupants" was compiled from tax rolls; approximately nine million notices were mailed out. The notice included the statement required by rule 23(c)(2) that any class member could "opt out" of the class by filing a request with the court. Some ten thousand exclusions were requested.

The discussions preceding notification of consumers made it clear that an effort would be made to notify every household in the seven states. This method of saturation notice was extremely expensive, costing close to half a million dollars. The response of Judge Lord to the problem was generous, bold, and ultimately unavailing. On April 14, 1971, the day after he certified the consumer class, Judge Lord directed that the state consumer notice be mailed under the judge's franking privilege; the federal government would bear the expense. (A similar order was made with regard to the mailing of notice to the institutional class members.) The gesture enmeshed the court and the parties for some time in a three-cornered dispute with the postal service and the Administrative Office of the United States Courts. The Administrative Office promptly issued an order prohibiting such mailings in the future. Finally, the seven states agreed to reimburse the federal government.

D. Factors Influencing a Settlement

The 1970 appointment of Judge Miles Lord to conduct further pretrial in the consolidated antibiotics cases was critical for the nonsettling states. A process almost entirely stagnated could be got on track. But the full significance of Judge Lord's possible future role dawned only slowly. First came the important rulings establishing the litigating classes. Second, the "book" on Judge Lord looked favorable. He was an activist, an innovator, a populist on corporate and business matters, a strong-willed and forceful judge whose two consuming passions seemed to be a docket that was kept current and doing justice to the little man.

Judge Lord did not disappoint these expectations with his litigating class rulings in early 1971. The judicial conversation that surrounded this series of rulings was significant. One of the main arguments of the defendants against creation of the consumer classes was that trial of the claims in these classes would be unmanageable for a number of reasons. First, the defendants would insist upon their right to jury trial as to each and every consumer's claim. This would require the services of all the federal judges in the entire system over a period of several years.³⁶ Judge Lord responded with the devastating remark that the way to try to a jury a vast number of damage claims was to try all of a state's consumer damage claims at once. The evidence would not consist of an infinite parade of individual consumers with testimony about family drugstore purchases. Rather economists and statisticians would describe the total volume of consumer sales and the probable prices that would have been charged in the absence of the antitrust violations. In other words, the "damage" issue could be reframed to inquire into the extent of injury that the antitrust violation had wreaked upon *all* consumers within the state. As to this issue, a single jury could hear all the evidence and render a final and binding verdict. The consumer members of the class would then simply make claims against whatever fund was produced by the verdict. The defendants would have no further legitimate interest in the question of damage distribution and could be excused. The validation of claims and distribution could be handled by a team appointed by the judge. The costs of distribution would be taken out of the fund. Although these concepts were tentative, Judge Lord believed that solutions to so-called manageability problems were ready to hand. All that remained to be done was to assure that he presided at

36. During the hearings on certification of the consumer classes, one of the defense attorneys had gone to some length to establish that it would take Judge Lord 8,000 years to try the consumer damage claims in the seven states. Judge Lord was later to remember the argument as conclusively establishing the utter unreality of any approach to the consumer claims other than a fluid damage theory.

the trial. As has already been seen, this was accomplished through his transfer of the human consumption cases to Minnesota for trial.

Factors that led to settlements in the *Midwest Vet* and *Doughboy-Hoffert* class actions were also operating in the six states cases. The guilty verdict in the government's criminal case had been reversed in April 1970 by the Second Circuit. The case was being retried before a judge sitting without a jury and on the original record, a terribly dull and laborious process that, predictably, had drained the government's case of whatever dramatic value it might have possessed at the original trial. The lawyer talk was that the trial on April 2-4, 1973, had not gone well. Judge John M. Cannella had called for the submission of briefs in July. (Judge Cannella ultimately found the corporate defendants not guilty of the charged antitrust conspiracy on the ground that there was insufficient evidence to sustain a conviction beyond a reasonable doubt. His decision was not announced until November 30, 1973, after the six states settlement had been approved.) A finding of not guilty could deprive the six states of the *prima facie* effect of a criminal conviction and would require them to establish liability through a complete and independent evidentiary trial. The process would inevitably be time consuming and terribly expensive.

For the defendants the economic consequences of a possible finding of guilty by Judge Cannella in the pending criminal case were more complex. Among other things, under section 162(g) of the Internal Revenue Code a finding of guilty would mean that two-thirds of any amount they were required to pay in a civil action would be nondeductible from their tax returns. (This would be true whether the amounts were paid under an adverse civil judgment or under a settlement.) The Treasury Department regulations, however, permitted attorneys' fees paid to plaintiffs in such a judgment or settlement to be deducted. Under this scheme a settlement was probably much more attractive than an adverse judgment. In a settlement the court would award some substantial portion of the settlement fund as fees to the plaintiffs' attorneys. Thus some substantial portion of the settlement itself could be deducted. In a judgment two-thirds of the total amount of damages would be nondeductible; the only deductible portion would be the additional amounts that were required to be paid as attorney fees to the plaintiffs. Theoretically, the ratio of damages and attorney fees in either a judgment or settlement should be similar. In actuality, they are likely to be quite different. In the presentation of a proposed settlement to the court, the parties always justified the amount of the settlement as if it were all damages, ignoring the fact that a large portion of it would be awarded as attorney fees. In a litigated case, the jury would find an

amount of damages that would not include any attorney fees; these would be determined separately and in addition to the total amount of damages.

The expense of trial preparation had been enormous. (California alone would later submit a claim of \$900,000 for trial preparation expenses.) The preparations of the Plaintiffs National Steering Committee had produced millions of documents, over a quarter of a million of which had been copied for possible use at trial. Several lengthy sets of interrogatories had been served on the defendants. More than 130 oral depositions of defendants' personnel and other potential witnesses had been taken in many states. (The defendants had taken over 200 depositions, including 7 in foreign countries.) Economic experts had been hired to construct damage studies and economic models. The plaintiffs were ready for the trial itself and had filed a 600-page trial brief. Judge Lord had stated that trial in the unsettled cases would start in the fall of 1973, with the liability issues in the human consumption cases to be tried first.³⁷

The imminence of the trial on liability crystallized for the six states the crucial nature of the months before trial. They had already spent more than \$1 million to prepare the cases. The choice was whether to push for a settlement or to risk everything on a trial on the merits. The risks were both financial and political. The states could lose all they had invested to date plus the money spent on the long trial process. And, of course, neither the states, their public institutions, nor their consumers would recover any damages. The political pressures to protect the investment of state funds that had already been made were great. Forty-three other states had settled with the defendants four years previously, and the money had been distributed to the government units and consumers that had filed claims. A finding of no liability could cause political embarrassment for the state attorney general offices that were the actual or nominal attorneys for the six states.

A final negative factor was the series of settlements that were being worked out between the defendants and all the farm plaintiffs. The attorneys in these cases had been among the most active and the best financed of all the nonsettling cases. Settlement of the farm cases would mean the loss of an important set of colleagues. Perhaps even

37. The intention was eventually reduced to an order. On September 11, 1973, Judge Lord issued administrative order no. 73-31 ordering consolidation for trial of the state claims, the insurance class claims, and the union health and welfare class claims on the issue of liability and impact of the alleged conspiracy. The trial was to commence on October 1, 1973. Administrative order no. 73-32 (September 21, 1973) extended the trial date to October 10, 1973. The order was in response to a motion filed by the nonsettling states in May 1973, which requested that the court set an early trial date.

more important, it meant the departure from the case of all but one important Minnesota attorney representing a plaintiff. Only the private insurance companies were still represented by Minnesota counsel.

However, several factors strengthened the hand of the six states in settlement negotiations. First among these was the emergence of the consumer claims as an important and provable element for substantial recovery. The states involved in the \$100 million settlement offer had treated consumer claims almost as an afterthought by the CCS attorneys favoring the settlement. Significantly, however, none of the attorneys negotiating for the CCS plaintiffs were attorneys for the seven states. The discussion among the various CCS plaintiffs had proceeded on the assumption that the claims of the state institutions themselves had first priority. This was defended on the ground that the institutional claims were the only group of claims for which the evidence of damages was anything other than speculative or for which evidence could be obtained without a great expenditure of time and money. Moreover, it was clear under existing law that the states could represent a class composed of their own subentities. But the power of a state to represent a class of consumers was quite unsettled. The claims of the government entities would, therefore, be satisfied first, and the remainder would be allocated in some fashion between the consumers and the druggists. This treatment of consumer claims was reportedly the most significant reason for rejection of the \$100 million offer by the seven nonsettling states. Subsequent developments had largely vindicated the position of the nonsettling states.

Judge Lord had substantially ruled in favor of the seven states' right to assert their consumers' claims through the consumer class action device. This victory, subject to definitive review by an appellate court only at the conclusion of a trial, resolved the matter in favor of the nonsettling states for the time being. Further, Judge Lord in his certification order and later had broadly hinted that he would accept a "fluid" proof of consumer damages and not require each consumer to establish damages in an individual trial. Equally important, the states had very actively pursued the extraordinarily complex matter of the actual proof of damages to consumers. In the pretrial preparation period, the six states, particularly California, had hired economists and statisticians to construct elaborate consumer class damage studies. Sampling techniques and statistical studies provided a much clearer picture of the extent of provable class damages. The consumer claims could no longer be regarded as speculative and of minor importance.

Another factor that favored a generous settlement was that the defendants were no longer under the most-favored-nation clause of the

1969 settlement. After early 1973, a settlement that was more favorable than the 1969 settlement would not require an upward adjustment in the earlier award.

E. The Negotiated Settlement

There does not appear to have been any serious attempt to open settlement negotiations in the six states cases during much of the period of trial preparation, even during the period when other groups, such as the farm plaintiffs, were being approached with settlement proposals.³⁸ The defendants apparently proceeded for some time on the hope that the sheer size of the task of managing litigation by a class of 5 percent of the nation's population would in the end prove too enormous a task even for the appetite of Judge Lord. It was only as the process of trial preparation continued—and as the defendants suffered defeat in their attempt to compel Judge Lord to remove himself from the cases—that the need to confront trial of the consumer claims as a definite possibility was made clear.

Serious negotiations probably began in January 1973, when the extensive discussions with the farm plaintiffs were proving fruitful. The parties at the January meetings found themselves far apart on dollar amounts. The defendants insisted that the legal uncertainties surrounding the consumer class claims precluded a large dollar figure. Several other discussions of settlement were held in the spring of 1973, after settlements had already been achieved with the farm plaintiffs. One of the meetings, on March 23, was held in California between several attorneys representing the principal defendants and representatives of the State of California, including Attorney General Evelle Younger and his three assistants who were actively litigating the California claims. But the parties were still far apart.

Settlement was now in the air, however. The parties negotiated continuously from March until the eventual resolution in October. One new element in the talks was a possible means of presenting consumer claims, if litigation continued, that would have proved of profound embarrassment to the defendants. In June, two attorneys for the six states informed one of American Cyanamid's attorneys that if the states were not able to obtain appellate approval of a "fluid" consumer class

38. An exception was the state of Hawaii, which had approached the defendants in 1971 with an offer to settle on the same basis as that achieved in the CCS settlement in 1969 in New York. The Hawaii claims were quite small, particularly since the City and County of Honolulu had been permitted to participate in the CCS and consumer portions of the 1969 settlement. Judge Lord, as has been described earlier, successfully induced the attorney for Hawaii not to settle.

damage recovery, the states were prepared to enlist the assistance of the state associations of pharmacists to aid individual consumers in proving their damage claims against the defendants. The threat could not be ignored, given the political relationship between these states and their local retail druggists associations. The associations represented pharmacists who were licensed and extensively regulated by state laws. The process of presentation of claims would still be horribly expensive and time consuming. But the defendants' obdurate refusal to deal with the consumer claims as a group would now possibly alienate a part of the merchandising chain that was indispensable for the distribution of the great mass of the defendants' prescription products.

In early September the plaintiffs requested a meeting in New York to continue settlement talks. Meetings were held on September 6 and 7 at the offices of Donovan, Newton, Leisure and Irvine, the law firm representing Cyanamid. These meetings resulted in a tentative agreement acceptable to all the states except California and Washington. The status of the settlement talks was reported to Judge Lord on September 30. Shortly thereafter (and just before the end of the trial in the severed case in North Carolina), several meetings were held in Minneapolis that finally resulted in the settlement agreement.

The various settlement documents were jointly drafted by both plaintiffs and defendants and presented to the court on October 17, 1973. Separate agreements were signed with each state as each state was the representative of a separate class action. Copies of the agreements were accompanied by memoranda in support of the settlement and affidavits of many of the attorneys involved that recited the course of the cases and the negotiations and contained the now familiar boilerplate language regarding the "arms-length adversary nature" of the negotiations and included the statement that the settlement presented to the court was the entire agreement between the parties.

Under the terms of the proposed settlement agreements, the defendants were to deposit with the court an amount slightly greater than \$35 million. At the same time they would also deposit an amount equal to interest for one year at 9 percent on the base \$35 million. The amount actually deposited by the defendants totaled \$39,616,000, less the expense of mailing notice. The defendants were to deposit the net amount nine months from the date of the settlement or on the date the settlement became final, whichever date was later. The defendants would advance the cost of providing notice of the proposed settlement to the classes other than California, and that amount would then be deducted from the amount the defendants were required to deposit. California itself paid for notice of the settlement to its consumers. As

was provided in all of the other settlements in the antibiotics cases, all the costs of the settlement distribution, attorney fees, and other expenses that had already been incurred by the class representatives would be paid out of the deposited fund.

One may well wonder what was the point of the year's interest provision in the agreements. From the point of view of the defendants there does not seem to be any tax or other reason for denominating part of the final payment as "interest." The only difference that suggests itself is that this description of part of the settlement fund would promote the public relations interests of the class representatives—the states and their attorneys general and indirectly the private counsel who would take their contingent fee from their client state's distributive share. A great part of the attorney fees particularly could be defended on the ground that they were paid for with "interest" that the settlement generated. Or so it would be explained if anyone asked.

Another provision of the settlement agreements stated that any interest earned *after* the settlement was deposited should go to the consumer classes if the amount of interest exceeded expenses and attorney fees. California (which was allocated approximately 71 percent of the settlement) estimated that it would cost \$1.5 million to administer and distribute the fund, \$900,000 for trial preparation costs to the date of settlement, and \$3 million in attorney fees. Thus the consumer classes would not begin to benefit from this provision for additional interest until almost two years after the deposit of the settlement fund.

Using formulas from the settlement proposals, the \$39.6 million settlement fund was distributed among the six states as shown in table 1.

In most instances the amounts proposed to be allocated to the states for institutional and welfare reimbursement claims were identical to the amounts that would have been received under the Alabama plan had the six states participated in the 1969 settlement. These amounts represented approximately 40 percent of the purchase price of antibiotics. The amounts proposed to be distributed to consumers were several times the amounts that were allocated by the Alabama plan to consumers. The estimates of damages were given in memoranda submitted by the states in support of the proposed settlement (table 2).

A study of institutional damages conducted by California after the 1969 settlement had estimated an average damage percentage for the entire 1954-66 period of 42.9 percent. This was substantially lower than the 66 percent overcharge relied on by Judge Wyatt in approving the New York settlement. Thus while the amounts proposed to be allocated to the states and institutions were similar to the Wyatt settlement figures, they had not been burdened with the 26 percent discount for

TABLE 1

Distribution of Settlement Among Six States

	Amount	Percentage of Settlement
California		
Institutions	\$ 3,915,000	
County of Los Angeles	1,090,000	
City and County of San Francisco	275,000	
Welfare reimbursements	1,956,000	
Consumers	<u>20,904,000</u>	
Total	\$28,140,000	71.03
Hawaii^a		
Institutions	\$ 190,000	
Welfare reimbursements	7,000	
Consumers	<u>154,000</u>	
Total	\$ 351,000	0.89
Kansas		
Institutions	\$ 735,000	
Welfare reimbursements	213,000	
Consumers	<u>2,622,000</u>	
Total	\$ 3,570,000	9.01
Oregon		
Institutions	\$ 355,000	
Welfare reimbursements	78,000	
Consumers	<u>1,744,000</u>	
Total	\$ 2,177,000	5.50
Utah		
Institutions	\$ 105,000	
Welfare reimbursements	53,000	
Consumers	<u>985,000</u>	
Total	\$ 1,143,000	2.89
Washington		
Institutions	\$ 690,000	
Welfare reimbursements	279,000	
Consumers	<u>3,266,000</u>	
Total	\$ 4,235,000	10.69

^aHonolulu, with more than three-quarters of the state's population, had been permitted by Judge Wyatt to proceed separately from the state and participate in the \$100 million settlement.

TABLE 2

Estimates of Damages

	Consumers	<i>Damage Estimates</i>	
		Institutional Class	Welfare Reimbursement
Hawaii	\$467,300—\$734,100	\$64,109	Missing
Utah	\$3,200,000—\$5,180,000	\$59,179	\$59,083—\$93,994
California	\$60,000,000	\$2,033,840	\$1,900,000
Kansas	\$1,868,000	... ^a	... ^a
Oregon	\$1,139,000	... ^a	... ^a
Washington	\$2,220,000	... ^a	... ^a

^aApproximately the same as the corresponding settlement figure shown in table 1.

uncertainties of fact and law. In addition, there were quite different, and unexplained, treatments of the base figure given by the states for institutional and welfare reimbursement damages. Hawaii, for example, furnished figures showing approximate damages to the institutional class of \$64,109, but the settlement provided for the payment of \$190,000 to that class, or actual damages trebled. Trebling of damages is provided for under the antitrust laws, but trebling was not claimed in the New York settlements or by the other states in the six states settlements. California estimated damages to the institutional class of \$2,033,840 (based on purchases of \$4,417,650), but the settlement provided for payment to the institutional class of \$3,915,000 or 85 percent of actual expenditures and almost double the estimated amount of damages. California's settlement figure for welfare reimbursements, on the other hand, is close to the estimated damages.

Part of the differences in the figures used by the different states is explained by the fact that California negotiated its settlement somewhat separately from the other states. In fact, California held out for three weeks after agreement was reached with the other states on September 12, 1973. (The three weeks of additional negotiations proved to be worth an additional \$3 million to California consumers.) In addition, the underlying formulas that were employed in arriving at final damage figures were often the result of somewhat arbitrary compromises that counsel on each side had arrived at in order to overcome factual or legal problems. For example, most of the states took the position in negotiations that the figures for the institutional class and welfare reimbursement claims of the state that had been arrived at in the 1969 settlement were adequate. As a result, there was little additional discussion of these claims in the 1973 negotiating sessions. In the calculation of consumer damages in Kansas, Oregon, and Washington damages were calculated on the basis of the defendants' sales figures rather than on the basis of retail sales. This concession by the plaintiffs reflected the legal uncertainty surrounding the claims of the plaintiffs that retail markups on the wholesale overcharge were recoverable damages. In California, on the other hand, consumer damages were calculated at retail prices. But California's calculations assumed that only 25 percent of available claims would actually be asserted while Kansas, Oregon, and Washington assumed that 50 percent of claims would be filed.

The consumer claims were treated markedly differently in the proposed settlement from the institutional and welfare reimbursement claims in two respects. First, the consumers would recover only approximately a third of the damages that were calculated. And, second, the consumer settlements would bear the entire expense of costs and attor-

ney fees. The justifications offered seem rough but in the end plausible. According to the states, they were prepared to accept the portion of the 1969 settlement relating to both institutional and welfare reimbursement claims. The only reason for rejecting the 1969 settlement was its inadequate provision for consumer claims. In order to maintain pressure on the states to settle all claims as a package, the defendants had refused to permit the six states to participate even to the extent of submitting institutional and welfare reimbursement claims. As the great bulk of expenses and attorney fees were attributable to post-1969 efforts, it was thought fair to impose these costs on the claims that had chiefly benefited. In addition, the major legal uncertainties in the case related to the consumer claims. Thus it was appropriate to accept a substantial discount in the value of consumer damages to reflect these risks.

F. Notice and Approval of the Settlement

As had been the practice in the farm settlements, the settlement agreements in the six states cases included forms that were proposed to be used for the orders that Judge Lord would issue directing notice to the class members. Also included was a form for the notice itself. On October 30, 1973, Judge Lord used these in class action order number 73-36 to order that notice of the settlement be given to the consumers in the six states. The order directed that notice should be mailed to each "occupant" in the six states, notifying them of a hearing on the proposed settlement to be held on February 13, 1974, in Minneapolis. The consumer mailing was directed to over 9 million residences. Notice was also to be mailed to each member of the institutional classes that had previously submitted a claim.

Few substantive reactions to the settlement were received before the February 13 hearing. No individual consumer appeared to object to or support the settlements. Only two formal-written objections to the settlement were received, and one of these merely complained that no distribution plan had been included with the notice. Several hundred inquiries about the settlement—most of them requesting information about filing claims—were received by the court. In consultation with attorneys from both sides Judge Lord had a form set of responses prepared by the administrative master that went out over his signature.

At the February 13 hearing Judge Lord listened to short statements of support for the settlement from counsel for defendants and the six states. He then announced from the bench that he was prepared to approve the settlement. He would retain jurisdiction over the case during distribution. As had been done for the farm cases, Judge Lord appointed David Lebedoff to supervise the distribution process. The

entire hearing lasted less than two hours and was largely nonsubstantive.

Judge Lord's opinion approving the settlement was issued on March 21, 1974. The factors he relied on in approving the settlements were similar to those in the farm cases: the extent of discovery, the damage studies, the extent of trial preparation, the expense and risk of future litigation, the amount offered as compared to prior offers, the experience of counsel, the extent of support from class members (gauged by the absence of dissent), and the asserted fact that the negotiations had been carried on vigorously and at "arm's length." Judge Lord had no difficulty with the institutional claims, particularly in view of the fact that the settlements were very close to the 40 percent overcharge figure that Judge Wyatt had previously found to be fair and reasonable. (He did not mention that the California institutional recovery was closer to 85 percent.)

The most notable fact about the consumer class, according to Judge Lord, was the increase of approximately \$15 million that had been offered as compared with the 1969 settlement offer. He found that the amount proposed for consumers represented 20-25 percent of the manufacturers' value of the products—a fact whose relevance, presumably, was in providing a rough measure of the extent to which these settlements comported with the oft-stated purpose of the federal anti-trust laws to compel "wrongdoers to disgorge ill-gotten gains." Further, Judge Lord stated, "counsel arguing for the proposed settlement have represented to this Court that the amount of the settlement represents an amount equal to single damages." If such a representation was made—which does not clearly appear—it was erroneous. None of the states were proposing a settlement that came close to returning actual damages to consumer class members. Hawaii and Utah proposed to return one-third of actual damages; Kansas, Oregon, and Washington, one-half; and California, one-fourth. It is only if certain as-then-untested assumptions were made about the number of consumers who actually would file claims that the amount distributed would approach actual damages, and then, of course, only to a fraction of the injured class.

Judge Lord then considered in detail the risks of future litigation. Aside from problems in presenting the necessary proof, there were five major obstacles to a substantial recovery due to uncertainty in the law. First, Judge Lord conceded, the concept of a "fluid" recovery was new and several other courts had refused to acknowledge it as legitimate. If the device were not available, the plaintiffs would be required to bring in each consumer claimant. Damages that would be recovered in this fashion would probably be reduced to less than 10 percent of the total estimated damages to the class. Second, though the "passing on" de-

fense had already been ruled against the defendants when Judge Lord certified the class, *Hanover Shoe* could be read in such a way that consumers would be denied any recovery at all. Third, the consumer class was asserting damages on the theory that they were entitled to recover from the defendants any increase in the retail price that they could prove was causally related to the alleged price conspiracy. But the defendants were contending that they could be liable, at most, only for the illegal increase in prices that they had charged to *wholesalers*. If, as consumer groups had contended in the 1969 New York settlement, drug wholesalers charged a uniform percentage markup regardless of the price charged to them or the resulting price charged to consumers, the defendant manufacturers should not be held responsible for this pricing behavior in the wholesale market. The consumer representatives had responded that the markup imposed by wholesalers on the illegal portion of the price charged by defendants was a "foreseeable consequence" of the illegal activity; even if defendants did not gain any economic advantage from the increased price, it should be a provable claim. If the ultimate outcome on this highly debatable issue had been in favor of the defendants, the resulting decrease in provable damages for the consumers would have been substantial. The customary retail markup was 66-100 percent.

Fourth, each of the consumer classes was bedeviled by the deceased and out-migrated consumer problem. What means could be found to deal with claims that had arisen from purchases during 1954-66 by persons who were now deceased and whose estates most likely would long since have been closed? What about such persons who were still living, but who had left the state? Would such persons have to be tracked down? If not, how could the defendants be held to a "fluid" damage concept that could not account for deceased and departed consumers? Would a statistical reduction based on demographic averages for the state in the years in question be sufficient? Surveys conducted by the defendants indicated that 20-28 percent of potential claims in the six states would be affected by these two problems. The matter was vexing and its outcome in the appellate courts by no means certain.

Finally, noted Judge Lord, in December 1973 after the settlement was agreed to by the parties, the defendants had obtained an acquittal on the retrial of the criminal charges. While the plaintiffs had always maintained that their cases were independent and did not rest solely on the criminal convictions, clearly the inability to rely on the *prima facie* effect of a criminal conviction would at least have made the establishment of liability more time consuming, costly, and problematical.

As in the *Doughboy-Hoffert* class settlements, Judge Lord con-

cluded his discussion with the statement that problems of "manageability" had not counted against the plaintiffs in his decision to accept the settlement. He cited the fact that counsel for the plaintiffs had worked through a committee system (a device common to large, multiple-plaintiff antitrust actions in recent years) and argued that this had not only provided a device to assure smooth operation of the complex system of preparation for trial but had also assisted in giving the plaintiffs a "wide geographic representation." The importance of this element was not explained. Perhaps it referred to the strategic location of counsel for the purpose of attending minor oral depositions. Perhaps it was meant to reflect the fact that there were so many attorneys involved that members of other classes could derive some assurance from the fact that several attorneys were looking over each other's shoulders. Judge Lord also noted the unique contribution of state attorney general offices. (Judge Lord had made his own early way into politics as the colorful attorney general of Minnesota between 1955 and 1960.) He also noted the helpful role played by economic experts in giving advice both to the parties and to the court.

XI. SUMMARY ANALYSIS

The \$39.6 million deposited by the defendants after Judge Lord's 1974 approval of the six states settlement brought the total amount of settlements since 1968 close to \$200 million. By any measure, this represents an immensely significant piece of litigation. Based on past experiences, the number of consumer claimants who will benefit from the antibiotics litigation is truly impressive, particularly in view of the very extensive coverage achieved in the six states settlement distribution. On the assumption that the defendants were in fact in violation of the antitrust laws, the coerced disgorgement of roughly half of the (untrebled) damages claimed by the plaintiffs is a truly impressive accomplishment for litigation. The procedural innovations which Judge Lord inaugurated do suggest that ways might be found for the successful amassing of consumer claims in one lawsuit, perhaps even if the lawsuit is tried on its merits. But these are partial and incomplete measures of the success of the antibiotics litigation. In the end, success or failure must be measured by the underlying policies of the substantive law that the antibiotics litigation presumably was brought to vindicate.

How well then has the antibiotics case served the societal goals which antitrust class actions are meant to implement? The current study permits only tentative responses to one version of that question. If one accepts that cost is no object and actual compensation of victims of

alleged price-fixing conspiracies is of relatively minor significance, then the results thus far of the antibiotics litigation suggest that the amended rule 23 can be used in some cases to require the alleged participants in the conspiracy to disgorge immense amounts of money to buy peace. Such a formulation, obviously, stops far short of describing the antibiotics litigation as a successful experiment in antitrust enforcement. Several problems and questions prevent a more enthusiastic assessment.

First, contrasts between the conduct of litigation under Judge Lord and that under Judge Wyatt suggest that the personality and predilections of the presiding judge might exercise an unacceptably high degree of control over the outcomes in the litigation. A long and obdurate history of judge shopping in American federal litigation suggests that efforts by plaintiffs to achieve success in antitrust class actions will often entail extraordinary efforts to maneuver a particular federal judge into a position of control over the litigation. And the results of class action litigation will thus possess an unacceptably ad hoc flavor.

The opaqueness of antitrust law doubtless contributes significantly to the lack of predictability of antitrust rulings by federal trial and appellate judges. But the developing class action law threatens to add a large additional measure of uncertainty. Subjective elements such as the different degrees of tolerance of judges for the personal commitment and attention that cases like the antibiotics case require will greatly influence their rulings on class action questions. Normally one would hope that appellate courts would prevent such subjective elements from significantly influencing the course of litigation. But as to many class action rulings the federal appellate courts have declared—even on the relatively rare occasion when immediate appellate review could be had—that trial judges possess a vast degree of “discretion” with regard to the creation of classes and the further conduct of the class litigation. As a result there is little uniform national class action law on many significant matters almost ten years after the amendments to rule 23 became effective.

Second, very few class actions for damages come to trial. The two class actions currently being tried in Minneapolis are the first such class actions of major significance to be tried since the new rule became effective almost ten years ago. This paucity of actual litigation means that the trial judge’s major class action rulings at the pretrial stage will often in practical effect decide the litigation “on the merits.” It is common knowledge—in fact it is built into the “death knell” concept on the timing of appeals—that a *denial* of class action status will often preclude further litigation by individual plaintiffs. The antibiotics litigation also suggests, in corroboration of what has previously been argued,

that the *grant* of class action status has almost inevitably sounded the "death knell" for defendants. The pattern that damage class actions have followed since 1966 suggests that the only open question once a class is certified might be the size of the settlement, assuming that the claims of the class cannot be defused by a summary judgment. Once an immense accumulation of damage claims is permitted, such as resulted from Judge Lord's 1971 class action orders, the pressures on the defendants to settle are greatly increased. The lapse of time between class certification and settlement might be long, the negotiations protracted and bitter. But settlement at some time, in some amount, seems to have been the assumed objective of most of the pretrial preparation that occurred. One may welcome settlements because of the cost savings and flexibility that they permit. But widespread confidence in a properly administered system of private class action litigation is jeopardized by the almost automatic manner in which settlements have followed from class action certifications. But perhaps the trials in the insurance company and union health and welfare cases now pending in Minneapolis will open the way to a greater acceptance of litigation as an alternative to settlement.³⁹ Time, apparently a great deal of time, will tell.

Settlements also exacerbate the individual influence of federal judges, for they reduce the likelihood of appellate review (from what will at last be a "final judgment"). Some appellate review will result from challenges to the settlement by maverick intervenor plaintiffs who have argued unsuccessfully against judicial acceptance of the settlement by the trial court. But these occasional appeals will often not be seriously entertained by the appellate courts. And even the well-received appeals will rarely involve a searching examination of the central question of class certifications.

Third, the role and function of attorneys for the plaintiffs in the antibiotics litigation raises several questions. The Harold E. Kohn episode in the 1969 global settlement in the Southern District sharply raises the question whether self-interest will on occasion be a dominant determinant of the behavior of an attorney purportedly acting in the interests of a class. As has been stated earlier, the pressure on plaintiff attorneys to settle and be able to claim a sizable fee against the settlement creates a disturbing potential for an actual conflict of interest between the attorney and the class members. Similar conflicts can develop when settlement offers are made in cases that are not class actions,

39. Both cases may, however, be atypical. Both are human consumption cases that seem to be riding the coattails of the United States and competition claims (neither of which is a class action and only one of which, the competition cases, is for treble damages).

but the problem is exacerbated in class action litigation. Often the client of the class action attorney is asserting a claim that is only nominal in size, and it is quite evident that economic considerations cannot motivate the client very strongly to accept or reject the settlement. In any event, because of the doctrine that permits attorneys for the class to assert a claim for fees against the entire fund generated for the class, the attorney will often have a far greater stake in a settlement than any other individual, including his original client. One solution to the problem of attorney self-interest might be thought to be an award of a sizable percentage even of very large recoveries in order to motivate an attorney, for example, to attempt to double a settlement offer of \$20 million. But such a policy would mean that the amount of the recovery that ultimately will go to class members will be greatly reduced. Unfortunately, the awards of attorney fees in the Minneapolis class actions have occurred too recently for detailed examination in this study. But the announced awards of total fees of approximately \$10 million (in addition to approximately \$1 million in expenses) in the \$40 million *Doughboy-Hoffert* class action suggest the magnitude of the fees, and the problems, involved.

The problem of the motivation of plaintiffs' attorneys is also exacerbated by the almost uniform resolution of class action damage cases by settlement. All of the settlements to date in the antibiotics litigation have provided that the attorneys for the class will look only to the fund produced by the settlement, and not to the defendants, for their fees. Furthermore, the defendants have typically had the settled claims dismissed as to them long before the attorneys' fee claims are asserted. By the time a hearing on final claims for attorney fees is had, the defendants will have no reason to contest a fee claim, no matter how exorbitant. To the contrary, the defendants may have tax reasons to hope the fees will eat up a major share of the award. The antibiotics cases support the argument that has been made on general grounds to the effect that a two-step approach to settlement should be insisted on by federal judges. First, the court should approve a sum that will be used exclusively to compensate the class members. Second, after the settlement is distributed, the court should entertain a motion by the plaintiffs' attorneys to compel defendants to pay the fee. Any problems of the power of the court that the second step might create could be met by a stipulation at the time of the original settlement that the defendants would pay the class attorneys a reasonable fee in an amount to be agreed upon later or as fixed by the court. The proposed solution is not ideal. Perhaps its most serious shortcoming is that it would increase the temptation for secret agreements on fees when the settlement is being

negotiated. But in the long run some method of providing meaningful scrutiny of fee claims seems necessary.

Fourth, distribution of the class recoveries has not been treated in the present report. Details available to me from the Southern District settlement have been selective and incomplete. The distributions from the Minneapolis settlements have occurred only quite recently or are still underway. Available materials are, however, highly suggestive. It appears that claims in the six states settlements from consumers will total approximately a million claims from a total population in the six states of approximately ten million households. This compares to the 34,000 consumer claims (less than 1 percent of the total households) in the Southern District settlements in behalf of 43 states.

The difference is stark. It is principally attributable to the difference in the efforts that were employed to achieve distribution. Notice of the opportunity to make claims in the New York settlement was made by one newspaper publication of a "legal notice," supplemented by varying publicity efforts in some few states. Notice in the six states case was achieved by a mass mailing to every household of a claim form, preceded and accompanied by an expertly devised media campaign, including publicity in the Spanish language. The claim form was designed with the advice of an advertising agency and was "market tested" by a professional firm before actual distribution to potential claimants. Additional claim forms and information about the settlement were placed in post offices and public libraries. Radio and television appearances by celebrities and the settlement master encouraged consumer attention to the need to make a claim. Follow-up publicity campaigns in Spanish concentrated on census areas that reflected a high percentage of Spanish-surname householders.

In short, enough is known about the six states settlement distribution effort to cast serious doubt on the validity of the methods of notice that were employed in the Southern District distribution. If due process requires the notice of an opportunity to file a claim in addition to the initial notice of the intent to certify a class, then it is doubtful that the validity of notice by newspaper publication in consumer class actions can survive the demonstration in the six states settlement distribution of the feasibility of individual notice by mail.

A fifth problem posed by the antibiotics litigation is that of cost. From the point of view of the judicial system as a whole, the costs have been remarkably low, if measured by judges' and clerks' salaries as a percentage of the resulting recoveries. Judge Lord has estimated that 20 percent of his time over the past five years has been devoted to the

antibiotics cases. This one-year equivalent of full-time judicial service has been purchased by the system for a total investment of \$40,000. Other public expenses, such as clerks' salaries and amortizable capital items, would surely not exceed an additional \$100,000 or so. In terms of the outlays of public funds (assuming a similar outlay in the Southern District), the public cost of the antibiotics litigation probably would be widely regarded as acceptable, at least if productivity is measured principally by the size of the settlements.

The attendant human and institutional costs are another matter. Both Judge Wyatt and Judge Lord found the handling of their portions of the litigation to be extremely taxing. A major difficulty in the instance of Judge Lord seems to have been the inability of the judicial system to respond with additional judicial manpower to take up the slack in the small, four-judge District of Minnesota; as a result Judge Lord was forced to undertake the antibiotics litigation while attempting to handle more than 80 percent of his normal caseload (which already was quite high). For both judges the demands of continually staying on top of an immense and complex series of interrelated cases probably required more continual and pressurized emotional commitment than many judges would find acceptable. The sheer weight of the responsibility for administering such an immense undertaking almost singlehandedly would probably lead both judges to repeat Judge Lord's statement that he would never undertake a similar judicial task without significant additional judicial assistance on the rest of his caseload.

A problem directly related to the burdens imposed on a judge by massive antitrust class actions is the probable resulting diminution of judicial control over the conduct of plaintiffs' attorneys. The Anglo-American litigation system normally depends upon the enlightened self-interest of the client to assure that important steps, such as settlements and the award of attorney fees, are within reasonable bounds. In the case of class actions the federal rules acknowledge an imperfection in the operation of this system and supply in its stead the requirement of judicial approval of settlements and attorney fee awards. But it is not clear from the antibiotics case that judicial scrutiny in fact occurs with sufficient frequency or in sufficient detail to assure that the interests of the class members are protected. Occasional disturbing signs have arisen to suggest that a potential one-sided clash of interests between the attorney and the class may sometimes be realized. The disturbing side-arrangement for fees in the New York settlement has been described. A class attorney submits a memorandum to Judge Lord in support of a settlement for several hundred thousand dollars with a very short and

unenlightening memorandum that argues that the judge is required to accept the "business judgment" of the attorney for the class. The judge in an opinion approving a settlement lists, as one of the factors supporting the reasonableness of the settlement, the fact that it is supported by the attorney for the class who negotiated it. Probably in no other comparable instance does the legal system put so much blind trust in self-selected champions of public fiscal well-being without any meaningful requirement of an accounting by the champion. The question is not whether in fact improprieties have actually occurred in the antibiotics litigation. There is no clear evidence that they have. Rather, the problem is that the circumstances are such as to encourage depredations by attorneys with little chance of detection. In such a setting, what otherwise might not disturb an observer takes on a different complexion. The very existence of the temptation to profit in the absence of the class members and the small degree of control that can reasonably be expected to be exercised by the presiding judge strongly suggest the need for some kind of detailed auditing of the conduct and claims of attorneys for massive classes. Perhaps this could take the form of an auditing arm of the Administrative Office of the United States Courts that would file reports on such things as requests for attorney fees and expenses with the presiding judge, much as the General Accounting Office scrutinizes the operation of federal programs for Congress.

The cost of litigating to the plaintiff classes has apparently been very high. When final figures are available, the total outlay for attorney fees and costs (mailed notice, masters, litigation expenses) will probably reach from 66 2/3 to 100 percent of the net amount that eventually is distributed to the class members in some of the classes. The acceptability of such a high figure under presently applicable legal rules is contingent only on acceptance of the amount of the outlays for individual items. As far as members of most, if not all, of the antibiotics classes are concerned, the class action structure was the only presently existing method of achieving a recovery of any size. The high percentage of the settlements that were expended prior to distribution does suggest, however, that a need might exist for more thorough public scrutiny of the operation of the process in order to insure that the costs being reimbursed are kept to a minimum. One is also led to speculate whether a change in the system to eliminate or significantly reduce the single greatest expense—the fees of the attorneys for the class—might not be feasible. At one extreme this might take the form of substitution of representation by public interest or government attorneys if, in fact, the motivation of immense profits is not needed to induce attorneys to

bring such actions in the first place. At the least, it would appear from a cursory examination of the awards of attorney fees in several of the settlements that a significant percentage of fees are being awarded to counsel in "tag-along" cases. In addition, it might be that too much of the fees represent compensation for purely administrative matters, such as the distribution of the settlement—a matter that could be better handled and at less expense by court-appointed masters.

A most significant question about the cost effectiveness of the antibiotics class action litigation is whether the costs to the defendant drug companies have in fact furthered broad societal goals. The limits of the present study have not permitted the kind of exhaustive investigation that would be required to gather relevant data on such costs. But the known aspects of the litigation pose several questions. First, and perhaps most important, do the antibiotics settlements represent costs that are offset against past profits that were generated by antitrust violations (and thus are presumably legitimate costs to the enterprises)? Or do the settlements represent an investment made to forestall the possibility of much greater future costs, those of litigating to a verdict the claims of the classes and of responding to potential damage awards that might have approached a billion dollars? As suggested earlier in the discussion of the class certifications, the price of peace for the defendants became much greater when the litigating classes were certified. If it is accurate to assume that an individual claim on the merits could have been defeated even nine times out of ten, still it might have been quite predictable economic behavior for the defendants to be more eager to settle a class's claim than the lesser valued claim of a single litigant.

But the increased eagerness to settle does not increase one's confidence that the antitrust laws are receiving just enforcement. Put in the perspective of the costs of doing business, it might well be that an additional cost of conducting a business in accordance with the requirements of the antitrust laws, as potentially enforced in class actions on a massive scale, is the avoidance of an increasingly broad area of activity because of the threat of class action litigation or the incurring of the additional expense of settling a consumer class action damage claim. It is doubtful in the extreme—in the context of the drug industry, in which no sales are made directly to individual consumers—that such additional cost would serve any viable antitrust policy.