

FALL 2013

from the Section Chair

Complexity

"I am so clever that sometimes I don't understand a single word of what I am saying."

—OSCAR WILDE

Dear Colleagues,

THIS ISSUE OF ANTITRUST addresses a complicated subject—the antitrust implications of the Supreme Court's *Actavis* decision on reverse-payment settlements. As you will see, that analysis follows several paths—practical and theoretical, specific and more general—to explore the meaning of *Actavis* not just for the pharmaceutical industry but also for all counsel who face rule-of-reason claims. In doing so, the magazine again succeeds in its essential purpose: to examine complex issues at the heart of our practice and present them in clear and readable form. Unfortunately, not everything we do as antitrust lawyers serves the goal of clarifying complex subject matter.

Recently I was sitting in court at the end of a long antitrust case, listening to a judge read jury instructions to a jury for over an hour. The lawyers had for weeks negotiated and battled over nearly every word of those instructions. And the judge had worked hard to make sure the language of the instructions lined up with the relevant appellate decisions. All of this was meant to serve the honorable goal of imparting accurate and complete information to the jury about the legal standards to apply and how to apply them.

But when the result of these extraordinary efforts was finally read to the jury, it was very hard to follow. To be sure, efforts had been made to render the instructions in plainer language than was customary in earlier times. But still the sentences were long, linguistically complex, and the vocabulary was unfamiliar. And of course, there was a mountain of words—more than 30 pages of them. It was hard to imagine how a juror—or anyone, really—could be expected to assimilate and apply this dense set of instructions to the many weeks of evidence that had preceded it. As I listened and the clock ticked, I began to wonder whether anybody in the courtroom really believed that this was an effective way to equip jurors with an understanding of the law.

There is plenty of research showing that it isn't. Over the last several decades, social science studies have found very low levels of comprehension of jury instructions. As one recent



commentator put it, "Studies have almost universally returned results finding that, by and large, jurors are confused by jury instructions and often disregard them."¹ Research has typically shown that juries understand fewer than 50 percent of the instructions they are given, with some studies finding comprehension rates as low as 13 percent.² For example, in one study, 43 percent of the jurors believed that they should give no weight to circumstantial evidence, in spite of receiving instructions to the contrary.³ Another study found that 49 percent of jurors did not understand the meaning of the word "demeanor," and thus had no hope of applying the concept in their deliberations.⁴ Some studies have even shown that jurors who received jury instructions did not perform any differently than jurors who received no instructions at all.⁵

The comprehension problem is even worse in antitrust and other complex civil cases. A study by the Federal Judicial Center found that juries in long civil trials experienced more difficulty understanding and applying jury instructions than juries in short trials. That is in part because the instructions are correspondingly more complex:

[L]onger trials, such as antitrust trials, typically are associated with a longer set of jury instructions and there is greater opportunity for psycholinguistic difficulties with them. The need for longer instructions reflects the reality that such trials (as compared with short trials) require jurors to master relatively more complex legal rules to guide their decision making, and that complexity of information conveyed will be one factor affecting comprehension.⁶

The jury instructions I had listened to in court were good examples of the problem. As an experiment, I tested that set of instructions using several popular tools used to measure the comprehension difficulty of text passages. They didn't do very well. One of the oldest and most widely used of those tools is the Flesch Reading Ease Test, which rates texts on a scale from 0–100 (the higher the score, the easier the passage).⁷ The Flesch test scores *Moby Dick* at 57.9 ("fairly difficult") and *War and Peace* at 68.6 ("standard"). The jury instructions I tested were significantly harder to comprehend than either Melville or Tolstoy, earning a Flesch score of 41.6 ("difficult").⁸

It is puzzling that the legal community ignores findings like this and clings to complicated jury instructions that are too hard for juries to comprehend. In every other part of our work, we emphasize the importance of condensing and expressing complex concepts in terms that nonexperts can readily grasp. That's one of the hallmarks of a good advocate. Yet, 25 years ago, as a young lawyer at my first antitrust trial, I remember enthusiastically copying convoluted language from appellate opinions into our proposed jury instructions. Why? Because I thought sticking to that language would help us convince the trial judge to use our instructions instead of the other side's. And I was right. But we ended up with jury instructions that only a junior associate could love, and no normal person could understand.

Fear of deviating from appellate language is one factor that drives lawyers and judges away from crafting more comprehensible jury instructions.⁹ It is also hard to do. As Pete Seeger said, “Any darn fool can make something complex; it takes a genius to make something simple.”¹⁰ But neither is an excuse for doing nothing about a system that threatens fairness by failing to communicate relevant legal standards to juries.¹¹

So what do we do? I suggest three things. First, lawyers, judges, and drafters of model jury instructions need to stop pretending that the way we do things now actually works. Common sense tells us it doesn’t, and there is ample research to confirm it. Second, we should experiment with techniques—like giving substantive jury instructions at the *beginning* of trials not just at the end of them—that have been demonstrated to increase jury comprehension and proper application of jury instructions.¹² Third, we need to use our skills as lawyers to devise simplified instructions that are actually understandable to ordinary people, even if it means loosening our attachment to the language of appellate opinions.

As to the last point, I am delighted to report that work is underway on a top-to-bottom revision of the Antitrust Section’s *2005 Model Jury Instructions in Civil Antitrust Cases*. This very important project is being carried out by the Section’s Trial Practice Committee, with help from volunteer plaintiff lawyers, defense lawyers, and judges, and is expected to be completed in 2014. Let us all hope that this revision articulates not only a balanced view of the law, but also a comprehensible one. Fairness demands both. ■

Best regards,



Christopher B. Hockett
Chair, Section of Antitrust Law 2013–2014

¹ Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of “Plain-Language” Jury Instructions*, 64 HASTINGS L.J. 643, 645 (2013).

² See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL’Y & L. 589, 596–97 (1997); Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors’ Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 546–50 (1992); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 83–87 (1988).

³ Steele & Thornburg, *supra* note 2, at 85 (citing study).

⁴ *Id.*

⁵ Lieberman & Sales, *supra* note 2, at 597 (citing studies).

⁶ *Id.* at 616 (citing Joe S. Cecil, E. Allan Lind & Gordon Bermant, *Jury Service in Lengthy Civil Trials*, Federal Judicial Center (1987)).

⁷ See Rudolf Flesch, *A New Readability Yardstick*, 32 J. APPLIED PSYCH. 221–23 (1948).

⁸ Other tools attempt to measure the level of education required to comprehend the material. For the jury instructions I tested, the average of those

measures was 15.3 years of education, i.e., more than three years of college. (If you are interested, the Flesch score for this article is a *Moby Dick*-like 56.2, and it requires a tenth grade education to comprehend.)

⁹ “[L]awyers and judges know that courts of appeal are far less likely to reverse if the trial courts use the same language that the appellate courts used.” Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 708–09 (2000).

¹⁰ Pete Seeger, Twitter (Dec. 28, 2012, 4:01 A.M. PST), https://twitter.com/Peter_Seeger/status/284630047413907459.

¹¹ It also could threaten the continued use of juries in antitrust and other complex cases. For example, the Third Circuit long ago observed that an exception to the Seventh Amendment right to a jury trial would exist “when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and relevant legal standards.” *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1086 (3d Cir. 1980).

¹² See, e.g., SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT 25–28 (Sept. 2008), <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>; Lynne ForsterLee, Irwin A. Horowitz & Martin J. Bourgeois, *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCH. 1421 (1993).

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