WRITING BETTER JURY INSTRUCTIONS: ANTITRUST AS AN EXAMPLE

*Joshua P. Davis**
*Shannon Wheatman***
*Cristen Stephansky****

* Associate Dean for Academic Affairs and Professor, University of San Francisco School of Law, and Member of the Board of Directors of and Senior Fellow at the American Antitrust Institute (AAI). We are grateful for funding from AAI to support our empirical efforts. We benefited from comments from numerous federal judges at AAI's annual seminar on "Business Behavior & Competition Policy in the Courtroom: Current Challenges for Judges," co-sponsored by the Stanford Program in Law, Science & Technology at Stanford Law School, the Stanford Graduate School of Business, and the Stanford Institute for Economic Policy Research. We also received valuable comments from participants in the Annual Loyola Chicago Antitrust Colloquium. Vern Francis and Jessica Meltser provided excellent research assistance. Any errors remain entirely our own.

** President, Kinsella Media LLC. Kinsella Media designs and implements international, national, and statewide notice programs in class actions, bankruptcies, and other mass claims actions. Kinsella Media has worked on more than 900 cases and placed over $380 million in legal advertising. Kinsella Media is a SourceHOV company.

*** Senior Notice Program Manager, Kinsella Media LLC.

I. SYNOPSIS

Understanding the law is difficult. Getting juries to understand the law is more difficult. Yet, we provide evidence that it can be done, even in complex areas such as antitrust. This Article tests whether jury instructions can be written in a way that maintains fidelity to the law—indeed, improves on fidelity to the law compared to standard jury instructions—while also permitting jurors to understand the relevant legal standards. But it goes further than that. It proposes

making empirical testing an integral part of drafting model jury instructions. It also shows that such empirical testing is feasible by harnessing the power of the Internet. It undertakes those efforts by drafting and testing jury instructions in two challenging areas of antitrust law. The results of the empirical testing provide reason for optimism about the prospects of juries understanding the law, if those who draft jury instructions test whether they are comprehensible and modify draft jury instructions in light of empirical results.

II. INTRODUCTION

The jury system has always had its admirers and detractors. Thomas Jefferson was a champion,[1] Jerome Frank a critic.[2] Over the course of the life of our Republic, there have been movements to limit the role of the jury and others to protect it. But we may not have done nearly enough to make it work as well as it can. This Article describes a method for undertaking that effort and offers an application of the method.

The novel method uses *empirical testing* to improve jurors' understanding of jury instructions. Recent technological innovations make that sort of effort much more feasible and less expensive than in the past. In particular, use of the Internet—and, more specifically, Mechanical Turk[3]—can support an empirical assessment of jury instructions without unreasonable effort and at a modest cost.

To demonstrate that the proposal is practical—not merely academic, in the derogatory sense of the word—we prepared two sets of jury instructions. And they do not arise in an area of the law that lends itself particularly well to clear jury instructions. To the contrary, they pertain to private enforcement of the

---

1 *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 135 (1832) ("[I]f the question [before justices of the peace] relate to any point of public liberty, or if one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact."); Thomas Jefferson, *From Thomas Jefferson to the Abbé Arnoux, 19 July 1789*, NATIONAL ARCHIVES: FOUNDERS ONLINE (Oct. 5, 2016), http://founders.archives.gov/?q=%20Author%3A%22Jefferson%2C%20Thomas%22%20%22if%20they%20think%22&s=1111311111&r=6 ("It is left . . . to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges, and by the exercise of this power they have been the firmest bulwarks of English liberty."); Thomas Jefferson, *From Thomas Jefferson to Thomas Paine, 11 July 1789*, NATIONAL ARCHIVES: FOUNDERS ONLINE (Oct. 5, 2016), http://founders.archives.gov/documents/Jefferson/01-15-02-0259 ("I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.").

2 *See, e.g.*, JEROME FRANK, COURTS ON TRIAL (1949).

3 *Overview*, AMAZON MECHANICAL TURK, https://www.mturk.com/mturk/help?helpPage=overview (last visited Oct. 12, 2016) ("Amazon Mechanical Turk is [an online] marketplace for work that requires human intelligence. [It provides] businesses [or academics] access to . . . diverse, on-demand [workers] . . . .").

antitrust laws, a doctrinal context in which some commentators have suggested a complexity exception should be made to the right to trial by jury.[4] If difficult topics in antitrust can be made comprehensible to a jury, we would argue, so can most other areas of the law.

To be clear, the goal of this Article is not merely to show that jurors can understand some jury instructions—it is to suggest that empirical assessment should be undertaken as an *integral part* of drafting jury instructions to ensure that jurors can understand them.[5] A room full of lawyers may speculate about what jurors can and cannot understand. They may even have real insight about the matter. But that is no substitute for using empirical testing on jury instructions to determine which ones work and which ones do not and then using the results, when appropriate, to refine them. That is the process we undertook for two areas of private enforcement of the antitrust laws. We believe the results we obtained provide a basis for optimism for this proposed way of proceeding.

In particular, we drafted two jury instructions. The first addresses overcharge damages in direct purchaser antitrust cases. The second involves the use of direct evidence to prove market power and competitive harm—or the lack of market power and competitive harm. These issues involve concepts that are very likely to be foreign to non-lawyers—indeed, even to lawyers who are not specialists in antitrust. We therefore take as no mean feat the success we achieved in drafting the instructions so jurors have a reasonable chance of understanding them.

III. WHY JURY INSTRUCTIONS MATTER IN THE AGE OF THE VANISHING JURY TRIAL

Before discussing the details of our empirical efforts, it seems appropriate to anticipate an obvious objection. Jury trials seem to be going the way of the dodo bird, perhaps particularly quickly in complex and high-stakes areas of the law like antitrust. Trials are rare.[6] So why do jury instructions matter? The question may seem somewhat heretical, but it is worth asking. We provide

---

4 *See, e.g.*, Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 1 REV. LITIG. 3 (1980–1981); Joseph A. Miron, Jr., *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.–KENT L. REV. 865 (1998).

5 *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (Stephen R. Saltzburg & Kenneth R. Redden eds., 1982). Although empirically testing jury instructions during the drafting process is not an entirely novel proposal, Elwork and his colleagues were limited in their ability to test the methodology they propose due to money and time constraints. *Id*. at 45. The use of Mechanical Turk obviates these concerns because it provides a low-cost method of empirically testing the jury instructions.

6 *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting, *inter alia*, that by 2002 the percentage of federal civil cases resolved by trial fell to 1.8 %—so over 98% of federal cases settled before trial).

three answers: jury trials still occur; the prospects at trial inform settlements; and jury instructions not only reflect, but may inform the law.

A. Some Jury Trials Do Occur

Some trials do occur, even in antitrust cases—indeed, even in antitrust class actions.[7] There are some recent examples.[8] Of course, when trials do take place, jury instructions can make a great deal of difference.[9] That is perhaps reason enough to ensure their quality. But if trial provided the only context in which jury instructions play a significant role, that would greatly limit their importance. The influence of jury instructions, however, is not so narrowly circumscribed.

B. Bargaining in the Shadow of the Law

Jury instructions affect not only trial. They can also affect settlements. Assuming jury instructions affect the probabilities of various outcomes at trial, they should also inform settlement negotiations. To borrow a famous turn of phrase, parties bargain "in the shadow of the law."[10] Presumably, predictions

---

[7] *Id.* at 487 ("Trial in class-action cases are quite rare."). As to civil trials, "jury trials make up almost two-thirds (65.8 percent) of all [federal] civil trials." *Id.* at 466.

[8] *Compare* Class Customer Plaintiff's Notice of Motion and Unopposed Motion for Preliminary Approval of Settlement, Approval of Form Notice, and Setting Schedule and Final Approval Hearing and Memorandum of Points and Authorities in Support Thereof at 2, Meijer, Inc. v. Abbot Laboratories, 544 F. Supp. 2d 995 (N.D. Cal. 2008) (stating that three days of jury trial took place), *with In re* Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 111 (D. Mass. 2015) (stating that a jury trial commenced), *and In re* Urethane Antitrust Litig., No. 04-1616-JWL, 2013 WL 3879264, at *1 (D. Kan. July 26, 2013) (stating that a judgment was entered by a jury).

[9] *See* Monica L. Thompson, *Jury Instructions: More Than an Afterthought*, 8 CBA REC., 32, 32 (1994) ("Jury instructions are the last guideposts given by the court which point to the outcome of the jury's deliberations.").

[10] The germinal article on the topic is Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). *See, e.g.*, Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 962 (2010) (stating that in addition to "bargaining . . . in the shadow of the law" various nonlegal factors effect civil settlements); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 766 (1984) (noting that litigation negotiations take place in the "shadow of the law," and therefore, "negotiators assume that what is bargained for are the identical, but limited, items a court would award in deciding [a] case"). The concept of the "shadow of the law" is also applicable to areas outside the civil law context. *See, e.g.*, David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777 (2013) (discussing the application of the concept of the "shadow of the law" to plea negotiations for criminal defendants); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449 (2008) (discussing the application of the concept of the "shadow of the law" to transnational law and transnational activity).

about the likely result at trial influence the terms the parties are willing to accept. Instructions that favor plaintiffs are likely to cause plaintiffs to demand more and defendants to pay more in settlement and vice versa. So jury instructions may matter not only for the rare cases that go to trial but also for the overwhelming majority of cases that settle.[11]

C. Jury Instructions Can Inform Other Stages of the Proceedings

Further, trial is not the only stage of the litigation in which courts assess the merits of litigation. Nor is it the only stage at which jury instructions may shape a court's view of those merits. Indeed, a feedback loop may develop at times between the law and jury instructions. In theory, the instructions should be drafted to reflect the law. In practice, courts may turn to jury instructions for guidance in saying what the law is. In *Deutscher Tennis Bund v. ATP Tour, Inc.*,[12] for example, the Third Circuit relied on the ABA model jury instructions in holding that "'application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry."[13] There is a reasonable argument that the ABA jury instructions—and the Third Circuit opinion following them—departed from existing case law.[14] More to the point, the jury instructions appeared to influence the Third Circuit's description of existing law, possibly altering how the law has developed. Thus, jury instructions not only can reflect doctrine, but they can also inform—even modify—the law.

IV. CRITICISMS OF (MANY) EXISTING JURY INSTRUCTIONS

Jury instructions, then, matter. The next issue is whether the existing instructions work well. We believe that they do not and, in particular, that the most influential instructions in civil antitrust cases, the ABA model jury instructions, could improve in various ways.

---

[11] *See* Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND INSTITUTE (2011), http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf ("The great majority of cases terminate in the 'Before Pretrial' stage."). Since 1998, bench trials have remained below 1.0%. *Id.* at 4. Seven years later in 2005, civil jury trial rates also dropped below 1.0%. *Id.*

[12] 610 F.3d 820 (3d Cir. 2010).

[13] *Id.* at 833 (quoting ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, A-8 n.2 (2005 ed.)).

[14] *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 779 n.223 (2012) (criticizing *Deutscher* in this regard and the ABA model jury instruction on which it relied).

A. Concerns About Jury Instructions, Particularly in Antitrust Cases

There are several concerns about existing jury instructions. In exploring them, we will focus on the ABA model instructions for civil jury trials, although many of the following comments apply to other jury instructions as well.

The first concern is a lack of clarity. Although the ABA jury instructions make a valuable contribution, they contain various omissions, ambiguities, inconsistencies, and opacities.[15] These imperfections are no doubt inevitable, as no effort is flawless. But we think greater clarity and internal consistency is possible without sacrificing fidelity to the law.

Generally, jury instructions are not written in a way that makes them as comprehensible as they could be to juries. To be sure, perfect comprehension by jurors lacking any legal training is too much to expect, particularly in a complicated and technical area of the law like antitrust,[16] but we should aspire to do better in at least a couple of ways. First, whenever possible, we should attempt to write jury instructions simply and clearly. The movement in favor of communicating to non-lawyers in plain language has been around for quite some time and has found significant support.[17] Scholars have developed various techniques for writing in a way that maximizes the chances of a layperson understanding the law. The ABA jury instructions do not always comply with these techniques. To be sure, the ABA attempted to make the jury instructions understandable to jurors, but they did not succeed in a number of key ways.[18]

A related point involves readability. The term "readability" refers to an objective measure—albeit an imperfect one—of the level of education necessary to understand written material.[19] It provides a rough proxy for the ability of

---

15 *See* discussion *infra* Part IV.B.

16 *See, e.g.*, DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 109 (2011) (summarizing criticism of the competence of juries in antitrust cases).

17 *See, e.g.*, The Honorable B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988). *See generally* 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 n.1–3 (2013) (citing various sources related to the plain language movement in juror instructions).

18 *See* discussion *infra* Part IV.A.

19 For a discussion of the history, critiques, and benefits of the Flesch-Kincaid Grade Level Readability Test, see Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147 (2007). This article adopts the definition of "readability" as it is calculated in the Flesch-Kincaid Grade Level Readability Test. *Id.* at 150. This formula uses the average number of words per sentence ("ASL") and the average number of syllables per word ("ASW") to calculate the approximate level of education needed to comprehend the particular document. *Id.* Although flawed because it does not take into account subjective factors and because of imprecision in calculations, the Flesch-Kincaid Grade Level Readability Test lends itself to this research because the formula can be used to calculate the grade level of a particular document as opposed to a score that later must be converted

people to comprehend writing. Drafters of jury instructions too often do not pay adequate attention to readability. This situation seems to be true for the ABA instructions in particular.

Further, recent scholarship has focused on the notion of "schemas" and their influence on a jury's understanding of the law.[20] The idea is that jurors bring to bear "schemas"—preexisting frameworks for understanding the world—to the task of finding facts.[21] These schemas can play various roles for jurors. Perhaps most obviously, they can shape a juror's beliefs about what is and is not permissible behavior in the marketplace—beliefs that may or may not conform to antitrust doctrine. Schemas can have other effects as well. They can, for example, influence how a juror reads a document, affecting what the juror expects to see and whether the juror is able to understand information provided. Although the task is ambitious, we tried to take into account principles of cognitive and educational psychology in structuring the proposed jury instructions and in attempting to modify jurors' schemas so that they more closely resemble those of experts in antitrust law.

Finally, in the antitrust context, a concern arises about fidelity to the law and economic theory as it has become embodied in the law. This concern applies to the ABA jury instructions. At times, they take positions that are not consistent with the best understanding of the current doctrine and economic theory. They require, for example, that a plaintiff establish a relevant market even when the plaintiff is going to rely on direct evidence to prove market power or monopoly power.[22] And they imply that the jury should award damages based on the actual harm to the plaintiff, even when the plaintiff seeks overcharge damages (in which case any "passing on" of overcharges is irrelevant as a matter of law).[23]

B. Reasons for Imperfect Jury Instructions

Why do jury instructions suffer from these flaws? As noted above, a possibility is human fallibility in drafting instructions. That is inescapable. But some of the flaws may be correctible. In this regard, it is important to keep in

to a grade level and allows researchers to easily compare documents based on empirical criteria. *Id.* at 161. Additionally, out of 200 readability formulas currently available, it is one of the most widely used. *See* William H. DuBay, *The Principles of Readability* at 27, 57 (2004), http://www.impact-information/impactinfo/readability02.pdf (last visited Oct. 6, 2016) (describing the development of numerous readability tests). *See generally*, Sirico, *supra* note 19, at 149–50, 161, 165, 167 (discussing criticisms of the Flesch-Kincaid Readability test and other similar objective readability tests).

20 *See generally* Gordon, *supra* note 17, at 643 (examining "social science [theory] in order to advance our understanding of how schemas continue to influence jurors' use of jury instructions, even when those jurors are given 'plain language' instructions").

21 *Id.*

22 ABA SECTION OF ANTITRUST LAW, *supra* note 13, at C-23 to C-25, Instruction 9.

23 *Id.* at F-2 to F-23, Instruction 5.

mind that jury instructions are not necessarily written to guide juries as effectively as possible. There may be various reasons for this reality. But what is most important is that jury instructions are unlikely to succeed in providing accurate guidance unless their drafters privilege that goal over the many others—and many practical considerations—that too often can dominate.

1. Political Compromise

The first problem is that jury instructions are written, at times, by a group of attorneys with varying perspectives who come to a political compromise. The term "political" is not meant to be pejorative in the sense that the participants have an improper motive.[24] It is meant instead to signify that jury instructions tend to reflect competing views of the law rather than to resolve them. The ABA jury instructions, for example, are produced by a diverse group of attorneys who are likely to have inconsistent understandings of the content of the law.[25] This diversity is important: it likely results in a more balanced and fair view than would drafting instructions with only one perspective. But it risks internal inconsistency.

2. Surviving Appeal Rather than Expressing the Law Clearly

Another problem is that jury instructions are often written by lawyers for judges—particularly for appellate court judges—not by experts in plain language for jurors.[26] Little attention may be paid to whether the same legal content can be expressed in simpler, more accessible language. That may be because lawyers suspect—rightly or wrongly—that using legal formulations as they are embodied in appellate case law will survive appeal, while translating those formulations into plain language may not.[27] An irony is that appellate courts have embraced framing jury instructions in plain language, while lawyers continue to prepare instructions that are not plain at all.[28]

---

[24] Value judgments may be inevitable in attempting to give the law sufficient determinacy to guide a jury. *See, e.g.*, Joshua P. Davis, *Legality, Morality, Duality*, 2014 UTAH L. REV. 55.

[25] *See* Gordon, *supra* note 17, at 646 (stating that "[jury instructions] are typically drafted by lawyers (or committees of lawyers)"). *See generally* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1083, 1085 (2001) (discussing the role of committees of lawyers and judges that draft jury instructions).

[26] *See* Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 461 (2006) ("[Drafters of jury instructions] concentrate on the language of the instructions and use precise legal terms whenever possible because they know that the appellate judges will review the instructions with a fine-tooth comb. The drafters . . . gear their approach to the appellate judges' review and not to the jurors' level of comprehension.").

[27] *Id.* at 462.

[28] *Id.* at 462–63.

3. Lack of Empirical Testing

Crucial to this Article is that jury instructions generally are not tested empirically to see whether typical jurors are likely to understand them.[29] Nor are they modified in light of such empirical evidence. We would never allow doctors to prescribe drugs that they think should work in theory without first testing whether they help patients—or harm them—in practice. If we want jury instructions to work, we should test them too and revise them based on what we learn. That is consistent with our grand tradition of subscribing to the scientific method, at least in those areas of study that are susceptible to it.

4. Reflecting Rather than Resolving Indeterminacy: There Is No Coherent "Neutral" Position

The final issue is somewhat philosophical. Drafters of jury instructions understandably wish to say what the law is, rather than what it should be.[30] The problem, however, is that the law is at least somewhat indeterminate, although how indeterminate has long been an issue of significant controversy.[31] Indeterminacy does not merely entail gaps, that is, areas that have not yet been addressed by an authoritative lawmaker or legal interpreter. It also involves ambiguities and inconsistencies. Simply placing before juries the law in all of its magnificent confusion and leaving it to jurors to make sense of it may be tempting, but it is not a recipe for clear understanding.[32]

C. Building a Better Mousetrap

1. Input from Many, Control by Few

As part of an effort to provide improved jury instructions, we sought input from many attorneys and other experts on antitrust law. We retained ultimate control, however, over drafting. The hope was that we could make the tough but fair decisions necessary to maintain clear communication.

---

29 *See* Judith L. Ritter, *Your Lips are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163 (2004) (discussing the concept that courts simply rely on the presumption that jurors understand instructions without questioning the validity of this presumption).

30 This is, of course, one formulation of what has traditionally been called legal positivism. *See, e.g.*, Davis, *supra* note 24, at 58.

31 *Id.* at 68.

32 For an argument that value judgments are necessary to give the law sufficient determinacy to provide meaningful guidance, see *id.* at 76–78.

2. Expertise: Not Just in the Law but in Plain Language

A fair criticism of the proposed jury instructions would be if they do not accurately reflect antitrust law. To avoid that criticism, it was essential that we have—and call upon—expertise in antitrust doctrine. In that regard, we sought comments and criticisms from a broad range of experts in the field. However, expertise in antitrust law is necessary—but not sufficient—for effective jury instructions.

A key step in making jury instructions clear is to involve an expert (or experts) in plain language, not just experts in antitrust law. Plain language is clear and direct, and relies on principles of clarity, organization, layout, and design.[33] Plain language writers "let their audience concentrate on the message instead of being distracted by complicated language."[34] Thus, plain language communicates effectively with the general public, which is critical because only 29% of U.S. adults have graduated from a four-year college.[35] Only 10% of the public attends graduate school.[36] Even more significant, a 2003 literacy study found that less than 15% of U.S. adults were proficient in "integrating, synthesizing, and analyzing multiple pieces of information located in complex documents."[37] Given the limited education of many jurors, readability is crucial to juror comprehension.

Empirical research has shown that redrafting legal documents into plain language increases reader comprehension and is more persuasive.[38] On the other

---

[33] *See generally* Tiersma, *supra* note 25, at 1107 (stating that a "fundamental principle of plain English is that you should use ordinary words in their ordinary meaning").

[34] Robert Eagleson, *Short Definition of Plain Language*, PLAIN LANGUAGE, http://www.plainlanguage.gov/whatisPL/definitions/eagleson.cfm (last visited Oct. 6, 2016).

[35] U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2014, http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html. This percentage is derived by dividing the total number of males and females, aged 18-years-old and over, with a Bachelor's Degree or higher (70,029) by the total number of all sexes and races within the 2014 U.S. population educational attainment survey (239,341).

[36] *Id.* This percentage is derived by dividing the total number of males and females, aged 18-years-old and over, with a Master's Degree or higher (24,853) by the total number of all sexes and races within the 2014 U.S. population educational attainment survey (239,341).

[37] Mark Kutner et al., *Literacy in Everyday Life: Results from the 2003 National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, 4, 13 (2007), www.nces.ed.gov/Pubs2007/2007480.pdf (finding 13% of adults demonstrated ability to perform such skills).

[38] *See* Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 62–65, 73 (1996) (listing a number of studies conducted on plain language and concluding that plain language is more persuasive and comprehensible to readers than standard legal writing). *See generally* Veda Charrow, *Readability vs. Comprehensibility: A Case Study in Improving a Real Document*, *in* LINGUISTIC COMPLEXITY AND TEXT COMPREHENSION: READABILITY ISSUES RECONSIDERED 85 (Alice Davison & Georgia M. Green eds., 1988) (rewriting automobile recall letters for readability increases comprehension among study sample); Robert P. Charrow & Veda

hand, failure to write in plain language can have serious consequences because if readers cannot understand the content of a document, they will stop reading.[39] In the jury trial context, that means jurors will be forced to rely on their commonsense notion of justice in rendering verdicts.

To listen to or read dense, legalistic, and highly technical jury instructions, an individual not only must be educated, but also must possess the motivation required to wade through technical and legal jargon. Studies have repeatedly shown that, "readers strongly prefer plain language in legal and public documents, they understand it better[,] . . . they find it faster and easier to use, they are more likely to comply with it, and they are much more likely to read it in the first place."[40] Plain language jury instructions provide clear and effective communication of complex and important information to people with basic education. Clear writing and effective presentation can help promote juror understanding and ensure justice is served.

Documents with legal content should not be unnecessarily burdensome to read for their intended audience. Plain language is more than just simple words; the term considers sentence length, subject/verb order, unambiguous modifiers, and even the active voice.[41] If sentences average more than 15 words, the legal content may confuse some intended readers. If interrupting clauses separate verbs from their subjects, the lack of unity and clarity may mislead readers. If a sentence is a mish-mash of floating modifiers that do not logically fit next to their antecedents, most readers will be perplexed, particularly when the legal content is already unfamiliar. The passive voice is also a problem: we should tell jurors that they should follow the jury instructions, rather than say that the jury instructions should be followed. Jurors who are confused or uncomfortable stop reading, and unnecessarily confusing and complicated jury instructions fail in their purpose of guiding juries.

We conducted a readability analysis on our proposed jury instructions and on the ABA jury instructions. We relied on the Flesh-Kincaid Grade Level Readability Test to measure readability.[42] It is the most widely used readability

R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (arguing that systematic rewriting of jury instructions can measurably increase reader comprehension); Michael E. J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67 (1994), http://web.uvic.ca/psyc/masson/MW94.pdf (reporting enhanced comprehension of legal documents after three stages of simplification).

39 *See* DuBay, *supra* note 19, at 1 ("When texts exceed the reading ability of readers, they usually stop reading.").

40 JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 105 (2012).

41 *See* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 11–18 (1992) (discussing the "elements of plain English" and the range of definitions that exist).

42 *See supra* Part IV.A.

scale.[43] The formula for calculating Flesch-Kincaid uses the average number of words per sentence and the average number of syllables per word to calculate the approximate level of education needed to comprehend the particular document.[44] This measure of readability indicates the number of years of education that a person needs to understand the text easily on the first reading (a score of 12 means the text would be understood by a high school graduate; a score greater than 12 means the text can be understood by someone with a college education).[45] In general, this test penalizes for polysyllabic words and long, complex sentences.[46]

To be sure, readability tests are just one tool among many. It is important to note that they can gauge only surface characteristics of text. Review of more qualitative factors, such as vocabulary difficulty, sentence structure, concreteness and abstractness, obscurity, and incoherence cannot be measured mathematically.[47]

D. Empirical Testing

The main proposal of this Article is to use empirical testing not only to confirm—or disconfirm—the clarity of jury instructions, but also to revise them to achieve improved results. The following is a description of the surveys we used to conduct our empirical analysis. Each consisted of: a model fact pattern; draft jury instructions; and objective and subjective questions. We then used Mechanical Turk to obtain responses to the surveys.

For each empirical study, we drafted a deliberately simple model fact pattern. It also did not present information to be considered by a jury in the form of evidence, much less conflicting evidence. Instead, it asserts what are to be accepted as objective facts. Admittedly, presenting the material in this way departs from an ordinary jury trial, but an experiment under simplified circumstances still likely has significant value.[48]

Each survey then included jury instructions that were intended to be tailored to the fact pattern. For the ABA versions, the instructions were derived from the relevant model jury instructions.[49] Some judgment was necessary in this tailoring. The goal was to provide a fair version based on the text provided. For

---

43 *See* DuBay, *supra* note 19 (stating that that Flesch-Kincaid Grade Level Readability Test is one of "today's most popular formulas").

44 *See* Sirico, *supra* note 19, at 150.

45 *Id.* at 158–61.

46 *See id.* at 150.

47 *Id.* at 168.

48 For a discussion of the limitations of this empirical effort, see *infra* Part V.

49 *See* ABA SECTION OF ANTITRUST LAW, *supra* note 13.

the proposed alternative approach, the instructions were derived from a report originally prepared by the authors for the American Antitrust Institute.[50]

The surveys were also intended to have right and wrong answers, at least in the relevant respects. Again, this approach deviates from the circumstances of an actual jury trial. A rationale for taking this approach is that it permits a relatively objective assessment of juror comprehension. We supplemented those objective questions with subjective ones, allowing more nuanced feedback and a proverbial peek behind the curtain into the thinking of the respondents. The proposed jury instruction on overcharge damages did not require revisions and iterations. In contrast, the proposed instruction on direct evidence of market power and anticompetitive effects did. We used the feedback from respondents—both subjective and objective—to improve the jury instructions and, thereby, our empirical results. We recommend that process to future bodies charged with drafting jury instructions.

Our empirical efforts benefited greatly—in terms of practical convenience and cost—from Mechanical Turk. It is a marketplace created by Amazon that provides businesses or academics access to workers who can perform tasks that cannot be done by a computer.[51] These workers can choose from thousands of tasks.[52] Once the task is satisfactorily completed, the worker receives an agreed upon sum.[53] The main advantage of using Mechanical Turk is access to a diverse subject pool at a low cost.[54]

The population of Mechanical Turk workers is diverse across several demographic factors such as age, gender, and income.[55] The population is not exactly representative of the United States,[56] as the workers tend to be younger, more educated, and more likely to be female. However, other studies have found that using samples from this population to draw conclusions can be comparable

---

50 *Jury Instruction Project*, AAI, http://www.antitrustinstitute.org/JuryInstructionProject (last visited Oct. 6, 2016).

51 *Overview*, *supra* note 3.

52 *Id.*

53 *Amazon Mechanical Turk Pricing*, REQUESTER, https://requester.mturk.com/pricing (last visited Oct. 6, 2016).

54 Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, http://link.springer.com/article/10.3758%2Fs13428-011-0124-6 (last visited Oct. 6, 2016).

55 *Id.*

56 Joel Ross et al., *Who are the Crowdworkers? Shifting Demographics in Amazon Mechanical Turk*, *in* CHI EA '10: EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 2863 (2010).

to or even more diverse than laboratory subjects used in other studies (such as students at a university).[57] Also, the population tends to remain stable over time.[58]

An experiment through Mechanical Turk can cost less than laboratory studies[59] and can be more efficient to conduct than other online studies due to Mechanical Turk's built-in payment method, simplified recruitment, and the ease of posting questionnaires for the participants.[60] Also, because of the way workers are evaluated and labeled with an "approval rate," they may be motivated to pay more attention when responding to studies than other subjects, as their future opportunities depends on their performance.[61]

Study results through Mechanical Turk were shown to be comparable to those conducted online and in offline settings, and Mechanical Turk seems to be considered a valid means to collect data.[62]

For the above reasons, we believe use of Mechanical Turk—or a comparable online service—can provide valuable information about the clarity of jury instructions and a feasible way to conduct empirical research in drafting jury instructions that jurors can understand.

V. ILLUSTRATION: INSTRUCTIONS REGARDING PRIVATE ANTITRUST ENFORCEMENT

A. The ABA Private Antitrust Jury Instructions that Serve as a Baseline

The most comprehensive jury instructions for private antitrust enforcement come from the ABA. They are the Model Jury Instructions in Civil Antitrust Cases.[63] Courts tend to use them as a point of departure for formulating the instructions that will be submitted to juries. Some of them would benefit greatly from revision. This Article focuses on two areas of those instructions. The first involves overcharge damages in private direct purchaser actions under

---

57 Adam J. Berinsky et al., *Using Mechanical Turk as a Subject Recruitment Tool for Experimental Research*, www.mit.edu/~glenz/Mechanical_Turk.pdf (last visited Oct. 6, 2016); Mason & Suri, *supra* note 54.

58 Mason & Suri, *supra* note 54.

59 Berinsky et al., *supra* note 57, at 5.

60 Mason & Suri, *supra* note 54.

61 Berinsky et al., *supra* note 57, at 3.

62 Mason & Suri, *supra* note 54; Berinsky et al., *supra* note 57, at 19–20.

63 *See* ABA SECTION OF ANTIRUST LAW, *supra* note 13. The analysis discussed in this article was based on the ABA model jury instructions published in 2005. The ABA recently published new model jury instructions in 2016, shortly before this Article was published. ABA SECTION OF ANTITRUST LAW MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES (2016 ed.) [hereinafter 2016 ABA MODEL JURY INSTRUCTIONS]. We do not make a systematic effort to discuss any relevant changes. Nor do we address the extent to which, if any, the new jury instructions were influenced by our analysis.

federal antitrust law, and the second, direct evidence of market power and competitive harm (or lack thereof) in antitrust cases.

B. Concerns About the ABA Instructions and Responses

1. Matters of Substantive Law

i. Direct Purchaser Overcharge Damages: Ambiguous About the Role of Actual Harm

Under well-established doctrine, artificial rules apply to which purchasers can recover damages in federal antitrust cases and to what damages they can recover. Generally speaking, only purchasers who buy directly from a defendant may seek damages under federal law.[64] Purchasers of the goods or services at issue who receive them through an intermediary cannot recover damages.[65] On the other hand, direct purchasers may receive the full overcharges they pay.[66] If purchasers pursue overcharge damages, they do not have to take into account any successful efforts they made to mediate damages, including by increasing the prices they charge at resale.[67]

The relevant model ABA jury instruction does not address these artificial rules in a way that is likely to be clear to a jury. Instruction 5 on Damages reads in relevant part:

> Plaintiff claims that it was harmed because it paid higher prices for [*product X*] than it would have paid in the absence of defendants' alleged violation of the antitrust laws. If you have determined that there was an unlawful agreement among competitors to [*fix prices, restrict output, allocate markets*] that caused some injury to plaintiff, you must now consider the extent of plaintiff's damages. A proper method of calculating those damages is to award plaintiff the difference between the prices it actually paid for [*product X*] and the prices it would have paid in the absence of the agreement to [*fix prices, restrict output, allocate markets*].[68]

The above instruction does not appear to provide a technically incorrect statement of the law. It describes the overcharge measure of damages: the difference between the prices plaintiff paid with the antitrust violation and the prices plaintiff would have paid without the antitrust violation. But two aspects

---

64 Illinois Brick Co. v. Illinois, 431 U.S. 720, 730–35 (1977).

65 *Id.*

66 Hanover Shoe v. United Shoe Mach., 392 U.S. 481, 494 (1968).

67 *Id.*

68 ABA SECTION OF ANTITRUST LAW, *supra* note 13, at F-22, Instruction 5.

of the instruction could easily confuse a jury. First, it asks the jury to consider "the extent of plaintiff's damages." Jurors may read this phrase to require them to award the amount plaintiff was actually harmed rather than the artificial measure of recovery required by the law. Second, Instruction 5 describes the overcharge measure of damages as *a* proper method, not *the* proper method. Jurors could reasonably infer that the overcharge method is proper only if plaintiff was unable to mitigate harm, such as by increasing the prices it charges its customers.

Model Instruction 2, pages F-12 to F-13, significantly exacerbates the latter problem. It specifies in relevant part:

> The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish the wrongdoer—what we sometimes refer to as punitive damages—or to deter defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. . . . Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries it suffered as a result of the alleged violation of the law.[69]

This instruction is wrong in several important regards for purposes of direct purchaser actions. Damages are not designed to put a plaintiff "as near as possible in the position" as if the antitrust violation had not occurred. Nor is it true that it is impermissible for plaintiffs to receive a windfall or that damages are not designed to deter. Direct purchaser plaintiffs may receive a windfall—if, for example, they were able to mitigate damages by passing on some of an overcharge—or they may receive an insufficient recovery to make them whole—if, for example, inflated prices caused a decrease in sales volume and therefore in their profits. And part of the rationale for allowing direct purchasers to recover full overcharge damages is indeed deterrence.[70]

Jurors' schemas are likely to compound these problems. Jurors may well expect that plaintiffs are entitled to recover only the actual harm they suffered as a result of illegal conduct. Without clear direction, it would be surprising if they

---

[69] *Id.* at F-12 to F-13. Note that the concerns in the text—including the language about putting a plaintiff "as near as possible in the position" it would have occupied if not for the antitrust violation—remain in the current version of the ABA model jury instructions. *See* 2016 ABA MODEL JURY INSTRUCTIONS, *supra* note 63, at 304 (Instruction 1).

[70] *See* Ill. Brick v. Illinois, 431 U.S. 720, 730 (1977) (stating that one of the rationales is deterrence).

read the ABA instruction in a way consistent with *Illinois Brick v. Illinois*[71] and *Hanover Shoe v. United Shoe Machinery*.[72]

ii. Direct Evidence of Market Power and Competitive Harm: Lack of Clarity About the Need for Circumstantial Evidence

The Supreme Court has long recognized that direct proof of market power and anticompetitive harm is sufficient and obviates the need for circumstantial evidence, including by defining a relevant market.[73] Lower courts have similarly recognized that direct proof of market power (and competitive harm) is sufficient.[74]

Various key commentators support the view that direct evidence of market power is sufficient. The federal government's 2010 Horizon Merger Guidelines, for example, put new emphasis on the value of direct evidence of market power and recognize that the point of the inquiry into market power is to determine likely anticompetitive effects.[75] The implication is that direct evidence of anticompetitive effects should be enough. Similarly, Professor Herbert Hovenkamp has argued against requiring market definition in every antitrust case,[76] and Professor Louis Kaplow has gone further, contending that there is no way to define a relevant market without engaging in question begging.[77] Their

---

71 *See generally id.* (holding that an adopted rule must apply equally to the plaintiffs and the defendants).

72 *See generally* 392 U.S. 481 (1968) (holding that the prior Supreme Court ruling did not constitute a new rule).

73 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (holding that the purpose of inquiring into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, so that "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects"); *see also* Eastman Kodak v. Image Tech. Servs., 504 U.S. 451, 477–78 (1992) (holding direct evidence of market power is sufficient).

74 *See, e.g.*, Epicenter Recognition, Inc. v. Jostens, Inc., 81 Fed. Appx. 910, 910–11 (9th Cir. 2003); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 107–08 (2nd Cir. 2002); Re/Max Int'l v. Realty One, 173 F.3d 995, 1019 (6th Cir. 1999); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995). Any doubt about this issue would seem to have been eliminated by the Supreme Court's decision in *FTC v. Actavis*, which held that a large "reverse payment" can suffice to establish both market power and harm to competition. 133 S. Ct. 2223, 2236 (2013).

75 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGE GUIDELINES §§ 2–4 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

76 *See* HERBERT HOVENKAMP, MARKETS IN MERGER ANALYSIS (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945964.

77 Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 440 (2010) (arguing that any effort to define a market requires resolving issues that the market definition is meant to answer).

arguments suggest that direct evidence of market power is superior to circumstantial evidence of market power that relies on a market definition.[78]

The ABA Model Instructions fail to address direct proof of market power and anticompetitive harm in the context of the Rule of Reason.[79] The ABA Model Instructions do address direct proof of market power in the context of a monopolization claim. This approach is somewhat odd. The support is at least as strong for allowing direct proof of market power under Section 1 of the Sherman Act as for allowing direct proof of monopoly power under Section 2 of the Sherman Act. Either way, direct proof should suffice.

The instruction this Article proposes attempts to provide a clear and simple explanation of direct proof of market power and competitive harm. If a plaintiff can prove that a defendant in fact *caused* the kind of harm to competition that the antitrust laws are designed to prevent, the plaintiff has shown that the defendant has market power, that is, the defendant is *capable* of causing the sort of harm that it did in fact cause. Greater complexity in the instruction is more likely to confuse than clarify this issue for the jury.

An analogy may prove useful here. In a murder investigation, if we have sufficient direct evidence of who committed a crime, we do not ask also for indirect evidence.[80] A videotape of Joe killing John and a signed confession from Joe obviate the need to determine whether an earlier argument between them created a sufficient motive for Joe to commit murder. The direct evidence is that he did commit murder. No circumstantial evidence is necessary. Similarly, if a monopolist responds to entry of a competitor with a restraint on trade that enables it to raise and sustain its prices without a significant loss of market share, we should not ask for circumstantial evidence that it had the market power to raise and sustain prices above competitive levels. It did raise and maintain its prices above competitive levels, so we know it had the market power to do so.

This analogy suggests the converse is true in criminal law. If we have a video of Joe killing John and Joe's admission, we do not arrest Nancy because

---

78 For additional analyses of this issue see Eric L. Cramer & Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. REV. 81 (2004); Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive Effects Can Be Shown with Direct Evidence?*, 26 ANTITRUST 53 (2012).

79 The relevant jury instruction, 3B (page A-6), pertaining to "Proof of Competitive Harm," notes that "the plaintiff must show that the harm to competition occurred in an identified market." ABA SECTION OF ANTITRUST LAW, *supra* note 13, at A-6. It also says that an "important factor in determining whether the defendant possesses market power is the defendant's market share." *Id.* at A-8. Neither of these statements is true if a plaintiff is attempting to prove market power and anticompetitive harm only through direct evidence. FTC v. Activis, Inc., 133 S. Ct. 2223, 2236 (2013).

80 Thomas E. Williams, *Jury Instructions—Reasonable Doubt—Don't Have to Know Instruction Is Not Reversible Error When Conviction Is Based on Direct Evidence Recent Decision*, 49 MISS. L.J. 985, 986 (1978).

she had the motive and opportunity to commit the crime. Direct evidence of her innocence should eliminate any inquiry into circumstantial evidence of her guilt. The same should be true in antitrust as well. Direct evidence that a defendant *lacks* market power and that its conduct did *not* cause competitive harm should suffice. There should not have to be an additional inquiry into circumstantial evidence of market power or competitive harm.[81]

Our proposed jury instruction attempts to cure these deficiencies. In doing so, it borrows from ABA Instruction 9, C-23, on direct proof of monopoly power but also deviates from it in some important ways. First, the ABA's monopoly power instructions contemplate proof of both a relevant market and direct proof of monopoly power.[82] That creates a confusing internal inconsistency. If a plaintiff establishes market—or monopoly—power through direct evidence, there should be no need for it to define a relevant market. That is just one step in using *circumstantial* evidence to prove market or monopoly power.

Second, the ABA Instruction implies—consistent with the express position in ABA Instruction 2, C-4—that monopoly power requires both the ability to control prices *and* the ability to exclude competition. In other words, the proposed instruction uses the disjunctive, whereas the ABA instruction uses the conjunctive. The ABA's choice is odd. It acknowledges that a number of courts—all of the legal authorities the ABA cites—use the disjunctive.[83] Scholarly commentary also supports use of the disjunctive approach.[84] Even the unusual court that uses the conjunctive in the monopoly power context of Section 2 of the Sherman Act uses the disjunctive in market power context of Section 1 of the Sherman Act.[85]

Nor is the ABA's explanation of its position sound as a matter of economics or practicalities. The ABA justifies use of the conjunctive by suggesting that power over price implies the ability to exclude competition and

---

81 *See generally* Texaco, Inc. v. Dagher, 547 U.S. 1 (2006) (holding that joint venture to sell gasoline under two gas brand names was not per se illegal price fixing).

82 *See, e.g.*, ABA SECTION OF ANTITRUST LAW, *supra* note 13, at C-2, Instruction 1 (stating "plaintiff must prove each of the following elements" and listing both "a valid antitrust market" and "that the defendant possessed monopoly power"); *id.* at C-23, Instruction 9 (instructing the jury to assess direct proof of monopoly power only "[i]f you find that plaintiff has proven a relevant market").

83 *Id.* at C-4, Instruction 2, n. 1 (citing Am. Council of Certified Podiatric Phys. & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d. 366 (6th Cir. 2003)); Pepsico, Inc. v. Coca-Cola Co., 315 F.3d 101, 101–07 (2d Cir. 2002); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002); United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001)).

84 For an early discussion, see Thomas G. Krattenmaker et. al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987).

85 *Compare* Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 966–67 (10th Cir. 1990) (using disjunctive formulation for Section 1) *with* Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159, 163–64 (10th Cir. 1986) (adopting conjunctive formulation in Section 2 context).

vice versa.[86] As a matter of logic, that means proof of one entails proof of the other, and therefore proof of either should suffice. As a practical matter, a jury may not understand this logical connection and may follow the ABA instruction mechanically, finding against a plaintiff who has proven defendant's power over price but who has not made the unnecessary additional showing of exclusion of competition (or vice versa).

2. Matters of Form

Beyond concerns about whether the ABA instructions maintain fidelity to the law, the issue arises whether they are comprehensible by a typical juror. Take a relatively innocuous example: the ABA introduction and purpose for antitrust damages. It states, "The law provides that plaintiff should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful."[87]

To a lawyer, this sentence may read as reasonably straightforward and accessible. However, various of its attributes may make it difficult for a juror to understand. It speaks in terms of a "plaintiff" rather than using the name of the party. It is long. It uses long, technical words. It employs the term "damages," and other technical terms, without defining them. It addresses several different concepts in a single sentence: that the law provides; that compensation should be fair; that damages include harm to business or property; that there must be causation (defined as a direct result or likely consequence); and that the jury has already made a finding. It also uses the disjunctive often.

The analogous portion of the proposed instruction attempts to be more straightforward. It provides: "Damages are the amount of money you should award [name of plaintiff] because of the violation. You must award in damages the extra amount [name of plaintiff] paid to [name or describe defendants] for [product or service] because of the violation."[88]

Although the Flesch-Kincaid readability test does not address all of the above matters, it does provide one measure of how easy jury instructions are to understand. The ABA instruction on overcharge damages scored 19.33.[89] That

---

86 ABA SECTION OF ANTITRUST LAW, *supra* note 13, at C-4, Instruction 2, n.1 (stating that although a number of courts have used the disjunctive formulation, "this instruction adopts the conjunctive formulation and places the focus on the ability to control price, while the ability to control or exclude competition is included as an aspect of the defendant's ability to control price").

87 *Id.* at F-12, Instruction 2.

88 *See infra* Appendix II.

89 We made the calculation using *Tests Document Readability: Readability Calculator*, ONLINE-UTILITY.ORG, https://www.online-utility.org/english/readability_test_and_improve.jsp (last visited Oct. 5, 2016) (online tool used to calculate the Flesch-Kincaid grade levels).

suggests that the reader must have three years of graduate school to understand the instruction[90]—a law degree would seem to do the trick.

Similar issues beset the ABA instruction on direct evidence of market power and competitive harm. It contains sentences like the following:

> If, in determining the parameters of the relevant product market, you find that there are manufacturers that have the ability to alter their production to manufacture products that can reasonably be substituted with the defendants—even though they do not presently compete with the defendants—you may consider whether the existence of these potential alternative suppliers can influence the prices that the defendants charge for their products and, if so, the amount of the products that these suppliers are likely to produce.[91]

Put aside the length and complexity of this sentence (it is a single sentence with 82 words). A juror might ask: What is a parameter? How does one know whether some products "can reasonably be substituted" with others? The sentence is packed with inaccessible economic concepts.

And consider another sentence from the ABA instruction:

> In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of the plaintiff and defendant regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.[92]

Again, put aside the length and complexity of this sentence (it is 86 words, not including the numbers). Also, put aside the undefined terms and complex concepts. The sentence says jurors may consider consumers' views on interchangeability, the relationship between the price of one product and the sales of another, the presence of specialized vendors, and three other matters. How is a juror supposed to do so? Which consumer views would support interchangeability and would not? Does the existence of specialized vendors

---

90 *See* J. PETER KINCAID ET AL., DERIVATION OF NEW READABILITY FORMULAS (AUTOMATED READABILITY INDEX, FOG COUNT AND FLESCH READING EASE FORMULA) FOR NAVY ENLISTED PERSONNEL, CNTECHTRA RESEARCH BRANCH REPORT (1975), at 19 ("The new Flesch Formula shown is a linear equation that directly predicts grade level.").

91 ABA Section of Antitrust Law, *supra* note 13, at C-12.

92 *Id.* at C-8.

indicate products are or are not interchangeable? How is a juror supposed to know? A background in the economics of antitrust would seem necessary to unpack the logic of this sentence.

Perhaps somewhat surprisingly, the ABA's jury instruction on market power and competitive harm did better on the Flesch-Kincaid readability test than the ABA instruction on overcharge damages. It scored 17.46.[93] Three semesters of law school should suffice, provided the third semester includes a class on antitrust law.

We analyzed our proposed instructions using the Flesch-Kincaid readability test as well. The instruction we prepared on overcharge damages scored 9.26.[94] In other words, a student in ninth grade should, in theory, be able to understand it.[95] Similarly, the instruction on direct evidence of market power and competitive harm scored 9.59.[96] Again, that should place it within the comprehension of a ninth grader.[97]

C. The Empirical Test

So, in theory, jurors should understand our proposed instructions better than the ABA instructions. But, the key point of the project was to test the theory in practice. To do that, we created simple factual scenarios. They were artificial in various ways: we provided facts, not evidence; we stated a single set of facts rather than two competing versions of them; the facts were far simpler than would be presented in a real antitrust case; and we designed the facts so that there were (what we believe to be) right answers to some objective questions about them. We presented these factual scenarios to participants in a study on Mechanical Turk, provided them the relevant jury instructions, and then asked them to answer a series of objective and subjective questions.

1. First Experiment: Direct Purchaser Overcharge Damages

The first experiment involved direct purchaser overcharge damages. It took place in November 2013. We collected responses from 109 workers on Mechanical Turk.[98] The participants read and completed the questionnaire on the Mechanical Turk website.

---

93 *See supra* note 89 and accompanying text.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 There were 64 women and 45 men with a mean age of 37 who participated in the study. These participants were highly educated (1% had some high school, 12% were high school graduates, 35% had some college, and 52% had an associate's degree or higher). There were no

Participants were asked to imagine that they were members of a jury. We provided simple facts about a plaintiff paying an overcharge as a result of an antitrust violation.[99] We then used the ABA instructions with one set of respondents,[100] and our own proposed instructions with another set of respondents,[101] to guide them. After reading the facts, the participants were asked to answer eight questions about the case. We asked participants a number of comprehension questions in multiple choice format on damages, including: how to define damages, can they consider pass-on, and how much damages should be awarded. We also asked questions about the ease of reading the instructions, whether any information was confusing, and whether they needed additional information to calculate damages.

Mechanical Turk measures the amount of time it takes a worker to complete a task. To encourage participants to take the study seriously, we offered a bonus payment of $1 if they answered all of the comprehension questions correctly.[102]

i. Demographics

Sixty-four women and forty-five men participated in the study.

Table 1. Direct Purchaser Overcharge Damages Jury Instructions – Respondent Demographics

Instruction	Number of Participants	Female	Male	Average Age	Average Education
Our Proposal	55	30	25	39	Associate's Degree
ABA	54	34	20	34	Some College

ii. Results

Our analysis revealed that our proposed Direct Purchaser Overcharge Damages Jury Instruction questionnaire took less time to complete—on average

significant differences in the demographics of participants who received our proposed instruction and ABA Direct Purchaser Overcharge Damage Jury Instructions.

99 *See infra* Appendices I, II.

100 *See infra* Appendix I.

101 *See infra* Appendix II.

102 It should be noted that for Mechanical Turk workers, wages average between $2-$3 per hour or around $0.50 per survey.

7.3 minutes—than the ABA Direct Purchaser Overcharge Damages Jury Instruction—on average 9.1 minutes.

Respondents rated the instructions on a 10-point scale from 1 (very easy) to 10 (very difficult). Our proposed instruction was considered slightly easier to understand—on average 3.1—than the ABA instruction—on average 4.3.

Participants who received our instruction had better overall comprehension than those who completed the ABA Direct Overcharge Jury Instruction, as captured by the following table.

Table 2. Comprehension of Direct Purchaser Overcharge Damages Jury Instructions.[103]

Instruction	What are damages?	Can you consider pass on?	How much damages to award?	Overall Comprehension
Our Proposal	85%	**85%**	**100%**	**90%**
ABA	74%	**66%**	**64%**	**67%**

iii. Respondent Comments

In addition to the objective questions, we asked subjective questions to encourage feedback. One of the questions we asked participants was, "What other information do you need to determine the amount of damages?" Participants were supposed to answer only if they believed (incorrectly) that they needed additional information.

Ten participants who received our proposed jury instruction responded to this question. One participant commented, "According to the law, no more information is needed." Only one participant indicated more information was needed. That respondent asked, "Are there any other sources of cost as a result of the steel industry price fixing? For example, did the cost of this trial and time spent amount to any possible extra damages?"

Twelve participants with the ABA instruction responded to this question. Four comments said no more information was needed; eight said more information was needed. In regard to those eight, two indicated a need for information about the timeframe, four about pricing, and five about other causes.[104] One comment read, "This should include moral and exemplary damages."

---

[103] The numbers show the percentage of respondents who answered correctly for each question. Bold indicates a statistically significant difference ($p < 0.05$).

[104] These numbers add up to more than eight because some respondents mentioned more than one of these issues.

We also asked for comments if any of the language in the instructions as a whole confused the participants. We asked for no response if none of the language was confusing. Regarding our proposed instructions, two participants indicated they were confusing as a whole, and two others who indicated the instructions were not confusing nevertheless provided comments. One respondent wrote, "It was very clear." Two indicated the examples were confusing. One said there was a need to adapt to new terms.

In regard to the ABA instructions, six participants indicated the instructions were confusing. One of them wrote, "It's just very dense and written in a way that's meant to confuse the jury." Another said, "Pretty much all of it" is confusing. Two others noted information was missing, one noted there was too much information, and one made no substantive comment. In addition, one of the participants who indicated the instructions were *not* confusing commented that they were "pretty clear."

2. Second Experiment: Direct Evidence of Market Power and Competitive Harm (or Lack Thereof)

The second experiment involved direct evidence of market power and competitive harm—or direct evidence of a lack of market power and competitive harm. In June and July of 2014, we conducted an experiment to test whether our proposed jury instruction on direct evidence of market power and competitive harm[105] was easier to comprehend than the comparable ABA jury instruction.[106] We collected responses from 114 workers on Mechanical Turk.

Again, participants were asked to imagine that they were members of a jury. Each participant was provided brief instructions and some facts about the sample case in the study. One set of surveys listed facts supporting the plaintiff and the other set listed facts supporting the defendants. To be more precise, one of the fact patterns provided direct evidence of market power and competitive harm[107] and the other provided direct evidence of a lack of market power and a lack of competitive harm.[108] After reading the facts, participants were asked to answer 11 questions about the case. Again, to ensure participants took this study seriously, we incentivized them by offering a bonus payment of $1 if they answered all of the comprehension questions correctly.

We asked participants a number of comprehension questions (multiple choice) on market power and competitive harm, including: how to define competitive harm and market power, whether the defendants had market power, and whether the defendants had caused competitive harm. We also asked

105 *See infra* Appendices IV.A, IV.B.

106 *See infra* Appendices III.A, III.B.

107 *See infra* Appendices III.A, IV.A.

108 *See infra* Appendices III.B, IV.B.

questions about whether any information was confusing and whether they needed additional information to determine competitive harm.

i. Demographics

Sixty-seven women and forty-six men participated in the study.[109]

Table 3. Competitive Harm/Market Power Jury Instructions – Respondent Demographics.

Instruction	Number of Participants	Female	Male	Average Age	Average Education
Proposal	64[110]	38	25	35	Associate's Degree
ABA	50	29	21	37	Associate's Degree

ii. Results

Our analysis revealed that our proposed Market Power/Competitive Harm Jury Instruction questionnaire took less time to complete—on average 10.2 minutes—than the ABA Market Power/Competitive Harm Jury Instruction—on average 15.3 minutes. This difference was statistically significant.[111]

Respondents rated the instructions on a 10-point scale from 1 (very easy) to 10 (very difficult). The respondents rated our proposed Market Power/Competitive Harm Jury Instruction as easier to understand—on average 3.5—than the ABA Jury Instruction—on average 5.1. The difference was statistically significant.

Participants who received our proposed Jury Instruction had better *overall comprehension* than those who completed the ABA Jury Instruction. The difference was statistically significant.

Respondents to our Jury Instruction had significantly higher comprehension regarding all of the questions pertaining to *competitive harm*.

The answers to our proposed instruction reflected higher comprehension rates on every question involving *market power*, but only one of the differences was statistically significant.

---

109 One respondent who completed our proposed Market Power/Competitive Harm Jury Instruction questionnaire did not report a gender.

110 One of the 64 people responding to the survey did not indicate gender, so the total number of participants is one greater than the sum of the female and male respondents.

111 Statistical significance refers to the probability that the results of this study were not the result of random variations, but due to an actual difference between the two instructions compared.

Table 4. Comprehension of Direct Evidence of Competitive Harm. The numbers below show the percentage of respondents who answered correctly for each question.[112]

Instruction	What is competitive harm?	Did the defendant cause competitive harm?	How do you know if they caused competitive harm?	Do you have enough information to determine if they caused competitive harm ?
Our Proposal	**89%**	**81%**	**79%**	**96%**
ABA	**64%**	**50%**	**53%**	**72%**

Table 5. Comprehension of Direct Evidence of Market Power. The numbers below show the percentage of respondents who answered correctly for each question.[113]

Instruction	What is market power?	Did the defendant have market power?	How do you know they have market power?	Overall Comprehension
Our Proposal	98%	77%	**77%**	**83%**
ABA	97%	69%	**58%**	**65%**

iii. Respondent Comments

Again, we asked subjective questions to obtain qualitative feedback. One question was what other information they needed to determine competitive harm. There were six comments in response to our proposed instruction. Three indicated they did not need additional information, two that they needed more information about market share, and one that he or she needed more evidence of harm.

Seventeen participants responded to this question in regard to the ABA instruction and twelve provided comments. Of those, four indicated they did not need any more information. Four expressed a need for more market share

112 The numbers show the percentage of respondents who answered correctly for each question. Bold indicates statistically significant differences ($p < 0.05$).

113 The numbers show the percentage of respondents who answered correctly for each question. Bold indicates statistically significant differences ($p < 0.05$).

information, four for more competitor information, three for more information about the firms, one for information about the regulatory environment, one about the cost of alternatives, one about other factors, two about witness or expert testimony, and one about the time period of the price fixing.[114]

Again, we also asked participants about whether any language in the instructions was confusing. Out of five responses to our proposed instruction, four indicated none of the language was confusing and one expressed a concern about the text. There were eleven responses to the ABA instructions. Six indicated no confusion, one noted the description was thorough, and five found the text confusing, incorrect, dense, or hard.[115]

VI. CONCLUSIONS, CAVEATS, AND QUALIFICATIONS

On the whole, the results of these experiments are promising. It was pleasantly surprising, for example, that *all* of the participants who used our proposed jury instructions calculated overcharge damages accurately, even though it was an admittedly easy calculation to perform. Less striking, but still quite encouraging, were the many answers for which participants provided more accurate answers in response to the proposed instructions than to the ABA instructions. Many of the differences were statistically significant, although not all of them were.[116] These results suggest that our proposed jury instructions improve significantly on the ABA instructions. It also suggests—at least in regard to the second experiment—that integrating empirical testing into the process of crafting jury instructions may well have value.

But some caveats and qualifications are in order. First, the context in which we tested the instructions was less complex and confusing than an actual jury trial. The facts presented to the participants were uncharacteristically simple. Similarly, the information was presented as facts, not as evidence to be assessed, much less as conflicting evidence subject to competing interpretations by adversarial counsel. Also, the respondents addressed only a single jury instruction, not a collection of them. To be sure, it would seem relative clarity in a less confusing context should translate to clarity in a more confusing context, but that is not necessarily so. Only empirical testing would confirm—or disconfirm—that hypothesis.

---

114 These numbers add up to more than 12 because some respondents mentioned more than one of these issues.

115 These numbers add up to more than 11 because some respondents mentioned more than one of these issues.

116 See Jeff Sauro, *What Does Statistically Significant Mean?*, MEASURINGU BLOG (Oct. 21, 2014), http://www.measuringu.com/blog/statistically-significant.php, for a general definition of "statistically significant." Informally, statistical significance means that a result should not be attributed to chance. *Id.* More technically, it means that there is a low probability the result occurring if there were no difference between the jury instructions. *Id.*

Second, the facts were intended to yield right answers and not to require an exercise in judgment. We took this approach for practical reasons. It would be difficult to assess the accuracy of respondents on issues about which reasonable people could differ. So we relied on what seems like a reasonable inference: that a clear understanding where there are clearly right answers should correlate to a clear understanding where judgment is required. But an inference is necessary. One does not follow logically from the other. Moreover, it would be very difficult to assess this inference empirically.

Third, as to the second experiment, the fact pattern was somewhat artificial. It involved an attempt at horizontal price fixing. Horizontal price fixing is per se illegal.[117] Market power and competitive harm are relevant only to the rule of reason, not to a per se antitrust violation.[118] So a jury considering a claim of horizontal price fixing would not be asked to assess market power or competitive harm. But we thought participants would not be affected by this oddity, and a horizontal price fixing agreement seemed like the most straightforward anticompetitive conduct to describe.

A final point is that our proposed jury instructions attempt to resolve ambiguities and inconsistencies. Arguably, the ABA left some of those ambiguities and inconsistencies intact. That may have contributed in part to the difficulty for participants in the experiments to understand them. This raises a deep philosophical issue about the nature of legal interpretation. It deserves sustained attention, more attention than is appropriate in this Article.[119] Nevertheless, some preliminary remarks seem in order.

One key point is that it seems unfair to jurors to ask them not only to figure out what the law requires but also to resolve difficult legal issues that judges—or lawyers crafting jury instructions for judges—are unwilling or unable to decide themselves. Of course, one might argue that jury instructions should reflect what the law is, not what it should be (a formulation often associated with legal positivism).[120] This argument would suggest that jury instructions should reflect any indeterminacy in the law, not attempt to cure it.

That position seems untenable. A full treatment of the topic would take some care. At the risk of saying both too much and too little, one preliminary response to it is that an ambiguous or internally inconsistent description of the law would not seem to be necessarily any more neutral or true to the law than a

---

117 15 U.S.C. § 1 (2012).

118 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.").

119 For a discussion of some of the relevant issues for legal interpretation see generally Davis, *supra* note 24.

120 *See id.* at 55.

clear and internally consistent (although contested) interpretation. Indeed, even if legal interpreters disagree on how the law should be interpreted, they would all likely agree that some coherent view should be taken. In drafting opinions, courts do not generally pronounce self-contradictory legal rulings, at least not deliberately. They do not in part—this seems obvious—because that could make it very difficult for them to decide the cases before them. The same is true for juries. If the judge is charged with resolving what the law involves—as is the modern understanding—jury instructions should take a clear view on what the law requires, prohibits, and authorizes. We owe it to them to give them a fighting chance to understand the law correctly, even if it is one contestable understanding of the law. A contested interpretation may offer an imperfect account of the law, but it is less likely to be imperfect than a vague or internally inconsistent interpretation.

VII. APPENDIX I

Juror Questionnaire – ABA – Direct Purchaser Overcharge Damages

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ____

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Now, let's imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5-7 correctly. You must answer all of the questions to get paid.

Case Facts

- □ US steel manufacturers conspired to fix steel prices. As a result of the agreement to fix prices, steel increases in price from $1,000 to $1,500 per ton.

- □ Detroit Steel, a steel wholesaler, sues the US steel manufacturers to recover overcharge damages under federal antitrust laws.

- □ Detroit Steel purchased 1 million tons of steel, paying $1.5 billion at the inflated price rather than $1 billion at a competitive price. The total amount Detroit Steel was overcharged was $500 million.

- □ The increase in steel price caused Detroit Steel to increase its steel prices from $1,200 to $1,650 per ton. Detroit Steel sold the 1 million tons of steel for $1.65 billion. In a competitive market it would have sold the steel for $1.2 billion. The net difference in the Detroit Steel's revenue based on these sales was $50 million.

- The plaintiff is Detroit Steel. The defendants are US steel manufacturers.

The jury has determined that US steel manufacturers violated the law, and the violation increased the price.

Your task is to determine Detroit Steel's damages.

Please read the following jury instructions:

Jury Instructions

If you find that defendant violated the antitrust laws and that this violation caused injury to plaintiff, then you must determine the amount of damages, if any, plaintiff is entitled to recover. The law provides that plaintiff should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful.

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award to the plaintiff an amount for attorney's fees or the cost of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries it suffered as a result of the alleged violation of law.

Damages for Purchasers- Overcharges Based on Horizontal Price Fixing

Plaintiff claims that it was harmed because it paid higher prices for steel than it would have paid in the absence of defendants' alleged violation of the antitrust laws. If you have determined that there was an unlawful agreement among competitors to fix prices that caused some injury to plaintiff, you must now consider the extent of plaintiff's damages. A proper method of calculating those damages is to award plaintiff the difference between the prices it actually paid for steel and the prices it would have paid in the absence of the agreement to fix prices.

Plaintiff has proposed to show the prices that would have prevailed in the absence of the allegedly unlawful agreement by showing evidence of the actual prices that prevailed in a period before the alleged agreement. If you find that the earlier period is a reliable guide to estimate what prices would have been later, in the absence of the antitrust violation, then you may calculate plaintiff's damages by

comparing (a) the prices plaintiff actually paid during the alleged damages period with (b) the prices plaintiff would have paid if the prices or price trend from the earlier period had continued. If you find, however, that prices in the earlier period are not representative of what prices would have been during the period in which the antitrust violation is alleged to have occurred, such as if prices were impacted by increased demand, changing products or technology, lawful pricing behavior of suppliers, or other factors and that what prices in the alleged conspiracy period would have been may only be calculated using speculation or guesswork, then you may not award damages based on the evidence of a different price in the prior period.

5. According to the jury instructions, what are damages?
   - ☐ Amount of money Detroit Steel charged its customers.
   - ☐ Amount of money Detroit Steel lost.
   - ☐ Amount of money US steel manufacturers overcharged Detroit Steel.
   - ☐ None of the above.

6. Can you consider the amount that Detroit Steel charged its customers for steel when determining the amount of damages?
   - ☐ Yes
   - ☐ No

7. How much should a jury award Detroit Steel in damages?
   - ☐ $50 million
   - ☐ $500 million
   - ☐ $150,000
   - ☐ $1.5 million
   - ☐ Amount cannot be determined

8. Do you have enough information to determine the amount of damages?
   - ☐ Yes (please go to Question 10)
   - ☐ No (please go to Question 9)

9. What other information do you need to determine the amount of damages?

10. Did any language in the jury instructions confuse you?
    - ☐ Yes (please go to Question 11)
    - ☐ No (please go to Question 12)

11. What information in the jury instructions confused you?

12. On a scale from 1 to 10 how understandable were the jury instructions?

- ☐ 1 – very easy to understand
- ☐ 2
- ☐ 3
- ☐ 4
- ☐ 5
- ☐ 6
- ☐ 7
- ☐ 8
- ☐ 9
- ☐ 10 – very difficult to understand

VIII. APPENDIX II

Juror Questionnaire – Our Proposal - Direct Purchaser Overcharge Damages

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ____

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Now, let's imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5-7 correctly. You must answer all of the questions to get paid.

Case Facts

- □ US steel manufacturers conspired to fix steel prices. As a result of the agreement to fix prices, steel increases in price from $1,000 to $1,500 per ton.

- □ Detroit Steel, a steel wholesaler, sues the US steel manufacturers to recover overcharge damages under federal antitrust laws.

- □ Detroit Steel purchased 1 million tons of steel, paying $1.5 billion at the inflated price rather than $1 billion at a competitive price. The total amount Detroit Steel was overcharged was $500 million.

- □ The increase in steel price caused Detroit Steel to increase its steel prices from $1,200 to $1,650 per ton. Detroit Steel sold the 1 million tons of steel for $1.65 billion. In a competitive market it would have sold the steel for $1.2 billion. The net difference in the Detroit Steel's revenue based on these sales was $50 million.

- The plaintiff is Detroit Steel. The defendants are US steel manufacturers.

The jury has determined that US steel manufacturers violated the law, and the violation increased the price

Detroit Steel paid for steel.

Your task is to determine Detroit Steel's damages.

Please read the following jury instructions:

Jury Instructions

"Damages" are the amount of money you should award Detroit Steel because of the violation. You must award in damages the extra amount Detroit Steel paid to US steel manufacturers for steel because of the violation.

Example

- Assume, only as an *example*, that Detroit Steel paid $10 for each unit of steel because of the violation.
- Also assume Detroit Steel would have paid $7 for each unit of steel if there had been no violation.
- You must award Detroit Steel $3 in damages for each unit of steel that Detroit Steel bought.

Explanation and Example

You must not decrease Detroit Steel's damages even if it avoided harm in some way.

- Assume, again only as an *example*, the violation caused Detroit Steel to pay $10 for steel instead of $7. Detroit Steel is entitled to $3 in damages for each unit it bought of steel.
- What if Detroit Steel was able to avoid some of the harm from the violation? What if, for example, it is a reseller and responded to the violation by raising its own prices?
  - You must ignore Detroit Steel's efforts to avoid the harm caused by the violation.
  - You should still award $3 per unit in damages.
  - You must not consider whether Detroit Steel raised its prices in response to the violation.
- The law requires you to take into account only the difference in price that US steel manufacturers charged Detroit Steel because of the violation.

5. According to the jury instructions, what are damages?
   - Amount of money Detroit Steel charged its customers.
   - Amount of money Detroit Steel lost.
   - Amount of money US steel manufacturers overcharged Detroit Steel.
   - None of the above.

6. Can you consider the amount that Detroit Steel charged its customers for steel when determining the amount of damages?
   - Yes
   - No

7. How much should a jury award Detroit Steel in damages?
   - $50 million
   - $500 million
   - $150,000
   - $1.5 million
   - Amount cannot be determined

8. Do you have enough information to determine the amount of damages?
   - Yes (please go to Question 10)
   - No (please go to Question 9)

9. What other information do you need to determine the amount of damages?

10. Did any language in the jury instructions confuse you?
    - Yes (please go to Question 11)
    - No (please go to Question 12)

11. What information in the jury instructions confused you?

12. On a scale from 1 to 10 how understandable were the jury instructions?
    - 1 – very easy to understand
    - 2
    - 3
    - 4
    - 5
    - 6
    - 7
    - 8
    - 9
    - 10 – very difficult to understand

IX. APPENDIX III.A

Juror Questionnaire – ABA - Competitive Harm [Plaintiff Should Win]

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ___

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Now, let's imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5, 6, 7 and 9 correctly.

Case Facts

- □ Steel sells in a competitive market in the US at $1,000 per ton.

- □ US steel manufacturers conspired to fix the price at $1,500 per ton for steel they sold in the United States.

- □ The price-fixing conspiracy caused US steel manufacturers to lose a little bit of business. A few of their customers were able to start buying steel from foreign manufacturers. Over time, other customers started buying a small amount of substitute products, such as plastic, aluminum, and graphite.

- □ Before the price fixing, US steel manufacturers control 80% of sales of steel in the US (measured by volume). After the price fixing began, their market share in the US decreased slowly to 75% and remained at that level.

- The US steel manufacturers were able to sustain this price increase for ten years. During that time, the price fixing was highly profitable for the US steel manufacturers. It was successful. It ended only because one of the conspirators admitted to fixing prices.

- During the price fixing conspiracy, Detroit Steel, a steel wholesaler, purchased steel from a US steel manufacturer at $1,500 per ton.

- Detroit Steel brought an antitrust claim against the US steel manufacturers based on their price fixing.

- Detroit Steel is the plaintiff. US steel manufacturers are the defendants.

- Assume Detroit Steel proved the facts above during the trial.

- Detroit Steel argues that the US steel manufacturers caused competitive harm. It also argues that the US steel manufacturers have market power in the market for US steel.

- The US steel manufacturers argue that they could not cause competitive harm in the market for US steel because they face competition from foreign sellers of steel and sellers of plastic, aluminum, and graphite. They also claim they have no market power because of that competition.

Jury Instructions

You must determine whether Detroit Steel has proven that the challenged restraint—the agreement to fix prices—has resulted in a substantial harm to competition in a relevant product and geographic market (caused "competitive harm").

Although it may be relevant to the inquiry, harm that occurs merely to the individual business of the plaintiff is not sufficient, by itself, to demonstrate harm to competition generally. That is, harm to a single competitor or group of competitors does not necessarily mean that there has been harm to competition.

Furthermore, Detroit Steel must show that the harm to competition occurred in an identified market, known as a "relevant market." There are two aspects to a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market.

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but significant permanent increase in price is approximately a five percent increase in price not due to external cost factors. If you find that such switching would occur, then you may conclude that the products are in the same product market.

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of the plaintiff (Detroit Steel) and defendant (US steel manufacturers) regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

In this case, Detroit Steel contends that the relevant product market is steel sold in the US. By contrast, US steel manufacturers assert that Detroit Steel has failed to allege the proper relevant product market. If you find that Detroit Steel has proven a relevant product market comprised of products that are reasonably interchangeable, then you should continue to evaluate the remainder of the Detroit Steel's claim. However, if you find that Detroit Steel has failed to prove such a market, then you must find it has failed to prove competitive harm.

Relevant Product Market – Supply Substitutability

In deciding whether Detroit Steel has proven a relevant product marker, you may also consider what the law refers to as "the cross-elasticity of supply" or, in other

words, "the extent to which the producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product." Such producers, to the extent that they exist, can increase supply and, therefore, drive prices back to competitive levels – defeating any effort to charge significantly higher prices.

Take two shoe manufactures, for example. The first manufacturer produces shoes for women, while the second manufacturer produces shoes for men. Generally speaking, men's and women's shoes are not reasonably interchangeable and, therefore, might be thought of as being separate products markets. However, it is possible that the men's shoe manufacturer could quickly shift its resources to start producing women's shoes if the women's shoe manufacturer raised its prices significantly and vice versa. Although women would not buy men's shoes, nor would men buy women's shoes, the ability of each manufacturer to alter its production could prevent the other manufacturer from raising prices significantly. Thus, in this example, the men's and women's shoes would be included in the same market.

If, in determining the parameters of the relevant product market, you find that there are manufacturers that have the ability to alter their production to manufacture products that can reasonably be substituted with the defendants (US steel manufacturers) – even though they do not presently compete with the defendants – you may consider whether the existence of these potential alternative suppliers can influence the prices that the defendants charge for their products and, if so, the amount of the products that these suppliers are likely to produce. However, if you find that no cross-elasticity of supply exists, you may define the market solely on your evaluation of whether the allegedly competing products are reasonable substitutes for each other from the consumer's perspective.

Relevant Geographic Market

The relevant geographic market is the area in which US steel manufacturers face competition from other firms that compete in the relevant product market and to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.

Detroit Steel has the burden of proving the relevant geographic market by a preponderance of the evidence. In this case Detroit Steel claims that the relevant geographic market is steel sold in the US. By contrast, US steel manufacturers

assert that steel sold throughout the world constitutes the relevant geographic market. In determining whether Detroit Steel has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors including:

- The geographic area in which US steel manufacturers sell and where their customers are located;
- The geographic area to which customers turn for supply of the product;
- The geographic area to which customers have turned or have seriously considered turning;
- The geographic areas that suppliers view as potential sources of competition;
- Whether governmental licensing requirements, taxes, or quotas have the effect of limiting competition in certain areas.

If you find that Detroit Steel has proven the existence of a relevant market, then you must determine whether it also has proven that the challenged restraint has a substantial harmful effect on competition in that market. A harmful effect on competition, or competitive harm, refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, and higher product quality. If the challenged conduct has not resulted in higher prices, decreased output, lower quality, or the loss of some other competitive benefit, then there has been no competitive harm.

In determining whether the challenged restraint has produced competitive harm, you may look at the following factors: the effect of the restraint on prices, output, product quality and service; the purpose and nature of the restraint; the nature and structure of the relevant market, both before and after the restraint was imposed; the number of competitors in the relevant market and the level of competition among them, both before and after the restraint was imposed; and whether the US steel manufacturers possess "market power."

The last factor mentioned, market power, has been defined as an ability profitably to raise prices above those that would be charged in a competitive market for a sustained period of time. A firm that possesses market power generally can charge higher prices for the same goods or services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether US steel manufacturers possess market power is their market share; that is, their percentage of the products or services sold in the relevant market by all competitors. If US Steel manufacturers do not possess a substantial market share, it is less likely that they possess market power. If US Steel manufacturers do not possess this kind of power, then it is

less likely that the challenged restraint has resulted in a substantial harmful effect on competition in the market.

5. What is competitive harm?
   - ☐ When competition causes harm, such as one company takes business away from another company by charging lower prices.
   - ☐ When a limit on competition causes harm, such as when competitors enter an agreement to raise their prices and are able to maintain prices above competitive levels for a substantial period of time.
   - ☐ None of the above.

6. What is market power?
   - ☐ When a company can charge anything it wants.
   - ☐ When a company is number one in its industry.
   - ☐ When a company can raise prices above competitive levels for a substantial period of time or exclude competitors.
   - ☐ None of the above.

7. Did the US steel manufacturers have market power?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

8. How do you know if they have market power or not?

9. Did the US steel manufacturers cause competitive harm?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

10. How do you know if they caused competitive harm or not?

11. Do you have enough information to determine whether the US steel manufacturers caused competitive harm?
    - ☐ Yes (please go to Question 13)
    - ☐ No (please go to Question 12)

12. What other information do you need to determine whether the US steel manufacturers caused competitive harm?

13. Did any language in the jury instructions confuse you?
    - ☐ Yes (please go to Question 14)
    - ☐ No (please go to Question 15)

14. What information in the jury instructions confused you?

15. On a scale from 1 to 10 how understandable were the jury instructions?
    - ☐ 1 – very easy to understand
    - ☐ 2
    - ☐ 3
    - ☐ 4
    - ☐ 5
    - ☐ 6
    - ☐ 7
    - ☐ 8
    - ☐ 9
    - ☐ 10 – very difficult to understand

X. APPENDIX III.B

Juror Questionnaire – ABA - Competitive Harm
[Defendants Should Win]

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ____

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Now, let's imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5, 6, 7 and 9 correctly.

Case Facts

- □ Steel sells in a competitive market in the US at $1,000 per ton.

- □ US steel manufacturers conspired to fix the price at $1,500 per ton for steel they sold in the United States.

- □ This price-fixing conspiracy caused US steel manufacturers to lose a lot of business. Most of their customers immediately bought cheaper steel from foreign manufacturers, or they bought substitute products, such as plastic, aluminum, and graphite.

- □ Before the price fixing, US steel manufacturers control 80% of sales of steel in the United States (measured by volume). After the price fixing begins, their market share in the US decreased quickly. Foreign manufacturers swiftly gain market share by charging lower prices than the US manufacturers.

- The US steel manufacturers were unable to sustain the price increase. The conspiracy to fix prices was unprofitable. It ended quickly. The manufacturers gave up. All of them went back to charging competitive prices.

- During the price-fixing conspiracy, Detroit Steel, a steel wholesaler, purchased steel from a US steel manufacturer at $1,000 per ton.

- Detroit Steel brought an antitrust claim against the US steel manufacturers based on their price fixing.

- Detroit Steel is the plaintiff. US steel manufacturers are the defendants.

- Assume Detroit Steel proves the facts above during the trial.

- Detroit Steel argues that the US steel manufacturers caused competitive harm. It also argues that the US steel manufacturers have market power in the market for US steel.

- The US steel manufacturers argue that they could not cause competitive harm in the market for US steel because they face competition from foreign sellers of steel and sellers of plastic, aluminum, and graphite. They also claim they have no market power because of that competition.

Jury Instructions

You must determine whether Detroit Steel has proven that the challenged restraint—the agreement to fix prices—has resulted in a substantial harm to competition in a relevant product and geographic market (caused "competitive harm").

Although it may be relevant to the inquiry, harm that occurs merely to the individual business of Detroit Steel is not sufficient, by itself, to demonstrate harm to competition generally. That is, harm to a single competitor or group of competitors does not necessarily mean that there has been harm to competition.

Furthermore, Detroit Steel must show that the harm to competition occurred in an identified market, known as a "relevant market." There are two aspects to a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market.

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but significant permanent increase in price is approximately a five percent increase in price not due to external cost factors. If you find that such switching would occur, then you may conclude that the products are in the same product market.

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of the plaintiff (Detroit Steel) and defendant (US Steel manufacturers) regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

In this case, Detroit Steel contends that the relevant product market is steel sold in the US. By contrast, US steel manufacturers assert that Detroit Steel has failed to allege the proper relevant product market. If you find that Detroit Steel has proven a relevant product market comprised of products that are reasonably interchangeable, then you should continue to evaluate the remainder of Detroit Steel's claim. However, if you find that Detroit Steel has failed to prove such a market, then you must find it has failed to prove competitive harm.

Relevant Product Market – Supply Substitutability

In deciding whether Detroit Steel has proven a relevant product marker, you may also consider what the law refers to as "the cross-elasticity of supply" or, in other

words, "the extent to which the producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product." Such producers, to the extent that they exist, can increase supply and, therefore, drive prices back to competitive levels – defeating any effort to charge significantly higher prices.
Take two shoe manufactures, for example. The first manufacturer produces shoes for women, while the second manufacturer produces shoes for men. Generally speaking, men's and women's shoes are not reasonably interchangeable and, therefore, might be thought of as being separate products markets. However, it is possible that the men's shoe manufacturer could quickly shift its resources to start producing women's shoes if the women's shoe manufacturer raised its prices significantly and vice versa. Although women would not buy men's shoes, nor would men buy women's shoes, the ability of each manufacturer to alter its production could prevent the other manufacturer from raising prices significantly. Thus, in this example, the men's and women's shoes would be included in the same market.

If, in determining the parameters of the relevant product market, you find that there are manufacturers that have the ability to alter their production to manufacture products that can reasonably be substituted with the defendants (US steel manufacturers) – even though they do not presently compete with the defendants – you may consider whether the existence of these potential alternative suppliers can influence the prices that the defendants charge for their products and, if so, the amount of the products that these suppliers are likely to produce. However, if you find that no cross-elasticity of supply exists, you may define the market solely on your evaluation of whether the allegedly competing products are reasonable substitutes for each other from the consumer's perspective.

Relevant Geographic Market

The relevant geographic market is the area in which US steel manufacturers face competition from other firms that compete in the relevant product market and to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.

Detroit Steel has the burden of proving the relevant geographic market by a preponderance of the evidence. In this case Detroit Steel claims that the relevant geographic market is steel sold in the US. By contrast, US steel manufacturers assert that steel sold throughout the world constitutes the relevant geographic

market. In determining whether Detroit Steel has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors including:

- The geographic area in which US steel manufacturers sell and where their customers are located;
- The geographic area to which customers turn for supply of the product;
- The geographic area to which customers have turned or have seriously considered turning;
- The geographic areas that suppliers view as potential sources of competition;
- Whether governmental licensing requirements, taxes, or quotas have the effect of limiting competition in certain areas.

If you find that Detroit Steel has proven the existence of a relevant market, then you must determine whether it also has proven that the challenged restraint has a substantial harmful effect on competition in that market. A harmful effect on competition, or competitive harm, refers to a reduction in competition that results in the loss of some of the benefits of competition, such as lower prices, increased output, and higher product quality. If the challenged conduct has not resulted in higher prices, decreased output, lower quality, or the loss of some other competitive benefit, then there has been no competitive harm.

In determining whether the challenged restraint has produced competitive harm, you may look at the following factors: the effect of the restraint on prices, output, product quality and service; the purpose and nature of the restraint; the nature and structure of the relevant market, both before and after the restraint was imposed; the number of competitors in the relevant market and the level of competition among them, both before and after the restraint was imposed; and whether the US steel manufacturers possess "market power."

The last factor mentioned, market power, has been defined as an ability profitably to raise prices above those that would be charged in a competitive market for a sustained period of time. A firm that possesses market power generally can charge higher prices for the same goods or services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether US steel manufacturers possess market power is their market share; that is, their percentage of the products or services sold in the relevant market by all competitors. If US steel manufacturers do not possess a substantial market share, it is less likely that they possess market power. If US steel manufacturers do not possess this kind of power, then it is less likely that the challenged restraint has resulted in a substantial harmful effect on competition in the market.

5. What is competitive harm?
   - ☐ When competition causes harm, such as one company takes business away from another company by charging lower prices.
   - ☐ When a limit on competition causes harm, such as when competitors enter an agreement to raise their prices and are able to maintain prices above competitive levels for a substantial period of time.
   - ☐ None of the above.

6. What is market power?
   - ☐ When a company can charge anything it wants.
   - ☐ When a company is number one in its' industry.
   - ☐ When a company can raise prices above competitive levels for a substantial period of time or exclude competitors.
   - ☐ None of the above.

7. Did the US steel manufacturers have market power?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

8. How do you know if they have market power or not?

9. Did the US steel manufacturers cause competitive harm?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

10. How do you know if they caused competitive harm or not?

11. Do you have enough information to determine whether the US steel manufacturers caused competitive harm?
    - ☐ Yes (please go to Question 13)
    - ☐ No (please go to Question 12)

12. What other information do you need to determine whether the US steel manufacturers caused competitive harm?

13. Did any language in the jury instructions confuse you?
    - ☐ Yes (please go to Question 14)
    - ☐ No (please go to Question 15)

14. What information in the jury instructions confused you?

15. On a scale from 1 to 10 how understandable were the jury instructions?
    - ☐ 1 – very easy to understand
    - ☐ 2
    - ☐ 3
    - ☐ 4
    - ☐ 5
    - ☐ 6
    - ☐ 7
    - ☐ 8
    - ☐ 9
    - ☐ 10 – very difficult to understand

XI. APPENDIX IV.A

Juror Questionnaire – Proposed - Competitive Harm [Plaintiff Should Win]

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ____

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5, 6, 7, and 9 correctly.

Case Facts

- □ Steel sells in a competitive market in the US at $1,000 per ton.

- □ US steel manufacturers conspired to fix the price at $1,500 per ton for steel they sold in the United States.

- □ The price-fixing conspiracy caused US steel manufacturers to lose a little bit of business. A few of their customers were able to start buying steel from foreign manufacturers. Over time, other customers started buying a small amount of substitute products, such as plastic, aluminum, and graphite.

- □ Before the price fixing, US steel manufacturers control 80% of sales of steel in the US (measured by volume). After the price fixing began, their market share in the US decreased slowly to 75% and remained at that level.

- □ The US steel manufacturers were able to sustain this price increase for ten years. During that time, the price fixing was highly profitable for the US

steel manufacturers. It was successful. It ended only because one of the conspirators admitted to fixing prices.

- During the price fixing conspiracy, Detroit Steel, a steel wholesaler, purchased steel from a US steel manufacturer at $1,500 per ton.
- Detroit Steel brought an antitrust claim against the US steel manufacturers based on their price fixing.
- Detroit Steel is the plaintiff. US steel manufacturers are the defendants.
- Assume Detroit Steel proved the facts above during the trial.
- Detroit Steel argues that the US steel manufacturers caused competitive harm. It also argues that the US steel manufacturers have market power in the market for US steel.
- The US steel manufacturers argue that they could not cause competitive harm in the market for US steel because they face competition from foreign sellers of steel and sellers of plastic, aluminum, and graphite. They also claim they have no market power because of that competition.

Jury Instructions

You must determine:

(1) **Competitive Harm**. Did Detroit Steel prove that the challenged restraint—the agreement to fix prices—substantially harmed competition in the steel market?

(2) **Market Power**. Did Detroit Steel prove that US Steel manufacturers have market power?

Definitions

In a free market, businesses compete for buyers. To increase sales, they may:
- Lower prices
- Make more products, or
- Improve product quality

Competitive Levels. Prices in a free market (where businesses compete for customers) are considered to be at **competitive levels**.

Competitive Harm. Competitive harm is harm to competition. It occurs when a limit on competition—such as an agreement to fix prices—harms buyers. Competitive harm occurs when such a limit causes buyers to pay higher prices, fewer products to be available for purchase, or purchasers to buy lower quality products.

Companies do not cause competitive harm when they compete with each other by lowering prices, making more products available, or improving product quality.

Market Power. Businesses have **market power** if they can cause competitive harm, such as raising prices above competitive levels for a substantial period of time or excluding competitors from an industry. Businesses do not have market power if they try but cannot raise or maintain their prices above competitive levels.

Examples

- Example 1: Imagine some companies that sell a product agree with each other to raise their prices and do raise their prices. Many buyers pay the new, higher prices. These buyers are unwilling or unable to switch to other products. The price fixing limits competition by keeping prices above competitive levels for years. The companies are able to profit from the higher prices.

  Did the companies cause **competitive harm**? Yes. The companies tried to limit competition. They succeeded. Buyers paid more than they would have without the price fixing.

  Do the companies have **market power**? Yes. They were able to cause competitive harm by charging prices above competitive levels for a long period of time. The price fixing is profitable.

- Example 2: Imagine some companies that sell a product agree to raise their prices and attempt to raise their prices. The companies immediately lose sales because buyers start buying cheaper substitute products. The companies have to lower their prices to avoid losing sales.

  Did the companies cause **competitive harm**? No. This price fixing did not limit competition because the companies could not keep prices above competitive levels. Purchasers were able to buy cheaper substitute products.

Do the companies have **market power**? No. They do not have market power because they were not able to cause competitive harm and were not able to keep prices above competitive levels for a substantial period of time.

- Example 3: Imagine that some of the companies that sell a product lower their prices. One of their competitors loses sales because it cannot match those low prices.
  Did the companies cause **competitive harm**? No. The companies did not cause competitive harm because consumers benefited from the lower prices and competition in the market.

  Do the companies have **market power**? There is not enough information to know whether the companies have market power. It is not clear whether they could, for example, raise prices above competitive levels for a substantial period of time.

Conclusion

- You may find US steel manufacturers **could** and **did** raise prices above competitive levels for a substantial period of time or exclude competitors. If so, US steel manufacturers have market power and caused competitive harm.

- You may find US steel manufacturers could **not** and did **not** raise prices above competitive levels for a substantial period of time or exclude competitors. If so, US steel manufacturers do not have market power and did not cause competitive harm.

5. What is competitive harm?
   - When competition causes harm, such as one company takes business away from another company by charging lower prices.
   - When a limit on competition causes harm, such as when competitors enter an agreement to raise their prices and are able to maintain prices above competitive levels for a substantial period of time.
   - None of the above.

6. What is market power?
   - When a company can charge anything it wants.
   - When a company is number one in its' industry.
   - When a company can raise prices above competitive levels for a substantial period of time or exclude competitors.
   - None of the above.

7. Did the US steel manufacturers have market power?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

8. How do you know if they have market power or not?

9. Did the US steel manufacturers cause competitive harm?
   - ☐ Yes
   - ☐ No
   - ☐ I Don't Know

10. How do you know if they caused competitive harm or not?

11. Do you have enough information to determine whether the US steel manufacturers caused competitive harm?
   - ☐ Yes (please go to Question 13)
   - ☐ No (please go to Question 12)

12. What other information do you need to determine whether the US steel manufacturers caused competitive harm?

13. Did any language in the jury instructions confuse you?
   - ☐ Yes (please go to Question 14)
   - ☐ No (please go to Question 15)

14. What information in the jury instructions confused you?

15. On a scale from 1 to 10 how understandable were the jury instructions?
   - ☐ 1 – very easy to understand
   - ☐ 2
   - ☐ 3
   - ☐ 4
   - ☐ 5
   - ☐ 6
   - ☐ 7
   - ☐ 8
   - ☐ 9
   - ☐ 10 – very difficult to understand

XII. APPENDIX IV.B

Juror Questionnaire – Our Proposal - Competitive Harm
[Defendants Should Win]

Please answer a few questions about yourself.

1. What is your Amazon Worker ID? ____

2. What is your gender? □ Male □ Female

3. What is your age? _____

4. What is the highest level of education you have completed?
   - □ Some High School
   - □ High School
   - □ Some College
   - □ Associates Degree
   - □ Bachelor's Degree
   - □ Post-graduate

Imagine that you are a member of a jury. Carefully read the information below and answer the questions that follow. You will receive a $1 bonus if you answer Questions 5, 6, 7, and 9 correctly.

Case Facts

- □ Steel sells in a competitive market in the US at $1,000 per ton.

- □ US steel manufacturers conspired to fix the price at $1,500 per ton for steel they sold in the United States.

- □ This price-fixing conspiracy caused US steel manufacturers to lose a lot of business. Most of their customers immediately bought cheaper steel from foreign manufacturers, or they bought substitute products, such as plastic, aluminum, and graphite.

- □ Before the price fixing, US steel manufacturers control 80% of sales of steel in the United States (measured by volume). After the price fixing begins, their market share in the US decreased quickly. Foreign manufacturers swiftly gain market share by charging lower prices than the US manufacturers.

- The US steel manufacturers were unable to sustain the price increase. The conspiracy to fix prices was unprofitable. It ended quickly. The manufacturers gave up. All of them went back to charging competitive prices.

- During the price-fixing conspiracy, Detroit Steel, a steel wholesaler, purchased steel from a US steel manufacturer at $1,000 per ton.

- Detroit Steel brought an antitrust claim against the US steel manufacturers based on their price fixing.

- Detroit Steel is the plaintiff. US steel manufacturers are the defendants.

- Assume Detroit Steel proves the facts above during the trial.

- Detroit Steel argues that the US steel manufacturers caused competitive harm. It also argues that the US steel manufacturers have market power in the market for US steel.

- The US steel manufacturers argue that they could not cause competitive harm in the market for US steel because they face competition from foreign sellers of steel and sellers of plastic, aluminum, and graphite. They also claim they have no market power because of that competition.

Jury Instructions

You must determine:

(1) **Competitive Harm**. Did Detroit Steel prove that the challenged restraint—the agreement to fix prices—substantially harmed competition in the steel market?

(2) **Market Power**. Did Detroit Steel prove that US Steel manufacturers have market power?

Definitions

In a free market, businesses compete for buyers. To increase sales, they may:
- Lower prices
- Make more products, or
- Improve product quality

Competitive Levels. Prices in a free market (where businesses compete for customers) are considered to be at **competitive levels**.

Competitive Harm. Competitive harm is harm to competition. It occurs when a limit on competition—such as an agreement to fix prices—harms buyers. Competitive harm occurs when such a limit causes buyers to pay higher prices, fewer products to be available for purchase, or purchasers to buy lower quality products.

Companies do not cause competitive harm when they compete with each other by lowering prices, making more products available, or improving product quality.

Market Power. Businesses have **market power** if they can cause competitive harm, such as raising prices above competitive levels for a substantial period of time or excluding competitors from an industry. Businesses do not have market power if they try but cannot raise or maintain their prices above competitive levels.

Examples

- Example 1: Imagine some companies that sell a product agree with each other to raise their prices and do raise their prices. Many buyers pay the new, higher prices. These buyers are unwilling or unable to switch to other products. The price fixing limits competition by keeping prices above competitive levels for years. The companies are able to profit from the higher prices.

  Did the companies cause **competitive harm**? Yes. The companies tried to limit competition. They succeeded. Buyers paid more than they would have without the price fixing.

  Do the companies have **market power**? Yes. They were able to cause competitive harm by charging prices above competitive levels for a long period of time. The price fixing is profitable.

- Example 2: Imagine some companies that sell a product agree to raise their prices and attempt to raise their prices. The companies immediately lose sales because buyers start buying cheaper substitute products. The companies have to lower their prices to avoid losing sales.

  Did the companies cause **competitive harm**? No. This price fixing did not limit competition because the companies could not keep prices above competitive levels. Purchasers were able to buy cheaper substitute products.

Do the companies have **market power**? No. They do not have market power because they were not able to cause competitive harm and were not able to keep prices above competitive levels for a substantial period of time.

- Example 3: Imagine that some of the companies that sell a product lower their prices. One of their competitors loses sales because it cannot match those low prices.

  Did the companies cause **competitive harm**? No. The companies did not cause competitive harm because consumers benefited from the lower prices and competition in the market.

  Do the companies have **market power**? There is not enough information to know whether the companies have market power. It is not clear whether they could, for example, raise prices above competitive levels for a substantial period of time.

Conclusion

- You may find US steel manufacturers **could** and **did** raise prices above competitive levels for a substantial period of time or exclude competitors. If so, US steel manufacturers have market power and caused competitive harm.

- You may find US steel manufacturers could **not** and did **not** raise prices above competitive levels for a substantial period of time or exclude competitors. If so, US steel manufacturers do not have market power and did not cause competitive harm.

5. What is competitive harm?
   - When competition causes harm, such as one company takes business away from another company by charging lower prices.
   - When a limit on competition causes harm, such as when competitors enter an agreement to raise their prices and are able to maintain prices above competitive levels for a substantial period of time.
   - None of the above.

6. What is market power?
   - When a company can charge anything it wants.
   - When a company is number one in its industry.
   - When a company can raise prices above competitive levels for a substantial period of time or exclude competitors.
   - None of the above.

7. Did the US steel manufacturers have market power?
   - Yes
   - No
   - I Don't Know

8. How do you know if they have market power or not?

9. Did the US steel manufacturers cause competitive harm?
   - Yes
   - No
   - I Don't Know

10. How do you know if they caused competitive harm or not?

11. Do you have enough information to determine whether the US steel manufacturers caused competitive harm?
    - Yes (please go to Question 13)
    - No (please go to Question 12)

12. What other information do you need to determine whether the US steel manufacturers caused competitive harm?

13. Did any language in the jury instructions confuse you?
    - Yes (please go to Question 14)
    - No (please go to Question 15)

14. What information in the jury instructions confused you?

15. On a scale from 1 to 10 how understandable were the jury instructions?
    - 1 – very easy to understand
    - 2
    - 3
    - 4
    - 5
    - 6
    - 7
    - 8
    - 9
    - 10 – very difficult to understand