





Where are we in the program?

- › We have heard from BC
- › We have heard from BCP
- › The question now is how these two relate
- › What is the overall mission of the FTC?
- › Disclaimer



Two possible goals

- › At the very least, keep the bureaus out of each others' way
- › A best, produce clarifying and useful synergies between them



The minimalist goal

- › Provide a basic structure of doctrine
- › Keep the bureaus from overlapping
- › Keep them from confusing one another's law

The basic “Consumer Choice”





This does not require

“maximizing” variety and choices

- › On antitrust side, requires only a sufficient range of choice, such as a competitive market would have produced
- › On consumer protection side, requires only a sufficient amount of information, not perfect information



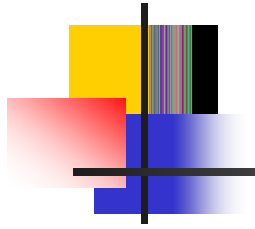
Efficiency defense

- › The choice interpretation permits this
- › Efficiency can involve innovation and thus produce more options in the future



A more detailed definition

- › COMPETITION -- Consumers find a reasonable range of options in the marketplace, undiminished by artificial constraints like price-fixing or anticompetitive mergers
- › CONSUMER-PROTECTION -- Consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints like deception or the withholding of material information





It is consistent with the BCP Unfairness Statement

- › BCP statement condemns “injury that cannot reasonably be avoided”
- › The ability to choose is the main mechanism by which consumer injury is avoided
- › Conduct that harms the exercise of choice threatens to permit consumer injury



The choice interpretation has been used by the FTC

- › 1980 Unfairness Policy Statement (Companion Statement)
- › International Harvester (1984)
- › The FTC Year in Review (Report for 2003 ABA Spring Meeting)



The choice interpretation starts the analysis on the right foot

- › In antitrust, both good and bad vertical restraints can increase price, but choice analysis focuses you on the question of whether options have increased
- › In consumer protection, choice analysis focuses you on question of whether actual purchasers have been misled
- › In short, a good basic doctrine

■ But can we do better?



Cas Hobbs (Morgan, Lewis)

- › How can we build on cross-bureau strategies that were used successfully in the past?
- › Those often involved bringing both antitrust and consumer protection laws to bear on a single problem
- › When might an FTC Chairman find an opportunity for similar strategies in the future? When does the Chairman want both bureau directors at a meeting?
- › How do you coordinate the tanks and the dive bombers?



Bob Skitol (Drinker, Biddle)

- › Can we devise additional, new cross-bureau strategies for the future?
- › Some of those may also involve cross-bureau coordination; others more novel theories
- › When can an FTC matter be usefully reconceptualized in terms of the law under the other side of the statute?
- › When would a bureau director want to call in a specialist from the other bureau to help on a difficult case?
- › How do you design a flying tank?



Bob Lande (University of Baltimore Law School)

- › The previous topics have applied existing BC and BCP law in new combinations
- › But does the choice model imply that antitrust law should become (somewhat) broader substantively in reaching nonprice forms of competition?
- › How do you build a bigger tank?



Commissioner Leary

- › FTC Commissioner
- › Will comment on all three papers



Mary Lou Steptoe

- › Skadden, Arps
- › Will also comment on all three papers