

1 **This transcript has been lightly edited for clarity**
2 PANEL ENTITLED: "PRICE DISCRIMINATION, PROFESSIONS,
3 JOINT VENTURES, AND EXCLUSIONARY CONDUCT: FROM
4 PROTECTING COMPETITORS TO PROTECTING COMPETITION."

5

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12

13 MODERATOR: ALDEN F. ABBOTT

14

15 MR. ABBOTT: People are drifting back from
16 lunch. I think we're on a very tight time schedule, so
17 we better get started. Welcome back. Welcome back, and
18 my name is Alden Abbott from the Bureau of Competition
19 of the Federal Trade Commission.

20

21 It's hard to top a panel involving Tim Muris and
22 Bob Pitofsky, who are sort of the super stars of the
23 regulatory scene over the past decade, but I do hope
24 this session will provide us with some additional food
25 for thought to add to your physical nourishment.

25

 Now, we've already heard that seeing the FTC's

1 initiatives in historical perspective is what this
2 symposium is all about. In that vein, this panel
3 features an all-star lineup of antitrust superstars who
4 surveyed the historical changes that have come about in
5 the FTC's antitrust enforcement mission by focusing on
6 three sets of cases spread out over many years and by a

1 Second, the joint venture between GM and Toyota,
2 which was blessed by the FTC roughly 20 years ago. This
3 case represents an early effort to weigh efficiencies
4 seriously, and I would argue that unlike Morton Salt --
5 and I should say before going on, I will say there is a
6 standard disclaimer that applies to all of us in the
7 government, that the views I am putting forth are most
8 assuredly my own and don't represent the views of anyone
9 else at the Federal Trade Commission or any of
10 the Commissioners.

11 Now, back to my commentary. Unlike Morton Salt,
12 the GM Toyota decision may be viewed as an effort to
13 protect competition, not competitors. By competition, I
14 understand the consumer welfare notion of competition,
15 which is currently shared.

16 Now, Kathy Fenton, the partner at the Jones Day
17 law firm who worked on the GM Toyota decision as an
18 attorney advisor to Chairman Miller and someone who is
19 closely related to one of our former speakers, Bill
20 Kovacic, will discuss her paper highlighting this path
21 breaking case.

22 Now, third, the FTC's ongoing enforcement
23 program aimed at professional advertising restrictions,
24 over 25 years old, and there are two bookend cases that
25 sort of epitomize the beginning of that program, and if

1 not its highlight, at least a point at which the Supreme
2 Court has directly addressed the analysis of
3 advertising. Those cases are the AMA, American Medical
4 Association case, and Cal Dental.

5 Dr. John Kwoka, Finnegan Distinguished Professor
6 of Economics at Northeastern University, will discuss
7 this trend of cases and more generally professional
8 regulation. Now, John, like our first two presenters,
9 once served at the FTC.

10 Fourth, as an added bonus, we're delighted to
11 have, to talk about fishing, Susan Creighton, the
12 Director of the Bureau of Competition, who has
13 had a distinguished career in private practice at the
14 Wilson, Sonsini firm, a former clerk to Sandra Day
15 O'Connor at the Supreme Court, and I think you'll find
16 her views on fishing and on exclusionary conduct
17 provocative.

18 Two commenters on our presentations. First up,
19 the individual who first taught me antitrust law and
20 economics many years ago, although I'm too blame for all
21 my deficiencies, he isn't, Kenneth Elzinga, Robert Taylor
22 Professor of Economics at the University of Virginia,
23 whose article "The Antimerger Law: Pyrrhic Victories" was
24 later cited by the Supreme Court in Ford Motor Company
25 v. US.

1 He'll be followed by Dr. Jonathan Baker. Jon
2 is a Professor of Law at the Washington College of Law,
3 American University, and a former director of the Bureau
4 of Economics.

5 Finally, we will end our session with a spirited
6 round table among our guests, and that will be that.

7 So let me turn now to John Peterman and start
8 out by asking: What's so special about Morton Salt?

9 DR. PETERMAN: It's a good brand, but anyway,
10 it's a pleasure to be here, and thank you very much,
11 Alden, for the great comments.

12 Now, my talk today will be a little fact heavy,
13 but I think it's important to start it off that way to
14 get where this case ends up directing the Commission. My
15 comments stem entirely from a study of the old Morton
16 Salt case, which I undertook took many years ago, and
17 this is one of the FTC's early, FTC RP, Robinson-Patman,
18 cases.

19 The case wound its way to the Supreme Court,
20 which upheld the Commission. The FTC decision, as
21 confirmed and strengthened by the Supreme Court,
22 reflected, for many years, the FTC's approach to the
23 regulation of price discrimination.

24 During the '50s, '60s and '70s, substantial
25 Commission resources were devoted to RP enforcement, and

1 behind this effort, the Supreme Court's Morton decision
2 provided very strong support. The RP Act reflected a
3 change in the government's regulation of price
4 discrimination.

5 Previously, the aim seems to have been to
6 protect small competitors from predatory price cutting
7 by the large competitor. The new aim was to protect the
8 small buyer from the large buyer who used his power to
9 secure advantages not available to the small buyer.
10 This concern is reflected very clearly and strongly in
11 the Supreme Court's opinion.

12 According to the Supreme Court, the Act's
13 purpose was to limit the use of quantity or other
14 price differentials to the sphere of actual cost
15 differences. Otherwise, such differentials would become
16 instruments of favor and privilege and weapons of
17 competitive oppression.

18 In Morton, the FTC found that the discounts
19 granted by Morton on its sales of table salt to grocery
20 wholesalers and retail chains were illegal price
21 discriminations. The discounts were said to injure
22 competition between resellers who received discounts and
23 those who did not, and Morton failed to show that the
24 discounts were cost-based.

25 The Commission made clear that it would

1 challenge similar discounts granted by the other salt
2 producers if it succeeded against Morton. The
3 Commission's order required Morton to eliminate all of
4 its discounts, after which all the other salt producers
5 followed suit.

6 There are three types of discounts challenged
7 in Morton. The first relates to shipments of salt
8 in full carloads at carload freight rates, and here are
9 some of the facts that you need to know. A discount of
10 5 percent per case was alleged to be granted to an
11 individual buyer who ordered a carload shipment from
12 the higher price charged to buyers of smaller quantities
13 whose orders were combined or pooled to make up a
14 carload shipment. That's the first discount.

15 The second discount relates to a lower price for
16 orders shipped in carloads versus orders shipped less
17 than carload. The discount here, of ten cents per case,
18 was granted to a buyer whose order was shipped in a
19 carload at carload freight rates from the higher price
20 charged to a buyer whose order was shipped in less than
21 a carload at less than carload freight rates.

22 Finally, there were a group of discounts granted
23 to large grocery chains that purchased certain very
24 large annual volumes of table salt. Morton made an
25 effort to cost-justify these annual volume discounts but

1 without success.

2 These annual volume discounts did seem to fit
3 the concerns addressed by the RP Act, large buyers
4 versus small, but the large chains that received these
5 discounts purchased only about 6 percent of the total
6 output of table salt, and there was no evidence that
7 these buyers acted jointly in purchasing salt or that
8 the producers of salt, of which there were then 15,
9 behaved other than competitively in supplying salt.

10 For systematic price discrimination to occur,
11 market power would be expected on the buying or selling
12 side or both. Throughout the proceedings, neither the
13 Commission nor the Supreme Court explained why the salt
14 producers were believed to grant discounts. What is
15 clear is that the discounts were not believed to be
16 cost-based.

17 I can't go into detail about all these
18 discounts, so I will just mention the way the carload
19 discount was handled, and how less than carload pricing
20 was handled, by the Commission and the Supreme Court.
21 This will give, I think, a clear sense of the approach to
22 the regulation of price discrimination.

23 The carload discount that was found illegal was
24 basically a fiction. Well over 99 percent of all table
25 salt was shipped in carloads at carload freight rates.

1 Each of the salt companies charged the same
2 price per case to an individual buyer of a carload,
3 and to the buyers of smaller quantities whose orders
4 were pooled to make up a carload. The sales forces of
5 the salt companies assembled the pool cars.

6 Virtually all buyers' orders were shipped in
7 pool cars or as individual carload orders; that is,
8 virtually all salt was shipped in carloads. The
9 evidence shows that buyers paid the same price if
10 they ordered a straight carload or for shipment in a
11 pool car. There were no complaints by wholesalers about
12 the producers' carload pricing.

13 The Commission claimed that a buyer who ordered
14 a carload received a discount from the higher price paid
15 by small buyers whose orders were pooled to make up a
16 carload.

17 The Commission relied on the fact that, on
18 occasion, certain salt producers had published price
19 schedules that reflected such a discount. But this
20 discount was never established in practice throughout
21 the years covered by the Commission's investigation, nor
22 over the prior 25 years. There was a great deal of
23 evidence that carload and pool car orders were priced
24 exactly the same.

25 Nonetheless, the Commission and the Supreme

1 Court found that the carload discount was illegal
2 because it injured competition between large buyers, who
3 (it was said) could order a carload and receive the
4 discount, and small buyers, who ordered in pool cars and
5 did not receive the discount, and because Morton failed
6 to cost-justify its discount.

7 Morton argued that a carload discount did not
8 exist, so competitive injury could not occur under
9 the Robinson-Patman Act. Morton presented no cost
10 justification because there was no price difference to
11 justify. The Commission's order eliminated the carload
12 discount. Since no such discount existed, the order
13 left the producers' carload pricing practices
14 unchanged.

15 For less than carload pricing, a higher price
16 was charged to a buyer whose order was shipped less

1 shipped LCL and charged the higher price.

2 Even if the higher price was fully
3 discriminatory, the overpayment would be \$8, and this
4 reflected orders over several years. Of Morton's total
5 shipments of Blue Label Salt, only 1/10th of 1 percent
6 were shipped LCL.

7 The higher price charge for less than
8 carload shipments was found to injure competition
9 between buyers who paid the higher price and buyers
10 who did not, and was illegal because Morton did not
11 cost-justify the higher price. It was possible to
12 estimate that the higher LCL price just covered the
13 higher freight costs that Morton incurred on these
14 shipments.

15 Morton's position was that its LCL price did not
16 injure competition because such shipments were too
17 infrequent and small to have competitive implications.
18 Morton did not try to cost-justify its LCL price, again
19 on the ground that it need not justify what caused no
20 competitive injury.

21 The Commission's order led Morton and the other
22 producers to refuse to accept LCL orders in the future.
23 This would not help buyers who occasionally ordered LCL,
24 nor would it help competition.

25 The Supreme Court centers its analysis of

1 competitive injury on the harm caused by Morton's
2 granting a carload discount and charging a higher price
3 for less than carload shipments.

4 I won't go into the annual volume discounts. I
5 won't have time. There was an effort to cost-justify
6 these discounts, but the effort failed, partly because the
7 companies, including Morton, made a very poor showing why
8 costs might have been lower in supplying the large chains.

9 The approach in Morton can be summed up. A
10 systematic price difference, perhaps even a price
11 difference that does not exist, is equated with
12 competitive injury and is illegal unless cost justified.

13 In future, this approach was followed, and
14 almost all complaints have been settled by consent
15 orders without any cost evidence presented. The cases
16 contain no analysis suggesting that market conditions
17 and contracting practices are consistent with
18 price discrimination, or that cost differences
19 considered realistically support (or not) the firm's
20 or the industry's pricing, particularly when assessed
21 in light of whether market conditions favorable to
22 price discrimination exist.

23 Almost all cases have been brought in industries
24 that have extremely low concentration and where
25 competition is almost certainly likely.

1 To conclude, I would just say that in its RP
2 enforcement, the Commission seems to have challenged
3 price differences and not price discrimination. Overall
4 the effort likely made the economic system a bit less
5 efficient, contrary to the goal of the Commission's
6 maintaining competition mission. I don't know why or
7 what forces led to this approach.

8 Contrary to most areas of antitrust, the FTC's
9 economists and economic analysis are not evident in RP
10 cases, and although I've looked into this, I've never been
11 able to discover why that has been the case.

12 Thank you very much.

13 (Applause.)

14 MR. ABBOTT: Thank you, John.

15 I think we'll see from our next speaker that
16 things got a bit better. Antitrust analysis got a bit
17 better, so, Kathy, will you tell us about GM/Toyota?

18 MS. FENTON: Thank you. As Alden mentioned in
19 his introduction, I was involved in the GM/Toyota
20 investigation as an attorney advisor to Chairman Jim
21 Miller. My current law firm, Jones Day, also represented
22 GM in that matter, but the views I'm going to present
23 now are entirely my own.

24 When the Commission issued its provisional
25 approval of GM/Toyota, one of the dissenting

1 Commissioners issued a statement raising the following
2 question: "If this joint venture between the world's
3 first and third largest automobile companies does not
4 violate the antitrust laws, what does the Commission
5 think will violate those antitrust laws?"

6 Shortly thereafter, at a Congressional hearing
7 on the subject of the Commission's approval, a
8 commentator also made a prognostication about the future
9 of the automobile industry. "It is a safe bet that 20
10 years from now, General Motors cars will bear no special
11 relationship to the United States, and Toyota will bear
12 no special connection with Japan."

13 From the perspective of 20 years, these concerns
14 may have a certain quaintness associated with
15 them, but they do give an indication of the very strong
16 reactions that the GM/Toyota decision evoked. What I
17 would like to do in the time available to me, and in keeping
18 with the historical theme of this program, is to review
19 briefly the factual background of the GM/Toyota joint
20 venture, summarize the FTC's investigation and decision
21 to approve the joint venture with conditions, describe
22 the subsequent history of the venture and its impact on
23 the U.S. auto industry and, finally, offer some
24 perspectives on the possible legacies of GM and Toyota,
25 in terms of the automobile industry, the substantive

1 antitrust analysis of joint ventures, and the FTC's
2 internal policies and practices.

3 The key facts about the joint venture are
4 relatively simple. By the early 1980s, GM, the largest
5 U.S. automobile company, with approximately a 44 percent
6 share of U.S. auto sales, concluded that it did not
7 know how to make small cars efficiently.

8 Toyota, the leading Japanese manufacturer and
9 the third largest worldwide auto manufacturer, in turn,
10 wanted to begin production of cars in the United
11 States. However, it had concerns about supplier
12 relationships and, most importantly, dealing with the
13 largely unionized American labor force.

14 To address both these needs, GM and Toyota
15 proposed a production joint venture to be called New
16 United Motor Manufacturing, Inc., or NUMMI. This would
17 produce subcompact cars for GM at a closed GM facility
18 located in Fremont, California.

19 The original thought was that approximately 250,000
20 cars would be produced each year, based on a Toyota
21 designed vehicle, the Sprinter, which currently was not
22 available for sale in the U.S.

23 The joint venture would be owned and controlled
24 50/50. Toyota would be responsible for appointing the
25 chief management personnel, and GM would market and

1 price the joint venture vehicle without any involvement
2 by Toyota.

3 Following the first public reports of the joint
4 venture, the FTC opened an investigation of the
5 transaction. Over the next 15 months, which included
6 the filing of a Hart-Scott premerger notification form
7 on behalf of the joint venture, the Bureau of Economics
8 and Competition at the FTC conducted a detailed
9 investigation. By one estimate, over 20,000 hours of
10 FTC professional staff time, excluding work by the
11 Commissioners or their offices, were devoted to the FTC
12 review.

13 The staff recommendation memoranda totaled over
14 1,300 pages, and several outside parties, including
15 Professor Kwoka, were retained as consultants to assist
16 the FTC in its review. When the matter was presented for
17 a Commission decision, by a three to two vote, the
18 Commission decided to provisionally approve the joint
19 venture with a consent agreement that placed a number
20 of restrictions on the joint venture's operations.

21 It was limited to a total of 12 years of operation,
22 could produce only one module (250,000 cars) a year,
23 and faced a series of restrictions limiting the ability
24 of GM and Toyota personnel to communicate on prices or
25 other strategic aspects of the joint venture. It

1 was contemplated, of course, that the FTC would have
2 visitation rights and other oversight provisions to
3 ensure compliance.

4 With these safeguards, a majority of the
5 Commission -- Chairman Miller and Commissioners Douglas
6 and Calvani -- voted to approve the transactions.

7 The reasons for their decisions were as
8 follows: The joint venture would increase the total
9 number of small cars manufactured in the U.S.; the cars
10 produced by the joint venture would cost less than any
11 other alternatives available to GM; it would provide
12 opportunities for GM to learn Toyota's efficient
13 manufacturing and management methods, which in turn
14 could be applied to other GM operations; and the venture
15 would serve as a positive demonstration project for U.S.
16 labor management relations, which in turn might
17 encourage Toyota and other Japanese and non U.S.
18 manufacturers to begin operations in the United States.

19 This positive assessment of the joint venture
20 was not shared by the two dissenting Commissioners,
21 Pertschuk and Bailey. Commissioner Bailey concluded
22 in voting against the joint venture that: "In this
23 decision, the Commission has swept away another
24 generally recognized set of antitrust law principles
25 into the dust bin, using again incorporeal economic

1 rhetoric that now dominates the Commission's decision
2 making."

3 In a similar vein, Commissioner Pertschuk said:
4 "Battalions of neoclassical economists dancing on the
5 head of a pin, cannot obscure the threat that this
6 marriage of competitors poses to the American consumer,
7 nor the fact that the joint venture is a plain and
8 unambiguous violation of the antitrust laws. The
9 Commission's settlement requiring Toyota and GM to
10 abide by the precise terms of their legal agreement
11 hardly qualifies as antitrust enforcement."

12 Following a public comment period in which over

1 earned several J.D. Power awards. A total of over

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1 Cooperative Research Act, which has been amended twice
2 since, to allow more favorable treatment for joint

1 only six years, remember, after the Hart-Scott regulations
2 became effective, and this was one of the largest
3 investigations of a merger or joint venture conduct under
4 the Hart-Scott Act to date.

5 It also had foreign documents issues. It had
6 intensive political and public scrutiny, and the
7 Commission's ability to deal with these issues was I
8 think a very positive learning experience.

9 Finally, it suggests a way for the Commission to
10 deal with basic antitrust issues in a time of change.
11 Just as the Antitrust Modernization Commission today is
12 going to be dealing with how to treat U.S. antitrust in
13 a global economy, GM/Toyota provides a positive
14 benchmark in that regard.

15 In concluding, one of the clear lessons that one
16 should take away from GM/Toyota is the humility required
17 in making prognostications about the future. However,
18 I think you will continue to see this Commission
19 experience as being one of the benchmarks that shapes its
20 consideration of controversial competition matters going
21 forward.

22 Thank you.

23 (Applause.)

24 MR. ABBOTT: Thank you, Kathy.

25 Now we're going to move from two health hazards,

1 salt and cars, to the cures, doctors and dentists.

2 John?

3 MR. KWOKA: Thank you, Alden. Let me begin by
4 saying how pleased I am to be here today. I was at the
5 Commission in the Bureau of Economics from 1975 until
6 1981, a period of time where many people would
7 characterize the FTC as an undisciplined, if not
8 chaotic, force. I found it to be enormously creative,
9 an exciting place to be and very productive in very many
10 ways.

11 I've been back to the Commission many times in
12 the past 25 years, always I think as a friend to its
13 mission, and I continue to find it an enormously
14 creative and exciting and productive place.

15 Coincidentally or perhaps not, my story today
16 begins in the 1970s. Back in the 1970s, the
17 professions, most of the professions operated as they
18 had for many decades. Professions thought of themselves
19 as having special missions subject more to their own
20 standards of conduct than the discipline of market
21 forces.

22 They avoided direct competition, sometimes
23 informally, but more often formally through codes of
24 conduct adopted by their associations or through the
25 state regulations that reflected these preferences.

1 The Principles of Medical Ethics of the American
2 Medical Association were typical. Adopted in 1957, they
3 prohibited physician advertising, solicitation and
4 contractual relationships with non physicians.

5 The result was an uneasy mix of competition and
6 collusion in the profession, but over the next quarter
7 century this would change profoundly. In 1975 the FTC
8 issued an historic complaint alleging that the AMA's
9 principles were anti-competitive and harmed consumers.

10 The Commission's opinion in 1979 prohibited the
11 AMA from any effort at preventing advertising or
12 solicitation, interfering with fee setting or
13 restricting participation in health care organizations
14 with non physician ownership. This decision was upheld,
15 with minor modification, by a divided Appeals Court and
16 affirmed by a tie vote of the Supreme Court in 1982.

17 The AMA case was a watershed event for the FTC.
18 It significantly extended the reach of competition
19 policy. It triggered evaluations of the competitive
20 implications of restraints on conduct by numerous
21 professions, including doctors, lawyers, optometrists,
22 dentists, chiropractors, podiatrists, psychologists,
23 physical therapists, obstetricians, veterinarians,
24 anesthesiologists, dermatologists, accountants,
25 arbitrators, music dealers, interpreters, real estate

1 brokers, and the list does go indeed on and on.

2 I've done a rough calculation, which falls
3 somewhere between the back of the envelope and a napkin
4 calculation, that these services fall in sectors, NAICS
5 sectors, of the economy that account for at least 15,
6 maybe as much as 18 or 19 percent of GDP in this
7 country.

8 By this measure I think that there are very few
9 actions by the FTC over its entire history with more
10 sweeping consequences. The path, however, has not been
11 straightforward. Now, there are one or two significant
12 new challenges that have surfaced.

13 What I want to do is today is to discuss two
14 later cases involving horizontal restraints in the
15 professions and then offer some observations on the
16 underlying economics, as I understand economics as
17 applied to the professions, and as the Supreme Court now
18 appears to understand it, which are not quite the same
19 thing.

20 The two cases involved FTC actions against the
21 Massachusetts Board of Registration and Optometry and
22 against the California Dental Association. For the
12 record, I should note that a transcript on behalf of the Tj-5.7108 0 T
15 scheduled to transcript by did not on the Dental

1 The Mass Board case was prompted by bans the
2 Board had imposed on advertising of price discounts,
3 testimonials, all ads deemed sensational, its term, or
4 flamboyant, and any ad that mentioned an affiliation
5 between an optometrist and an optician.

6 At trial the staff argued that these restraints
7 were truthful advertising and should be condemned
8 without the elaborate economic analysis, the latter term
9 being the staff's, but the Staff nonetheless introduced
10 evidence, I did, on behalf of the Commission that bans
11 on price and other informative advertising and on
12 commercial advertising in professions did, in fact,
13 raise price.

14 Restrictions were struck done by a Commission
15 decision in 1988. The Commission's reasoning relied on
16 extensive work by Tim Muris at the time that articulated
17 the so-called Structured Rule of Reason. This approach
18 was an effort to accommodate the possibility of
19 efficiency enhancing restriction, of some restriction
20 being efficiency enhancing, without embarking on a
21 full-scale reason inquiry into cases where the
22 efficiency benefits were implausible on their face.

23 The Mass Board case was important largely for
24 its articulation of the Structured Rule of Reason, but
25 within a few years, the Commission had modified its

1 approach to horizontal restraints in the profession.

2 In 1993 Commission filed a complaint against the
3 California Dental Association, whose code of ethics
4 prohibited, among other things, what it termed false
5 and misleading advertising, but it defined false and
6 misleading advertising as anything that was, quote,
7 likely to mislead because in context, it makes only a
8 partial disclosure of relevant facts.

9 In conjunction with other provisions of its
10 code, Cal Dental essentially prohibited price and
11 discount advertising, claims about quality or
12 superiority and advertising of guarantees. At trial,
13 the staff argued that the restrictions were inherently
14 anti-competitive, and staff chose not to offer into the
15 record any evidence of actual effects.

16 The Commission found against the restrictions.
17 Now, moving away from the Structured Rule of Reason,
18 they rejected the restraints on price advertising as per
19 se interference with the price mechanism and rejected non
20 price restraints under what was then termed the quick
21 look version Rule of Reason.

22 The Appeals Court upheld the Commission after
23 applying the quick look standard to both price and non
24 price restraints, but the real surprise came with the
25 Supreme Court. On a five to four vote, the Supreme

1 Court overturned the circuit ruling in its entirety and
2 remanded the case for a full Rule of Reason evaluation.

3 It said that, and I quote now: "When any
4 anti-competitive effects of given restraints are far
5 from intuitively obvious, the Rule of Reason demands a
6 more thorough inquiry into the consequences of those
7 restraints than the Court of Appeals performed."

8 The reason given as to why the effects of these
9 largely familiar restraints were not obvious was that
10 they arose in the context of a market for professional
11 services, and in several other passages, the court
12 asserted that the effects of advertising might be
13 different from the case of ordinary goods and services.

14 It said, for example, that in the case of
15 professional services, price advertising may be a bad
16 thing because it constitutes inherently incomplete
17 information in a setting where information is already
18 asymmetric between buyers and sellers.

19 With regard to non price advertising, the court
20 rejected the circuit's view that the CDA ban was
21 anti-competitive simply because it failed to distinguish
22 between truthful advertising and advertising that might
23 be false and misleading.

24 The Supreme Court also said that the circuit
25 erred in giving no weight to what it termed the equally

1 plausible suggestion that restricting difficult-to-verify
2 claims about quality or patient comfort would have
3 a pro-competitive effect by preventing misleading or false
4 claims that distort the market.

5 Well, in this and other passages in Cal Dental,
6 the Supreme Court's holding was really quite
7 unexpected. It reopened the question that many thought
8 had largely been resolved; namely, are the professions
9 different?

10 The professions, of course, have always asserted
11 that they are different in some important way, and it
12 appears that that issue will need to be revisited, so
13 let me take a few moments and talk about my
14 understanding of the economics of the question: Are the
15 professions different?

16 I believe that the professions best case as to
17 the argument that they are different in some relevant
18 way rests on two propositions. The first is that the
19 market for professional services, many of them at least,
20 are afflicted with informational asymmetry. This is
21 different from simple information imperfection where
22 both sides of the market lack information.

23 Here the seller knows what's being provided, but
24 the buyer does not, and so good quality services is
25 sustained not by informed consumers but by the honesty

1 and integrity of the professionals that are providing
2 the service.

3 The second claim is that even this precarious
4 balance was disrupted by advertising, and perhaps most
5 especially by price advertising, the same price
6 advertising that in an ordinary market is so helpful to
7 consumers. In professional services, price advertising
8 shifts consumers toward low price suppliers who are
9 inevitably offering low quality service.

10 Practitioners who wish to provide high quality
11 service for personal or professional reasons find that
12 their customers are defecting, and the equilibrium in
13 this market has only low quality service.

14 Most of us will recognize in this scenario
15 George Akerlof's model of the economics of lemons, that
16 is, bad or defective products, and the professions and
17 even the Supreme Court, unprompted in Cal Dental,
18 offered a citation to Akerlof's work, but I think the
19 citation is facile, if not faulty, for three reasons.

20 First is that Akerlof himself, if one actually
21 reads the article, which I think those who cite it do
22 not, Akerlof himself recognized that the doomsday
23 scenario can be and often is forestalled by offsetting
24 mechanisms or institutions. For example, warranties and
25 guarantees, reputational effects, chain firms,

1 licensing, all provide information or assurances to
2 consumers, and all of these exist in professional
3 services.

4 In fact, I would assert that it's difficult to
5 identify any real world market that has followed
6 Akerlof's doomsday scenario, including his own example
7 of used cars. For that reason, I have long argued that
8 Akerlof's work is more important in explaining the role
9 of these counteracting mechanisms than in explaining any
10 real world market failure.

11 Second and quickly, because I'm getting the hook
12 here, the policy question is not really whether the
13 markets for professional services have informational
14 asymmetry or perhaps even the kind of lemons process at
15 work, but whether and on how advertising exacerbates any
16 adverse effect. The policy question involves the
17 incremental effects of advertising, and for the
18 professions to defend restrictions on advertising, I
19 believe they should bear a burden that they have not
20 namely of demonstrating incremental adverse effects of
21 advertising on the process.

22 Thirdly, apart from these theoretical matters,
23 there's considerable empirical evidence on the effects
24 of advertising and commercial practice in the
25 professions, and that evidence provides no support for a

1 doomsday scenario.

2 Among a number of studies, the one that focused most
3 closely on this question was a study of the optometry
4 profession conducted by Ron Bond, Jack Phelan, Ira
5 Whitten and myself undertaken here at the FTC in the
6 late 1970s.

7 This study in fact was a good example of
8 cooperation among the bureaus, whereby the Bureau of
9 Economics and the Bureau of Consumer Protection,
10 together with the Bureau of Competition, were all engaged
11 in an effort to support the Commission's initiatives in
12 the professions.

13 The Bureau of Economics study examined the
14 quality of service provided in the optometry profession
15 most thoroughly of any study I know, essentially by
16 having trained subjects, subjects trained by schools of
17 optometry to get eye exams and glasses in a number of
18 cities across the country that had different types or
19 degrees of restrictiveness over advertising and chain
20 firms.

21 The results in short were quite remarkable.
22 They showed that there were no differences in the average
23 quality by any measure of exam thoroughness, accuracy of
24 prescription or accuracy of eye glasses in any city
25 regardless of the degree to which there was advertising

1 in place or commercial practice presence.

2 So the Cal Dental holding seems to me to be at
3 odds with current economic understanding of the effects
4 of these restraints. While the court, 25 years earlier,
5 had planted the seed of its concern about the
6 professions, and perhaps in 1975, there was some reason
7 for its concern, by the late 1990s and surely in the
8 current era, I think that economic understanding about the
9 effects of advertising and commercial practice in the
10 professions considerably exceeds what the court in Cal
11 Dental found "intuitively obvious."

12 I would only hope that the full weight of this
13 evidence does become clear to the court in order not to
14 impede what I think to be one of the center pieces of
15 the Commission action in the last 20 or 30 years, namely
16 its long standing and hugely beneficial initiative with
17 respect to competition in the professions.

18 Thank you.

19 (Applause.)

20 MR. ABBOTT: Thank you. Thank you, John.

21 We know that thieves rob banks because that's
22 where the money is. Presumably enforcers of Section 2
23 of the Sherman Act, in looking for targets, should fish
24 where the fish are, but where are those fish? Susan,
25 can you enlighten us?

1 MS. CREIGHTON: Thank you, Alden. Can you all
2 hear me okay at the ends there? You can hear me okay?

3 I was a late edition to this panel when Bill
4 Kovacic, actually I showed him a draft of the article I
5 was working on, and I think he concluded that it can
6 aptly be characterized as a summary of recent history,
7 so I'm here to be rounding out the panel by bringing us
8 up to the last two or three years, and as Alden
9 mentioned, the working title of this draft, which is
10 still very much a draft, is called "Cheap Exclusion,
11 Fishing Where the Fish Are."

12 I'll have to explain that title here in a
13 minute, and it's an attempt to find some common themes
14 that run through the Commission's cases in the last few
15 years in the area of exclusion. By exclusion, I mean
16 here just to be descriptive, not normative or
17 analytical. What I mean is cases arising either under
18 Section 1 or Section 2 that involve restrictions on
19 others' output as opposed to restrictions on your own
20 output.

21 Now, obviously in the last several years the
22 Commission has continued what has always been a core
23 component of our enforcement agenda in restrictions on
24 its own input ranging from cases like Schering, the
25 patent settlement cases, the horizontal merger cases,

1 our physician price fixing cases and so forth.

2 I think it would be fair to say that not
3 withstanding disagreements around the edges, that
4 there's a great deal of consensus in those kinds of
5 cases about what the shape is of policy and practice in
6 terms of our analytical approach to those cases.

7 I think it would be fair to say and not very
8 much a ground of dispute to say that we've got much less
9 far in terms of a common understanding of a proper
10 approach or analytical perspective to bring to cases
11 involving exclusion or restrictions on other's output.

12 The paper, there's actually going to be some
13 drafts probably in the back at some point, it's got some
14 glitches in the drafts that were photocopied, so with
15 your indulgence, if you would care to read it, it will
16 be otherwise posted on the web site sometime. This is
17 an attempt to describe what Bruce Hoffman, Deputy
18 Director in the bureau, has dubbed cheap predation. I
19 gave it the less catchy title Cheap Exclusion because
20 some people don't like the predation nomenclature.

21 What I would like to describe for you briefly,
22 and the article will describe it in greater detail are,
23 what are the characteristics that I think run through a
24 number of our cheap exclusion cases.

25 Before getting there though, let me say that a

1 starting point and I think in probably most contemporary
2 discussion about exclusion cases generally has arisen in
3 the context of Section 2 cases, and in particular with
4 regard to the conduct element under Section 2 test for
5 monopolization.

6 In particular I think we can probably trace back
7 much of the contemporaneous discussion about exclusion.
8 The springboard for that discussion has been the
9 analysis of predatory pricing cases going back to the
10 1970s and early 1980s. I think today a lot of the
11 discussion about proper sacrifice test, economic
12 irrationality, all those can really be traced back to
13 Professor Areeda, Professor Bork and a lot of the other
14 writings that arose in the context of predatory pricing
15 analysis.

16 I think the idea from an enforcer though, since
17 we're stepping back and thinking about a lot of the
18 debate in this area, I would submit that predatory
19 pricing may have been an unfortunate point of departure
20 for our discussion about exclusion cases because I think
21 I would submit that predatory pricing is the
22 quintessential example of what I will call costly
23 exclusion or cost predation.

24 It's a method of predation that is expensive,
25 often more so for the predator than for the victim.

1 It's difficult to accomplish. It's difficult to
2 sustain, and from an enforcer's perspective, it's
3 difficult to distinguish from competition on the merits.

4 Maybe the most practical matter of all is if you
5 step back as an enforcer thinking about where to put
6 scarce Agency resources, I think it's fair to ask the
7 question, How likely is it that firms, which are profit
8 maximizers, are going to choose a costly predation
9 strategy?

10 As profit maximizers, you take into
11 consideration the costs of any alternative that they
12 pick, isn't it more likely, all else equal, that they
13 would prefer exclusion strategies that are cheap, both
14 absolutely and relative to the potential upside.

15 So assuming as a hypothesis, one could say in a
16 pond of exclusion that the question is: Isn't it more
17 likely that in terms of where we would put resources to
18 be searching out for exclusionary behavior -- isn't it
19 more likely that we would find rich fishing where the
20 exclusion strategies are cheap rather than expensive?

21 Now, that is of course not to say that if you
22 caught a fish elsewhere in the pond, you don't reel it
23 in, but it is to say, in terms of deciding where to put
24 down your hook, that you should fish where the fish are.

25 What we have hypothesized and I think the last

1 three years have proved is that the fishing for cheap
2 exclusion is rich and deep and that there is a lot at
3 stake. By cheap exclusion, I mean exclusion that is
4 cheap absolutely, that it preferably imposes a
5 symmetrically higher costs on the victims, and third it
6 provides a strong upside, so it's a good cost benefit
7 analysis from the point of view of firms seeking to
8 obtain monopoly power.

9 Now, where have we found cheap exclusion to
10 flourish? The cases that we've grouped and are calling
11 cheap predation involve conduct that cannot even
12 arguably be claimed to further competition on the
13 merits; that is, it does not even arguably advance
14 efficiencies.

15 Maybe to make that more concrete, let me give
16 you two specific examples from our recent cases, and for
17 those of you, some of you may be familiar with the facts
18 of these cases, but I'll go through them briefly, and
19 because they're in litigation, I'm only asserting them
20 on the basis because of the allegations in the complaint
21 which have not been proved because the cases are still
22 pending.

23 The first such case is the South Carolina Board
24 of Dentist case, a Section 1 case. Now, the facts, as
25 alleged in the complaint in that case, are that the

1 board of the dentists in South Carolina, in the face of
2 a state legislative act that opened up the possibility
3 of hygienists providing dental hygienist health care to
4 children, for children in South Carolina public schools,
5 enacted an emergency regulation that required pre
6 examination by dentists before such hygienist services
7 could be provided, in the allegation in the complaint is
8 that there was, in fact, no medical benefit to that

1 Simply it effects a wealth transfer from the hygienists
2 to the dentists.

3 A second case is our Unocal case, which is
4 scheduled to go to trial in mid October. The
5 allegations in that case are that Unocal, in the course
6 of regulatory proceedings regarding the adoption of
7 reformulated gasoline standards in California, that
8 Unocal made representations to the California Air
9 Resources Board saying, Here's a bunch of information
10 that you can include in your regulations, and it will be
11 in the public domain, free of charge, free to use.

12 On the basis of those representations, the CARB
13 incorporated the information into the regulations, and
14 only thereafter did Unocal reveal that it had a patent,
15 and it intended to enforce that patent against all the
16 refiners who, as a result of the regulation, were
17 required to practice Unocal's technology.

18 Again the conduct is from Unocal's perspective
19 cheap. It was participating in the regulatory
20 proceedings already. It's likely to be durable. The
21 CARB regulations in effect are now locked in, and the
22 refiners have spent hundreds of millions of dollars
23 developing refineries that were compliant with those
24 regulations.

25 There's no benefit to consumers short-term or

1 long-term. There is substantial harm to victims.
2 There's a wealth transfer. It's not efficiency
3 enhancing, and the allegation is that it violates
4 Section 2 because it creates a likelihood of monopoly
5 power.

6 Now, those two examples involve manipulation of
7 government processes, but the same analysis of cheap
8 exclusion in the characteristics I've just described I
9 think apply to a wide range of cases, both that we've
10 brought, that have been brought by the Department of
11 Justice, and in fact turning back in time and looking at
12 other Commission cases, characterize Commission cases
13 going back for at least 40 years.

14 Let me give you some other quick examples of
15 cheap exclusion. I gave the Unocal example, but there's
16 also private standard setting, which actually involves a
17 classic kind of opportunistic type of behavior, cases
18 likes Rambus, Dell, also earlier cases involving what
19 the Supreme Court had found to be Section 1 violations,
20 but if you go back and look at those cases, really
21 whether it was Section 1 or Section 2, just as in South
22 Carolina Dentist and Unocal, what's really at issue
23 isn't whether it was collective or unilateral.

24 It's quite different from own output restriction
25 cases. In all those standard setting cases, really what

1 For example, in Unocal it might be the
2 allegation or the defense is, We had a right to petition
3 the government, so this might be a constitutional claim,
4 for example, but obviously in terms of public policy,
5 one needs to weigh the antitrust issues against those
6 broader public policy issues, but there's not the same
7 kind of internal conflict between concerns about

1 area is the argument that, well, for example, if it's a
2 tort action, shouldn't we just let tort law handle it?
3 I guess I would have are two responses to that.

4 The first is typically in those cases, neither
5 the private party who might vindicate such an interest
6 nor the remedy obtained in such cases typically are very
7 well aligned with the interest that we would be seeking
8 to vindicate in antitrust. Second, also Tom
9 Krattenmaker, one of our coauthors on this article, and
10 I was joking with him that just because conduct is
11 inefficient doesn't mean that it's not
12 anti-competitive.

13 I would submit that simply because conduct is
14 otherwise conduct that we're trying to chill or have
15 found to be illegal for other reasons is not a reason to
16 give it a pass under the antitrust laws.

17 Thank you.

18 (Applause.)

19 MR. ABBOTT: Thank you, Susan.

20 Ken, your comments?

21 MR. ELZINGA: Well, you can see that a professor
22 is always eager to profess. I couldn't wait to get up
23 here after John Peterman's remarks. My remarks will be
24 brief. It takes less time to lead the applause than to
25 criticize a paper.

1 The first one is that the smaller buyers often
2 simply pooled their purchases into carload lots, and the
3 salt producers almost invariably charged the same price
4 for pool car orders as for individual carload orders.

5 The second is that the discount structure of the
6 salt companies came out of their experiences in the
7 National Recovery Administration. So we learn,
8 through John's paper, that the NRA, which is already
9 considered perverse to anybody who is in the antitrust
10 grain, was even more perverse than we thought.

11 Now, I'm an antitrust pack rat. Bill Kovacic is
12 as well. He brought his old copy of the Nader book on
13 the FTC. I brought an old copy of a book that the DOJ
14 put out, a DOJ report on the Robinson-Patman Act, and
15 this came out in 1975. Some of the antitrust older
16 people here will remember this. It summarized a lot of
17 the literature critical of the Robinson-Patman Act, and
18 it very clearly showed that the Department of Justice
19 could restrain its enthusiasm for this particular piece
20 of legislation.

21 I'm going to read just a couple portions from
22 this. The authors are talking about Morton and its
23 progeny, and they conclude: "The total effect of the
24 majority of the secondary line cases is to create a
25 virtually irrebuttable presumption that any price

1 discrimination is injurious to competition, thus the

1 the Robinson-Patman Act, it was because of this report
2 that he was unacceptable to continue as head of the
3 Antitrust Division in the Carter Administration. The
4 Robinson-Patman Act then, as now, has its friends.

5 The other document I brought long is the 1989
6 ABA report. I was the token economist on this ABA
7 committee, although I would count members like Tim Muris
8 and Ernie Gellhorn as honorary economists who served on
9 this committee. The interesting thing about this report,
10 this is 1989, is how little it says about the
11 Robinson-Patman Act. This is all it says. "The FTC's
12 non-merger antitrust plate was once filled with
13 Robinson-Patman Act enforcement. That era ended around
14 the time of the 1969 report and few commentators have
15 lamented its passing."

13

1 the antitrust bar. So it had a value of sorts of
2 redistributing income, and perhaps we should be cautious
3 about dispensing with it, for that reason.

4 Don Baker argued that the real social value of
5 the Robinson-Patman Act was that it provided comic
6 relief in the teaching of antitrust law. Then who can
7 forget Terry Calvani dressing up as a clown when he
8 would discuss the Robinson-Patman Act.

9 So to come back to John Peterman, who spent many
10 years at the FTC, I would raise the question that his
11 paper does not answer, and that is: Can there be a good
12 secondary line price discrimination case, and if so,
13 what would it look like?

14 If good cases don't exist, then shouldn't the
15 FTC -- we're celebrating a 90th birthday, but it's been
16 about 70 years now of experience of the Robinson-Patman Act,
17 shouldn't the FTC call for its repeal or legislative
18 change so that the lingering effects of cases like
19 Morton might finally be swept away or, as the Bible put
20 it, be cast out and trodden under foot. Or if not cast
21 out, then isn't it time for the FTC to push to make
22 secondary line price discrimination congruent with the
23 Brooke Group principle of primary line price
24 discrimination.

25 I will just say as a final measure here of

1 self-applause, I'm the first one to finish before the
2 time's up deadline went up. Thank you very much.

3 (Applause.)

4 MR. ABBOTT: Thanks for those spiffy comments,
5 Ken, and I won't comment on if we are the salt of the
6 earth or not.

7 Now, let us turn to Professor Jonathan Baker for
8 some additional comments on I think our second and third
9 papers. John?

10 MR. BAKER: Thank you to everyone here who
11 invited me and I've worked with. This is a wonderful
12 occasion, accented by Allen Fisher's dahligs at the end,
13 and the papers that I'm here to talk about, Kathy
14 Fenton's and John Kwoka's, are wonderful papers, too,
15 clear and thoughtful and convincing.

16 I want to use their stories to highlight two
17 interesting moments in antitrust history, and I will
18 emphasize the legal side of antitrust mostly in my
19 remarks today. If you want to hear me on economics,
20 come back for lunch tomorrow.

21 First, the General Motors/Toyota joint venture.
22 I am of course an expert on this joint venture because
23 in the mid 1980s I bought the car. The FTC's review
24 took place in that very interesting moment in antitrust
25 history when there was a transition beginning between

1 the structural era of antitrust and the Chicago School
2 era. BMI, for example, had been decided but Maricopa
3 had followed it, and you weren't sure how far BMI went.
4 This was all before NCAA in horizontal restraints. In
5 the Section 7 area where this case was reviewed, for
6 joint ventures, the Penn Oil decision from 1964 involved
7 loss of potential competition as the main concern.

8 The fight in the Commission was not between
9 Democrats and Republicans. There was at least one of
10 each party on both sides. It was about how antitrust
11 should change and how far it should go in response to
12 criticisms that the rules unduly discouraged
13 pro-competitive conduct, and the answer in 1984 was
14 passionately contested.

15 Let me start by just rehabilitating this case
16 because Kathy sees all of this from a modern point of
17 view, by putting it a little more in the context of the
18 times. From a structural perspective, this was actually
19 an easy case.

20 We had a tight oligopoly in the auto industry
21 with General Motors as the price leader. Entry was
22 difficult. Entrants from Japan were restricted by the
23 Trade Agreement. This venture involved the first and
24 fourth leading U.S. sellers of automobiles.

25 General Motors could have picked Isuzu to

1 partner with, which it owned, but it didn't. It picked
 2 Toyota, a bigger firm. It was a part owner of Isuzu.
 3 General Motors and Toyota could have competed to produce
 4 small cars, but they choose to cooperate to make them
 5 instead, and this joint manufacturing venture put them
 6 in a position to exchange all sorts of competitively
 7 sensitive information.

8 Now, the competing Chicago School perspective
 9 didn't presume that concentration would lead to high
 10 prices and was more attentive to efficiencies from
 11 collaboration, even collaboration among rivals. This
 12 case I think also seemed easy from that perspective to
 13 the majority of the Commission.

14 General Motors had been unsuccessful in
 15 producing small cars and it wanted to learn on how to do

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1 easily by producing here. I think the majority saw the
2 competitive danger as limited because there was only
3 one little plant.

4 Now, as a practical matter, the final decision
5 of the Commission was largely a Chicago School victory,.
6 But recall that this venture technically violated Section
7 7, according to the Commission. It was allowed to
8 proceed through an order that placed restrictions on
9 information sharing and the like.

10 The fact that this venture was framed as a
11 violation of Section 7 rather than getting a free pass
12 was a way of harmonizing the wide-ranging competitive
13 effects and efficiencies analysis that the Chicago School

12131313

perspective encouraged with the prans S witmo

1 appointment of Terry Calvani to the Commission, which
2 gave the Chicago forces a majority, and this decision,
3 we were at the interesting moment where we see the FTC
4 embracing an economic approach to antitrust.

5 That's the real legacy I think of the GM/Toyota
6 case. Of course, in the passage of the time, certain
7 claims about what happened were quite extreme, I think on
8 both sides actually. Kathy emphasized the way the risks
9 to competition appeared overstated in retrospect.

10 John Kwoka wrote an article reviewing the case,
11 and I think I agree with him, that the efficiency gains
12 were likely overstated too, but I think that's a longer
13 conversation than we have time for today. The real
14 influence of this case and its legacy is on antitrust,
15 doctrine, not on its effect on the automobile industry.

16 To turn to John Kwoka and California Dental,
17 here we are a decade later. The Supreme Court had
18 largely completed its reconstruction of antitrust along

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1 Democrats were in control of the Executive Branch for
2 the first time since 1981, and it took a few years
3 before that changed the composition of the FTC, but the
4 promise of having the Democrats in power was that it
5 would reveal what was partisan and what was permanent in
6 the antitrust Chicago's School revolution. At the
7 FTC the specific question would be, "Where would Bob
8 Pitofsky accept changes in antitrust and where would he
9 try to push back?"

10 As you know, I worked for Bob. I did not work
11 at all on California Dental that I can recall. I think
12 when we arrived, it was just before the Administrative
13 Law Judge decision came down, and so the whole
14 proceeding from my point of view was taking place as an
15 oral argument in front of the Commission, and then later
16 on in the courts, where I was just -- BE wasn't really
17 involved and I was just an academic observer.

18 You know that Bob knows everything important
19 about antitrust and its history, and all the old
20 precedents are part of the rich store of reference that
21 he has. I think he sees the whole line of decisions of
22 antitrust history as a continuous evolution, and
23 he synthesizes in his mind all the recent decisions with
24 the older ones and tries to find their common core.

25 Bob essentially accepts the modern efficiency

1 emphasis as a healthy corrective to earlier antitrust
2 principles. In fact, like he told you earlier today,
3 he reminded us really, he was the one who was the reason
4 we have the efficiency modifications of the merger
5 guidelines in 1997. But I think he would tell you that
6 he emphasizes that you have to demonstrate efficiencies,
7 not assume them, and of particular importance not
8 discard core antitrust principles in the enthusiasm
9 for efficiencies.

10 So one key feature of his for the Commission
11 majority or for the Commission's California Dental
12 opinion that I took from it was his insistence on the
13 clear distinction between per se rules and the rule of
14 reason. It's also a theme of the competitive
15 collaboration guidelines that came out on his watch a
16 little later. My guess is what Bob was trying to do
17 was protect the per se rule against negative price
18 fixing from erosion by those who were presuming
19 efficiencies everywhere.

20 He worried that if you use the "inherently
21 suspect" analysis of Mass Board, and I guess now it's
22 in Three Tenors, that by moving closer to a continuum
23 of rules, I think he would say, this is me, not Bob
24 talking here, my interpretation, that he would say that
25 you get less protection against doctrinal erosion.

1 On the Supreme Court's opinion -- I know I have to
2 conclude, so let me sort of jump to it quickly -- I think
3 it implicates the central issue that Bob was worrying
4 about in the California Dental, the way it dealt with
5 quick look rules. I think after that decision, it's
6 hard to know which quick look rules really exist and

1 going to have high prices to empirical research in
2 advertising that John talked about, John Kwoka, by
3 professionals that was going on in BE, supporting the
4 long engagement with the professions on the antitrust side
5 of this Agency, to the work in BE on raising rival's
6 costs that Steve Salop and Dave Scheffman and others worked
7 on. I think they were thinking about exclusion, and now
8 we see Susan's discussions of cheap exclusion.

9 From Allen Fisher's dahlias to BE research,
10 if you'll look behind everything that the FTC does, at
11 least everything good and useful, I think you'll find
12 the Bureau of Economics. Thank you.

13 (Applause.)

14 MR. ABBOTT: It sounds like a bit of economic
15 imperialism. Does anyone have any response to any of
16 the comments, any of the authors? John?

17 MR. KWOKA: I would just like to make one brief
18 comment about GM/Toyota which I've heard characterized
19 in several ways, both by Kathy Fenton and Jon Baker. I
20 don't really disagree with most of what both said, and I
21 certainly don't want to debate 20 year old issues.
22 However, I think there were some serious issues that the
23 Commission at the time, the three votes of the
24 Commission in favor of letting the joint venture go
25 forward, did not address, and I think they were serious

1 economic issues, and so I would disagree with I think
2 Jon's characterization as this being the turning point
3 toward economic analysis implicitly away from something
4 else, which of course is what I did.

5 I think among the serious questions that the
6 Commission did not satisfactorily answer was the
7 standard question I believe of what the counter factual
8 was. What it is that GM in particular, and Toyota was
9 less of an issue, would have done in the absence of the
10 joint venture.

11 There was good documentary evidence, and
12 eventually some of it was disclosed, that GM, as Jon
13 mentioned, would have in fact engaged in a very similar
14 joint venture with Isuzu. It's doing that, with its
15 ownership of Isuzu, really made the alternative
16 competitively innocuous, and it may not have conferred
17 all of the benefits, but it seems to me a standard and
18 very good economic question as to what the alternative
19 would have been.

20 The idea that it would have done nothing and GM
21 would have been without a supply of small cars or
22 without the technology I think is inconsistent, even
23 with the common view within the Commission at the time,
24 that this was very important to GM and therefore surely
25 I think almost everyone was in agreement it would do

1 something, so that was one issue I think that I thought
2 to raise, and obviously we came to different conclusions
3 about it, but I think it was a good sound economic
4 condition.

5 The other, of course, was as Jon noted, I've
6 written on this and have discussed the issue of the
7 magnitude of efficiency, and Kathy noted that this was
8 an important milestone in the Commission's examination
9 of efficiencies, but I think it would repay some effort
10 going back to how the Commission evaluated it because I
11 do believe in fact there were far less substantial --
12 the attributable and cognizable efficiencies were far
13 less substantial than the common view amongst many
14 commentators at the time.

15 MR. ABBOTT: Kathy, do you have a rejoinder to
16 that?

17 MS. FENTON: I would pick up on John's last

1 predicates underlying the Commission decision and
2 testing them against subsequent events, and to the
3 extent there is a target crying out for some kind of
4 retrospective review, I think GM/Toyota represents that
5 type of opportunity.

6 MR. ABBOTT: Thanks, Kathy. I had one
7 interesting footnote. We talk about a Structured Rule
8 of Reason, and John mentioned Mass Board. Some of those
9 issues were raised in the Three Tenors case, which is
10 now before the D.C. Circuit, was argued a week ago, and
11 talking about continuing analysis of antitrust, I think
12 it will be interesting to see how the courts struggle
13 with these difficult issues about the continuum of
14 analysis.

15 Unfortunately, I think the rug is about to be
16 pulled out from under our chairs, so I want to thank
17 everyone, all the panelists and commentators for
18 outstanding presentations, and I hope everyone enjoyed
19 it, and I know I learned a lot. Thank you.

20 (Applause.)

21 (Break in the proceedings.)
22
23
24
25