This transcript has been lightly edited for clarity

PANEL ENTITLED: "UNDER ONE UMBRELLA: INTEGRATING THE COMPETITION AND CONSUMER PROTECTION MISSIONS."

SPEAKERS: CASWELL O. HOBBS
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ROBERT SKITOL
MARY LOU STEPTOE
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MODERATOR: NEIL W. AVERITT

MR. AVERITT: Welcome to the last panel of the afternoon. We're on the home stretch now. The panel is called Under One Umbrella. It deals with the relationship between antitrust and consumer protection law.

That's actually an important issue for the Agency. The FTC is unusual in combining both of those functions, and obviously if we can make that combination work for the Agency rather than against it, we're going to be well ahead of the game.

Before going into the details of all of this, though, let's pause for a second and think about where we are in the overall trajectory of the program. We

heard earlier today from BC. We've also heard from BCP, and the question now is how these two bodies of law fit together, how do they relate? Another way of expressing it is this: How do the two fit together to define a single more or less coherent overall mission for the Agency?

Before getting into that, let me note for the record that any opinion I express here is solely my own and not necessarily that of the FTC.

If we're trying to define a relationship between the two bureaus, there are two general ways in which we could approach that task. One is relatively narrow and defensive and it aims, at the very least, to keep the two bureaus out of each other's way, to make sure they

are to create a basic structure of doctrine for the Agency as a whole, to keep the two bureaus from overlapping, and hopefully to keep either one of them from pursuing a particular doctrine in ways that create legal or doctrinal problems for the other bureau.

There are a number of ways that one might go about doing that, but the one that's been most current in recent years is a "consumer choice" interpretation of the FTC Act, and that's what I would like to outline here as a background for the panel.

The consumer choice interpretation starts with the notion that the FTC is in the business of protecting the market economy, an economy that would be driven primarily in response to consumer preferences as expressed through purchase decisions.

If you're going to be having a market economy of that sort, there are two basic things that you need. You need, first of all, an array of options in the marketplace, and that's the task of antitrust. Then the second thing you need is an ability on the part of consumers to choose among those options, and that's the task of the consumer protection. And then the two together will help you defend the American market economy.

There are a couple of grace notes to mention, a couple of points of detail here. One is to note that

There are a couple of other nice features to note. A choice model is consistent with the BCP Unfairness Statement. That statement noted that it was concerned about harms that cannot reasonably be avoided. But the basic way that consumers avoid harm is by exercising choices in the marketplace, and if there's conduct that impedes the exercise of choice, then that becomes almost automatically harm that leaves consumers open to unavoidable harm.

For these reasons, the choice interpretation has been followed by the Commission. The issue doesn't come up that often, but when it comes up, this is the model that the Agency has tended to reach for. It did so in the first instance as part of the companion statement to the 1984 Policy Statement on Unfairness. It did so most elaborately in International Harvester. It did so most recently in the Year In Review report for last year's ABA Spring Meeting.

price in mind, you become immediately at a loss because you probably see prices going up, but you don't know if that's due to market power, which is bad, or to the suppression of free riding, which might be good. But if you approach it with a choice model in mind, you find yourself asking, "Well, has the conduct resulted in an increase or decrease in options," and that's the right question to be asking.

Similarly, on the consumer protection side, the analysis induces you to look to the question, "Has an actual purchase decision been affected," and so that tends to lead you away from a focus on immoral conduct -- perhaps kid's ads -- which doesn't necessarily affect a purchase decision. The purchase is going to be made by the parents. So that's not really apart of our core mission.

So in short, choice provides a good, basic doctrine. And yet, and yet, Milton reminds us that

Put differently, having differentiated the missions for the sake of clarity, can they be put back together now so as to increase the force and the wisdom of the Agency? Those will be the questions for our panel.

To address these questions we have five very well qualified people. First up will be Cas Hobbs from Morgan Lewis. Cas will be taking on the question: Can we build on those cross-bureau strategies that we used successfully in the past? Those are, for the most part, strategies that brought both competition and consumer protection resources to bear on a single problem. Put in practical terms, the issue or the center of gravity of Cas's remarks will be: When would an FTC chairman want to have both bureau directors, BC and BCP, present in the room when formulating a strategy for dealing with a problem area? How do you coordinate the tanks and the dive bombers?

Next up will be Bob Skitol from Drinker Biddle. Bob will be asking: Is it possible to devise additional new cross-bureau strategies for the future? Some might involve reconceptualization or substitution. There might be a matter that's been traditionally handled by one bureau under its side of the FTC Act, yet could be reconceptualized and viewed as a violation of the other side of the Act instead. There may be benefits from doing

that in some cases. In other words, how do you design a flying tank?

Then the third speaker will be Bob Lande from the University of Baltimore Law School. The previous speakers have all taken BC and BCP law as a given, as it stands. Bob will be asking: Would antitrust law be construed at least a little bit differently if it were construed in the bigger context of a choice model? If we care about choices and options, does that imply that we care about non-price options and non-price competition, and does that in turn imply that this ought to be a somewhat more explicit part of antitrust analysis in the future?

Then with all these topics on the table, we have two speakers that will comment on them. The first to do that will be Commissioner Leary from our own Agency, who will be commenting on all three papers. Then next will be Mary Lou Steptoe from Skadden Arps who will be contributing to the discussion also on all three papers.

So without further ado, Cas Hobbs.

MR. HOBBS: Thank you, Neil. If you think that I'm going to fall for Neil's gambit of trying to get me to characterize one bureau or the other as a tank or a dive bomber, you're going to be disappointed.

I would like to develop four propositions in the

extraordinarily limited amount of time that Neil has allocated to me, and given that time limitation, I'm going to put them forward upfront. I'll get as far as I can in developing the evidence in support of them, but you'll have to wait for the paper because, despite all of my triage this morning, I didn't get close to getting this paper cut down small enough to cover all of it.

In keeping with my assigned focus on the "past as prologue," all four of these propositions are taken from what I consider successful initiatives of the cross-bureau type in the past. The four propositions are the following:

First, I think the Commission can and should make greater use of its unfairness authority to address market failures which cause economic harm to consumers. Going back to the luncheon discussion, I probably differ from Tim Muris and Bob Pitofsky in this regard by about 20 percent I would say. I have never sat in a Chairman's chair though (at least when anyone was looking), so I have the luxury of saying that.

Second, I think the Commission should place greater emphasis on guidelines rather than individual cases. I think industry oriented guidelines, practice oriented guidelines, have been great successes in the Commission's past and ought to become part of the

future. I have nothing against individual case adjudications; I just think you get a lot further a lot faster with the guideline approach.

Third, I would like to see the Commission resume putting emphasis on consumer information disclosure initiatives. I think providing key performance oriented product information like the R-value Rule did, like the Octane Rule did, and doing it in a standardized way -- and standardization is probably pretty important to this -- will improve the competitive functioning of markets in a significant way and improve consumer well-being in a significant way. Information can lead to consumer well-being in the form of lower prices, prices that are better correlated to the key performance characteristics of products, and innovation that is keyed to the key performance characteristics of products.

Fourth, I would like to see the Bureau of Consumer Protection do more industry-wide activity where industries are being unresponsive to consumer interests and concerns. I think though we need to do that based on the Bureau of Competition, Bureau of Economics type of analysis that asks: What is the market failure that's leading to this unsatisfactory performance, and do we have a focused remedy that will change market behavior?

Obviously these four propositions are closely interrelated in significant ways, and I think that Neil's consumer choice model is a helpful way of evaluating and highlighting those issues. Having given you those four bottom line propositions, let me see how far I can get before my time runs out.

Let me start with the guidelines proposition, which also I think supports my industry wide orientation proposition. I think that we need to pay more attention to some of the largely unsung heroes of the past. A significant number of FTC guidelines have been, in my view, significant competitive and consumer protection success stories.

I put those in three categories: Industry oriented guidelines, practice oriented guidelines, and then advertising guidelines, just because advertising has always been sort of special.

In the list of industry oriented guidelines, we have the Funeral Rule, (the price disclosures in the Funeral Rule), Used Cars (the warranty disclosures), home insulation (the development of the R-value measure and disclosure), franchising (earnings disclosures and related disclosures), care labeling, and vocational schools (with drop-out and placement disclosures).

In the practice oriented guides, I think the rules

that we take for granted but that have had enormous impact in the market are the cooling-off, door-to-door sales, negative option, holder in due course, mail order, and credit practices rules. I think all of those are great successes.

In the advertising area, I think the endorsements and testimonial guidelines have had a remarkable effect on that area of advertising. I think the green environmental advertising guidelines are a great (and under-appreciated) success. I think the green guides provided a framework for competition and competitive advertising that in essence prevented the anarchy that was going to break out in the environmental advertising area, and it provided a level playing field for the members of the industry to advertise and provided the opportunity for those with superior performance characteristics to gain ground in making those claims. It prevented a lot of confusing and contradictory advertising claims being directed to consumers and provided consumers with at least a starting point for a meaningful flow of information.

There were also non successes in the information disclosure area, and I think we need to evaluate those as well, but I don't think they should take away from the successes.

Let me turn to the Commission's unfairness jurisdiction. As you know, there is an unfair methods

consumer protection considerations. It was a pioneer, I suggest in legal cross-dressing. The case was litigated before the Commission on an antitrust theory, went to the Supreme Court on a consumer protection theory, and resulted in the unfairness decision that you're all familiar with.

The Commission's now infamous cereal case was also a fascinating interplay of consumer protection and antitrust issues. It was described and conceptualized as a shared monopoly case, one in which there was a sustained supra-competitive profits and prices, but a key focus of the complaint was on intensive product differentiation and brand proliferation, the result of which, the Commission alleged, was to impair and subvert the ability of consumers
to make product decisions based on the nutritional benefits and
prices of the competing products while simultaneously raising barriers to entry to new potential competitors. Now, as you know, the case washed out on unsound economic grounds, but that was a fascinating combined antitrust and consumer protection approach.

I think the setbacks in those early years should not lead us to disregard the enormous value of the unfairness jurisdiction on both the consumer protection

and antitrust side. I think it allows the Commission to reach behavior on the consumer protection side that deception doesn't reach or doesn't usually reach. I think it also gets us into some important areas in concentrated industries on the antitrust side that are being unsatisfactorily treated in the federal court of jurisprudence and in private litigation.

So I think the FTC's past forays under Section 5 with unfair methods of competition were aimed at a valuable target. I'm not saying the Commission should bring more cases, but I would like to see the Commission, for example, become an intervener in the federal court Tacit collision/conscious parallelism cases and bring to bear a much more structured analysis to those cases.

Let me turn to consumer information. I think consumer information is a very important shared consumer protection and antitrust concern. The Commission, in the '70s explored a large number of market failure problems involving lack of information or market failures that could be improved by information to consumers.

The informed consumer stands at the crossroads of consumer protection and antitrust. It's an antitrust objective to have economically efficient markets based on informed consumer decisions. The consumer protection objective is to avoid consumer deception or consumer

ignorance concerning the material features of products.

When the Commission promulgated the Insulation Disclosure Rule, for example, it indicated this Rule would advance both consumer protection and competition objectives: "Market imperfections impede the process of providing such information, first, discourage consumer consideration of salient product features; second, diminish comparison shopping; third, create unwarranted competitive parity or advantage for inferior products."

Skipping probably five pages right now, my last point is that I think the Commission should, in the consumer protection area, go back to focusing on entire industries and focus on them in the way that the Bureau of Competition and the Bureau of Economics does. I think that the examples of guidelines, rule-making proceedings that I mentioned previously, some of which I think have been enormously successful, support that orientation.

Those are my four propositions, and I think I'm right in under the red "time's up" card.

(Applause.)

MR. SKITOL: Well, my intent is to stand on Cas's shoulders, as broad as they are. I want to comment on how the Hobbs vision for cross-bureau information disclosure initiatives can and should inspire some fresh thinking about particularly difficult issues -- competition policy issues

code was anti-competitive. The Ninth Circuit second-guessed the Commission's analysis, came up with a different approach, different antitrust based standards, and then the Supreme Court third-guessed the Commission's judgments by essentially accepting the dentists' justifications for what the Commission had found to be overbroad regulation.

I would respectfully suggest that the outcome might have been nicely different if, at the outset, the Commission had alleged unfair practices in addition to unfair methods of competition and had employed BCP's experience in advertising regulation under its established deception standards.

The dentists' code obviously prohibited more than deceptive kinds of claims, and the resulting over-regulation caused consumer injury of a kind meeting the Commission's definition of an unfair practice, even if not also so clearly a violation of existing antitrust law.

Looking ahead, California Dental should not inhibit enforcement efforts against any association crossing the line between desirable and undesirable kinds of self-regulation activity. BC can develop

involvement in this effort.

The second example is BC's initiative to address the patent ambushes or patent hold-ups that keep popping up in standards-setting proceedings throughout the information technology sector. This is a problem that's pretty well recognized these days. It comes out of the interaction between proliferating patents and proliferating needs for standards to enable inter-operability amongst lots of different kinds of products employing new technologies.

This evolves into situations where desired specifications implicate patents undisclosed during the standard-setting proceeding, patents that would be widely infringed in the absence of licenses from the owners. This has great potential for exclusionary effects.

The Commission's efforts to date to address this problem under its unfair methods of competition authority have been controversial. The Agency has struggled to find viable theories under which a patent holder's nondisclosure of its patent claims during the standard-setting can be found to create market power or otherwise to be sufficiently anti-competitive in conventional antitrust terms to amount to a recognized antitrust violation.

A related problem is that even when a patent is disclosed, the owner withholds meaningful information on its intended license terms until after the standard is adopted and an entire industry is locked into its use in developing compliant products. Standard setting participants thus vote to buy the patent and input without kni4st1 /hat it wi(6)s2Tbsst(dev2Tj-50dto1097 0 Td(6)Tj5.709

Court established a standard setting group's antitrust liability when anti-competitive harm occurs as a result of the group's failure to implement procedures aimed at preventing abuse of its processes. There's no reason why the same idea should not apply to any situation where a standard setting group enables patent owners to hide facts essential to informed decision making.

I'm going to move on to a third example involving digital rights management, which really encompasses a mesh of issues surrounding content protection. In our emerging all-digital world, there are sharply conflicting interests between and among content providers, hardware vendors, original equipment manufacturers and aftermarket rivals and consumers, line drawing between piracy versus consumer fair use, unlawful circumvention of IP laws versus legitimate reverse engineering, desirable protection of innovation incentives versus undesirable or excessive limitations on competition in primary or aftermarket spaces.

The relevance of BC's competition expertise is obvious, particularly since a lot of the problem lies right at the intersection between IP and competition law where the Commission has invested a lot of time and resources in recent years. But BCP's consumer protection expertise is also quite relevant, since core parts of the problem implicate issues of consumer expectations regarding affected devices and the absence of information at the point of purchase about use restrictions. Consumers are effectively getting locked into DRM solutions imposed by concerted industry actions unknown to them but adversely affecting product usage.

So most immediately the Commission could constructively provide its perspectives with input from both of the bureaus on these issues through amicus briefs in pending litigation, appearances in hearings on pending litigation, and particularly comments to the FCC in the course of its pending proceedings in this area as the American Antitrust Institute has cogently argued and urged the Commission to do.

BC could also begin close scrutiny of some of the new kinds of collaborative activity under which industry groups are creating standards and technology pools and licensing schemes for DRM solutions without

safeguards for anti-competitive abuse. BCP could also take a lead role in addressing information disclosure and adequacies.

My time is up, so if you want to know about the fourth example involving the Kodak doctrine, you'll have to wait for my paper.

(Applause.)

MR. LANDE: Good afternoon. Many of this morning's speakers talked about how consumer protection law is really about consumer choice and how a consumer choice framework is the best way to analyze consumer protection issues. I'm going to try to do the same thing for antitrust, and I'm going to talk about times when antitrust should focus explicitly and directly on consumer choice.

Even though I think we would all agree that consumer welfare considerations demand that antitrust consider such consumer choice, non-price issues as quality, variety and innovation, in theory these needs could be accommodated under a price or efficiency approach. That is, in theory a price approach could analyze conduct in terms of "quality adjusted prices."

An efficiency model could take account of, quote, "the value that consumers attach to having greater variety." This can be done in theory, but in practice,

neither of these things happen very often, arguably because the translations are extremely difficult to do.

So, usually in a price analysis the theoretical caveats or adjustments are moved to the footnotes and then forgotten about, and then the analysis proceeds along the familiar lines of cost and price. As an example, consider an example that Mary Lou Steptoe gave me years ago, the Federal Trade Commission's case against firms' jointly set restrictions concerning the advertising of bulletproof vests.

In theory we could translate any non-price harms, e.g., consumers buying less safe bulletproof vests, into price terms if we did enough mental gymnastics. But as a practical matter, in the real world, we would only pay attention, in most such cases, to the price and cost savings effects at the expense of the relatively difficult-to-quantify safety issues. Price would be in the text. Safety would be in a footnote and then, as a practical matter, it would be forgotten about.

In a case like this, wouldn't it just be better to focus on safety, the item that consumers really care about, explicitly and directly?

However, there is often a problem with doing this. The problem is that normally a market that is competitive

in price terms will also be competitive in non-price terms. This is true because competitive firms usually will meet whatever price or non-price options the consumers demand, so normally there's no difference between using a price or efficiency approach on the one hand and using the consumer choice approach on the other hand.

The consumer choice approach only deserves to be a new lodestar for antitrust if there are significant, frequently encountered areas where it demands to be used, and where its use would be superior to that of a price or efficiency model, and none where it's inferior. I think that there are three important situations where the consumer choice framework meets this test.

The first category involves conduct in markets with little or no price competition as a result of regulation, of joint ventures, or third-party payers. In

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1960s?" The answer is we wanted them to compete with one another on the basis of quality, even though prices were regulated.

How about cases involving industry-wide joint ventures? As you recall, Aspen involved what the court decided was a relevant market for antitrust purposes, and it had an industry-wide joint venture with an industry-wide lift ticket. So there was no price competition for this product.

There was, however, choice competition between the firms involved. This gave consumers the ability to choose on the basis of quality, and it also gave the two firms an incentive to compete with one another on the basis of quality. A price analysis wouldn't work very well in such a market.

Finally, how about markets involving third-party payers? Whenever a consumer's bills are paid by somebody else, they're likely to care more about quality and variety than price. If a person knows that their health insurance or car repair bills are going to be paid by their insurance companies, a price model will simply be inadequate at fully explaining their behavior.

A second category of cases where a consumer choice approach would be superior involves conduct that increases consumers' search costs or otherwise impairs

consumers' decision-making ability. This conduct tends to harm consumers not only by raising the prices to the consumers, but also by impeding their selection of products in terms of quality and variety.

There are a large number of these cases, many which have been discussed here today. Consider all of the FTC's advertising cases, like Cal Dental, and the list goes on and on and on, and also similar cases that involve collusion to raise consumer search costs, like National Society of Professional Engineers.

Efficiencies were claimed for each of the practices, and depending on the case, the efficiencies were more or less believable. Prices of the services in question, whether it was dental services, legal services, optician, engineer, architecture, whatever, probably went up. That was the whole point of the collusion after all. The prohibitions against advertising these professional services also made it difficult for consumers to choose the professional that was best for their needs, so consumer selection of a lawyer, dentist, architect, et cetera, was suboptimal on account of the collusion.

Most of these practices are evaluated under the Rule of Reason, and if we were doing a Rule of Reason analysis of these practices, we would balance the

efficiencies on the one hand against the price effects and the diminished consumer choice in terms of quality and variety on the other hand.

That balance could easily come out different if only the negative price effects were included in the trade-off. A trade-off that includes also the negative non-price effects would much more accurately reflect consumer welfare.

Finally, there's an important category of cases that involves markets in which firms compete primarily through independent product development and creativity rather than through price. These markets often involve high-tech innovation or editorial independence in the media.

Effective competition in these industries may sometimes require more independent centers of decision-making than are required to ensure price competition, so market concentration principles taken from a price context might not ensure robust competition in the respects that are actually of most interest to

independent judgment, decision-making and creativity. Suppose there were only four remaining media sources of a particular type, book publishers, TV news, magazine owners, whatever, and suppose two of them wanted to merge. Suppose we believe that three companies would be enough for effective price competition.

Would you approve of this four to three merger, or would you fear diminished consumer choice, fewer independent sources of opinion and information? If so, some large media mergers might well be evaluated differently under a consumer choice standard than a price standard.

Let me contrast what I'm saying with a very conventional merger. Suppose there were only four firms that made cookies, and they wanted to merge down to three firms. Suppose that three firms would be enough to

true for the media.

The owners of the media might have distinct preferences concerning the editorial slants of the news. Within limits they might be able to slant the content of the news coverage.

Moreover, the media owners might have unconscious biases, and even if they have the best intentions, they might not be able to supply the full range of views. While companies easily can supply all different types of cookies, it's much more difficult to hold all different types of world views.

To emphasize the point: Why don't we let every TV news network merge? That is, why not let them merge the entirety of all the network news operations into one? Would there be cost savings efficiencies? There would be tremendous cost savings efficiencies. Would there be any bad effects on prices? Well, if you're more creative than I am, you might be able to find a few minor ones. But remember that they're competing for

much better than a price or efficiency model.

Finally, what about high technology where innovation is crucial? It's virtually meaningless to try to use a price standard to evaluate the effects of a merger or a joint venture on future technology.

For mergers in the defense, pharmaceutical, computer or other high-tech sectors, to ensure the optimal level of future consumer choice we want divergent sources of attempts to maximize innovations. In fact innovation is often more important in these industries than prices of existing products.

These mergers should be evaluated explicitly and directly in terms of whether the research might need lead to new and better products, in terms of whether consumer choice will be enhanced or diminished. Prices are also important, of course, but a consumer choice approach would, quite properly, intensify our focus on products that might never be invented but for a merger.

In conclusion, under a consumer choice standard, factors like innovation, perspectives, quality and safety would be moved up from the footnotes, where they're all too often ignored, into the text where they would play a much more prominent role in the antitrust analysis.

Thank you.

(Applause.)

COMMISSIONER LEARY: I don't think I'll bother standing up, if you don't mind. Just a few quick comments here on the speeches and papers prepared.

This segment of this conference is I think critical to long-term development of law in both consumer protection and competition areas. They share a common framework that most people don't think of. The competition wing of our house focuses on distortions of the supply side. It focuses on price fixing schemes or exclusionary behavior that has the effect of increasing the price at which goods are offered. The consumer protection side of the house focuses on distortions on the demand side because they focus on false representations that convey the impression that goods are worth a great deal more than they are. As anybody who has studied Economics 101 understands, the prices offered and the quantities manufactured depend upon the interaction of supply side and demand side.

So if there's a distortion on either one of them, you get a false result, a distorted market result, and that's the best argument, by the way, for having both functions in the same house.

It's interesting that the traditional view of competition law is that competition law is economic

indeed. I think they are clearly correct that consumer responses are more active and complex than many of our competition cases assume.

Consumers are not just an undifferentiated mass of people who disappear if the prices go up 5 percent, and then a larger number who will walk out of the door if they go up 10 percent and so on. They're much, much more complicated than that.

I don't think I'm an atypical consumer, but I don't mind telling you, I will not drive a car with a foreign nameplate, period, and I don't care what Consumer Reports said. I would be embarrassed to be seen in one. I will not wear dungarees unless I'm riding a horse because I don't want to look like a superannuated hippie, and I don't care what the cost/benefit is of wearing that garment. I won't do it.

A lot of people say, "Oh, well, these things are so-called fashion exceptions to the normal rules of economics," but we live in a society where the fashion exceptions are becoming the rule, and the commodity products are the exceptions.

So we have to have a richer understanding of what economics is because consumers are much, much more complicated. It's not just consumers, it's businesses as well.

Do you remember the big excitement over B2B a few years ago? We had these gigantic conferences about what the impact of B2B is going to be because the efficiencies are overwhelming and because companies are going to be able to get all these anonymous quotations, and they're going to be able to array them and make all these efficient decisions. This is going to take over, and what are the antitrust implications?

Well, what happened to them? What happened to them? We have talked to some people. We, the Federal Trade Commission, reviewed a venture in my old industry,

right on.

Where I fall off the sled a little bit is when you start moving from that insight to a discussion of tweaking the HHI presumptions or something of that sort, because I think the problem is much, much more fundamental than that.

Let's try a thought experiment. I read in the press just recently that the woman who created Harry Potter, a welfare mother ten years ago, is now a billionaire. My guess is that the Harry Potter Enterprise -- if you apply a standard guidelines test of whether people will flee with a 5 or 10 percent price increase -- is a monopoly.

Okay. What does it mean to say that the Harry Potter Enterprise is a monopoly? Suppose hypothetically that this woman wants to diversify her investment and wants to sell out Harry Potter to Walt Disney. Is it a horizontal merger in the first place because I suspect in many respects that the Walt Disney enterprise is a monopoly under standard guidelines testing?

If it's not a horizontal merger, do we care? If it is a horizontal merger, what is the market? What is the HHI in the first place? So, that is one of the questions that you might want to be asking in your paper, before you start talking about whether we should worry

depart from practicing law, to focus on golf, tennis, gardening and cooking, and then he leaves behind this big ticking time bomb.

For example, the whole notion of identifying industries where there is market failure and then intensively regulating them is kind of interesting, if you take it in juxtaposition with what Messrs. Lande and Averitt are telling us, because how do you identify market failure? Traditionally we want to identify it by price that is well in excess of marginal costs, right? That's what Lou Engman's Line of Business inquiry was all about.

Well, the fact of the matter is when you're dealing with businesses like Harry Potter, marginal costs are totally irrelevant. When you're dealing with some of these high-tech-businesses, marginal costs are totally irrelevant. So how do we determine what is a good performing industry and a bad performing industry in the first place?

I'm not saying that there isn't some way to do it, but we have to find some new ways to do it before we undertake regulation in the Federal Trade Commission that identifies these industries and tries to tweak them.

I'm not smart enough to say that the cereal industry is performing poorly economically. I have no

idea. I think most of the stuff they sell is inedible, but that's just me. Obviously they appeal to somebody, and I'm not about to say -- with my own views on automobiles and dungarees -- that their tastes are any necessarily better or worse than mine.

I am particularly concerned as well about the suggestion that across the board, the Federal Trade Commission should determine which industries are providing sufficient information to consumers and which are not.

Cas, in your own paper you say that the problem isn't as hard as it used to be because you have E-Commerce now, and with E-Commerce, if you mandate the provision of information, it's a great deal less costly than it used to be. But the fact of the matter is because of E-Commerce, there's also a great deal more information out there than there used to be.

There is frankly a blizzard of information out there, and I have no idea how significant that

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Boy, we knew that in the automobile business. You ask people, "What is important to you in driving an automobile," and the answers you will get invariably are economy, utility and so on and so forth, and then they all go out and buy these massive SUVs. Don't fool yourself, it's not advertising that makes them buy the massive SUVs. Somehow or another, when they see them on the road, it means something to them. It's an image of power, or devil-may-care or I'm rich enough to be stupid.

I don't know, but it's something. I suspect there's a great deal more information out there about automobiles today than there used to be, and I don't know whether people are making intelligent choices or not, certainly not by my lights.

So what do I want to say in conclusion here? I think I can remember my conclusion. Look, this is an idea that we are working on. We are bringing cases now that are rooted in much, much more sophisticated motions.

I think what Susan Creighton said is an indication of some of the things that we are doing. I don't know whether those cases are going to prove out in fact or not, but the way the complaints are framed, you will see they are framed to take some of these consumer choice things in mind.

Secondly, we are overtly facing up to something that we haven't talked about today, and that is

to some very stimulating and provocative ideas, all of which deserve some consideration.

That having been said, my own reactions as a left brainer to Bob and Neil's choice approach is that I think it's very valid. I tend to agree with Commissioner that where I have the most concerns about it is trying to import it right now into merger analysis which, by definition, is one step removed as a predictive exercise, so the uncertainties associated with this choice approach I think are harder to play out.

I do, however, think it is a wonderful model and should be pushed into antitrust more on the conduct side, and I say that having brought a couple of the cases that I know Bob has considered, the Detroit Auto Dealers case and the Personal Protective Armor, the bulletproof vest case, in both of which I think as attorneys at the time we were intuiting our way into a choice approach.

We knew that something was distorting competition. It really wasn't in the first instance about price. We got over that rather shakily I think. We just knew the conduct was wrong. We were in the lucky position of being able to extract a consent so we didn't have to articulate the analysis very clearly. But I think, now speaking with a hard wired left brain, that if you tried to

work this choice approach into conduct issues like

in order to speed up the restoration of the market?

Are those kind of differentiations worth thinking about, rather than saying, "Information, yes or no?" In other words, can we identify particular kinds of information short falls as raising special competition concern?

MS. STEPTOE: I think I may have misunderstood your question, but did you put it in a merger context?

MR. AVERITT: No. I meant to put it in a non-merger context.

MS. STEPTOE: Well, I think in a conduct context where you can have a before and after, you saw perhaps what the market was like before the restraints were imposed or perhaps you have an analogous market that doesn't have the restraints from which you can make comparisons, that those sort of creative remedies are appropriate.

In fact I think in Detroit Auto Dealers, for example, we did the equivalent of affirmative action remedy. The dealers had been conspiring to limit their hours, which meant that people couldn't search for cars, and we imposed a remedy that said, "You have to be open." We tried to be creative. We didn't tell them exactly what days or how long.

We gave an overall number of hours they had to be open in the week and then left it up to the dealers

to try to work it out, unilaterally, as how best to fit in with the contours of the order.

That was a creative order. It was also a flawed order. It was a flawed order because we forgot that the total number of hours might make it prohibitively dangerous for inner-city car dealers to remain open that length of time. The order was amended when this was brought to our attention. So, I think you ought to be both creative in the original order and flexible in any adjustments as the order operates in the market.

MR. AVERITT: Mary Lou, you've been a Bureau Director. Are there sociological or institutional factors that could work to encourage or to discourage collaboration on this? Are there things that you would suggest that either you ought to consider doing or ought to consider avoiding?

MS. STEPTOE: I think my experience predates the golden age that Commissioner Leary described where BCP has become more rigorous and BC has become more flexible. So while I do remember institutional barriers, I guess I would say that it sounds like they have vanished, and there is an attempt at being a more cohesive Agency than I was there, so I'm not going to walk into that particular bog.

MR. AVERITT: Bob Skitol, what would be the role

example, I think it's appropriate for the Commission to bear the burden of proving either market power in a conventional antitrust sense or some other measure or some other indicium of substantial consumer injury, if you want to alternatively pursue the case on an unfairness theory.

people who come in on both sides who proceed from the same economic premise, so it's not an ideological question either.

They both are using statistical methods. They're both eminent. Both sides are represented by eminent advocates and economists, and they're telling you diametrically opposite things, and so ultimately, in weighing these things you have to try to apply some kind of an intuitive feeling based on your own experience or something, always with the realization that you can be wrong.

So the first thing and the final reaction I have in reading all of these papers is that they appeal to our humility. It's an appeal to realization of our own fallibility. We have to make these choices because that's what we took an oath to do, but I don't feel that I can be replaced by a computer.

It's interesting, when you talk to a whole bunch of business people in an audience, you know, they keep talking about why can't the law be more predictable and certain and all this kind of stuff, and I'll say, Talk to your CEO and ask your CEO whether he can be replaced by a computer.

Of course they get hotly indignant. Yet they have all these tools to measure and predict, all of

these economic tools, and intuitively they know a lot more about their own businesses than any outside commissioner can. They still would be furious if you suggested that this law could be reduced to a mathematical calculation.

I would say, "Well, why do you think that I can make decisions the same way?" That's not a repudiation of economics. It's just that economics is not the same as physics, and I think an awful lot of people forgot that at one period of time.

MR. AVERITT: I think that gives you the last word, and it's exactly five o'clock. I am told that the reception begins at six at the hotel, the Marriott, down on Pennsylvania Avenue. I hope to see you all there. We hope to see you all tomorrow as well.

(Time noted: 5:00 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R S

TITLE: 90TH ANNIVERSARY SYMPOSIUM

SYMPOSIUM DATE: SEPTEMBER 22, 2004

WE HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by us on the above matter before the FEDERAL TRADE COMMISSION to the best of our knowledge and belief.

DATED: OCTOBER 6, 2004

SALLY J. BOWLING

DEBRA L. MAHEUX

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE