>> Robin Thurston: Well, welcome back from lunch. I hope you all were able to find something good to eat in the area. We're back with panel four, which is titled "Which Practices, If Any, Cause Significant Harm To Consumers, And What Are Potential Solutions?" My name's Robin Thurston. I'm at attorney with the FTC. We have a great panel here to discuss this topic. To my left is Bill Brauch, who's a special assistant attorney general with the consumer-protection division of Iowa's Office of the Attorney General. Next is Jack Gillis, the director of public affairs at the Consumer Federation of America. We also have Tom Hudson, a partner at Hudson Cook. And Andy Koblenz is back from this morning, vice president and general counsel of the National Automobile Dealers Association. To his left is Ian Lyngklip, Senior member of Ian Lyngklip & Associates. And at the end of the table, by virtue of having the last name starting at the end of the alphabet, is Keith Whann, general counsel for the National Independent Automobile Dealers Association. So, this panel, the focus is gonna be on practices that cause particularly significant harm to consumers when they occur, but they might not occur that frequently or which occur primarily in particular regions or in particular types of consumers. I think that most people would agree that these sort of practices are problematic -- for example, failing to provide good title to a consumer following a car purchase. And the focus of the panel will be on what, if anything, the FTC should do to curb them, rather than whether the practices themselves are good or bad. For the most part, we'll leave the discussion of practices that are widespread in the auto industry and for which people disagree on when whether they cause consumer-protection issues for panel five. So, as the panel progresses, I'll be soliciting ideas from our panelists about particularly harmful practices, but one that I wanted to start with, which we heard a bit about in the leasing context in panel two, is spot delivery and in particular when spot deliveries turn into yo-yo financing. So when the contract isn't assigned and the consumer winds up back in the dealership and often winds up in a less favorable deal. If one of the panelists could start with discussing the harms that this causes to a consumer. Bill, go ahead.

>> Bill Brauch: Thank you very much. And just wanted to quickly note that in my role as chair of the NAG automobiles working group, we have about 36 states, plus D.C., as members of the working group meet monthly and talk about issues, and we identified issues that we wanted to bring to the attention of the FTC and its new role, and yo-yo spot delivery was number one on our

list. Not necessarily meaning that it's prevalent in the sense of being extremely common all across the country, but it's causing enough harm that the attorneys general around the country have listed it as number one as far as the harm to consumers. Obviously, if you have a situation where a consumer is trapped, where they believed they had financing, they believed that they had a deal, and they got a call that said, "Come on back, and you're gonna have to work this out with us," it's a very difficult situation, particularly if the trade in that the customer had w

>> Tom Hudson: One of the things I've learned is that a good number of us are from Mars, and some of us are from Venus, I think, so we see things completely differently. In the eyes of the consumer advocates this morning I heard this morning, they see nothing but troublesome transactions. The world I live in, I see a completely different set of transactions. And let me mention spot delivery as sort of an example of how that fits into my frame of reference. I define spot deliveries the way that Terry did this morning. Basically, a dealer engages in a transaction, and he has not finally determined who the assignee will be, and the customer drives off with the car. That is in my view a spot-delivery transaction. A dealer who is sure that he can get that customer financed will not bother to get any sort of unwind agreement from that customer. Very occasionally, there'll be a problem with a deal like that, and when that problem arises, we tell the dealer that he has just become a sales-finance company, and it's his job to hold that paper and collect it. If he doesn't have an agreement, he's dead. And then there are transactions where the dealer is pretty confident he can get the deal done, but he's not positive. And in those transactions, he and the customer agree that in the event -- the dealer will make his effort. In the event he can't get the deal done, then the deal will have to be either re-contracted, or the customer can walk away. And then there are the ones I've been listening to today and at the last roundtable, the abusive spot deliveries where something's being done to the customer that's already illegal six ways from Sunday -- misrepresentations, fraud, problems like that -- and I think what the FTC and other enforcement agencies should do with those kinds of things is enforce the existing laws that prohibit that activity.

>> Robin Thurston: Andy?

>> Andy Koblenz: Actually, I don't have a lot to add. Maybe I'll just add a little numerical quantification. There are literally millions of transactions, and there are many, many, of them are done, as Tom described, as spot deliveries, and they are not of the type that Ian has been describing or Tom Domonoske this morning described, where we're talking about affirmative misrepresentation. Tom said it three times. Customer was misled by the dealer. The dealer misled the customer. The dealer misled the customer. That is rank fraud, and fraud is illegal in

enforcement action. And we think that the laws should be enforced, and there are lots of remedies, and we hear stories all the time. I think Tom Domonoske this morning mentioned one where he brought it in. He was able to succeed in getting a significant -- I think he said he settled because of the threat of a significant number of damages. The law needs to be enforced. However, there are a large number of conditional-sale agreements that are not of that variety that bring tremendous benefit to the marketplace, and they should not be thrown into this discussion, because they're not part of it.

>> Robin Thurston: Okay, Bill. And, Bill, in addition to making the point that you had in mind, I'd like for you and subsequent panelists to comment on how frequently these abusive spot deliveries or yo-yos occur as part of the broader spot-delivery practice.

>> Bill Brauch: Obviously, we don't have numbers. It's not something the states track to that degree. We're too busy chasing bad guys to count everything to the Nth degree. But the fact that you had the NAG autos working group identifying this as the number-one issue -- and these are folks who enforce auto law, UDAP in auto situations, every day -- tells you, I think, that it's a problem that we're seeing. And we talk to thousands of consumers every year and see thousands and thousands of complaints. I just want to correct one, I think, misconception, and that is that there's always a misrepresentation at the outset. There isn't always a misrepresentation at the outset. It may be, in fact, that the dealer says something in effect of "we're pretty confident we can get you a loan," but not necessarily that they promise or say "you are approved," but then go ahead and sell the trade-in, call the police. Now we're seeing dealers charging wear and tear and mileage fees on people on the new vehicle when they bring it back in. Absolutely outrageous conduct. And for those industry folks who are on this panel who said, you know, there are some violations of law going on here, we say amen. You're right. There are, and the FTC should join us in taking action.

>> Robin Thurston: Ian. And, again, if you have data or other indicators of how frequently these practices occur, that would be great.

>> Ian Lyngklip: Let me start with that. I made an effort to try and obtain from the state of Michigan some data on what they saw as the numbers on spot delivery and many of the common consumer frauds in Michigan when they complaints are received by the attorney general. They have a special code for those. I was told repeatedly that there was no coding for this. They had no way of tracking it, and all that they did was any complaints that came in about cars they sent on to the DMV. So there was no data available. But what I can tell you is it's significant enough of a problem that it's already been a subject of an opinion letter from our state's financial regulators. It's in the dealer manual, and there's most recently been another opinion letter written. So it's going on. It's going on to the point where it's getting back to the state, and people are being harmed enough that they're complaining to the state about it. Although they have not done anything to curb it or track it officially, that's a problem. But what I wanted to say in response to the prior comments is there's a serious problem with the way that these deals are being viewed by dealerships, namely that they don't treat these deals as being done until they've gotten funding. They view these credit contracts somehow or another as conditional, and the problem here is this. There is no other transaction that I can think of, any similar moment or consequence where this can happen. I don't go down to the grocery store, buy an apple, start eating it, and then have the clerk chase me out the

that's being disclosed, and that's not what's being told to the consumer. And the problem is that these transactions, the conditional credit is such a complicated transaction, it is unlike anything that the consumers are likely to see any place else in the economy. It is absolutely fraught with the possibilities of abuse by the dealers. And, of course, when the deals go bad, that is, in fact, the abuse that they see. And some of the dealers will exercise any means possible by hook or by crook to get those cars back, and that may mean sending the repo trucks out to go get the car in the middle of the night, or it may mean having your brother-in-law who's the district attorney prosecute somebody to get it back. In some cases, yeah, dealers will step up to the plate and be finance

>> Andy Koblenz: First of all, Tom-- We -- Tom talked about the situation where there was no agreement between the two parties that made the deal conditional, and that's when he said that the finance -

>> Robin Thurston: Tom?

>> Robin Thurston: Keith?

>> Keith Whann: I don't know if there is any data with respect to this, but I do know that most of the places that would log complaints in the way we did it back in the Ohio A.G.'s Office were motor vehicles and other things -- motor-vehicle sales or service and maybe financing. So I don't know that we ever get to data, other than something that Tom has done or maybe someone like Experian that tracks this type of financing, but do I think, when I look at the spot delivery, very clearly what we're talking about here is a lack of whether it's communication, understanding to the consumer that this is, in fact, a conditional deal, and I don't know if financing hasn't been approved. I guess I'll agree with Tom on this, where the dealer would have the right to go and sell a car and

>> Ian Lyngklip: Thank you. Just in response to the idea that this is -- there's a good reason for this kind of a transaction, and really underlying that, what I heard was that this is a significant convenience to the consumers and that they're gonna choose this kind of transaction for that convenience. That is entirely predicated on the idea that the consumers are making a choice with full, truthful information -- full disclosure of truthful information. And the fact of the matter is there isn't a single one of the consumers who gets yanked back into a dealer, loses their car, has to come back and sign papers, who ever thought that they were walking back into the dealer because the true disclosures are not being made. And the disclosure that needs to be made is that, "This deal is contingent upon whether or not we can figure out a way to make enough money on this later." That's what these conditions boil down to. That is the condition that we're talking about here, not whether or not they can sell the deal to a finance company because, again, you know, this is an open, free economy. The deal can always be sold for a low enough price. You can sell a car for $10,000. Would you

maybe out of business, but addressing the cheaters, but don't throw the large universe of people

>> Jack Gillis: We begin by doing it, and I think the bottom line is, you know, with all due respect to Andy, there is a problem here. There's a very serious problem. The FTC has gathered groups of people, three successive in three different cities, and there is a serious problem here. And the FTC has the ability to step in and promulgate regulations -- promulgate regulations as simple as simply requiring that all transactions must be filed upon vehicle delivery -- period. Now, what would this mean? Would this hurt the car dealers? I don't think so. I think that what I'm hearing from Andy is these spot dealers -- spot deals may really be causing a lot of trouble for them, maybe causing them to expend a lot of time, money, and effort. So I don't think it's in anyone's best interest to preserve the right of a spot deal. What we should be focusing on is getting that transaction done quickly, efficiently, with the ability that most dealers have today to access credit records and information about the consumer. This process is much, much easier than it was two years ago, five years ago, 10 years ago. So I think that the FTC could step in. And if you do promulgate a requirement or you do enforce the requirements that are on the books now, that sends a very powerful message. You don't have to go after every single dealer. Most dealers are trying to do the right thing, and they want to do the right thing, and they hire people like Tom to make sure they do the right thing. So a little bit of enforcement action, I think, can go a long way.

>> Robin Thurston: Keith?

>> Keith Whann: Well, I'm not gonna get into whether you have authority to outlaw the practice or not. Let's assume the practice is gonna go forward, at least, for the time being. And if that's the case -- I mean, I heard, Bill, what you were saying. I don't know that it was a whole lot different than what I said, in terms of what I thought was good business practice. So, that being the case, I think, from my perspective, I'd support that because it gives us a bright-line test of what probably is

pick on the biggest dealer who's out there, but to have enforcement actions that are brought across the idea that enforcement action is needed -- I agree. I think that that's got to be part of the complement of tools that's used to address it. But most importantly, the consumers have got to have a remedy all across the board to be able to enforce these transactions. And just to respond just briefly -- you know, we see transactions -- I've litigated spot-delivery cases, and I have a friend who's got one going right now, where a car dealer was sitting on approvals. They had approval notices through the callback system saying they've been approved by a finance company, but the dealer just didn't want to do the deal, and so they called it back. I understand that most dealers don't want to be in that situation, but there are plenty who are willing to do it, and I've seen those cases. What's really going on here, at base level, with the spot deliveries -- I think the idea of consumer convenience is a straw argument to mask what's going on. They're removing consumers from the marketplace. They're not allowing consumers to choose. They're locking them into the deal so they won't go someplace else and shop for a deal from a dealer who's honest, who's willing to give them the car and to honor the transaction. Instead, you've got the dealers who want to take the cars -- be able to take the car back and play both sides of the transaction -- acting --, because there's no uniform rule. And that's what we need is a uniform rule, just simply saying, no conditional deals. The marketplace has to be able to function properly. And in order to allow consumers to freely choose the deal that they want, they've got to be able to get their disclosures, walk from dealer to dealer, and select what the best price is. And the spot-delivery idea -- the idea that you represents consumers, a plaintiff's lawyer representing consumers, and you're hearing the experience of an experienced dealership lawyer, who actually tries to help dealers comply. I think, before the FTC does anything by way of a rulemaking, they have an obligation to try to figure out

>> Andy Koblenz: Yeah, I'm not an expert in this area, but, back in Detroit, we had a panel on this, and Pete Kitzmiller, who is an expert on this area, participated in it. And we've got to be careful about the language we're using here when we say it's a big problem. There's no question buying a car and not getting title to it is a very large problem -- I mean, it's hard to think of one larger for that person, and I don't belittle it at all. The question is the frequency of this occurring, and I believe Bill used the word that it's rampant, but that -- that we haven't seen. We just came through the period of the greatest number of dealer closures that we've witnessed in this country in half a century, and yet the reported situations where this occurred were exceedingly small, and it's -- we're -- I'm not belittling the significance of the problem in the instance. I'm questioning the breadth of the problem in the marketplace, and I think Pete said that there was some reference that there were - -

of state UDAP laws and other state laws, like Iowa's Damage Disclosure Law, and there are a number of states that have those. That is a very injurious practice. It puts people in cars that may be dangerous unknowingly. It also means that people are probably paying at least double what the car is actually worth in the marketplace. And it is a practice that has been with us for quite a while.

vehicles that they -- that are going through their processes that are now getting in. So the notion that the dealers are seeking, as a group, to perpetuate the title fraud and the salvage fraud is furthest from the truth. We have been at the vanguard of attempting to promote that. There are still gaps in the NMVTIS System. The timeliness of reporting isn't where we want it. There's only -- It's only monthly. We'd like it more frequent. The completeness of the reporting isn't there. It's only current year -- model year and back four years. We -- The statute under which NMVTIS is being implemented was written before -- almost before the Internet. It was certainly before the prevalence of electronic titling and other electronic communications. So my request to the FTC in this regard would be --

the database. But this is one of those that I think the dealer community, the auction community -- everybody would support getting this simplified as much as possible and having as much disclosure of this information so that everybody knows what a brand is and we don't have issues of nondisclosure with this.

that. Yes. Are they doing it because they're out as for-profit businesses? Yes. But they want to retain those customers for life. So their economic incentives are largely aligned. That doesn't mean there aren't bad apples. That doesn't mean there aren't people who cut corners. I think the place where we disagree -- And that's why I went into a little bit of the -- of the economic interest of the dealer in the -- in the abusive spot delivery -- or the non-abusive spot-delivery context -- not the abusive one, the non-abuse spot-delivery context, because their economic interests are not aligned with the -- with the rampant fraud. I assume that Bill and Ian are seeing the problem cases. I mean, the dentist sees a lot of people who have problem with their teeth. And that -- So it doesn't surprise -- Nor am I denying that the cases that they see are there and need to be remedied. It's that they -- I think what they may be missing is the larger university, the enormous universe of satisfied, happy consumers who are getting what they want in fair transactions that are negotiated, that goes on every day of the year, and that the dealers are delivering to them, and customer satisfaction is an enormous aspect of that. So, no, I don't think that we're -- we may be talking past each other on some of the remedy issues and things like that, but I think the perspective is that there's this large, enormously large portion of the marketplace that is not getting the recognition and the value to our society and the ability to climb up that economic ladder that the vehicle transportation allows for people -- isn't being given as much attention that might be appropriate.

>> Jack Gillis: Well, I -- just in response to that, I can say from CFA's perspective -- and every year, we work with consumer agencies all around the country and consumer groups around the country. And for some reason, there is a significant problem that consumers have with buying -- --

>> Robin Thurston: I would actually like to move on a little bit and bring us back to the focus of this panel. The next panel will be another great opportunity to talk about widespread practices in industry, but I wanted to --

>> Andy Koblenz: There's a response to that, but I'll hold it.

>> Robin Thurston: I have no doubt. But I wanted to ask if any of the panelists have issues that they'd like to raise besides the two that I've suggested, being yo-yo financing and title problems -- issues, practices that cause significant harm when they occur, but that may not be industry practiced or that are not particularly widespread. Ian?

>> Ian Lyngklip: Well, I think one of the most difficult practices that I'm seeing is something that's already within the FTC's wheelhouse, which is the warranty and the misrepresentations concerning warranties. It's already governed by the Magnuson-Moss Warranty Act. And in particular, we see car dealers consistently misrepresenting, over and over again, what it is that the effect of that warranty is. It's a particularly harmful practice for them because consumers are leaving dealerships thinking that they are -- they are covered, that they've got warranties when they're buying service contracts. And the statute already has provisions for that, in that, and consumers do not have remedies and are -- those remedies are not being made available to them consistently across the board right now. It's harmful because, in my city, in Detroit, the

remedies under a plethora of federal and state laws. They have common-law fraud remedies. They have contract remedies.

>> Ian Lyngklip: In Michigan, we don't.

>> Tom Hudson: There are remedies galore for customers. And I think to say that consumers don't have remedies is just not correct.

>> Robin Thurston: I believe Andy had his tent --

>> Andy Koblenz: This was up from before.

>> Robin Thurston: Okay. Bill, go ahead.

>> Jack Gillis: Go ahead.

>> Andy Koblenz: I was -- I want to respond. I really want to respond.

>> Bill Brauch: Yeah, well... [Laughter] There are a couple of practices that were prevalent in the past and now are beginning to rear their ugly heads again, and those are outright lies to consumers that they have to purchase optional products, like credit health, credit life insurance, in order to obtain financing, which, of course, is never the case, but we're starting to see that again. And we are starting to see -- now, remember, this is not rampant practices we're talking about here. [Laughter] She's asking about harmful, but not necessarily all across the board. The other is payment packing, where you're not gonna see it in the ad because they have to disclose a higher monthly payment, but when you're talking to the dealer's representative, the salesperson is quoting prices for the vehicle which include optional products, and not telling you that. And consumers end up paying higher prices and not understanding the situation.

>> Robin Thurston: Okay. Andy and then Keith.

>> Andy Koblenz: Yeah, I just -- payment packing, Bill, as you know, is illegal in every state. Out-and-out lies are illegal in every state. There -- And there are --

>> Ian Lyngklip: Not in Michigan. [Laughter]

>> Andy Koblenz: You can lie in Michigan.

>> Bill Brauch: Hold on a minute. You guys keep saying that, but we're not talking about proposing new laws here. We're talking about problems in the marketplace, and they are there. We're not -- Yeah, it's illegal. Of course it is. The FTC wants to know what's going on that's harming consumers, and so we're telling them that.

>> Andy Koblenz: Okay. I mean, yes, lies -- you know, out-and-out lies are -- harm them, to the extent that they occur, and "to the extent" is the important part of that. The -- You know, it was described earlier -- the menu-selling point -- it was underscored by the dealer representatives up here that these are presented as optional products that you can, you know -- one comment I heard in the back of the room was, "How hard is -- isn't it easier just to say, 'No, thank you,' and leave?" When the menu is presented, you know, the menu is -- it, you know, defeats the whole concept of payment packing. And I will tell you -- and, you know, Bill might hear about it first -- I'm not gonna concede that he won't, but we have not heard this. We have not heard these concerns, but if they're there, Robin, you're asking for solutions, let's enforce the laws. We got laws against all these things. Let's enforce them.

>> Robin Thurston: Keith?

>> Keith Whann: Well, I think, as you travel the country -- and I get to do quite a bit -- and talk to dealers and even talk to consumer groups, I think what we do see is that gap. And I think the gap we see -- and probably because the people that will show up at a seminar or a meeting that I will do or Andy does or Tom will do are probably not the people who are engaging in some of the acts or practices, Ian and Bill, that you're saying.

>> Ian Lyngklip: You're probably preaching to the choir.

>> Andy Koblenz: My choir.

>> Keith Whann: I would say that that's probably the case. Now, that doesn't mean that things

>> Tom Hudson: No, it would be -- I'm sorry. It would be in front of an arbitrator. I think that -- And I draft arbitration agreements, as one of the things I do for a living. And my view is that arbitration agreements need to be as consumer-friendly as they can possibly be. The dealerships, the finance companies ought to bend over backwards to make the arbitration as fair as possible. And I think a well-drafted, fair arbitration agreement is a -- is a very, very good thing for both the consumer and the dealer.

>> Robin Thurston: All right. Ian.

>> Jack Gillis: But, just to be clear, we agree -- and I notice you didn't use "mandatory."

>> Tom Hudson: I mean mandatory.

>> Jack Gillis: Oh, okay.

>> Male Speaker: Then you don't agree. [Laughter]

>> Jack Gillis: Everything else -- Everything else was good except for the mandatory.

>> Robin Thurston: Ian, go ahead.

>> Ian Lyngklip: Just to be clear -- I mean, we know that there are lots of good dealers out there doing good work, but on the flip side of that, from the consumer's viewpoint, from Venus or Mars, whichever planet you think I'm from, the reality is that consumers -- every consumer who walks into a car dealership is scared. They're scared they're gonna be taken. There's the -- There's -- nobody who walks into the car dealership and sits across the desk from a finance manager who does 1,800 deals a month and says, "I'm going beat this guy." Nobody says that they're take advantage of this car dealer. They're worried about's gonna happen to them. And the fact of the matter is that the car dealers who do take advantage -- it's not just that they tar the industry -- it's just -- it's that they distort the marketplace. They're eliminating the ability of the consumers to

freely choose. When dealers do things like add on an undisclosed acquisition fee after advertising a specific price and then adding on -- saying, "Oh, the finance company said you have to have this," or that price then gets added on a window-etching product for another $250 to $1,200, depending on what they think that the consumer can tolerate. That kind of experi is the experience that causes consumers to worry about whether or not they're gonna be taken in the dealership, and it also penalizes the dealers who do good things, who sell uniformly, who make sure they're complying with fair lending by offering products at uniform prices to everybody who comes -- to all comers who walk in the door. Those disadvantage those dealers. And there's a place for the FTC in this. There's absolutely a place because every single one of these problems that we're talking about, including the spot-delivery problems, start with the misrepresentation, and in the case of spot deliveries, it starts with the misrepresentation of, "Congratulations. You've got -- You've been approved." Nobody signs a contract thinking that they hav

>> Male Speaker: The point I'm making is you can assign any lease or any contract as written, and they'll buy it from you, but you choose not to do it. Dealerships choose to defraud the consumer instead.

>> Andy Koblenz: [Chuckles] The dealerships do not to choose to defraud the contracts -- the -- excuse me -- to defraud the consumers. The concept of retaining recourse at the dealership would dramatically alter the pricing of the vehicles, and it would -- it would -- the consumers would not appreciate the outcome of a mandate to do that. I just have to respond to Jack -- to -- and Ian -- that the notion of -- you know, every consumer that goes in is scared of what's going to go on there -- it just ignores the vast amount of information that we have about the level of satisfaction that people have with the car-buying process. It is -- We're not in the 1970s or 1980s any longer, -- that the dealers have figured out the customer-for-life approach to their businesses. And the -- It's almost like -- and I hesitate saying this. It's almost like those polls about Congress, where people say, "I can't stand Congress, but I love my own Congressman." I'm not sure that's true anymore. But that's -- And there's -- Actually there was an organization called Automotive Retailing Today that actually did data research into this, and that's exactly what they found. They found that there was this general perception that, "Oh, the -- the dealers are -- dealers at large are," as being described by some of the other folks on the panel, "but my dealer -- the one I deal with? No, no, no. He's a really good guy." It was is overwhelmingly that. So I reject -- Are there some people? Sure. There are some people. But I just -- but reject the notion that that describes the majority -- the overwhelming majority are not described by Ian's comments.

>> Robin Thurston: Okay, I'm gonna take another question over here.

>> Female Speaker: I just have two, hopefully, brief questions. The dealers have talked about conditional sales -- in other words, that, when the car leaves the dealer -- leaves the lot on spot delivery, the dealer maintains the ability, if financing doesn't go through, to take it back. Would you agree to give the same right to the consumer, that, in other words, if they go home and sleep over it for a few days and realize they can't afford it on terms that are acceptable to them, or if they lose their job, that they likewise -- that that conditional sale goes both ways?

that you can still ask for arbitration, but that it's voluntary and not mandatory how --- how do you propose that there are remedies galore, in light of these arbitration clauses that are infecting every consumer transaction?

>> Robin Thurston: Okay. I think Keith wanted to make a point and someone else can answer that question. And then I'm afraid we have to wrap up.

>> Robin Thurston: Okay. I'm afraid I have to wrap this up. Otherwise, no one's gonna have a chance to get a drink of water or use the restroom before the next panel. But before you all go,