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Panel 2:

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Panel 5:

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P R O C E E D I N G S

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INTRODUCTION

MR. SCHMIDT: Good morning. I think we are going to try to start the program. Welcome to the FTC's Workshop on Unilateral Effects. I am Jeff Schmidt, the Director of the Bureau of Competition, and we are very glad to have you here today. We are really excited about this program. As some of you may know, this workshop is the brainchild of Chairman Majoras, and it represents the best of the FTC in trying to better understand some of the important competition policy issues that we face.

I have the chore of doing a couple housekeeping tasks here, so if you will indulge me as I go through this to make sure that I have covered the requirements. I think the -- let's see, the first thing is I have been asked to remind you that the agenda today is a full one, so that if you can try to be back in your seats by the time lunch is over with and breaks are over with, we can hopefully stay on schedule.

And I have also been asked to ask you to use the side doors instead of the center doors, for reasons that are not particularly clear to me.

Secondly, if you will turn off the ringers on your cell phones, BlackBerries, pagers, and the like, and

OPENING REMARKS

CHAIRMAN MAJORAS: Well, thank you very much, everyone. It is always good to see a robust crowd in the morning in Washington, especially on election day.

I welcome you to this workshop at the FTC. As many of you know, the FTC has found that when we are working through particular policy issues, we often find it very valuable to bring in experts from the outside who can then, in a public forum, communicate their views and help us think through the issue. Our public discussions can take whatever form or length is required for the issue.

Just last week, for example, we held a one-day round table with DOJ to explore our Joint Technical Assistance Program in the international arena. Just about a year ago this week, we had a two-day forum on the broadband access issue, which has been dubbed Net Neutrality. And then, as many of you know, over the past 18 months, we and DOJ have hosted 29 sessions of experts discussing the appropriate application of Section 2 of the Sherman Act to business conduct.

So, today, you have been good enough to join us as we gather to discuss unilateral effects analysis in

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that unilateral effects is recognized as a central antitrust concern, and that the Government has a record of success in obtaining relief in these cases.

Of course, the record is not perfect. In litigated matters, both the FTC and DOJ have suffered some losses in differentiated products cases under a unilateral effects theory. Most recently, for the FTC, in the *Whole Foods* case, the district court did not grant the preliminary injunction that the FTC sought, and before that, DOJ lost the *SunGard* and *Oracle* challenges. Even when the Government has prevailed in cases in which a unilateral effects theory of harm has been alleged, as in *Staples*, *Swedish Match*, and *Libbey*, the courts' decisions have really not expressly discussed the application of unilateral effects theory.

Now, there may, of course, be no meaningful pattern in these losses. If we are doing our jobs, we likely will lose some cases over time, as only the toughest cases result in litigation; and try as we do, we cannot determine with absolute precision on which side of the line a close case will fall according to a court. Still, we cannot shy away from the tough cases if we believe that we have the evidence to support our position that a merger is likely to be anticompetitive.

Clearly, though, if you lookif

because it was not consistent with business delineations recognized within the industry. The Government had presented testimony from numerous customers that they might prefer defendants' products over some of the alternatives, but, said the court, none testified about how they would respond in actual purchases to a post-merger SSNIP. Lack of hard, quantitative

disaster. The Government alleged a market that was shared hot-site services for customers with mainframe and midrange computer processing centers. Defendants contended that there were a lot of alternatives to these that customers could and did turn to to safeguard themselves in the event of disasters.

Both sides offered customer testimony to support their contentions, but there the court rejected the customer testimony, finding that both sides were engaging in cherry-picking sampling and that neither side's witnesses were representative of all existing and future customers. Ultimately, the court found a relevant market that was neither the narrow market that DOJ had alleged or the broader market that the defendants had alleged. In fact, the court found a market somewhere in between.

And finally, if you look at the Commission's challenge to Whole Foods' acquisition of Wild Oats, the court there rejected the contention that the relevant market was the premium natural and organic supermarket. There, the Government presented not only economic evidencea l l e g e d

covering many of the areas that we and others outside have identified as worthy of discussion. For example, has market definition, which has been such an important tool in analysis, become an end in unilateral effects cases rather than a means to determine if the merged entity will have the ability to exercise power? If so, is it because, as Professors Farrell and Shapiro argue and

unilateral effects cases, market definition and competitive effects are simply two sides of the same coin no matter how we label? Or should we, as some might argue, stick to traditional market definition and concentration calculations because, while sometimes imperfect, they provide important disciplines on legal analysis? Should our thoughts on this be influenced by the fact that a huge percentage of mergers we review have to be analyzed within only 30 days or less, necessitating that we have to have some tools to be able to find the right answer quickly? What about our evidence and how we present it? We have had judges reject customer declarations, customer testimony, parties' unvarnished statements about competition and mergers in favor of litigation declarations and economic evidence at different times, all of which, some of us believe, at least at some points, to be very important evidence in these cases.

Are we moving toward a system where fancy econometrics will win the day, much like we hear about jurors who have seen so much *CSI* and *Law & Order* on TV that they insist on fancy DNA or fingerprint evidence in order to find guilt in a case? What types of noneconomic and economic evidence are most probative in these cases, and how does our answer vary by factual

conditions, where we have dynamic versus static markets; if we have industrial products cases versus retail cases, direct to consumer?

How do we handle new economic learning when we go in to court? This is very important, because ours is not a static discipline, and we want to learn as the economics develop. So, how do we handle that from a litigation standpoint? How important are industry experts? And how can we best tell the story to a judge, especially if the market definition -- and you heard some of the ones that I mentioned in some of these cases -- are just simply not intuitive to us as consumers?

Now, later today, I am very excited that we are going to have a mock closing argument over a hypothetical ice cream merger, and as you will see from the facts there, the Government in that hypothetical case alleged that superpremium ice cream is a separate market from other types, with the defense taking the position that ice cream is ice cream. As we will see, the economics and facts are not necessarily completely in alignment with what our intuition might be. So, this panel will provide us with really an exceptional opportunity to hear how two experienced judges go about weighing the often complex and contradictory testimony

in economics, which is typically presented in an antitrust merger case.

So, with that, I

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So, with that I am going to go ahead and give a brief introduction of the panelists, and then I am going to ask them to go ahead and start their presentations.

First off, we have, all the way down at the end, Andrew Gavil. Professor Gavil teaches law at Howard University School of Law. He has been a member of the Howard faculty since 1989. Prior to joining the faculty, he practiced antitrust law and commercial litigation with law firms in Chicago and Denver. He is the lead author of *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, and is currently at work with the co-author, Professor Harry First, on *Microsoft and the Globalization of Competition Policy: A Study in Antitrust Institutions.* In 2004, he received the Warren Rosmarin Award for Excellence in Teaching and Service at the Law School and serv

neither novel, nor new. What is newer? Well, the theory has certainly been refined; it has been elaborated. There are new empirical techniques, and we will talk a little bit about that, which have clearly been aided by technology and there is increased access to data, which also, aided by technology, has been very significant. But the question, of course, on everyone's mind, and as Chairman Majoras already put it for us, is why has the contemporary theory of unilateral effects proven to be such a difficult sell in the courts?

The basic larger idea of merger to monopoly, of course, is original to the Sherman Act. Here is a quotation from Hans B. Thorelli, *Federalfrom*

theory was merger to monopoly, and the trusts themselves were combines. They were viewed as mergers to monopoly.

The 1950 amendments ushered in the non-monopolistic merger period, somewhat in response to the *Columbia Steel* case of 1948, although there are other factors as well. The Government was losing a number of these merger challenges from the twenties to the forties. Congress decided to step in. They clearly had a different set of concerns. They broadened out and altered the focus from a focus on merger to monopoly to what we might call nonmonopolistic mergers.

We might also call these the wilderness years, as the anchor, even in early thinking about merger to monopoly, was a little bit more clear than what happened in this period. There was an evolution from emphasis on "trend towards concentration," a concept which is typified by cases like *Brown Shoe*, *Von's*, and *Pabst*, and which we now teach against in casebooks, toward the structural approach, and the general concerns it raised about market shares that were obviously elevating. Here was the idea of making predictions from market structure that took form in the *Philadelphia National Bank* presumption, and, of course, was reflected in the first Merger Guidelines in 1968.

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to the degree they are relying on creating a circumstantial, predictive case for coordinated effects, they are more like the circumstantial approach to merger analysis.

I tried to give a new name -- I don't know if it will work or stick -- but unilateral effects is more akin to "predicting actual effects" based on empirical evidence, and in that sense, it really can be located in the circle with cases like *NCAA* and *Indiana Federation* and *California Dental* and *Polygram*, cases that try to, as the Chairman was talking about earlier, try to look at actual effects and market definition, market power, as flip sides of an issue.

As the court said in *NCAA* and again in *Indiana Federation*, traditional market power analysis involved defining a relevant market, calculating market shares, and predicting market power and consequence anticompetitive effects from large and durable shares. The Court has held, however, that doing so was just a surrogate for actual anticompetitive effects. When you have the actual anticompetitive effects, you shouldn't need to do those things.

The tension about that has arisen with respect to such actual effects cases is similar to the tension that exists now around unilateral effects. Concerns

about the reliability of actual effects evidence have also caused some push-back in non-merger areas. So, one productive step we could take would be to get merger analysis, instead of in its own pigeonhole, relocated in the larger picture of what is happening in antitrust.

The irony of precision -- last slide here -- why are unilateral effects cases a tough sell in court? For economists, there is the appeal of empiricism. They are very appealing. They -- based on data -- I pulled this quotation out of one of Jon Baker's articles:

"[i]f the facts support a unilateral theory, it is clear as a matter of economic logic why the particular merger would likely lead to higher prices."

This reminded me a little bit of the language in *Polygram* where the FTC talked about anticompetitive effects being "intuitively obvious" based on economic analysis. But what is the challenge for decision-makers? Why the resistance?

Well, in a sense, the models can be more complex than the traditional *PNB* presumption. This is somewhat ironic since the models were designed to yield a greater degree of precision, a greater degree of understanding, yet the models themselves are more complex. The *PNB* presumption was by comparison easy, like per se rules, like other burden-shifting devices. It did not require

a lot of understanding to say: "40 plus 20 is 60. Ooh, that's a lot!"

Empirical evidence also may be confusing when combined with traditional structural evidence. It can appear highly dependent on assumptions, and, therefore, subject to manipulation if the assumptions change. It can be a little bit more rigorous in theory than practice. Sometimes the data do not match the theory. And I think there is a larger issue, one that David Meyer talked about in a speech la 0 1 270 f* ET n 224.16 53.l(theaa

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Now, everybody keeps saying today -- and I have heard this before as well -- that the 1982 Guidelines are all about collusion, coordinated effects, as we would call it today. Hey, I was there; Larry White was there. It turns out that the Herfindahl Index, by 1982, was being published as coming right out of a Cournot model. You all remember this, economists Cowling and Waterson, and, in fact, Ordover and I were asked to write a review

in the Guidelines, and here, too, I am worried that we are losing track about which one it is that we are speaking of.

First of all, unilateral effects apply in the Guidelines to the case of "homogeneous products," commodities in the common parlance. The Guidelines call this a market in which firms are distinguished by their capacities rather than by the characteristics of their products, because they are all basically the same; hence, homogeneous products. Unilateral effects make totally good sense in a market of homogeneous products. The economics of it are very simple.

The idea is that if a firm gets bigger in a space of homogeneous products, then it has got a bigger base of capacity on which to enjoy a price rise, and so a big merger

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competitive significance, because the competitive relationships are general throughout the marketplace. That is the lead case of differentiated products under the Guidelines, and there, relevant market makes just as good sense as

source of substitution for the BMW than would be the best-selling Camry. So, here, product characteristics are discernible; they are different; people recognize them as such; and they drive the importance of different substitution relationships. So, three different kinds of unilateral effects. Today, we are really only talking about the third one, and I think it would really help to clarify that in our discussions.

When we have localized effects, we are going to have small, narrow relevant markets. You know, Bimmer-oriented relevant markets instead of all cars or all midsize cars, and what we are hearing is all judges who I guess do not drive Bimmers find it a little bit harder to understand.

A proposal I would make today -- and I am not going to wait for the question, I just want to slip it in -- the proposal is that we accept the idea that markets can be narrow where competition is localized -- bite that bullet -- and accept the idea that sometimes the best evidence for what constitutes the true, narrow relevant market is not our normal kind of intuition about, "Oh, a car is a car; a grocery store is a grocery store; a stationery story is a stationery store," but we allow ourselves, where appropriate and where the evidence is there, to deduce market definition from

evidence about competitive effects; that after we look at the *Staples/Office Depot* evidence, that where there are only two superstores instead of three, prices are higher, that teaches us that the office superstores are not in the same relevant market as your corner drugstore, which I would have thought intuitively, but the evidence proves that is not true. The evidence proves that, indeed, the relevant market is office superstores. I wouldn't have known that through other sources of evidence, but the statistics that show that are our best evidence for market definition.

Why shouldn't we allow markets to be defined using best evidence? And in cases where we have those kinds of data, that would be our best evidence. It is not that markets are irrelevant. It is just that we should be willing to test them and to prove them, sometimes using the same kind of information that we use for competitive effects, where we have such solid evidence.

It is not wrong in *Whole Foods* for the judge to be debating what the relevant market is -- all supermarkets or just organically oriented ones. That is very much the right question, and I think the judge was on the right beam in trying to figure out what the best source of persuasive evidence was. I don't know what

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dangerous way to lead our process as far as the law is concerned.

Thank you.

MR. WALES: Thank you, Professor.

We are now going to turn to Jan McDavid with her opening statement.

Jan?

MS. McDAVID: Thanks, David.

In recent years, as we have been talking about, the agencies have increasingly relied on unilateral effects theories. Other panelists, and especially the economists in the room, can tell us whether the techniques underlying these theories are appropriate and debate which theory is appropriate in a particular case. I am not an economist; I don't play one on television. I hire people like Bobby for that.

Instead, I'd like to discuss these issues from the perspective of an antitrust practitioner who has to explain them to business people who are making decisions about potential transactions and who interact with the staff of the agency about particular transactions.

Now, it has always seemed logical to me to consider whether a merger that eliminates direct competition between the merging parties substantially reduces overall competition within the meaning of

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The Division concluded that there were two kinds of skiers: There were destination skiers, like me, who get on an airplane and fly somewhere to ski, and if prices go up for us, we could go somewhere else. I could get on an airplane to Salt Lake rather than to Denver if I wanted to go skiing. And then there were what they called the front-range skiers, the folks who get in their cars somewhere in the Denver metropolitan area and drive about two-and-a-half hours to a ski area, and they concluded that that was the market in which they needed to analyze the effects of the proposed Vail-Ralston transaction. .

The competitive impact statement made it clear that the Division

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come back to -- and data on margins, the Division concluded that a price increase of a dollar per ticket was likely in the event that Vail owned Vail, Beaver Creek, and Keystone, because Keystone was the next best substitute. They also concluded that divesting A-Basin would fix this problem.

Now, the antitrust agencies' ability to engage in the type of analysis that they used in the *Vail* case or in the other cases we have been talking about has been made possible by the kinds of rich data sources that

It seems logical to me that differences in the quality of the data are very likely to lead to differences in the quality of the economic analysis that is being done and that use of data that is not reliable may lead to skewed and unreliable results.

An awful lot of the debate is also about the kinds of assumptions that are being used, and if you vary the assumptions, you vary the outcome. It is very possible, undert 0 0 1 413.0.08 Tc (va1 0 0 1 4770 0 1 463.2 0 1 26

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end up.

For that reason, I rarely try to define markets in the transactions I am working on. I always zero in, almost immediately

It is not a substitute for Vail. So why should we trust an economic model that suggests that it is.

So, I think where all of this takes me is that we have to bring some common sense to these kinds of analyses, and that is where I am concerned that the agencies are running into resistance. Some of what they've been doing appears to be gerrymandered or jury-rigged and doesn't pass the common sense test. When your judge is someone who

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effects is not a sound theory? Is it more practical in the sense that there are assumptions, intuitive problems? Are the Guidelines to blame? What do you think the problems are?

PROFESSOR GAVIL: Well, the Guidelines are a product of a long history and tradition, and again, I would say that you need to look at it in the larger context of antitrust. We have been thinking about relevant markets and market definition and market shares and assumptions that you draw from that, connections between that and the possibilities of anticompetitive effects, for a long time. So, shaking that loose is not going to be an easy process, and the evidence is going to have to be especially compelling.

I think if something does differentiate *Staples*, it is that the evidence was especially compelling. It is difficult from the outside to evaluate how compelling the evidence is in cases still pending, like *Whole Foods*, where we just don't know all of the evidence that was introduced.

And I think a second part of it is Bobby's comment that maybe we shouldn't be trying to persuade anyone to totally let go of that structural tradition. I combine that with Jan's comment -- this has been true in nonmerger cases -- when the two kinds of evidence are

pointing in the same direction, you are going to have the strongest case.

Now, that means a lot of work maybe, but when the direct and circumstantial evidence in non- merger cases is pointing towards market power, those cases are pretty hard to rebut. So, maybe there is this sort of combination of thoughts here that lead to that conclusion.

MS. McDAVID: I think one of the things about *Staples* we should remember is that although we had very complicated economic analysis by Professor Ashenfelter, there was also some really simple stuff. Prices were higher where there was one firm and prices were higher where there were two firms than they were when there were three. That was a pretty simple paradigm for even people who don't do the

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looked jury-rigged, and I think that is just part of the problem. It failed the common sense test.

MR. WALES: What about one of the -- I guess in the merger commentaries it talks about the fact that you can have both quantitative and qualitative evidence that may be probative of the closeness of substitution of the various products and, of course, the potential competitive effect.

Is it the case now that you must have quantitative evidence, despite the fact that the commentaries talk about how you can have either quantitative or qualitative information, like

hold that out as the model. We have to do it. The agency's going to do it. It is a mutually assured destruction circumstance.

PROFESSOR WILLIG: I mean, to me, the quantification, aside from our satisfaction in using professional standards as economists, but the substantive question that has to be addressed -- and this brings us back to relevant market, I think -- is suppose that we can all agree, intuitively, that B is the closest substitute for A, and A would be the sellers are threatening to merge, but that really is not the end of the story, nor is it even the end of the story to say how closely substitutable A and B are, because in many, many local or bigger markets, there is a C, D, and E lurking behind A and B.

Those of you who know Princeton, if you get off Route 1 to make a right turn to come to the campus down Washington Road, there is a little traffic circle, and on that traffic circle there is two gas stations, and they are head-to-head competitors. I mean, they are literally head to head on the traffic circle. So, I always use this in class. What if those two gas stationscit6l0 0 1 0g n BT F 1 177.12 0? Tc (cit6l0 0 Tc (-22) Tj

So, anybody who says yes never makes it to the midterm as far as I am concerned. But you know what? Half a mile down Route 1, there are five other gas stations. Now, it is true if those two gas stations merge, we would lose that head-to-head competition, but it would not be a substantial or it might not be a substantial change in the state of competition, because there is all these other gas stations just a half a mile down the road.

This is what scares me about getting rid of relevant market when it comes to localized competition among differentiated products. Half of my class will say, right away, "No, no, we have got to stop that merger," without asking what else is there right behind that pair of closest substitutes? And that is the question that the relevant market forces us to answer, to pick it up, saying, "Well, yeah, there are other sources of competition, but you know what, they are not nearly as important."

But we need some quantification to get us to the ability to conclude whether or not those other gas stations are closely enough competitive to these two that are head-on to see whether their merger will significantly tend to raise price, or whether, instead, C, D, and E will provide ample competitive discipline to

stop there from being a significant price increase because of the merger. That means some kind of quantification is necessary.

When I tell you half a mile, you know the answer, but when we are talking about cold remedies or supermarkets of different kinds, we have no ready such quantification, and now we are into a real debate that is frustrating a lot of people.

MS. McDAVIA

So, when you say change the Guidelines, ask should we change the Guidelines, well, to what end and with what consequences? I think it has become a difficult challenge for the agencies to articulate enforcement standards to two communities. They are articulating to the business community their intentions with respect to enforcement efforts, but then when they go to court, in part, given the Supreme Court's absence from mergers for so long, when they go to court, they are kind of trying to use the cases that are available, that are the best cases. Yet they have to live with the Guidelines as if it were law, as if it were their own law.

So, it is a challenging question, what to do with the Guidelines, and can you fix the problem in court by changing the Guidelines, by further developing the theories? Maybe. Coming back to something Bobby said, when those first '82 Guidelines came out with HHIs and SSNIP, you know, there was giggling in the room at the ABA meeting -- "what could this be and what court would ever do this?" And with time, that has clearly changed.

So, maybe part of the answer is that changing the Guidelines could change things, but it may not change things in the next case or it may take some time

pretty negative comments on it; other courts were willing to accept it as another proxy in the attempt to measure the closeness of substitution between the merging products.

The Merger Commentaries talk about it as merely a screen and not a safe harbor

the case -- maybe appropriately, there is no doubt about it -- but then the relevant market has to be articulated as a narrow one, and then the 35 percent threshold will be met easily.

The question is, will the court find that narrow market to be credible? And if not, maybe it shouldn't be credible. It really is a matter of judgment, and the court is weighing in from a lay point of view.

MS. McDAVID: Think back to the *Grinnell* case where the Court talked about the market definition as a red-haired, green-eyed man with the limp. I mean, is that the kind of thing you want to argue to a judge who is going to be viewing this through his or her prism, which may or may not include an economics background?

PROFESSOR WILLIG: Or maybe the judge will like to sleep in a van with the dogs and go skiing.

MS. McDAVID: Exactly.

PROFESSOR GAVIL: One thought just to add here is I think safe harbors are important. And I think that not all market definition is going to be rocket science. And the challenge is, if you have got a market definition that does require more data, that is one that is a little bit more complex, stating safe harbors can suggest a false level of certainty -- using a safe harbor that is based on a numerical threshold suggests a

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the easiest, but I do not think anyone's going to say that is all we should be looking at.

MS. McDAVID: I would go back to circumstances in which the evidence aligns, where the economic evidence is consistent with the parties' internal strategic planning documents. You can almost use their strategic planning documents as a first screen. If they particularly focus on one another, that may be an indication of next best substitutes, and, therefore, a transaction should be subject to additional analysis. But I'd use a combination of all of the evidence and be sure it points in the same direction.

PROFESSOR WILLIG: Yeah, Jan, we have both seen an awful lot of collections of business documents where a company is very fond of naming one competitor over and over again strategically and where the sum total of the competitive forces from all the others, on analysis, turns out to be every bit as important.

MS. McDAVID: I said first screen.

PROFESSOR WILLIG: Yeah.

MS. McDAVID: First screen.

PROFESSOR WILLIG: But caution to that.

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customers, evidence of recent entry, the competitive problems the particular firms face, the whole array of evidence.

PROFESSOR GAVIL: I think we have come to a point where there is something of a paradox that makes the question hard to answer. It is easy to say they need to bring the best case; the Government needs a win. It is easy to say that. And it is relatively easy, too, to say that, well, all the evidence ought to be pointing in the same direction.

Here is the reason I think it is somewhat paradoxical. The blatant merger to monopoly, like the blatant cartel, is not going to happen, presumably, very often. The cases that are going to be presented are going to be harder cases. The merging firms are going to be represented by people like Jan, who are making the best possible arguments with the best possible economists about why a particular transaction should be permitted. So, I think, in a sense, that, combined with the general skepticism of the courts about antitrust now, means there are not going to be any easy cases. It is going to be hard to choose the best case.

It's not to say that people do not still propose extreme things and that that may come along and you may get lucky and have a fish

think that we are more likely to be facing complex fact patterns, complex economics, and close calls, and it may have more to do, in terms of winning, with the luck of the draw in which judge you get and how that judge reacts to the package of evidence than all that much that the agency can do or the parties can do. Those are going to be tough cases. That is where we are in a lot of areas of antitrust.

PROFESSOR WILLIG: And, of course, don't forget that how tough the cases are is, in a way, a testament to the remaining credibility of the agencies, because the cases that would be easy do not get to court. So, the ones that are left to go to court are the really hard ones, inevitably, and that is still true, despite the somewhat checkered record of the agencies in courts lately, and that is a testament to the lasting view of this marketplace of the skills and the abilities of the agencies. So, look on the bright side.

MR. WALES: I think there has been a lot of talk lately about the general skepticism about antitrust. That skepticism is something that we feel more generally in terms of talking to judges and others.

How do we deal with that? How do we reduce that skepticism and somehow renew the interest in strong antitrust enforcement?

MS. McDAVID: It is a forensic exercise. It's got to be. And I think the bench is becoming better educated about the concepts that underlie some of this. The Antitrust Bar tries to do a good bit of that, and we do supply copies of Antitrust Law Developments.

PROFESSOR GAVIL: The only thing I would add here is, again, I think context is important. We tend to get narrowly focused on our little corner of the world in antitrust. Judges are not skeptical just about antitrust cases. Litigation has become a costly and expensive process. *Twombly*, which we think of as our antitrust case -- I am working on a symposium at Howard on the history of *Conley* and *Twombly* -- and *Conley*, in 1957, 50 years ago, was a civil rights case. The five lawyers working on the case were all African-American. They were basically trying to crack the nut of getting at intent to discriminate by a union that was complicit in employer discrimination, and in that context, at that moment in time, the court said, "lower the pleading barrier, these cases have to go forward." That became the standard that we used in all civil litigation for 50 years.

And then if you had to imagine what would be the antithesis of that case, *Twombly* was potentially the antithesis of that case -

involving potentially hundreds of millions of consumers against all of the leading telecommunications companies, and the court recoiled from *Conley* in that case.

Now, partly, that is a challenge of using the same procedural standards in every kind of case that we do, but what does that mean? It

point. One of the ironies, though, is that to the extent the agencies have fed the fires of hostility to private actions, the courts' hostility to antitrust is coming back and constraining the agencies as well.

But yes, clearly, if you look at the Supreme Court decisions of the last two terms, there is a lot of anti-private action rhetoric going on, and some of it was coming from the government agencies that were encouraging that view, and it came back to bite them in a case like *Credit Suisse*, for example.

MS. McDAVID: I think there is a good bit of truth in that. Certainly it was driving *Twombly* and *Trinko*.

MR. WALES: Okay, I'd like to thank our panel today

PANEL 2:

THE ROLE OF MARKET DEFINITION IN UNILATERAL EFFECTS ANALYSIS AND IN THE LITIGATION OF UNILATERAL EFFECTS CASES

MR. SCHMIDT: The next panel is going to focus on the role of market definition in unilateral effects analysis. I think you have already seen from the first panel that it is difficult to separate these panel discussions so that they do not overlap at all, but our focus is going to be on the requirement or the lack of requirement to prove a relevant product market and the various implications of that.

We have a terrific panel to focus on that issue with us today, and let me just take a minute to go through the introductions, and then we will start right in.

To my far left, Jon Baker. Jon is a Professor of Law at American University's Washington College of Law, where he teaches courses primarily in the areas of antitrust and economic regulation. Professor Baker is a senior consultant with CRA International. His previous experience includes being the Director of the Bureau of Economics -- we won't hold that against him -- at the Federal Trade Commission, Senior Economist -- sorry,

Mike, wherever Mike is -- Senior Economist at the President's Council of Economic Advisors, Special Assistant to the Deputy Assistant Attorney General in the Antitrust Division, and Assistant Professor at Dartmouth's School of Business Administration. As I am sure you know, Jon is co-author of an antitrust case book and past editorial chair of the *Antitrust Law Journal* and a past

American Law, *The Best Lawyers in America, 2007*. She previously served as an Attorney Advisor to the Chairman of the FTC and was a law clerk here in the District of Columbia, the District Court.

To my far right is Dan Wall, partner at Latham & Watkins. Dan is Chair of Latham's Global Antitrust and Competition Practice Group. Throughout his career, Dan has been active in the Antitrust Section of the ABA, also. Dan was a founder and served four years as editor of the

O'Melveny in February 2001 after serving three years at the FTC, as first Senior Deputy Director and then Director of the Bureau of Competition. Rich has been recognized as a Leading Lawyer in Antitrust by the *Legal Times*; named by the *Global Competition Review* as one of the best antitrust defense lawyers in the United States; and recognized as a leading antitrust practitioner by *Global Competition Review, Chambers Global, Chambers USA*, and *Super Lawyers Magazine*, and probably others. He received the Distinguished Service Award also from the FTC.

So, with that, I think we are going to try to follow the same format that the first panel used, which is to ask each of the panelists to give a short presentation, and then we will go right into questions and hopefully have a lively discussion. I think we are going to start with Jon.

PROFESSOR BAKER: Good morning, everyone. I am delighted to have been asked to be here, and I see some old friends. It is also very nice to be discussed, but for future reference, Bobby and Andy, I prefer to be discussed for my ideas, not for how I look, okay?

My assignment is to talk about -- is to be a law professor and to talk about the -- I can't help it, I will be an economist, too -- talk about the pros and

cons of using market definition in unilateral effects cases to set up the panel. The arguments neatly divide into three categories, so I am going to talk about legal arguments, economic arguments, and litigation tactic pros and cons.

So, on the legal side, we have to start with the words of the statute, of Clayton Act Section 7, which objects to acquisitions that substantially lessen competition, and now I will quote, "in any line of commerce or in any activity affecting commerce in any section of the country," and that language, that statutory language, arguably, makes proof of a market an element of the offense.

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high market share, so the Government essentially has to define a market to satisfy this element of what Judge Walker sees as part of the offense. The con here is that Judge Walker's holding in that decision is based on a clear errora

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more intuitive, like Jan suggested this morning, unless gerrymandered in its appearance. The broad market allows the competitive effects case to take primary place in telling the competitive effects story in litigation for the Government and focus attention on the way that the merger

response of an important rival, consistent with the economic theory. It would seem the Government could avoid litigation problems with defining a broad market when market shares are low, but the con is that may be illusory, because the defendant would presumably define a broad market, and so the Government may not actually avoid the problems arising from defining a broad market.

So, there you have it, an even-handed view of pros and cons of proving markets in unilateral effects cases.

MR. SCHMIDT: Thanks, Jon.

Kathy?

MS. FENTON: Thank you, Jeff.

I was asked to share some thoughts on the legal need to prove market definition in unilateral effects cases, and as Jon Baker already indicated, the reason we are having this discussion goes back to the basic language of Section 7, the requirement to show effects "in any line of commerce in any section of the country," a mandate that some -- you may call them a strict constructionist -- have identified as being the source for any obligation to prove markets as part of your affirmative showing of a Section 7 violation.

But I think the more interesting issue to focus on in this area is the fact that much of the current

debate can be directly traced to the lack of recent and

outside of Section 7, outside of the merger context, in areas involving either collusion

could go down the litany, you see judges struggling with this question of what is their obligation to formally make findings of fact and conclusions of law on the relevant market question, and they tend to engage in activities that could be characterized as a market definition exercise without necessarily acknowledging their obligation to do so. And I think the only hope I can identify for resolving this question is the possibility of further Supreme Court statements on this question.

Now, in the world post Hart-Scott-Rodino notification, that is going to be a difficult proposition, just because most mergers that are challenged by a government enforcement agency do not hold together long enough to ever reach the point of Supreme Court review, but I think there is one possible candidate on the horizon that I offer for your consideration. Itonly

But in that case, the Commission opinion dealing with a post-closing challenge to a hospital merger concluded:

"It is not necessary to define the relevant geographic

just *Marine Bancorp*. It is *Philadelphia National Bank*, it is *DuPont*, that all contain the language about defining relevant markets, as well as what I would suggest are some practical limitations imposed by the Merger Guidelines themselves and the Merger Guidelines structure, because there, the five-part organization embodied in the Guidelines has, in a sense, provided a road map for a lot of subsequent district court analysis.

You start with market definition and concentration; you consider potential adverse effects; you do an entry analysis; you consider efficiencies; you deal with failing or exiting assets. That, again, sounds like a mandate for relevant market definition, and as a result, to borrow Andy's phrase from the initial panel, it is probably a very hard sell for the courts to try and avoid or escape that exercise, and in particular, this combines with a number of other practical aspects, including judicial skepticism of economic analysis.

And I was reminded in preparing for this exercise of a fascinating quote from Ken Auletta's book, *World War 3.0*, which, of course, is on the *Microsoft* case, but he had, you might recall, conducted fairly extensive interviews as part of the process for that

book. One of the people he interviewed was Judge Hogan of the district

government perspective on trying these cases, and as you know, I am now playing on the other team, so it would really be unfair if you quote this stuff back to me when I am sitting next to a client. When I'm down here trying to convince you to go away. So, let's get that down as a rule.

What I want to talk about is how to put a case like this together. We have people who understand the law and economics better than I do. You do not need to hear that from me. So, here is my own personal view, and trying cases is an art, and everybody has a different style, but here is the way I think about it.

I was privileged, my first job out of law school, to clerk for Judge William Matthew Byrne, Junior, in Los Angeles, who passed away a year ago, who was one of the best trial lawyers in Southern California before he went on the bench. He won a lot of big cases. And was a great trial judge and was a great teacher. And I remember, when I was down there, we had this really boring patent case. I would rather watch paint dry than listen to this testimony in this chemical patent case, but that was my job and my co-clerk's.

And the trial ended, and we went back to chambers, and the judge said, "Well, "Justice West of the Pecos" says that the plaintiffs ought to win here."

I said just looked at him. He said, "By that I mean, common sense, logic, my gut sense of what is fair and

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you let this merger go through, those prices are going up. I will give them their market. I will give them that, but I am also going to prove effects to you and I do not need *Philadelphia*." And I would -- in the right case, I would take that -- I would take that step.

Those are my thoughts, and I hope these most certainly have been helpful to you, and I know it is tough to lose these cases, it is very tough, because anybody who tries cases who loses them, it is not a good thing. The key point here is that I think it is very admirable for this agency to get all these people in here and to look at what they've done and to be self-critical and try to come up with some new concepts and some ideas, and I really commend you for doing that.

I will turn it over to you, Dan.

MR. SCHMIDT: Thanks, Rich.

Dan?

MR. WALL: Good morning. Let me pull something up here.

So, thank you for the introduction, but we all really know why I am here, and it is because of *Oracle*, which Rich did mention, and that is okay, you know, he got --

MR. PARKER: I mentioned it, Dan.

MR. WALL: Yeah. You know, you have got to have

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don't think about it. Under current case law and the Guidelines, which

prediction game based upon market structure and market definition arguments, and I will probably win that most times.

The second point, you know, the Merger Guidelines are your own worst enemy about this. If you want to pursue cases in which the unilateral effects market definition is not part of the equation, amend the Guidelines. Not a suggestion. I am telling you it is an imperative, because what we do is we use the Guidelines against you to impeach you, to say to the judge, "Look, they are not even following their own Guidelines." You would do it, too, if you were in our position, and some of you will someday when you are in our positionpositij 1 0Tm n

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For The Record,

because this is a -- I mean, this is what we do if a plaintiff has a flakey market definition or if they are running from market definition. There was actually a pretty credible theory that DOJ had developed during the Hart-

going to -- you can't leave us any room to argue that you are doing something else.

My second pointyou

are actually taking a big risk if you gerrymander the market in some way to get that when, if your economics

is a very simple intuition. That is Bobby's intuition

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Technical Services case, where we were up against Max Blecher, one of the best plaintiff's lawyers in the United States, and his expert, the plaintiff's expert, is Jeffrey MacKie-Mason, and he's being put on the stand, and the first question that the plaintiff's lawyer asks his own expert is, "Dr. MacKie-Mason, isn't it true that if you ask two economists the same question, you get three answers?" He started nullifying the economic testimony, because we were coming on with Carl Shapiro and Janusz Ordover, and we had a lot to say, and he didn't want the jury to care about it, and so with his own expert, his first question is nullifying the value of the economic testimony. Well,W

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output are invariably imperfect for a variety of reasons. You know, I can't help but offer a couple responses.

First of all, it is not actually a valid criticism of Judge Walker in *Oracle*, because Professor McAfee had no data. It was not an imperfect data. He was running a market share-driven model, not a data-driven model.

But second, I'm sorry, but pervasive data problems are a reason not to rely on merger simulations. They don't -- they don't excuse it. If it's bad data, you are actually adding risk to your case, not cutting it back.

So, fourth and finally, and I really -- I say this with great sincerity, is that you have got to stop taking the amount of trial risk that you are by arguing for markets that are narrower than they have to be. If you believe in your competitive effects case, argue it within a defensible market, and by that I mean a market that is not going to get cut to ribbons.

Look, we know it is not working, okay? We all know it is not working, and thatthat

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the market.

These were just a couple of slides, I could have done a zillion of these, and I could take them from any other case, but they were just some of the slides

"I don't remember."

"Let me show you the document."

This is shooting fish in a barrel. This is so easy. Honestly, it really is. It takes very little talent to do that, because you have got the documents right in front of you, you know? I shouldn't say that, it will probably, you know, reduce the -- change the slope of my demand curve by saying that, but it is not that difficult to gather that stuff up, and you have got to anticipate that. You have got to anticipate that and plan for it and don't let me do it. And if you can bring your case by conceding me those people, do it. You take away all my good stuff. I mean, that's really what you want to do.

And that leads kind of to my sort of final point here, which is, you know, if you believe in the unilateral effects model, do it. I mean -- now, this is -- you know, this is -- this is another quote -- sorry to keep picking on Jon and Carl, but this is a positive one here. They make the point here that, "As an economic matter, unilateral effects don't turn on market definition.

firms within a broader market."

Okay, do you believe it? If you believe it, do the latter. Don't let me make

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parties. That's not terribly far off than what the Guidelines say themselves.

We were contesting factually whether that existed in the case, not to get too much into the details. The Government was saying that there was an identifiable space like that in which SAP, which is far and away the largest business applications provider, was not a good substitute for Oracle or PeopleSoft. We were contesting that. We said that that didn't exist. We were saying that factually.

And I believe that what Judge Walker was saying there -- and I know, you know, it has been interpreted -- and frankly, not unreasonably given the language he used -- to say something grander -- but what I think what he was saying is that you at least have got to demonstrate that there is that space where there is this -- some kind of dominance by the merging parties. I wouldn't -- you know, I wouldn't read it as being a whole lot more than that.

He does go on to worry about whether this is a backdoor way of creating submarkets, and that's a legitimate worry. He's not the first to raise that. A lot of people have raised that, whether unilateral effects is a backdoor way of getting into submarkets, but rather than decrying this as setting up a standard

which is impossible to meet, if I were litigating on behalf of the Government, I would argue to reconcile it with the Guidelines rather than create a conflict.

PROFESSOR BAKER: May I add something on that?

MR. SCHMIDT: Sure.

PROFESSOR BAKER: Which is -- I don't have the *Oracle* opinion in front of me. My recollection is there is another place -- a second place in the opinion where he doesn't use that localized competition language, where he says something that sounds a lot stronger about the merger to monopoly. But I have a related comment -- maybe it's a different point, but on the same general issue -- that comes up when I hear, you know, "throw out the Merger Guidelines" or "revise them dramatically" kind of questions, which is I think it would be easy to overreact here to some merger decisions that are probably, in large measure, just bad luck.

If you sort of throw out the hospital mergers, which seem to be on a different planet than the rest of the merger decisions, and you throw out *Oracle*, because that is, you know, a judge who, unlike most, was an antitrust expert who had a strong point of view before he took the case, and you think about the other cases, there really aren't that many, and they are all tough.

You know, when we took -- when I was at the FTC

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example, the internal documents describe the -- you kno Tj 1 c -0.04 7imentskn8(describe) Tj 1 0 s

win this case, guys?" And I would apply a fundamentally different analysis at that point, which is a very practical analysis, and it is one about saying s0.08 Tc (g112.78 Tr

MR. PARKER: Jeff, I think you have got to look at both the documents and the economics

it shows that there is sort of head-to-head competition going on there.

I have a pet saying that

like I said, generals like the last word. In *Cardinal Health*, I thought the best 870,

evidence.

MR. SCHMIDT: Kathy, let me throw one to you. Should the standard be any different in what we are talking about for a preliminary injunction versus a permanent injunction?

MS. FENTON: Well, I think this is another area where the existing cases are not particularly helpful, because the issue tends to be litigated in the PI context, and one of the questions that I struggled with in thinking about this is what would you do with the traditional assignments of burden of proof, burden of persuasion, in a full-blown trial on the merits if you were doing a true effects analysis and not starting with market definition as your starting point, what would be the trigger .32 T

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the equivalent of the -- the plaintiff could meet its initial burden, instead of by showing high, increasing market shares, with some evidence of -- based on diversion issues and margins or some evidence to show that these are -- there is a -- the merging partner -- one of the merging firms would lose sales to the -- a significant amount of sales to the other one now and that -- after the merger that that constraint would be lost, that kind of thing.

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over."

This is important. You can't run the economy without really -- you know, by coming in and talking about whether there's issues going to the merits or whatever. The parties come in and say, "You are going to end a multibillion transaction if you do this." And Judge Bates didn't need 90 pages to do a 13(b) analysis, and all these other -- *Staples* and all these other opinions, when you read them, they are deciding the case, period, no matter what the standard they say they are applying, and you ought to assume you are trying the case when you go in for a preliminary injunction no matter what the law is, because I think that's what somebody in black robes is going to do.

MR. WALL: I also -- I always wondered myself about whether -- what the actual value of burdens of proof are after the third day of trial, something like that, you know? Burdens of proof are important in things like summary judgment motions. They are - they are definitely important in, I think, criminal cases where you have the beyond a reasonable doubt kind of standard.

When you get into a two-week/three-week kind of trial, the judge has been so immersed 359.wc (week) Tj 1 0 07Ae6 24

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thank the panel for a terrific discussion.

(Applause.)

MR. SCHMIDT: We are going to take a lunch break until 1:15, and then we have another great panel on judicial perspectives scheduled for that time.

(Whereupon, at 12:05 p.m., a lunch recess was taken.)

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JUDGE WOOD: Mr. Bloom, aren't you assuming the answer to the most important question before us, which is whether there really is a superpremium ice cream market in an antitrust sense?

MR. BLOOM: I am, from the moment that I began calculating shares, Your Honor. And I will spend a good deal of time in my presentation explaining why superpremium ice cream is the correct relevant market based both on documents and testimonyand

through acquisition. This would result in a two-firm market in which the combined Tressel/Higbee would have a 55 percent share.

JUDGE GINSBURG: Higbee is a relatively new entrant, is it?

MR. BLOOM: Yes, it is, Your Honor. It entered approximately four years ago, and in that four-year period, it has been able to garner a roughly 16 percent share of a superpremium ice cream market.

JUDGE GINSBURG: And it stepped up from the next tier, the premium ice cream tier?

MR. BLOOM: It did. It had some advantages that others may not have. The point that I'd like to make with respect to that, Your Honor, is that there was a duopoly prior to the entry of Higbee that functioned here for a number of years. In response to that duopoly and the superb margins earned there relative to the premium ice cream segment -- superpremium ice cream sells for three times the price of ice cream in the premium market segment, there was no sufficient entry in fact, there was no material entry at all that succeeded prior to the advent of Higbee's.

JUDGE GINSBURG: And do you have information on the effect of that entry on prices in the superpremium market?

MR. BLOOM: Yes. I can tell you that Higbee Corporation itself came in at a price 5 percent below the other firms in the superpremium market, and consumers benefited directly and immediately from the availability of that price.

JUDGE GINSBURG: And it is your contention that if they were to leave, that 5 percent would re-appear?

MR. BLOOM: Certainly, Your Honor. That 5 percent, perhaps a little more or less depending on the combined firm's assessment of what its profit-maximizing price is, but assuredly, an appreciable portion, if not all of that.

JUDGE WOOD: You know, along a related line, the 2007 Ice Cream Institute *Fact Book* outlines the difference among these three levels, if you will, of ice cream: value, premium, and superpremium.

MR. BLOOM: Yes.

JUDGE WOOD: And as I look at these differences, they don't seem to be all that huge, and that's what makes me wonder what you have in the record to show that even if Higbee were acquired, you know, a new Higbee might come along and challenge the superpremium sector of this market.

MR. BLOOM: Your Honor, the question of product differentiation is one that economists tell us is

properly viewed from the point of view of consumers, not producers. I would submit to you that the relevant question in this case is, therefore, are these differences material to consumers and ought we expect some entry or repositioning that would take up the space of the lost Higbee from the point of view, again, of consumers?

Notwithstanding your assessment that the *Fact Book* doesn't suggest dramatic differences, consumers of superpremium ice cream are paying three times the price that they would pay for premium ice cream for the advantage of significantly higher butterfat content, significantly lesser injected air content, and the variety of imaginative flavors and combinations and inclusions of fruits and nuts and things that are offered in superpremium products. The difference matters greatly as measured by the relative prices consumers are willing to.

As I said, again, those prices of three times premium ice cream prevailed for several years prior to the advent of Higbee's. It seems to me to stretch credulity to suggest that if that 5 percent premium disappeared because Higbee's disappeared as an independent entity, all of a sudden, the gates would be opened, and premium forces would march in and rapidly

take up Higbee's 16 percent share.

Now, I happily acknowledge that it may be that over time, firms will fill in from the premium space up to the superpremium space. There is, for example, in the record evidence about a firm that, at a slight premium to other premium vendors is offering an, arguably, higher quality product, some improvement in the inclusions, in butterfat content, and such.

JUDGE WOOD: You are speaking of Alfred's Coffee Beans?

MR. BLOOM: I am, Your Honor, I am.

JUDGE WOOD: Okay. I wanted to ask you, since you're talking about that, you're making an assumption here that when the -- post-

analysis, as such, that was performed by Dr. Pangloss, and let me observe that it seems to be offered as a rebuttal to the empirical econometric work done by the Government's testifying expert, to which I will turn after discussing Dr. Pangloss' critical loss analysis.

I would suggest that this critical loss analysis is offered to show that the combined Tressel/Higbee would not be able to raise prices, but it shows no such thing. Dr. Pangloss states that, given the prevailing operating margin of superpremium ice cream manufacturers, a 3 percent price increase for Higbee superpremium ice cream would be defeated if Higbee's unit sales dropped 5.7 percent -- and he makes a similar finding for a different scenario, for a 5 percent scenario -- but that is correct if and only if none of the customers that switch ice creams to avoid the price increase switch to other products controlled by the combined Tressel/Higbee.

It is, as this court said in *Swedish Match*, if one is to correctly apply critical loss analysis, two factors are of particular concern: The price-cost margin and the diversion ratio, meaning the percentage of switched sales that are captured somewhere else, anywhere else, within the combined firm.

JUDGE GINSBURG: Mr. Bloom, the account you are

discriminations that you are making.

MR. BLOOM: I would suggest that the discriminations, while --

JUDGE GINSBURG: For instance, not every price change to the retailer is flowed through to the consumer.

MR. BLOOM: That is correct, Your Honor.

JUDGE GINSBURG: So, therein lies the problem.

MR. BLOOM: And that

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supermarkets that gives them an advantage, and the --

JUDGE GINSBURG: In the case of the competitors, though, they would just as soon see a price umbrella over their heads, wouldn't they?

MR. BLOOM: I think that is generally true of competitors, that they would prefer to see a price umbrella over their heads. But when we look not only at testimony in this trial, but at other pronouncements in documents of the parties, it seems pretty clear that the principal competitive interactions are within superpremium, if they are superpremium producers --

JUDGE GINSBURG: Right, but not without some effect on the next tier, on premium.

JUDGE WOOD: And I just wanted to

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JUDGE GINSBURG: Customers at which level?

MR. BLOOM: At the supermarket level.

JUDGE GINSBURG: Consumers or supermarkets?

MR. BLOOM: Retailers of products. And these are people whose interest is in the competitive market producing the lowest price for them. They have, I think

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notes this Alfred's Coffee-Beans-in-Cream is a premium brand, and the premiums are edging up toward the superpremiums

want to hear from you again, though, after we have heard from other counsel.

COMMISSIONER KOVACIC: If I could invite Rick to speak for the merging parties.

MR. LIEBESKIND: Thank you, Your Honors, and good afternoon. I'd like to make -- tick off five points that I'll come back and cover so that I can give you a preview a little bit of where I'd like to go.

First of all, I would like to talk a little bit about precedent, which except for one cite to *Brown Shoe* we didn't hear from Mr. Bloom on. I would like to talk a little bit about the fact that we are talking about a manufacturer merger, not a retailer merger, as Judge Ginsburg mentioned.

I'd like to talk a little bit about the theory of differentiated products mergers so that we understand why it does not meet the requirement that a merger may substantially lessen competition, which is the statutory standard.

I'd like to talk about the evidence of constraint from other people. And I'd like to talk a little bit, very little bit, about critical loss. So, those are the --

JUDGE WOOD: And I do think, Mr. Liebeskind, the elephant in the room for you is this enormous price

difference between the superpremium level and even the premium level, as shown by the record.

MR. LIEBESKIND: There is certainly a large price difference between them, but the question, of course, Your Honor, is whether as a result of this merger somebody will be able to exercise market power and raise price and widen that gap.

JUDGE WOOD: I understand that, and it seems to me that Higbee was almost what we maybe once had thought of as a maverick. There it was, you know, pricing 5 percent below the other premium people --

MR. LIEBESKIND: And still is.

JUDGE WOOD: -- in the post -- in the post-merger world; though with Tressel and Higbee combined into one company, that gives you a certain amount of room to get rid of that 5 percent distinction.

MR. LIEBESKIND: Well, what we know, Your Honor, from the actual documents and the actual evidence in this case is that Incline, the market leader in Mr. Bloom's purported superpremium market, prices itself at roughly 3 percent -- three times that of premiums; that Tressel prices itself at parity; and that Higbee prices itself at 5 percent below Tressel and Incline. And therefore, the question is, will the constraint on Tressel go away or be loosened as a result of this

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Higbee, Tressel can raise the price of Higbee, but not of its own -- not its own price.

JUDGE WOOD: Well, because its own price is already up at parity, and so it brings Higbee's up.

MR. LIEBESKIND: And is constrained. And is constrained. Tressel's price is constrained.

JUDGE WOOD: Well --

MR. LIEBESKIND: If Higbee can raise -- If Tressel acquires Higbee and raises the price of Tressel, that is the unilateral --

JUDGE GINSBURG: That was not the Judge's question. It raises the price of Higbee.

MR. LIEBESKIND: I misspoke, Your Honor. I beg your pardon. If Tressel acquires Higbee and raises the price of Higbee's, will the price of Higbee's goes up? That is obviously implicit in the question. I cannot deny that that is going to happen.

JUDGE WOOD: Right, and why is not that an anticompetitive unilateral effect? With Higbee as an independent company, there is at least one participant in the superpremium market that is trying to compete to a certain degree on the basis of price.

MR. LIEBESKIND: Well, as Mr. Bloom noted in response to your questioning, Your Honor, Higbee is itself a recent entrant into this market. Higbee moved

that question, Your Honor, and this is a quibble. This is -- what Mr. Bloom's analysis --

JUDGE GINSBURG: In other words, it is true, yes.

MR. LIEBESKIND: It is true, and it is worth less than 1 percent, because what Mr. Bloom's analysis and what Dr. Cassandra's analysis shows is that the diversion effect is basically 9 percent of the diversion sales, and if you multiply the critical loss times the diversion, that is 0.81 percent. . ,

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JUDGE GINSBURG: you

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sales that a hypothetical monopolist or two merged firms or whatever you are looking at needs to lose for a price increase to be unprofitable. It is not

of how much it can raise price. To the retailer, there is not a one-to-one correspondence. As is indicated in the

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Honors are familiar with, is that this analysis that's being applied here, this unilateral effects diversion analysis, to yield a post-merger price increase as a result of a merger simulation exercise, that

there somewhere.

despite the evidence of repositioning that we have seen, there

have to increase your butterfat by 1 percent and increase your price by 300 percent, and you are in the market. It can't be an entry barrier that you have to keep your -- that you can't raise your price.

JUDGE WOOD: Well, apparently there is much more to it than that. That's why I commented to your opponent that in some ways these facts indicate to me that there aren't huge differences, and yet I could say the same thing about all

JUDGE GINSBURG: Other than Higbee itself.

MR. LIEBESKIND: So, I've got two.

JUDGE GINSBURG: And that's your burden, isn't it?

MR. LIEBESKIND: My burden to show entry? I don't think so, Your Honor.

JUDGE GINSBURG: No, to show that repositioning mitigates any concern that the Government's raised.

MR. LIEBESKIND: Not under the *Baker Hughes* framework, not as I understand it, Your Honor. My understanding is it is the defense's burden to come forward with evidence. The burden of persuasion remains on the Government in all time frames. That is the statement in *Baker Hughes*. So, I would say that is not my burden other than to come forward with the evidence.

JUDGE GINSBURG: Anything else?

COMMISSIONER KOVACIC: Would the Court like to hear from Mr. Bloom again?

JUDGE GINSBURG: Sure, yes, please.

MR. BLOOM: Sure.

JUDGE GINSBURG: This is too much fun.

Mr. Bloom, could you pick up where your brother left off with respect to the burden on repositioning?

MR. BLOOM: Yes. The issue is one in which I believe the burden of coming forward has switched to the

defendants in this action. They need to come forward with enough evidence to put that issue fairly back in play. I suggest to you that they --

JUDGE WOOD: I notice you're saying very carefully to come forward. You concede that you have the burden of 1 0 02.4 Tm 0 Tc (.) Tj 1 0 0 1 312.96 602.4 TdsTj 1

begs the question of why, then, there were not other

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there's this gigantic price gap between the premiums and the superpremiums, and since 2003, when Higbee starts introducing its brand, to the present, nobody else has tried to come in, the question is, why should we think there are people out there who are walking away from these profits?

MR. BLOOM: That, Your Honor, and the utter absence in the record of any evidence that any person is planning entry, is contemplating entry, is putting together the distribution system necessary to effectuate that entry.

JUDGE GINSBURG: The last question I have on the critical loss analysis is this: I think this is your expert's position, that if more than 5.7 percent of the unit sales lost as a result of a 3 percent price increase for Higbee's superpremium were captured as Tressel's superpremium sales177.12remium

JUDGE GINSBURG: Is that part of this econometric analysis?

MR. BLOOM: It is not part of the econometric analysis except insofar as this chart's cross-elasticity of demands and explains the lack of price sensitivity --

JUDGE GINSBURG: Okay, now, if Higbee's price gets to where it's the same as Tressel's, why would anyone switch from Higbee's to Tressel's? If they are being priced out by the increase, they can go to premium. Why would they go to Tressel's superpremium?

MR. BLOOM: Let's address that question in this way: The consumers about whom we are concerned in a differentiated products market unilateral action case are those consumers here who have a preference for superpremium ice cream. That is what they are purchasing notwithstanding the great price disparity.

JUDGE WOOD: That's these young, trendy people who don't care about their weight?

MR. BLOOM: And apparently a few others, Your Honor. The question that I would pose to Your Honor is, if those consumers are willing to pay three times premium prices, and some of them have to sustain a 5 percent price increase to remain in the premium -- in the superpremium segment. Is it reasonable to expect, notwithstanding their willingness to pay three times

premium prices, that they will not choose, in large part -- and we only need, I think we said, 5.7 percent --

JUDGE GINSBURG: Yes.

MR

about a 5 percent price change, it is highly implausible to think that fewer than 5.7 percent will divert to Tressel in the event of the loss of an independent competitor.

JUDGE GINSBURG: But that is just intuitive, correct?

MR. BLOOM: I would say that it --

JUDGE GINSBURG: So, if we don't share your intuition, we have a problem.

MR. BLOOM: I am sorry, Your Honor?

JUDGE GINSBURG: If the court does not share your intuition, then what?

MR. BLOOM: I think if the court doesn't share my intuition, the court ought to look at the empirical evidence of Dr. Pangloss, which -- excuse me, of Dr. Cassandra, which looks at thousands upon thousands of transactions and calculates cross-elasticities to determine that there is a relevant market here and that consumers will be injured in that relevant market. Consistency of that information and the testimony of --

JUDGE GINSBURG: The sustainability of a price increase and of re-entry depends upon something for which there are no data.

MR. BLOOM: If you are referring to --

JUDGE GINSBURG: Namely, what will happen -- no,

is not it? In other words, no firm would pursue a pricing strategy in which actual loss exceeded critical loss.

MR. BLOOM: It is certainly not intended as a tautology, and the testimony is clear on this point. What Dr. Cassandra is saying is that her econometric study says that there will be a post-acquisition price increase in a superpremium ice cream market. That means that the actual loss will be less than the critical loss. She has answered the unanswered question in the critical loss analysis done by defendants' economist through the econometric study involving testing of supply -- excuse me, of price-demand elasticities over thousands and thousands of products, looking each transaction

JUDGE GINSBURG: of products

MR. BLOOM: Thousands of transactions. I misspoke. me.

JUDGE GINSBURG: .

COMMISSIONER KOVACIC: the panel like to hear at all further . Liebeskind?

JUDGE GINSBURG: ' think he wants to that chance.

MR. LIEBESKIND:

COMMISSIONER KOVACIC: you, Counsel.

Thanks to Michael and Rick for very helpfully going through the hypothetical with the panel. I'd like to spend the few minutes we have left posing a couple of questions about the methodological issues that lie behind the exercise.

I suspect at the time that all of us, and certainly our two judges, began teaching competition law and teaching the evaluation and assessment of market power, the starting point in the traditional framework was to use the circumstantial approach of defining a relevant market and using market shares as a basis for inferring market power. From the '92 Guidelines onward, but perhaps even earlier from *Indiana Federation of Dentists,* comes the suggestion that that is, perhaps, a second-best approach to dealing with the underlying question of market power.

I was wondering if you were going back to the classroom and teaching again, how would you reconcile or at least think about these two streams of analysis; that is, the traditional approach that relied on market shares, and to what extent has the alternative, direct approach come to complement or perhaps even would it displace in some instance the traditional framework?

JUDGE WOOD: Well, I will say a word about that. Maybe it's because I taught too long at the University

So, I think today, if you were teaching it, you would say, "Here is the ultimate question: There are a number of different means to that end. One of them is probably still going to be defining a market, but there are others that are probably better."

COMMISSIONER KOVACIC: Doug?

JUDGE GINSBURG: Well, I haven't gone back and looked at it with this question,

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that features prominently in one of Judge Wood's opinions, known well to this audience, *Toys "R" Us*. I am wondering if anyone has ever taught *Interstate Circuit* without attempting to construct the hub and spoke on the blackboard with the relevant parties and how that presentation of evidence might be a useful guide for how to make the presentation accessible.

As one of the comments on the earlier panels mentioned, Judge Hogan's subsequent reflections on *Staples* said that what really caught his attention were the documentary records. The econometrics were interesting, but that did not really cause him to turn his head.

JUDGE GINSBURG: But you have to prepare for the case where you do not have the documents, where what you have got is the econometric evidence. That is the one that -- that is the challenge, to present that case without taking things out of the mouths of the parties.

COMMISSIONER KOVACIC: Is there a methodology, just in general terms, that is likely to be more effective; that is, in thinking how to frame and present the case where that

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file a brief on our PI and the Congress stopped us?

JUDGE WOOD: Yes, an appropriations rider.

JUDGE GINSBURG: It was an appropriations rider. Before the argument in which -- remember, Bill Baxter, Professor Baxter, couldn't answer one of the questions because of the appropriations rider. Before we filed that brief, he was called to the White House, to the Oval Office, to answer the President's question of why are we doing this? What is -- somebody had gotten to the President, maybe it was Charlton Heston or something, and said, "This is a bad idea," and the President didn't say, "I will stop it." He said, "I will look into it." So, he called up and said, "Tell me what you are up to." So, Bill went over there, and this is what he did. This is 1983, maybe '82?

COMMISSIONER KOVACIC: Yes, 1983.

JUDGE GINSBURG: He said, "Mr. President, imagine that you have a record store across the street from K-Mart." Now, you all remember K-Mart, and you remember record stores? He said, "And customers come in to your record store and listen to records in the listening booths, and if they like them, they go across and buy them

hadn't been any listening booths for more than 20 years, but the President could understand that, and it was not the least bit disingenuous. It made the point correctly.

COMMISSIONER KOVACIC: When I think of those who have had perhaps the most formative role in integrating economic concepts into the development of legal principles in this area, I think of people like Judge Posner, I think of Bill Baxter, I think of Ernie Gellhorn, Phil Areeda, and Betty Bock, who as a group had such a facility for telling a narrative that brought, by use of examples, by use of logic, made the reasoning accessible. I sense for myself in the classroom and elsewhere, the challenge for the modern narrators is to do the same with high-powered quantitative techniques, especially for an audience that has been running away from mathematics since junior high school.

JUDGE GINSBURG: Well, judges, at least as much as lawyers in general, tend to be not well educated in mathematics, let alone economics. They are overwhelmingly liberal arts majors who studied history and political science, English literature, and so on, and have never -- they had to take some requisite, limited amount of math, perhaps in college, maybe not --

COMMISSIONER KOVACIC: Did I leave a copy of my college transcript here?

JUDGE GINSBURG: -- and they haven't gone back to it since or had occasion to.

Now, I mean, there is a -- I could give you an oral brief forb2 576.96 Tm - Tj 1 0 aving 220.08 m -0.07n BT 1 0 0

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to California every year to participate in the Practicing Law Institute panel out there and deliver remarks with respect to merger analysis. She's now at Kilpatrick Stockton, and she's Deputy

talked about, which is how do you prove your case in a merger case, and more specifically, in a unilateral effects case?

We will begin with a discussion of general principles. We will then move to the role of econometric and noneconometric economic evidence, a subject that was covered today. We will then move on to the role of noneconomic evidence. And then we will move to trial strategy. And then we will conclude with a discussion of weighing the different kinds of evidence.

And what we are going to do to cover those

present their case?

So, do you want to start, then, Dick, please?

MR. RAPP: Sure. And I wonder -- it's up to you, but others this morning spoke from the podium. Since your intention is to make this largely a panel discussion and to keep these fairly short, I am just happy to do it from here if that's the way you would --

COMMISSIONER ROSCH: That is fine.

MR. RAPP: Okay, if that's all right with everybody.

It seems to me that stage-setting on general principles after what we have just heard and after this morning's excellent panel :,

is about differentiated

To tie that, as background, to the subject of the panel, let me just rehearse for you, again, things that have been mentioned at length today but never listed, and that is the types of economic evidence that go along with this. They are own price and cross-price elasticity, which have been in the antitrust and merger literature since before *Brown Shoe*; diversion ratios; critical loss analysis. And I will mention about critical loss analysis, that it involves profit margins, and that profits and profit margins, even gross profit margins, where what we are trying to seek is only the incremental margin, is itself problematical. I don't think that has been mentioned, but we might dive into that at some point.

I will add merger simulation without further mention of it, and

up in this conversation, not only in its technical guise, but in the form of control over the things that tend to inform, informally, people's intuitions. That's for a start.

COMMISSIONER ROSCH: Thank you, Dick.

Susan?

MS. CREIGHTON: Sure. Thank you, Commissioner.

So, I wanted

their memos, you know, would be following the Guidelines, and there would be a first section on antitrust, sort of on market definition, but at least at the front office level, we'd be in discussions with staff from long before we saw any memos discussing the merits of the case, and during all those discussions, I can't really recall, in the back and forth, very much, if any, discussion in deciding is this a good case or not, any real discussion about market definition.

Rather, we were focused on whether we could show competitive effects; what were going to be sort of the effects of entry, repositioning, so forth. And it was really only very late in the game, at least as best I can recall, when we were getting the memos ready for the Commissioners, that we would start to seriously say, "Okay, so, what are we saying is going to be the product market? And what is going to be the geographic market?"

So, let me -- just to crystallize that, let me give one concrete example where I can recall this occurred. Some of you may recall the case, but it was one where we had data very much like that which the Commission relied upon in *Staples*, only it was even more robust, reflecting the fact that data kept by companies has gotten better in the future, since then. As a result of this data, which involved the combination of

some retail stores, it looked like we had some very clear and direct data showing that when the two merging parties had stores right next to each other, there was a very strong discounting effect, and when they were a little further away, there was less discounting, and then when they were even further away, there was less, and so on.

Now, the parties had been arguing that there was an online supplier that should be considered as part of the market, but, you know, I have to say, as part of our analysis, we were thinking, who cares, because they are universally there sort of throughout the country, and it's not making this geographic effect go away. Similarly, the parties had pointed to some other less close competitors in the space, and the data seemed to show that while those competitors acted as some kind of constraint on price, the clear price effect persisted, again, depending on how close competitors had in terms of how close their stores were.

So, we thought at that point that we had a great competitive effects case, but then when it came to the point of actually sending up the memos, we said, "Okay, so, now, is this online supplier in the market or not? Are these other retail competitors in the market?" And depending on how you defined it, if you included those

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finding ourselves trying to litigate a case which is not really the one that we investigated; or are we better off trying, again, to persuade for the need for a formal change in the Guidelines; or should the Commission be pursuing alternatives, such as Part 3 proceedings or maybe expressly advocating, as the staff did in *Evanston*, but in the district court, that it's sufficient to have direct evidence of competitive effects?

COMMISSIONER ROSCH: Well, that is a very rich discussion, Susan.

Let me throw it open now to both Connie and to Bill. When I do, however, let me just ask you three questions that are going on in my mind as I listen to you and as I listened to the judges this afternoon.

The first is, isn't it critical to know the answers to the questions that have been posed -- that is to say, what is the legal framework -- before you try and put on your case? Doesn't that pretty much determine the kind of case you are going to be putting on and how you are going to be trying to prove it? So, that is question number one.

Question number two is, I think I heard two judges, appellate judges, say that they thought that the law had evolved to the point where you could analyze a

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are unusual judges. They know antitrust law in a way that most judges do not. I am a little more old-fashioned and think that you still have to go to court and prove a relevant market even if you back into it, which I think you can do. I do not think you have to march along to the Guidelines and do the analysis, strictly in the order of the Guidelines.

You can put on your case, showing the harm, and having shown the harm, I think judges, if they are persuaded of the harm, will give you a little leeway in the product market. That was the case in the label stock case, where, quite frankly, I was very worried that the Government could not prove a relevant product market, but there was really strong evidence of anticompetitive harm.

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get the agency's articulation of enforcement principles consistent with the analytics they are doing, but you cannot simply decide you are going to do that and expect the courts and your adversary to go along.

And one final lesson from me is, you look back to the effort, the time -- and Connie will remember this -- that the agencies had to take to get the courts to consider the Merger Guidelines back in '82 and -- what, '82, '84, '92, these are just advisory; they don't mean anything. But you look at it now, the courts -- there is a body of case law where these things are taken seriously, and so if, in fact, looking more to evidence of effects, particularly in unilateral effects situations, is where you want to go, and you want the courts to go along with you, I think you have got to get the process going of changing the way the -- the analytics the agency uses and the articulation of the analytics.

COMMISSIONER

simulation studies in the courtroom?

And third, what is the probative value of critical loss analysis in the courtroom?

I think we just saw a demonstration that sometimes it doesn't work very well for court of appeals judges, but what do you think about the courtroom?

MR. RAPP: Well, let me see if I can group those together and add a point of my own to them.

I think -- and you have to apply the Mandy Rice-Davies test to what I am about to say. Anybody remember Mandy Rice-Davies? She was the one who was cross examined with the question, "Well, isn't it true that Judge Astor testified that he never slept with you?", the Profumo affair, to which her reply was, "Well, he would say that, wouldn't he?" So, the Mandy Rice"

successfully, but there are excellent, powerful examples of all of these techniques.

I am thinking of Greg Werden in the *Interstate* -- the bread-baking case. I don't remember whether that -- he actually served as a witness in that, but somewhere on the DOJ web site is a set of slides where he describes what he would have said had he testified or perhaps did, and it is effective, potent stuff.

The thing to remember about both simulation and econometric studies is that it is actually not hard to present. It is terribly difficult to cross examine, but it is not hard to present in the simplest form. In other words, what needs to be shown is the model. There needs to beof

directly in response to your question, is that the econometrics and economic studies generally that we read about in unilateral effects decisions are of

independent experts to advise them about what it all means.

COMMISSIONER ROSCH: Sue?

MS. CREIGHTON: I certainly agree with Connie's last point, because I think it is particularly difficult for judges to unpack all of the powerful assumptions that really can help drive the analysis, and so maybe when Dick said that it is difficult to cross examine, I think it is probably difficult for a judge to evaluate it for that reason as well.

One kind of economic evidence, Tom, that you didn't mention but I always found particularly powerful, and maybe because I wasn't smart enough

judges, I think were having some trouble with the economics in this case, and I was a little bit surprised by that, because I have always felt that the appellate court is a different audience from what the federal district court is, a general federal district court, but I will just throw out, did anybody have different reactions than I did to that panel?

MR. RAPP: No, but I have the urge to reply to my fellow panelists.

COMMISSIONER ROSCH:

COMMISSIONER ROSCH: The only thing I'll say about that, Dick, is that -- and I am not sure that he's right about this -- but Bill Kovacic suggested that Judge Hogan had written in a memoir of some kind that while there had been econometric studies that had been presented in *Staples*, that they were way beyond him, and that at the end of the day, he just kind of threw up his hands about it. I don't know whether that's true or not, because I have not read that memoir, but that's what Bill says.

MR. RAPP: I have strong opinions about natural experiments, but I will wait

in a better position than industry participants to

to give too little weight to the customers' experience and knowledge, even if it can't be quantified.

Now, part of the problem, I think, is that agencies have -- we haven't always done a good job of explaining the underlying market and the competitive dynamics in a way that helps the judge put the information into proper context. In that regard, I will go to Dick one more time and say that I think that natural experiments are probably a tool that we should be using more, as judgesthink

notwithstanding recent judicial decisions, is the testimony of knowledgeable customers; next is the evidence of the merging parties themselves; and finally, on discrete issues, such as the ability to enter or expand, the competitors themselves.

I think as you indicated, Commissioner, and perhaps Connie said, in my view, the economic evidence is just a quantitative tool for presenting evidence from the very same sources. So, we are just talk0 1 284.4 500.64 T'1.6 6

Not all evidence has to be scientific evidence, we recognize that, but the trouble with customer testimony and other testimony of that sort -- again, not proposing that it should be done away with or anything like that -- is cherry-picking. In other words, the imperfection of the sampling process in an advocacy -- in a setting of advocacy; selection of documents or selection of customers produces outcomes based upon the nature of the choice, and that is different from the kind of methods that are subject to the *Daubert* discipline. So, that is not meant to say no customer testimony should be allowed; it's just meant to say bear in mind that each of these things has their relative merits and demerits.

On natural experiments, all I wish to say is that natural experiments, without controls, are dangerous and misleading precisely because they appeal to intuition. The difference between a -- let us use a hypothetical natural experiment on store openings that stands by itself and says, "Here is a selection of store openings. When merging firm B opens a store premerger, prices of merging firm A's respond to that." That is an experiment that ought to be part of an equation that has a WalMart dummy in it; that has other con -- that takes account of other considerations that might realistically

affect the outcome; and that might make the intuition that comes out of the simple experiment intuitive and, at the same time, wrong. It is just an argument for rigor and care in the selection process when dealing with the kind of evidence that, like Susan, in agreement with Susan, I regard as necessary and essential to one of these cases but that ought to be subject to the kind of discipline I have described.

Thanks.

COMMISSIONER ROSCH: Okay.

Connie, let me ask you just boldly here, was Judge Ginsburg just playing with Michael Bloom when he expressed his dissatisfaction with both customer testimony and competitor testimony? Because that one came as a bolt out of the blue to me. It seemed like Michael was darned if he did and darned if he didn't. Who else is he going to put up there in terms -- if you are going to be using anything other than econometric or economic testimony, who else are you going to be relying on?

MS. ROBINSON: Well, I guess I have a slight difference with Susan on the issue of customer testimony. I think customer testimony is a necessary evil, but I think it is -- I always hated to be in trial and watch my customer be cross examined, because you

never know what comes out, and it's often bad, because they are not antitrust lawyers, and you haven't had much time to work with them, and they don't -- you know, they have a different motivation.

But their testimony can be very valuable to the extent they are really talking about objective facts, to the extent they have had a natural experiment in their life. Did they have a time when there were fewer players? What happened? Or before this company entered into the superpremium business, what was it like? So, they have a value, but I think you can't -- you have to objective understand that they have some costs with them as well.

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MR. BAER: I think, in telling a story in a trial, if you have a knowledgeable industry expert that can provide some perspective, that can be of value, but it is of value in sort of outlining the nature of the competitive interaction that goes on. At the end of the day, in order to persuade a trier of fact, I think you need both quantitative and nonquantitative evidence.

You know, we distinguish between economic and noneconomic. That may not be the right terminology given that a lot of what some of us think of as noneconomic evidence really involves evidence of pricing behavior and pricing decisions, but it is just not an econometric study, a critical loss study, that sort of stuff.

So, I think at the end of the day, all of us on the panel agree that you need to look at all kinds of evidence, but I do agree with Connie and Susan that understanding how the parties have behaved; how they've viewed their market; how they've set prices; who they've reacted to and who they haven't reacted to.

Going back a couple years, Dick Rapp in a phone call where we were talking about this made the point, which I think is right, you know, you have got to distinguish between different kinds of noneconomic evidence. I mean, some of it, the opinion of a customer

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that's the least probative witness.

Second, who are the customers? I was a little bit surprised in this trial or this appellate argument that we listened to before this panel to have some of the questions that were asked. It seemed to me that in *Heinz-Baby Food*, the agencies basically won the argument that the retailers constituted a separate set of customers from the end users, and so I would have thought that the testimony of those retailers would have been quite probative with respect to what they expected in terms of this transaction.

And then the third observation I would make -- and I will just throw this out in the form of a question -- is, are the agencies relying too much on customer testimony when those customers are not end users? More specifically, when the agencies go to customers who are wholesalers and they ask them what their views are with respect to the transaction, and those customers can pass on any price increases that they may experience, of what value is the fact that they are not opposing the transaction? One can argue that particularly if they are pricing at keystone, they'd be all for an anticompetitive merger.

Connie, do you have any views at all on any of those subjects?

MS. ROBINSON: I want to address the industry expert. When I tried cases with the Government, we didn't tend to use the industry expert. In almost every case that I saw, there was an industry expert on the other side, and as you know, oftentimes, the Government loses its merger cases. So, I took away a lesson from industry experts which said to me that judges like to hear facts from people who know the industry. Industry experts, if they are well qualified, may do that and may provide some context.

It also seemed to me it fulfilled the important lesson of repetition, you know, like when you teach a child how to play the violin, they practice the same thing over and over and over, and the more they play it, the more they learn to like it. So, if a judge hears something more than once, it may resonate, and you don't forget it as much. So, I found, you know, when I was watching industry experts on an adversarial basis, that they added value to the case.

COMMISSIONER ROSCH: Anybody else have any observations to make?

MS. CREIGHTON: Well, I guess I would agree with Connie, actually, that I do think there is a lop-sided dynamic going on where the parties have industry experts at hand, whether it's a paid expert or their own -- the

merging parties, and trying -- and when you are the plaintiff and you have to go first, it's a difficult question how to introduce the judge to the industry and the dynamics in a way that you want.

I guess at the same time, Commissioner, it is hard to find that good industry expert. So, it may be more a sort of hypothetical than real.

COMMISSIONER ROSCH: Bill, did you have anything?

MR. BAER: No.

COMMISSIONER ROSCH: Okay. Well, you are up next on trial strategy.

MR. BAER: Well, thanks. You know, I was here at the FTC when the FTC won a bunch of cases, although I was not the trial lawyer, but I thought maybe it would be

A lot of it was case selection, to make sure we had identified cases that were appropriate, that we staffed them up with a team that would be thinking about going to trial earlier than in some cases the agency had done, integrating both the Bureau of Economics' economists as well as early retention of outside experts. And I don't mean to say, by the way,

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that which we understood on a very detailed and complicated level, make it simple, make it clear, grab the trier of fact as early as you can, well before there is an opening statement.

We tended to favor -- and I still do, and I think Susan may have mentioned had -- multiple story-tellers. It may have been Connie's point, but this notion of explaining what is problematic about a particular transaction, not just through the lawyers and through briefing, but if you have an industry expert, that can help. If I had Dick Rapp to be not just the presenter of the econometric analyses he did, but, you know, he's always shown me to be somebody who is articulate and thoughtful, speaks in layman terms. If I could get him to integrate the rest of the evidence that he reviewed that formed part of his expert opinion about why this is problematic, that's just a way of reinforcing for the court that there is a lot here. And so I would do that.

There are many cases where the witnesses available to the Government are limited. In a consumer-facing transaction, you know, you can't get in, you know, Harry and Steve and Diane to -- oh, Diane's back, probably the wrong term, she would be good -- but to offer credible testimony. You know, it just doesn't

work. So, you need to be mindful of what you can do and what you can't do, but I think that notion of not just showing the judges8.6tdf* 0 g n BT 1 0 0 1 notiu688 2596 1 277.2 65

you had three superstores and the individual items were priced higher where there was only one superstore. Wonderful visuals, wonderful evidence pointing in one direction: there is going to be a price rise after this merger.

So, you have to look at the totality of what you have, and you have to look at what the negative side is. Is your economic evidence pointing in a different direction from the documentary evidence? If it is, you have to ask yourself, long and hard, should I be bringing this case? What do those company documents say? Perhaps they have, you know, a wonderfully provocative name, like "Project Goldmine," which some documents in *Whole Foods* case did, but, you know, unfortunately, when you read the judge's opinion, he read further than the name, and he found information in there that showed that if they closed one of the Wild Oats stores, two-thirds of the customers would go to other supermarkets. So, the provocative name doesn't necessarily get you anywhere if the underlying document does not point in the same direction.

Customer testimony, I have already told you my bias about that, but particularly if there is a natural experiment, that can be very helpful. I think pricing evidence in company documents for me is sort of the

single best thing if you can find it. It's powerful evidence to the court of what would happen after the fact. I don't think it exists in very many cases, and quite frankly, it would be interesting to look back at *Staples* to see what the other side argued the documents meant to see how strong that case was. I suspect there were some warts in the case that don't come up in the opinion so much, but good for them.

It is that combination of documents; testimony; and even declarations if they are not cookie-cutter declarations, if they make points that underline a key point of your case, and if the declarants are not biased. It seems like a lot of judges are kicking out declarations on the basis of bias. And so that is basically how I weigh evidence.

COMMISSIONER ROSCH: Well, let me tee up four or five specific questions now and ask the reaction of the panel.

First of all, live testimony versus declarations, what's your view?

Second, what's the role of pundits? In the *Oracle* case, Dan Wall used to walk out of the courtroom every day, stroll out to the Hanna Room, and there was just a huge press mob assembled, and he'd hold forth, usually in a very homey way, and that was thought not

calling hostile witnesses, is something maybe that the agency should think about doing more. I think it was pretty effective in *(305.76 704.16 Tj Eto Tf 1 678.72 T1 -0.06 Tc*

there who's got some credibility independent of the advocate helps.

On the pundits thing, you know, the honest truth is I think what Dan Wall did was brilliant, that you have to be mindful of the environment you are in. You know, you could overdo it. The real action is in the courtroom, but to make sure one is explaining to the people who are covering a trial what's at stake is, I think, part of the Government's obligation. I mean, there is a public interest determination, a reason to believe determination that has been made and what the hell is it? And so, you know, finding a way quietly, not necessarily even with the courtroom advocate, to make sure the press understands why the agency has taken this time, invested these resources, seems to me very important.

I think

requiring canned economic reports, that the first time you see your expert witness is when he or she is testifying on cross examination, which is not the way I think the Government wants to start its case.

I agree with Bill. I think that you need to explain what you are doing to the pundits. I know that at some of the trials I was at, we acs2 Tm 0. Tj 1 Tc (doing) Tj T

this market works, it is in bounds. There is a danger of overstepping that, and overstepping it, being out of bounds, is something that you wouldn't want your expert to -- a

what the salient points were of that cross examination?

MR. RAPP: The most effective cross examination was cross exam -- this is going to be an uneducational reply. I have to answer truthfully. It was the first time I came onto the witness stand in federal court, and I withheld cross examination very well, but I was unexpected -- I was unprepared for a question that just appealed to the -- this was not a judge, but a jury trial -- to their instincts. It was not a merger case. I was asked at the very end, "Well, you wouldn't want some" -- basically, without going into the facts, "You wouldn't want -- if you were a member of what was then a small firm, you wouldn't want somebody to do that to you." And I didn't know better than to say, "No, I wouldn't want that to happen." And that undid a lot of very effective cross examination, and I hasten to add it was a very long time ago. I'm sorry I couldn't give you a more educational answer, but that's the truth.

COMMISSIONER ROSCH: Well, sometimes those pithy questions are the best ones.

With that, I'd like to thank all the panelists, and thank you for your attention.

(Applause.)

(A brief recess was taken.)

PANEL 5:

VIRTUES AND LIMITATIONS OF

ECONOMETRIC VERSUS OTHER APPROACHES

FOR DEVELOPING ECONOMIC EVIDENCE

PROFESSOR BAYE: Welcome to the fifth and final panel of today. It has been an absolutely great session. I think this last panel will also be excellent.

As you know, this panel is on virtues and limitations of econometric versus other approaches for developing economic evidence, and that seems to imply that there are more types of economic evidence than just econometric evidence. I think oftentimes, when you listen to some people talk, they tend to use "econometric evidence" and "economic evidence" as synonyms. So, we will find out whether or not that is appropriate and to what extent there are some virtues and limitations of different types of analysis.

Before we begin, I'd just like to briefly introduce the panel. To my immediate left is Dennis Carlton. Dennis rejoined Compass Lexecon Economic Consulting after serving as Deputy Assistant Attorney General For Economic Analysis in the Antitrust Division of the U.S. Department of Justice. It was really sad to

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industrial organization, competition policy, the economics of innovation and competitive strategy. Carl served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice during 1995 and 1996. He's consulted extensively for a wide range of private clients, as well as the U.S. Department of Justice and the Federal Trade Commission, and testifies, on occasion, as an expert witness in the areas of antitrust economics, including intellectual property and patents. Probably most relevant for our panel today is the recent work that he's done with Joe Farrell that got some positive

of the Econometric Society; the Academy of Arts and Sciences; the Society for Labor Economics;

Harris, Joe co-authored the paper that actually introduced critical loss analysis to much of the conversation that we are having today.

MR. SIMONS: I take the blame.

PROFESSOR BAYE: You take the blame, excellent.

His recognitions included *Crain's New York Business* "40 Under 40" and *Chambers USA: America's Leading Business Lawyers.*

So, without further ado, I think we will begin the panel. It will be similar to the sessions that we had this morning, and I will ask each of the panelists to speak somewhere between three to five minutes, starting with Dennis.

PROFESSOR CARLTON: Okay, thank you.

Let me start out by saying that the distinction between unilateral and coordinated behavior that we hear about so often is really not the sharp one that you might think from reading the legal commentary and even some of the economic commentary or commentary by economists. It is not the sharp distinction from an economic point of view.

As practiced, unilateral effects is really a shorthand for saying that there is a differentiated product, or sometimes it is a homogenous product, with an estimated demand system usually. I postulate some

usually static game of competition, Cournot, Bertrand, make some assumption about the game, and then I do a merger simulation.

Coordinated behavior, in contrast, is usually thought of as something more complicated, people are coordinating, but in economic terms, in game theoretic terms, that means it is more of a dynamic game. But both are using the economic theory of oligopoly and game theory, and to think there is a sharp distinction could easily lead you down the wrong path.

Regardless of what type of effects you

And the real difficulty, I will just illustrate it, is that if the number of firms is determined by something other than the price, then you can see the number of firms changing, and you can then observe what happens to price. On the other hand, if the only thing that causes the change in the number of firms is price changes, then it is going to be hard to sort out what's causing what, okay?

Well, it turns out there are ways to deal with that problem. There are plenty of instances in which we have a natural experiment in which you have entry, that will occur in one part of the country, for example, and not another, that occurs for reasons wholly independent of current prices, and, therefore, you can observe what is going on. Well, that is a reduced form. That is one way to do things.

The second way to do things is structural estimation. In structural estimation, you estimate, as the name suggests, the underlying structure, and you try and piece together what is going on. You estimate a demand system, and then you postulate some competitive interaction, and you do a merger simulation.

Now, the estimate of the demand side uses typically sophisticated econometrics, and I think that that is a real gain for the profession. We have learned

a lot about how to estimate demand systems. The merger simulation really tells you how to interpret your demand estimates.

Now, the difficulty with doing merger simulation is it requires lots of assumptions. You have to assume what particular competitive rivalry is occurring. It is always a static game, because we are not that good yet as doing dynamic games econometrically. Is it a Cournot game? Is it Bertrand? What do you assume about retail competition? Is it retail competition? Is it not? Is it competition at retail, or are they passing on and earning a margin? Are there dimensions other than price that matters? Advertising? Repositioning the quality of the product? Because of all these assumptions, it can often be hard to present such an analysis in

errors in how it is used.

So, I will just summarize, these empirical methods are complements, not

it is very interesting to me that earlier today, we have heard people who do this, and the agencies say, "Well, of course, we don't really do that, following the Guidelines, because that's all screwy. We look at the competition between the merged firms, we figure out whether there are effects, and then we find a way to back into a market."

Well, that is telling us, first off, it is bad if your Guidelines don't reflect actually the way the agencies do the analysis, and it's causing problems in court, because it is a very convoluted way to

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making fun of earlier, because it actually has two or three variables in it. I might point out to him -- of course, he scurried from the room, I suspect not wanting to stick around to hear the response --

UNKNOWN SPEAKER: There is no Greek in there either, I notice.

PROFESSOR SHAPIRO: What?

UNKNOWN SPEAKER: There is no Greek in there either.

PROFESSOR SHAPIRO: No, there is no Greek. I could put Greek in.

The Herfindahl has many -- is a much more complicated formula, which is far less directly relevant anyhow, so, I mean, the notion that -- I cannot accept the notion that the agencies are incapable of going to a judge and saying we have to multiply two or three things together and subtract something, that that's the test, okay? So, if that's where we're at, it's very sad, okay?

So, basically, it would take a little longer to explain this, but the amount of -- the fraction of the sales coming at the expense of Wild Oats, that would be the diversion ratio, D. The profit margin on each unit sale at Wild Oats, that is the P minus C term. And if that is bigger than the efficiencies, we have upward

price. You know, we will talk about that if they propose one. No artificial boundaries. You don't have to explain a broad structural presumption or what it's based on or Herfindahl levels.

So, this, it seems to me, could really cut through things substantially, and as I said, it is extremely robust. We show in our paper it does not depend on the form of oligopoly conduct. If you wanted to estimate the demand system, go ahead and be my guest, but it won't matter for this test, and we're not trying to predict the magnitude of the price increase; just price pressure. So, we're proposing this as an alternative to the market definition/market concentration screen to tell whether mergers are problematic, and then there could be further

because of an inability to define the relevant market.

I agree with Dan Wall that -- just so I mention, the second-stage inquiry would be similar to what it is now. So, I agree with Dan Wall that it seems to me you need to change the Guidelines to do this, because otherwise, you will have that "gotcha," okay, but it does seem to me that it is somewhat dysfunctional now, does not reflect the actual practice, and this is very strong, solid economics. So, if you have additional evidence so you can do econometrics, that might be very useful at the second stage, but I don't want that

PROFESSOR ASHENFELTER: I am sure you did. We had a meeting on the weekend of industrial organization economists at the National Bureau, actually, and it was reminiscent in a way of the difference between this meeting and that one, and the difference is that when you are here, we are the economists, mostly. It is apparent that maybe we are not that welcome. There was a very -- a very good friend of mine sent me -- there is an underground on the internet, by the way, of economist jokes, and I am reminded of -- by the way, there was an article, if you want to send me an email I will send it to you, an article in the *Sentinel Chronicle* where the guy went off on the internet and got all these jokes about economist, and I am reminded of one which is the story of the devil taking a man down to hell, and on the way down, they pass a really beautiful woman who's in a heated discussion wit 0 1 11a7.12 Tm -0.054 Tc (dismc (a) Tj 1 0 0

the three econometricians out hunting a deer and with their weapons, and they see one, and the first econometrician raises his weapon to his shoulder and fires and misses by a meter to the left. The second one immediately raises his weapon and fires and misses by a meter to the right, at which point the third one leaps up and says, "We got him." I have heard those comments basically all day long, because precision, we really don't believe in precision that much. mak21

So, let me just make a few comments about the role of econometrics. I was the econometric guy, one amongst others, in the *Staples* case, and I have been involved in several others, including the one that was mentioned here, *Swedish Match*. The first point I'd like to make is to distinguish between -- and this is relevant for Carl's paper, too, which I have read, by the way -- actually, I lost it, did you take it back from me? -- it is a

or I read his paper, actually, I think what he has in mind is very sensible from the point of view of regulation; however, I have testified in a courtroom, as have some of the others, and I am not really sure how it would go over in the courtroom itself. So, there is a distinction, I think, that has to be made between those two. I appreciate -- I think lawyers do understand that well -- maybe economists don't understand it so well -- about whether you are really thinking about something that will be done on a day-to-day basis, whether you are just thinking about a regulatory environment as opposed to the courtroom.

Now, the courtroom, let me tell you my defining story about that. It actually changed my whole life in some ways. For years and years, I have taught judges in -- like Vaughn Walker is a student of mine, not a student like at Princeton, but a student in courses for judges. And Diane Wood was a student, and I think Doug Ginsburg, too. All of them were students. And my memory of this started in 1979. We did this starting in 1979. I had done it with a private group at George Mason and also with the Federal Judicial Center, and in my memory of it, I was struck by the following:

We were in a lovely place, and a federal judge at the time, we started talking, and -- very informally,

and he explained that he was in Princeton a lot, went to Princeton. I said, "Oh, that's nice. Why are you there so much?" He said, "Well, I am on the board of trustees." Well, that's pretty big, my boss really. I said, "You know, let me ask you a question. There has been this discussion in the press" -- and this has had a big effect on the way judges can learn some of this material, about how judges are being brainwashed by the -- whoever it may be, the Federal Judicial Center, which is actually their own agency, or somebody else. So, I couldn't resist, and I asked him, "What do you think of that, of our brainwashing?" And he said something that I will never forget. "Orley, with all due

just a simple thing. These are mergers that went through.

You can see up there, they are all from the late nineties. I bought the data from IRI. There is, of course, cereals and motor oil and various things, pancake syrup. You can see the change in the HHI that was implied by them, typically

exactly how it is constructed. There is four numbers that underlie it. There's a pre; there's a post; there's a control group pre and post, and I have to subtract all four of those numbers. I could show that to you, and

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mean, more or less, you know, like a Kellogg MBA would have written them. What do you do when a competitor comes in? And, you know, make sure 30 days in advance to let everybody know to lower prices, and -- so, this was all kind of out there in the

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something that the earlier panel said, which is that the trier of fact is invariably a federal judge, has very little economics background, probably maybe a little more antitrust, but maybe not much, and so what is that judge going to do during the trial? The judge is going to think, reason the way the judge normally thinks, the way most of us in this room normally think, which is based on experience. You extrapolate. That's what people tend to do.

So, what the judge is going to do to extrapolate based on experience in that courtroom. What does that judge see? So, that's why you have to have this overall construct. You have to tell the judge, "Here's our theory." And you have to tell the judge, "This evidence is relevant, this evidence is not relevant, here's why." And then, "Here's the evidence." And then the judge hears it, sees it, and knows exactly where to put it in the construct, right? That is how people remember things. And if you haven't spent time with your economist during your investigation, then you do not have a really good construct in all likelihood.

One other point I'd like to make about the economists as it relates to the trial is that when you're the prosecutor, at least when I was a prosecutor, the thing I wanted to know really badly, before the

they were an advance because it was a complete, integrated whole. They were geared specifically to evaluating the possibility of mergers causing tacit collusion.

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available, and I think he highlighted one of the tensions that exists between many of the new Ph.D. students who are very interested in structural estimation versus kind of where we are in

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deviating too much.

Having said that, if the other quantitative techniques show that there is an effect, I would say, "Listen, Judge, there's an effect here. One way to think about it is the market exists, but don't, you know, get hung up on sharp dividing lines between what's in and out of a market, and don't let that deter you from understanding the economic forces that my analysis is revealing."

PROFESSOR SHAPIRO: If I could add a comment on that, too, the question you raised, Michael. The fact is these mixed structural models are a lot of fun for the econometricians and exciting methodologically, but they're pretty fragile, and I don't think they have a very good record. I think it is the Peters paper that you are referring to.

PROFESSOR CARLTON: Yeah, Peters.

PROFESSOR SHAPIRO: Which looks at the airline mergers and --

PROFESSOR CARLTON: He's at the Department of Justice.

PROFESSOR SHAPIRO: Is he? Okay. But even holding aside and comparing their predictions versus what actually happened, we just know that they are finicky, these models, and as Dennis said before,

there's already this assumption of static model. Well, where did that come from? You know, there's all these assumptions, the functional forms and they require a lot of data, and so I just -- and it seems very -- extremely nontransparent. I just don't see how judges are going to ever put much weight on that. I don't -- not for -- we are nowhere near there, and I don't see why they should.

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whether or not they'll agree about what they think is the best way to estimate them. And

to do, and that is consistent." So, I think you want to have a full range of economic tools in your testimony.

PROFESSOR CARLTON: Could I just say -- follow up really on two points Orley raised?

You know, I agree with him that, you know, what Carl is doing, you need cross-elasticity, so it is a kind of simulation, but I think a more fundamental point, even when you use market shares, that is a simulation. So, when a judge adds these numbers together and says, "Oh, now I am going to use what they say in the Merger Guidelines to estimate, you know, if it is a price change I should be worried about," that's a simple simulation model. So, the question isn't whether you are going to have a simulation or a predictive model. You do. It is only how simplistic you want it. And the market share is real simplistic, and then you can get increasingly sophisticated.

The second point is really perhaps not so much aimed at the attorneys in the room as at the economists in the room, and that has to do with what do economists know about mergers after they've occurred? And when I was on the Antitrust Modernization Commission, Hew Pate asked a very good question. He says, "How do we know we are doing a good job?" And we chose not to study that question. But this summer, when I was at the -- you

know, in the Department of Justice, I decided I'd write a memo, a one-page memo, to Tom Barnett about how to answer that question, and my instinct was to use retrospective mergers, much like Orley was

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to try to get rid of the ones that are going to be anticompetitive. There is lots of others that are not. And the -- I think the best test for is that bound. Now, if, for example, the data we have for the nineties, if, for example, that bound has

PROFESSOR CARLTON: -- but the point I was making is the information you get from retrospective merger studies would be greatly improved if you could compare it to the predictions at the time.

PROFESSOR ASHENFELTER: I completely agree with that. That would be fabulous.

PROFESSOR CARLTON: The other point is that if

was describing, I

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cases say.

PROFESSOR SHAPIRO: Well, that's different.

PROFESSOR CARLTON: I think you have to ask who's answering the question whether you need a market definition. I think if economists do a study, most economists would say, "If I know there are competitive effects, if I can show you that prices go up, and I am convinced of that, that ends the inquiry." That is precisely the question.

So, the only issue is the decision-maker, who is not maybe an economist, is going to have to evaluate economic evidence, and if the economic experts don't, you know, for and against the merger do not unanimously agree, yes, there are competitive effects and prices going up from this merger, then the judge -- and obviously that won't be the case -- the judge is going to have to decide, "Who do I believe? One economist says there are no competitive effects; the other one says there are competitive effects."

Now, maybe he can weigh those, but the question is, what else can he look at? He can look at other evidence, but I think he -- and I think he will be compelled by the cases to ask, is there some market that would -- if I do a market definition, would give me an inkling as to being an additional piece of information

that might help me? Now, in many cases, I agree with Carl, it is a completely circular exercise for the economist if he knows there are competitive effects, but for someone who doesn't

market definition at the end of the day. And the other alternative is, to go to Congress, but who knows what happens there?

PROFESSOR BAYE: What about the first part of the question? That is, is econometric evidence sufficient to prove a case or is there other economic evidence that one would need to present?

MR. SIMONS: With the most brilliant economist imaginable with the most fortunate set of data imaginable, it's just hard for me to believe that you could survive with just that, and I think you have really got to have a full picture.

PROFESSOR SHAPIRO: Well, you know, we heard earlier that, you know, eventually you have to tell a story and convince a judge that the effects will be there. So, I guess the -- kind of what I am picking up is if you do that, then from what the lawyers are telling me, then you would be foolish not to then backfill a market that is consistent with that, which seems to -- I think to the economists to be kind of a pointless exercise, but we are checking off a legal box, and then I think the question is whether Dan Wall and his folks will be able to throw up enough smoke around that and say, "Are you kidding? This stuff that is outside the market 0 1 398.88 32undaround

not true." He cross examines the witnesses. You get all that junk getting brought in, and I guess you are telling me we can't avoid it. It seems like a shame to me, but -- and effectively you are leveraging the effects to define the market to try to check that box.

PROFESSOR ASHENFELTER: There is another point I'd like to make, especially after listening this morning to these other discussions. The value of formal econometric evidence is -- even if we can disagree about its interpretation -- is it's not just my opinion. The power of this is very, very important. You see it every day in medicine. You may have seen that the study of diabetics, maybe there is someone in the room that's been alarmed by this, that worked hard to get their blood sugar down is killing them. They stopped the study part way through. These are randomized trials. It is the gold standard way of doing it.

There is -- everything in medicine says bringing down your blood sugar is a good thing. This is a complete shock to everybody. So, you could have found every doctor who would be saying the more you can do to pound that sugar down, the better, and you would have been killing yourself. We have seen lots of examples in medicine and even in economics occasionally where some powerful facts that just come about because of an

accident almost, not an experiment, let us get that new information.

I think what always bothers me about, you know, is this in this market or is this in this market or, you know, I think this car is like -- I like this kind of car a lot and it would be a

like 75 percent. It wasn't being stated expressly, but when you peeled away the layers, it was there. The economics helps you get all those assumptions on the table up front. In fact, if you went back and looked at the NAAG Merger Guidelines, they say the same thing. You have to have I think 50 or 75 percent of customers view two products as substitutes for those products to be in the same market.

PROFESSOR ASHENFELTER: Carl's diagnosis -- method here, by the way, does get around that. I mean, you notice how the margin makes a huge difference as to whether -- I mean, that's a simple intuition, right? A little bit of diversion with huge margins is worth a lot, but it is kind of hard to explain that without having, as you say, something that can -- I think it can be explained in words to people, and if you can back it up, it's fine, but I only mention it because the anecdote -- I appreciate you're trying to -- you're trying to find a way to explain something to people that they can't otherwise get their hands around, and I appreciate that.

PROFESSOR CARLTON: You know, there is another issue, and that has to do with what is the proper way to present expert testimony and is our court system geared for that? It is a slightly different topic, but there

are other forums in which, when you have opposing experts, what the court tries to do is hone down between the two experts and see what is the consequence for their differences, and when it's just opinion, as Orley was saying, that's hard to distinguish, you know, what is the scientific basis for the difference?

When they are usingthe

would you answer that question?"

It turns out to be a more -- a very effective technique of reining in what experts can say. But probably the most unusual experience or -- positive experience I had along those lines was I was in an arbitration, actually, Orley was in the same arbitration, in which the arbitrator was an econometrician, Dan McFadden. Orley and I were on the same side, though, representing different

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

DOCKET/FILE NUMBER: P073901

CASE TITLE: UNILATERAL EFFECTS WORKSHOP

DATE: FEBRUARY 12, 2008

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on thet r a n s c