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<sup>1</sup>The views stated here are my own and do not necessarily reflect the views of the  
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about how antitrust will be applied that have been circulating since the financial crisis exploded on the scene last Fall. I will explain why I would suggest that antitrust enforcement is part of the solution to the economic crisis, rather than the problem, and provide some specific examples as to how it might apply to mergers, single firm conduct, and cartels. Finally, I will also discuss how the consumer protection aspect of our mission may be impacted by the financial crisis.

### I. Economic Theory

One thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead. Antitrust enforcement principles over the last forty-plus years have been heavily influenced by this school of economic theory, which has its origins in, among others, Friedrich von Hayek's and

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<sup>2</sup> Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* (1978).

antitrust laws were irrational and actually hurt consumers. He also argued that consumers were often beneficiaries of corporate mergers. Chicago School theory was first fully embraced by the Supreme Court of course in the 1977 *Sylvania* opinion,<sup>3</sup> where the Supreme Court abandoned reliance on the rule of *per se* illegality for non-price vertical restraints and instead opted for the rule of reason.

Evidence of Chicago School economics is still evident in the FTC's website, where there are repeated references to "faith in the market." For example, comments the FTC made to the OECD roundtable on the interface of competition and consumer policies in 2003 stated that, "[o]ur faith in the market is firmly grounded in the principle that free enterprise and competition best guarantee commercial freedom, economic efficiency, and consumer welfare."<sup>4</sup> Chicago School economic theory is also evident in the Supreme Court's *Trinko*<sup>5</sup> decision, where the second part of the decision suggests that monopolies are beneficial because they will spur innovation. It is also the basis for the Department of Justice Antitrust Division's Section 2 Report, where the dangers of overenforcement of the antitrust laws (called Type I error) were emphasized.<sup>6</sup>

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<sup>3</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>4</sup> Note by the U.S. Federal Trade Commission, Interface of Competition and Consumer Policies, submission to the October 16, 2003 OECD Roundtable, *available at*: <[http://www.ftc.gov/bc/international/docs/Comp-ConsumerPro%20jnt%20rndtbl\\_2003%20Oct\\_US%20paper.pdf](http://www.ftc.gov/bc/international/docs/Comp-ConsumerPro%20jnt%20rndtbl_2003%20Oct_US%20paper.pdf)>.

<sup>5</sup> *Verizon Communications v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

<sup>6</sup> Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act U.S. Department of Justice, September 2008, *available at*: <<http://www.usdoj.gov/atr/public/reports/236681.pdf>>; *see also Rambus v. Federal Trade Commission*, 522 F.3d 456, 466 (D.C. Cir. 2008).

The antitrust agencies have tried to export this theory, especially when counseling the Chinese about the development of their anti-monopoly laws. Although the counseling to the Chinese was done orally, the theory is evident in speeches. For example, in a speech before a standard setting conference in Beijing, former Counsel to the Assistant Attorney General of the Antitrust Division, Hill Wellford, declared that, “[a]s we consider the challenges and proposed solutions within standard setting, we should keep in mind the power of markets to self-correct.”<sup>7</sup> And in a Beijing speech, Former Assistant Attorney General Hew Pate declared: “. . . the American intellectual property system rests on two fundamental foundations: first, the

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<sup>7</sup> Remarks of Hill Wellford, Antitrust Issues in Standard Setting, 2<sup>nd</sup> Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute, Beijing, China, March 29, 2007, *available at*: <http://www.usdoj.gov/atr/public/speeches/222236.htm>.

<sup>8</sup> Remarks of R. Hewitt Pate, Promoting Economic Growth Through Competition and Innovation, Chinese Academy of Social Sciences, Institute of Law, Beijing, China, July 1, 2004, *available at*: <http://www.usdoj.gov/atr/public/speeches/204931.htm>.

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merger case, that is what it is based on. There of course the Supreme Court allowed the acquisition of a coal company despite the fact that the transaction resulted in high market shares. It held that high market shares did not reflect the true nature of the acquired firms' future competitiveness, because the firms' coal reserves were either depleted or committed under long term contracts.<sup>13</sup> This undermined the government's prima facie case. Mr. Smith argued that this analysis allows parties to argue that current high market shares are not always good indicators of what future competition will be like. That is correct. But the impact of a financial crisis on antitrust enforcement can work both ways – it is by no means clear that it will result in less enforcement.

Contrary to Mr. Boies, I think antitrust laxity during an economic recession can result in a deepening of economic contraction. Competition spurs innovation, productivity, growth and cost effectiveness. Increased prices are almost always (if not always) accompanied by reduced output. Thus, reduced antitrust enforcement could result in increased prices and reduced output, and in turn more unemployment. Put differently, if anticompetitive mergers and other business practices are permitted during an economic crisis, it is likely to cause reduced innovation and output, and consumers will lose the benefits of lower prices. Thus, I would suggest that competition laws need to be implemented at least as strictly during a time of economic crisis as they are otherwise.

At a minimum we need to be more humble. We can't make orthodox and unvarnished Chicago School of economics claims with the same authority. This does not necessarily mean that antitrust based on Chicago School economics is dead wrong. But the message needs to be

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<sup>13</sup> *Id.* at 503-04.

fine tuned. In terms of economic theory, we may need to move more towards what has been called “behavioral economics,” based on the facts about how individuals *are* behaving rather than on how Chicago School of economic theory would predict they will behave.<sup>14</sup> This would require some adjustments in how we apply the antitrust laws – particularly in the Section 2 area, which I will briefly discuss in a moment.

But at the same time, antitrust enforcement agencies should arguably be cautious in embracing

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<sup>14</sup> See, e.g., Maurice E. Stucke, New Antitrust Realism, GCP, The Online Magazine for Global Competition Policy, January 2009, *available at*:

<http://www.globalcompetitionpolicy.org/index.php?&id=1544&action=907>.



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<sup>15</sup> Albert A. Foer, The American Antitrust Institute, Preserving Competition After the Banking Meltdown, Global Competition Policy, December 2008, *available at*: <http://www.globalcompetitionpolicy.org>.

<sup>16</sup> Thomas B. Leary, A Suggestion For Revival Of Section 5, Remarks Before FTC Section 5 Workshop, October 17, 2008, *available at*: <http://www.ftc.gov/bc/workshops/section5/docs/tleary.pdf>; Thomas B. Leary, The Bipartisan Legacy, *available at*: <http://www.ftc.gov/spe680.1600> If\*Q Albert A. F

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<sup>18</sup> U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 5.1 n.39 (1992) (with Apr. 8, 1997 revisions to § 4 on efficiencies), *reprinted*

entanglements between firms, I've wondered whether it would be better to just say "no" to the transaction in some situations. I am not the first Commissioner, past and present, to have such thoughts. Conducting retrospective analysis of some of the agencies' more complex remedies will help us understand whether in some circumstances it is better to just say no.

Review of consummated mergers could also be stepped up with freed up resources resulting from a decline in HSR filings. In the current crisis there may be more last minute mergers that should have been blocked. Many of these deals will not work out very well, for a variety of reasons, and the merged entity may end up divesting assets of its own volition. But to the extent that doesn't happen, and down the road it becomes clear that a consummated transaction has created a firm with the ability to exercise market power, the FTC can always challenge the transaction after the fact.<sup>19</sup>

Finally, Mr. Boies may be right that there will be an increase in political and societal pressure to either block or allow a merger because it will prevent job losses, or plant closures, good or bad. In other countries, the government has been more willing to step in and override the relevant antitrust authority. For example, very recently, in the face of the current financial crisis, the UK has altered its regulatory framework as applied to financial sector mergers to enable public interest concerns to trump competition review. In September 2008, the UK Secretary of State issued an Intervention Notice under the Enterprise Act of 2002 on the Lloyds TBS/HBOS merger, thereby eliminating the authority of the Office of Fair Trade to review the transaction and placing it in the hands of the Secretary of State. But our antitrust laws in the U.S. do not incorporate this type of analysis. I hope that the Administration here resists the

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<sup>19</sup> See, e.g., *Chicago Bridge & Iron Company v. Federal Trade Commission*, 534 F.3d 410 (5<sup>th</sup> Cir. 2008).



## VI. Consumer Protection

I would like to finish tonight by talking briefly about the impact of the financial crisis on the American consumer and, consequently, how this will inform the consumer protection aspect of our mission at the FTC. As you are probably well aware, the current economic situation is extremely grim for many consumers: delinquencies on auto loans and home equity lines of credit have reached their highest levels since record-keeping began in 1980;<sup>20</sup> a record one in 10 American homeowners with a mortgage were either at least a month behind on their payments or in foreclosure at the end of September;<sup>21</sup> increasing numbers of Americans are struggling to pay off medical debt;<sup>22</sup> and in December, the unemployment rate rose from 6.8 percent to 7.2 percent, the highest rate since January 1993.<sup>23</sup>

Clearly, consumers are struggling with personal financial difficulties. Whether these difficulties are caused by a general downturn in the economy, a loss of employment, or the burden of a ballooning mortgage payment, many consumers will need some sort of assistance.

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<sup>20</sup>Nancy Trejos, “Loan Delinquencies Hit Record High Last Year,” *The Washington Post*, Jan. 8, 2009, p. D03, *available at*: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010703913.html>; “Late Loans Payments Hit a Record High,” *MSNBC.com*, Jan. 7, 2009, *available at*: <http://www.msnbc.com/id/28541097/>.

<sup>21</sup>Alan Zibel, “Home Loan Troubles Break Records Again,” *The Associated Press*, Dec. 5, 2008, *available at*: [http://www.newsvine.com/\\_news/2008/12/05/2180597-home-loan-troubles-break-records-again](http://www.newsvine.com/_news/2008/12/05/2180597-home-loan-troubles-break-records-again).

<sup>22</sup>Sandra G. Boodman, “Seeing Red – The Rising Costs of Care and a Failing Economy Drive More Americans into Medical Debt,” *The Washington Post*, Jan. 13, 2009, *available at*: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/12/AR2009011202892.html>.

<sup>23</sup>Statement of Keith Hall, Commissioner, Bureau of Labor Statistics, “Commissioner’s Statement on the Unemployment Situation,” Jan. 9, 2009, *available at*: <http://data.bls.gov/cgi-bin/print.pl/news.release/jec.nr0.htm>.

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<sup>24</sup>John Leland, “Swindlers Find Growing Market in Foreclosures,” *The New York Times*, Jan. 15, 2009, available at: <<http://www.nytimes.com/2009/01/15/us/15mortgage.html>>.

<sup>25</sup>*FTC v. National Hometeam Solutions, LLC*, No. 4:08-cv-00067 (E.D. Tex. Feb. 26, 2008) (complaint filed), available at: <<http://www.ftc.gov/opa/2008/02/nhsnfs.shtm>>; *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-00388 (M.D. Fla. Jan. 5, 2009) (stipulated final judgment and permanent injunction entered), (M.D. Fla. Feb. 5, 2008) (complaint filed), available at: <<http://www.ftc.gov/opa/2009/01/mfs.shtm>>; *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio Apr. 28, 2008) (complaint filed), available at: <<http://www2.ftc.gov/opa/2008/04/foresolutions.shtm>>; *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735 (M.D. Fla. Sept. 15, 2008) (cApr. 28, 2008) 0000000 0 0000 0.00000 1.00000 0.0fi400 0.0000 TD

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<sup>26</sup>*In the Matter of American Nationwide Mortgage Co.*, Docket No. C-3168 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment); *In the Matter of Michael Gendrolis d/b/a Good Life Funding*, Docket No. C-3034 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment); *In the Matter of Shiva Venture Group, Inc. d/b/a Innova Financial Group*, Docket No. C-3032 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment), *available at*: <http://www.ftc.gov/opa/2009/01/anm.shtm>.

<sup>27</sup>*See* FTC Press Release, "Subprime Credit Card Marketer to Provide At Least \$114 Million in Consumer Redress to Settle FTC Charges of Deceptive Conduct," Dec. 19, 2008, *available at*: <http://www.ftc.gov/opa/2008>



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<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre38.shtm>.

<sup>30</sup>“Fiscal Fitness: Choosing a Credit Counselor,” Dec. 2005, *available at*: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre26.shtm>; “Before You File for Personal Bankruptcy: Information About Credit Counseling and Debtor Education,” Nov. 2006, *available at*: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre41.shtm>.

<sup>31</sup>“Fair Debt Collection,” Mar. 1999, *available at*: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.shtm>.

<sup>32</sup>*See generally* <http://www.ftc.gov>.

Elizabeth Warren, “Making Credit Safer,” 157 U. Mr01 U. Mr01 U. Mr01 U. Mr01is20 0.00009131i T

While the framework for ensuring greater consumer protection in financial services has yet to be decided, I believe that the FTC should play an important role not in ensuring the safety and soundness of financial institutions (which has not traditionally been its province) but in providing meaningful and consistent protection for consumers in this area. Consumer protection has been the central mission of the FTC for many decades, and the

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<sup>37</sup>*E.g.*, Consumer Leasing Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Credit Repair Organizations Act, and the privacy provisions of the Gramm-Leach-Bliley Act, Truth in Lending Act, Home Ownership and Equity Protection Act, and Equal Credit Opportunity Act.

<sup>38</sup>FTC Press Release, “FTC Releases Staff Report on Improving Consumer Mortgage Disclosures,” Feb. 13, 2007, *available at*: <http://www.ftc.gov/opa/2007/06/mortgage.shtm>; “FTC Releases Staff Report on Mortgage Broker Compensation Disclosures,” Feb. 27, 2004, *available at*: <http://www1.ftc.gov/opa/2004/02/mortgagerpt.shtm>.

<sup>39</sup> *See, e.g.*, United States Government Accountability Office, Report to Congressional Addresses, *Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System*, GAO-09-216, Jan. 2009, at p. 58, *available at* <http://www.gao.gov/new.items/d09216.pdf> (“For example, policymakers should identify ways to improve upon the existing, largely fragmented, system of regulators that must coordinate to act in these areas. As noted above, this should include serious consideration of whether to consolidate regulatory responsibilities to streamline and improve the effectiveness of consumer protection efforts.”)

### Conclusion

Let me conclude by emphasizing that I have done a lot of crystal ball-gazing. These are uncertain times, and many of the predictions I've made are uncertain. But one thing is certain, it is that the FTC has much to learn from the financial crisis. And, if we don't learn from it, we are foolish.