



# Research Ideas in Antitrust and Consumer Protection: A View from the FTC

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These are my views and do not necessarily represent  
those of the Federal Trade Commission or any of the  
Individual Commissioners

# The FTC

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Three missions work hand-in-hand to achieve the FTC's goal of enhancing consumer welfare

- Competition (Antitrust)
- Consumer Protection
- Public Policy/Advocacy/R&D

# Sample of Recent Antitrust Work

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- Whole Foods/Wild Oats (on Appeal)
- Google/DoubleClick (Closed)
- Cephalon (in Litigation)
- Inova/Prince William (in Litigation)

# Sample of Recent Consumer Protection Work

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- Mortgage Disclosures
- FACTA Study
- Upcoming Mortgage Conference (May 29)



# Resale Price Maintenance

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- Legal History
  - Supreme Court in *Dr. Miles* (1911) made minimum RPM *per se* illegal
  - Supreme Court in *Leegin* (2007) overturned *Dr. Miles* in favor of rule of reason
    - 5-4 majority
  - Contentious issue still

# Role of Economics in RPM

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- Theoretical
- Empirical
  - Includes work by Pauline Ippolito (

# Research Opportunities on RPM

- In his dissent, Justice Breyer called for research:
  - “I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?”
  - “How often, for example, will the benefits to which the Court points occur in practice?”
  - “The question is how often the “free riding problem” is serious enough to significantly deter dealer investment.”
  - “...the ultimate question is not whether, but how much, “free riding” of this sort takes place.”
- The change in regime from *per se* illegality to rule of reason provides opportunities for quantitative research on agency/efficiencies/free rider effects



# Bundled Discounts and All Unit Discounts

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- Bundled discounts ubiquitous and generally efficient
- However, three theories where bundling might be exclusionary
  - A form of predatory pricing
  - De facto tying
  - Entry deterring exclusionary conduct

## Recent History: LePage's

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- LePage's v. 3M (3<sup>rd</sup> Circuit) condemned bundled discounts as violation of Section 2
  - Did not assess whether 3M's bundled discounts were competition on the merits
  - Did not consider whether 3M's bundled pricing was above cost, no matter how cost was calculated
  - Unclear what would have been sufficient to show competition on the merits

# PeaceHealth Decision (2007)

- 9<sup>th</sup> Circuit and refused to follow it – Adopted a cost-based standard for bundled discounts
- 5<sup>th</sup> Circuit explicitly disagreed with 9<sup>th</sup> Circuit and refused to follow it
- Adopted a cost-based standard for bundled discounts
  - “Discount attribution standard” in which the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products
  - If the resulting price of the competitive product is below the defendant’s incremental costs to produce them, the trier of fact may find the bundled discount exclusionary

# Antitrust Modernization Commission (2007)

- Concerned that 3M decision too vague and will chill welfare-enhancing discounts or rebates
- Proposed a 3 prong test for plaintiff:
  - After allocating all discounts and rebates attributable to the entire bundle to the competitive product, the defendant sold the competitive product below the competitive product's incremental costs
  - Defendant is likely to recoup these short term losses
  - Bundled discount or rebate program likely to have adverse effect on competition
- Recognized that the first test is not perfect and may result in further scrutiny of bundled discounts with no anticompetitive effects
- Carlton, in his separate statement, observed that the analogy of single product predatory pricing and multiproduct bundled discounts is faulty
  - Price discrimination rationale for bundling

# Research Opportunities on Bundled Discounts

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- Calls from the legal and policy communities for additional empirical research into bundled discounts
  - Solicitor General in amicus brief in *LePage's*
  - Antitrust Modernization Commission
  - 9<sup>th</sup> Circuit in *PeaceHealth*
- Complex cost allocation issues
- Effects on competition
- Implementable “screens” or “tests”

# Oil and Gas Market Research

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- An area where the FTC has tremendous expertise
  - Antitrust cases
  - Commission Reports
  - Advocacy
  - Research
  - Gasoline price monitoring
    - 20 wholesale regions and approximately 360 retail areas nationwide
- Significant Utility of Quantitative Studies

# Online Behavioral Advertising

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- Tracking of a consumer's online activities in order to allow businesses to deliver targeted advertising that more closely match the interests of particular consumers
  - Provides benefits to consumers
  - May harm consumer privacy
- Commission recently requested comments on self-regulatory principles for online behavioral advertising
- Some examples of recent comments:







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