



Federal Trade Commission

Broadband Access Policy: The Role of Antitrust

**J. THOMAS ROSCH¹
COMMISSIONER, FEDERAL TRADE COMMISSION**

**presented at the
Broadband Policy Summit IV: Navigating the Digital Revolution
Washington, D.C.
June 13, 2008**

Today, I want to talk about some of the concerns that are wrapped up in the network neutrality debate – and specifically whether, and to what extent, antitrust or consumer protection law could address those concerns. I thought it might be helpful to outline both what we can offer and perhaps more importantly, what we can't. I should make a couple of points at the outset. First, a disclosure. I'm not a policy wonk who knows the ins and outs of the policy arguments surrounding net neutrality. Nor am I a technologist or someone with extensive knowledge about the FCC's regulatory structure. Instead, my perspective is as a litigator with over forty years of experience in antitrust and, to a lesser extent, consumer protection. My focus is on law enforcement rather than what the law should be. As a result, I don't want to take a position on net neutrality legislation although I'll admit that I generally favor a wait-and-see approach lest the legislation do more harm than good.

Second, as an agency focused on consumer protection and competition, I believe the FTC

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors Kyle Andeer and Beth Delaney for their invaluable assistance in preparing this paper.

has a role to play in broadband and Internet markets. At the same time, I recognize that there are other perspectives of equal and even greater importance. Internet access, like access to traditional forms of media and communication, touches on broader public policy goals than economic efficiency which has become the touchstone of antitrust law.

Finally, I'd be remiss if I didn't recognize former FTC Chairman Majoras who took the initiative two years ago and dedicated significant resources to increasing the Commission's understanding of the broadband policy issues. Over the last two years, our staff has held a series of workshops and issued several reports that discuss aspects of broadband policy.² All of us at the Commission owe them a debt of gratitude for increasing our awareness and understanding of these issues.

Introduction

When I arrived in Washington two and a half years ago the net neutrality debate was focused on speculation that network operators would implement access charges for Internet content and application vendors.³ The battle lines were drawn between firms like Google, Amazon, and eBay on one side and Verizon, BellSouth, and Qwest on the other. The core concern was that network operators would make available certain content and applications to users in a preferential fashion in exchange for payment.

² See, e.g., FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf> (The agenda, transcript, and other information related to the underlying two day workshop are available at <http://www.ftc.gov/opp/workshops/broadband/index.shtml>); FED. TRADE COMM'N, Municipal Provision of Wireless Internet (2006) available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

³ Roger O. Crockett, *At SBC, It's All About 'Scale and Scope'*, BUSINESS WEEK (Nov. 7, 2005) ("The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!").

Today the net neutrality debate is dominated by “network management” strategies being used by ISPs like Comcast and TimeWarner. The public debate on this issue was jumpstarted last fall with the Comcast-BitTorrent controversy.⁴ Comcast vigorously defended its practices on the grounds that users of peer-to-peer applications, like BitTorrent, are gobbling up bandwidth and that it needed to take action to protect its network from being overwhelmed. Network management remains a hot issue as both TimeWarner and Comcast have announced plans to experiment with usage caps and metered pricing plans for broadband consumers.⁵ Indeed, TimeWarner rolled out its “metering” plan for new customers in Beaumont, Texas just last week.

From my perspective, which is hardly unique, net neutrality boils down to an argument over the terms and conditions of Internet access. Should broadband providers have an unfettered right to control the content and applications that are delivered through their service or should there be some curbs on that power? Net neutrality proponents argue forcefully that legislation is needed to prevent the telecommunications and cable companies from controlling this critical medium. They believe that absent such legislation the Internet as we know it will be fundamentally changed for the worse – that once the proverbial genie is let out of the bottle there

⁴ See Jacqui Cheng, *Evidence mounts that Comcast is targeting BitTorrent traffic*, ARS TECHNICA (Oct. 19, 2008) available at <http://arstechnica.com/news.ars/post/20071019-evidence-mounts-that-comcast-is-targeting-bittorrent-traffic.html>; Peter Eckersley, Fred von Lohmann & Seth Schoen, *Packet Forgery by ISPs: A Report on the Comcast Affair*, Electronic Freedom Foundation (Nov. 28 2008) available at http://www.eff.org/files/eff_comcast_report.pdf.

⁵ See Ryan Paul, *40GB for \$55 per month: Time Warner bandwidth caps arrive*, ARS TECHNICA (June 3, 2008) available at <http://arstechnica.com/news.ars/post/20080603-40gb-for-55-per-month-time-warner-bandwidth-caps-arrive.html>; *Comcast Considering 250GB Cap, Overage Fees*, Broadband Reports (May 6, 2008) available at <http://www.dslreports.com/shownews/Comcast-Considering-250MB-Cap-Overage-Fees-94185>.

will be no way to put it back. Opponents disagree about the need for new legislation. They make some legitimate points about the risk such legislation would pose to network infrastructure investment incentives. Further, some opponents argue that existing regulatory oversight at the FCC, coupled with consumer protection and antitrust enforcement, is sufficient. I'm no expert on FCC regulation so I'll leave that to others for comment, but I thought I'd comment on the role of consumer protection and antitrust enforcement to address these problems.

I. The Role of Consumer Protection

As others have observed, some of the concerns caught up in the net neutrality debate could be addressed by greater transparency and disclosure when it comes to network management.⁶ There seems to be widespread consensus that new applications and the swapping of large files like movies over the Internet threaten to overwhelm some of networks. I have no reason to question the validity of these concerns although I'd note that there is little publicly available information about the extent or seriousness of congestion – or for that matter how networks are currently managing traffic. At least from my perspective, it's a bit of a black box. Whenever there's a lack of transparency, then speculation and suspicion is inevitable.

Network operators are experimenting with different management strategies – such as usage caps, metered service, or enhanced service – to address congestion problems. I would urge them to clearly and conspicuously disclose these efforts. Consumers are best served when they can make informed choices about the alternatives available to them. Accurate disclosure of material terms allows consumers to compare similar services offered by multiple providers and

⁶ Commissioner Jon Leibowitz, Concurring Statement Regarding the Staff Report: “Broadband Connectivity Competition Policy (June 2007) *available at* <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>. *See also*, Broadband Connectivity Competition Policy, *supra* note 2, at 129-137.

weigh the different terms being offered when making decisions about what services to purchase.

Requiring clear and conspicuous disclosure about material terms is, of course, one of the hallmarks of the Commission's consumer protection mission, and our efforts to date in the Internet service provider area are no exception.⁷ For example, in the *Cyberspace.com* matter, the FTC alleged that defendants violated the FTC Act by mailing purported "rebate" or "refund" checks for \$3.50 to millions of consumers and businesses without clearly and conspicuously disclosing that by cashing the check those individuals and businesses would receive monthly charges on their telephone bills for defendants' Internet access services. The federal district court for the Western District of Washington granted summary judgment in our favor on the issue of liability, and following a trial on the issue of consumer injury, the court ordered the defendants to pay more than \$17 million to remedy the injury caused by their deceptive conduct. Earlier Commission orders in other cases – such as *American Online*, *Compuserve* and *Prodigy* – prohibit defendants from misrepresenting the terms and conditions of any online service trial offer.⁸

In addition to prohibiting deceptive practices, the Commission also has the authority to pursue practices that are unfair to consumers. As many of you are aware, the Commission has

⁷ See, e.g., *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, 2003-1 Trade Cas. (CCH) P73,960 (W.D. Wash. 2000) (appeal pending in the 9th Circuit); *In re America Online, Inc. & Compuserve Interactive Servs., Inc.*, FTC Docket No. C-4105 (Jan. 28, 2004) (consent order); *In re Juno Online Servs., Inc.*, FTC Docket No. C-4016 (Jun. 25, 2001) (consent order); *In re WebTV Networks, Inc.*, FTC Docket No. C-3988 (Dec. 8, 2000) (consent order); *In re AOL, Inc.*, FTC Docket No. C-3787 (Mar. 16, 1998) (consent order); *In re CompuServe, Inc.*, 125 F.T.C. 451 (1998) (consent order); *In re Prodigy, Inc.*, 125 F.T.C. 430 (1998) (consent order).

⁸ Although these cases involved the provision of dial-up Internet access, the orders are not limited by their terms to the offering of narrowband Internet access.

taken the position that a unilateral change of material contract terms may be an unfair practice.⁹ In short, Commission authority to curb unfair and deceptive acts and practices in the broadband Internet access services area is fairly straightforward and non-controversial. However, I don't think the same could be said for antitrust.

II. The Role of Antitrust

Speaking as an antitrust litigator, I doubt that antitrust can address many, if any, of the problems cited by network neutrality proponents.¹⁰ At the outset, I'd suggest that Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade, and Section 7 of the Clayton Act, which prohibits acquisitions or mergers that threaten to "substantially lessen competition" are of limited application. To be sure, Section 7 may be invoked to block a merger of network operators that threatens to create market power on the theory that the merged entity would be able to restrict Internet access. Indeed, agency approval of network operator mergers have been conditioned in the past on the merged entity's agreement to carry the content of third parties.¹¹ But after a merger has occurred, antitrust statutes arguably do not operate to prevent or control single firm conduct, which is at the root of the net neutrality debate.

Section 2 of the Sherman Act prohibits single firm conduct that creates or maintain monopoly power or constitutes an attempt to monopolize. The challenge in using Section 2 to

⁹ Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

¹⁰ My friend and colleague Commissioner Leibowitz has made a similar observation. Commissioner Jon Leibowitz, Concurring Statement Regarding the Staff Report: "Broadband Connectivity Competition Policy (June 2007) *available at* <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf> ("In my view, the Report demonstrates that while our consumer protection authority may be adequate to the task, the same may not be true with respect to antitrust law.").

¹¹ In re American Online, Inc. & Time Warner Inc., FTC Docket No. C-3989 (2000) *available at* <http://www.ftc.gov/os/caselist/c3989.shtm>.

address these problems is probably best understood by walking through a few examples. Let's start with the much discussed case of *Madison River*.¹² You all know the ones but let me briefly summarize the facts that are salient to an antitrust analysis. Vonage, a VoIP provider, complained that its service was blocked in rural North Carolina by Madison River, a DSL service provider – that is, Madison River's DSL customers were unable to access Vonage. The speculation was that Madison River was motivated by its desire to protect its wireline phone service from the competitive threat posed by Vonage. The FCC acted quickly, and less than a month after Vonage's complaint it announced a consent decree under which Madison River agreed to “not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.”¹³ The complaint and Vonage's allegations raised quite an uproar when it was reported in early 2005 – and it continues to play a role in the debate today. Indeed, it is the rare article or paper on net neutrality that fails to mention this case.

Most, if not all, commentators roundly applauded the FCC's action in *Madison River*. I must admit that this seemingly widespread consensus surprised me as an antitrust lawyer. The allegations in *Madison River*, if brought as an antitrust complaint, would most likely have been a refusal to deal claim under the Sherman Act. *Madison River* allegedly denied Vonage access to its DSL network – it essentially refused to deal with Vonage. Vonage was a competitor to *Madison River* in an adjacent market – telephone service. The antitrust complaint would have alleged that *Madison River*'s conduct in one market, DSL broadband service, would have redounded to its benefit in another market, telephone service. These sorts of claims have always

¹² In re *Madison River Communs., LLC* 20 FCC Rcd 4295, 4297 (2005) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf.

¹³ Id.

been difficult to litigate and recent developments at the Supreme Court have only made them more difficult.

The facts surrounding BitTorrent, at least as I understand them based on publicly available information, would be even less likely to support a Sherman Act claim than those in *Madison River*. Comcast is not alleged to have blocked BitTorrent altogether. Rather, it appears that it sporadically interfered with BitTorrent and other peer-to-peer applications. There has also been some speculation that in addition to Comcast's desire to manage traffic on its network, its conduct may have been motivated by a desire to disadvantage a potential competitor to its video service. At best, these allegations would amount to a constructive refusal to deal if brought as a Sherman Act claim. Essentially one would have to argue that the sporadic interference resulted in a loss of consumer confidence in BitTorrent and other applications such that consumers would stop using them. Such a theory of liability would be on even shakier ground than that of an outright refusal to deal under the Supreme Court's prevailing interpretations of the Sherman Act.

Several recent incidents have also fueled concerns that network operators may engage in practices that will reduce the variety and quality of content available to users. Verizon Wireless' treatment of NARAL¹⁴ (Nay-rawl), AT&T's censorship of Pearl Jam's political statements¹⁵, and Telus' blocking access to a union website¹⁶ have all been cited as cause for concern. This sort of

¹⁴ Ken Fisher, *Verizon flip-flops on censoring "unsavory" political group SMS messaging*, ARS TECHNICA (Sept. 27, 2008) available at <http://arstechnica.com/news.ars/post/20070927-verizon-censoring-unsavory-political-group-sms-messaging.html>.

¹⁵ Nate Anderson, *Pearl Jam censored by AT&T, calls for a neutral 'Net*, ARS TECHNICA (Aug. 9, 2008) available at <http://arstechnica.com/news.ars/post/20070809-pearl-jam-censored-by-att-calls-for-a-neutral-net.html>.

¹⁶ *Telus cuts subscriber access to pro-union website*, CBC News (July 24, 2005) available at <http://www.cbc.ca/story/canada/national/2005/07/24/telus-sites050724.html>.

conduct, however, is outside the purview of antitrust. Concerns about content diversity are not new to antitrust – indeed they have long been voiced in reviews of traditional media mergers.¹⁷ But antitrust today is focused on economic efficiency and price competition, and it struggles with how to accommodate for broader public policy goals. One need to look no further than the Commission’s recent experience in Google-DoubleClick. Some urged the Commission to challenge that merger on the grounds that the combined company would have unprecedented access to information about consumers and posed a real risk to privacy rights. While I had concerns about the merits of this argument, I was even more troubled by the inability of complainants to articulate how this argument would play out in an antitrust challenge.

I’ll leave the policy debate about whether we *should* be concerned about this type of conduct to others. Rather, my point is simply that *if* there is consensus that this sort of conduct is problematic, then the antitrust laws – at least as they are currently interpreted by the Supreme Court – are unlikely to offer a solution. As an antitrust litigator, I wouldn’t relish litigating the facts of *Madison River* as a Sherman Act claim – indeed I am not at all confident that the claim would survive a motion to dismiss in some of our courts.

My comments are not meant to suggest that this as it should be. I’ve previously expressed concern about the direction of antitrust law.¹⁸ The Supreme Court has grown increasingly skeptical of antitrust over the last thirty years. The current Court’s antitrust

¹⁷ See supra note 11; see also Opening Address of Chairman Michael Pertschuk, Federal Trade Commission’s Symposium on Media Concentration, Washington, D.C. (Dec. 1978).

¹⁸ See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, “Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence,” Remarks at the Bates White Fourth Annual Antitrust Conference (June 2007) *available at* <http://www.ftc.gov/speeches/rosch/070625pendulum.pdf>.

jurisprudence is laced with concerns about the costs and burdens of antitrust litigation.¹⁹ So-called non-horizontal practices or “leveraging” claims – that is, conduct in one market having effects in another market – are particularly difficult to challenge under the prevailing antitrust jurisprudence today.

The terms and conditions of access have long been a thorny issue in antitrust. Refusals to deal, and the related doctrine of essential facilities, are controversial and some have subjected these claims to withering criticism.²⁰ In the wake of the Supreme Court’s decision in *Trinko* four years ago, refusal to deal claims have grown even more difficult to successfully litigate.²¹ Indeed, *Trinko* demonstrates the challenges of using the antitrust laws to address questions of network access. As others have observed, the fight over access that is at the core of the network

¹⁹ See, e.g., *Bell Atlantic Corp. v. William Twombly et. al.*, 127 S.Ct. 1955, 1966-1967, 1975 (2007) (writing in dissent, Justice Stevens observed that “[t]wo practical concerns presumably explain the Court’s dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.”); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007) (“In sum, it is a flawed antitrust doctrine that serves the interests of lawyers.”); *Credit Suisse Sec. LLC v. Billing*, 127 S. Ct. 2383 (2007).

²⁰ See, e.g., Testimony of Hew Pate, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 31 (July 18, 2006) available at <http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf> (“With respect to refusals to deal, or as I prefer to think of it, duties to assist competitors, all have the right to take a different tack. I think in the wake of *Trinko*, as we have seen lower courts try to make sense of, and cabin the *Aspen* decision, that the time has come for *Aspen* to be overruled, and that the law would be better with it off the books.”); Testimony of Rick Rule, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Conclusion of Hearings, Transcript at 122-123 (May 8, 2007) available at <http://www.ftc.gov/os/sectiontwohearings/docs/070508trans.pdf>; Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

²¹ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

neutrality debate mirrors in many respects the fight over access that played out between ILECs and CLECs over the last decade.²² A number of firms attempted to enter the market for telephone and Internet access over the last decade by seeking access to the networks owned by the telecommunications companies. The failure of many of those firms led to a wave of litigation in which the incumbent firms were alleged to have engaged in a variety of practices designed to frustrate the entry of new competitors by effectively denying them access to the incumbent's networks. *Trinko* was a product of that litigation. Although I think *Trinko* has been interpreted far too broadly by some, there's no denying that Justice Scalia's opinion is hardly a ringing endorsement of refusal to deal liability or essential facilities doctrine.

It will be interesting to see whether the Court will address these questions again in the *linkLine* case. That case involves allegations that the defendant violated Section 2 of the Sherman Act when it used its alleged monopoly power in the wholesale market for DSL service to "squeeze" its downstream competitors in the retail DSL market by charging wholesale prices equal to, and at times higher than, its retail prices. The district court and the Ninth Circuit held that "price-squeeze" allegations in this case were sufficient to make out a claim under Section 2 of the Sherman Act.²³ The Solicitor General, in a brief filed three weeks ago, urged the Court to grant review of the Ninth Circuit's decision.²⁴ The Commission, for a variety of reasons,

²² See, e.g., Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, (Feb. 25, 2008).

²³ *linkLine Comm'n v. Pacific Bell Telephone Co.*, 503 F.3d 876 (9th Cir. 2007).

²⁴ Brief for the United States as Amicus Curiae, *Pacific Bell Telephone Co. d/b/a AT&T California v. linkLine Comm'n*, No. 07-512 (May 2008) *available at* <http://www.usdoj.gov/osg/briefs/2007/2pet/6invt/2007-0512.pet.ami.inv.pdf>.

disagreed with that conclusion and issued a statement outlining its reasons.²⁵ AT&T's petition for Supreme Court review is still pending at this time. The terms and conditions of access to a network will likely be a critical issue if the Court grants review in that case from the Ninth Circuit.

Some have argued that the Robinson-Patman Act should be used as model for legislation addressing some of the concerns about tiered pricing or other discriminatory practices. However, the R-P Act condemns discrimination with respect to "commodities" rather than "services," because discrimination is easier to discern where commodities, instead of services, are involved.²⁶ The Act also contains safe harbors for meeting competition and for cost-justified discrimination that makes it less than an ideal model for legislation dealing with net neutrality legislation. Moreover, the R-P Act has long been a source of controversy in the antitrust community and the Antitrust Modernization Commission, among others, has recently called for its repeal.²⁷ Thus, I don't think the R-P Act has much, if any, of a role to play.

Let me leave you with one last thought respecting the role of antitrust in the network neutrality debate. Congress created the Federal Trade Commission almost 100 years ago to administer the FTC Act, Section 5 of which prohibits "unfair methods of competition" and

²⁵ Statement of the Federal Trade Commission on the Petition for a Writ of Certiorari in *Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc.* (No. 07-512) (May 23, 2008) *available at* <http://www.ftc.gov/os/2008/05/P072104stmt.pdf>.

²⁶ See 15 U.S.C. § 13; see also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 496 (6th ed. 2007); *Metro Communs. Co. v. Ameritech Mobile Communs., Inc.*, 984 F.2d 739, 745 (6th Cir. 1993) (holding that Robinson-Patman Act does not apply to sale of cellular telephone service).

²⁷ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, Chapter IV.A. (April 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

“unfair or deceptive acts or practices.” As the Supreme Court observed, Section 5 empowers the FTC to “define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws” and to “proscribe practices as unfair or deceptive in their effect on competition.”²⁸ However, Section 5 has rarely been invoked as an independent source of authority since the early eighties. The Commission’s reluctance to rely on Section 5 as an independent authority is grounded in three cases in which the courts rejected the Commission’s application of Section 5.²⁹ Since then, the Commission has largely read its Section 5 authority to be coextensive with the Sherman and Clayton Acts. That may be changing.

Section 5 has been cited as independent statutory authority under which to challenge certain practices in two recent cases – *Valassis* and *N-Data*.³⁰ The facts of those cases are not directly germane to the present debate but the matters represent a willingness by some of us at the Commission to explore the limits of our authority under Section 5. The Commission will hold workshops on Section 5 later this year in an effort to identify other areas where Section 5 may be appropriate. I, for one, hope that we explore the possibility of using Section 5 to address some of the concerns that are invoked in support of net neutrality.

²⁸ FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

²⁹ See *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides (“OAG”) v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

³⁰ In the matter of *Valassis Communications, Inc.* FTC File No. 051 0008 (March 16, 2006) available at <http://www.ftc.gov/os/caselist/0510008/0510008.htm>, In the matter of *Negotiated Data Solutions, LLC*, FTC File No. 051 0094 (Jan. 2008) available at <http://www.ftc.gov/os/caselist/0510094/index.shtm>.

III. Conclusion

In conclusion, let me stress that I consider the current debate about net neutrality to be a legitimate debate. But I have concerns that we not over-promise what antitrust enforcement can contribute to that debate. That said, I am also concerned that legislation based on speculation or misinformation may surrender to the law of unintended consequences. For the moment, perhaps the best course is rigorous enforcement of our consumer protection laws requiring upfront disclosure of all material facts.