



UNDER ONE UMBRELLA

The Relationship Between
Antitrust and Consumer Protection



Where are we in the program?

- We have heard from BC
- We have heard from BCP
- The question now is how these two relate
- What is the overall mission of the FTC?
- Disclaimer



Two possible goals

- At the very least, keep the bureaus out of each others' way
- A best, produce clarifying and useful synergies between them



The minimalist goal

- Provide a basic structure of doctrine
- Keep the bureaus from overlapping
- Keep them from confusing one another's law



The basic “Consumer Choice” interpretation of the FTC Act

- The role of antitrust is to preserve a range of options in the marketplace
- The role of consumer protection is to protect customers’ ability to choose freely and effectively among the options
- Together the two roles allow the FTC to protect a market economy



This does not require “maximizing” variety and choices

- On antitrust side, requires only a sufficient range of choice, such as a competitive market would have produced
- On consumer protection side, requires only a sufficient amount of information, not perfect information



Efficiency defense

- The choice interpretation permits this
- Efficiency can involve innovation and thus produce more options in the future



A more detailed definition

- COMPETITION -- Consumers find a reasonable range of options in the marketplace, undiminished by artificial constraints like price-fixing or anticompetitive mergers
- CONSUMER-PROTECTION -- Consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints like deception or the withholding of material information



Benefits of this interpretation

- Is consistent with all case law
- Gives each bureau a defined task
- Formulates complementary tasks
- Clarifies essential elements of each offense
- Easy to explain
 - The business community
 - The public and juries
 - Congress
 - Developing countries
 - The EU
 - State AGs and “little FTC Acts”



It is consistent with the BCP Unfairness Statement

- BCP statement condemns “injury that cannot reasonably be avoided”
- The ability to choose is the main mechanism by which consumer injury is avoided
- Conduct that harms the exercise of choice threatens to permit consumer injury



The choice interpretation has been used by the FTC

- 1980 Unfairness Policy Statement (Companion Statement)
- International Harvester (1984)
- The FTC Year in Review (Report for 2003 ABA Spring Meeting)



The choice interpretation starts the analysis on the right foot

- In antitrust, both good and bad vertical restraints can increase price, but choice analysis focuses you on the question of whether options have increased
- In consumer protection, choice analysis focuses you on question of whether actual purchasers have been misled
- In short, a good basic doctrine



But can we do better?

- Can we do more than avoid problems?
- Can we achieve positive synergies in litigation?
- Having differentiated the missions, can we now usefully put them back together?
- Those are the questions for our panel



Cas Hobbs (Morgan, Lewis)

- How can we build on cross-bureau strategies that were used successfully in the past?
- Those often involved bringing both antitrust and consumer protection laws to bear on a single problem
- When might an FTC Chairman find an opportunity for similar strategies in the future? When does the Chairman want both bureau directors at a meeting?
- How do you coordinate the tanks and the dive bombers?



Bob Skitol (Drinker, Biddle)

- Can we devise additional, new cross-bureau strategies for the future?
- Some of those may also involve cross-bureau coordination; others more novel theories
- When can an FTC matter be usefully reconceptualized in terms of the law under the other side of the statute?
- When would a bureau director want to call in a specialist from the other bureau to help on a difficult case?
- How do you design a flying tank?



Bob Lande (University of Baltimore Law School)

- The previous topics have applied existing BC and BCP law in new combinations
- But does the choice model imply that antitrust law should become (somewhat) broader substantively in reaching nonprice forms of competition?
- How do you build a bigger tank?



Commissioner Leary

- FTC Commissioner
- Will comment on all three papers



Mary Lou Steptoe

- Skadden, Arps
- Will also comment on all three papers