1 **This transcript has been lightly edited for clarity**
2 PANEL ENTITLED: "UNDER ONE UMBRELLA: INTEGRATING THE
3 COMPETITION AND CONSUMER PROTECTION MISSIONS."
4
5 SPEAKERS: CASWELL O. HOBBS
6 ROBERT H. LANDE
7 ROBERT SKITOL
8 MARY LOU STEPTOE
9 COMMISSIONER THOMAS B. LEARY
10
11 MODERATOR: NEIL W. AVERITT
12
13 MR. AVERITT: Welcome to the last panel of the
14 afternoon. We're on the home stretch now. The panel
15 is called Under One Umbrella. It deals with the
16 relationship between antitrust and consumer protection
17 law.
18 That's actually an important issue for the
19 Agency. The FTC is unusual in combining both of those
20 functions, and obviously if we can make that combination
21 work for the Agency rather than against it, we're going
22 to be well ahead of the game.
23 Before going into the details of all of this,
24 though, let's pause for a second and think about where
25 we are in the overall trajectory of the program. We

1 heard earlier today from BC. We've also heard from BCP,
2 and the question now is how these two bodies of law fit
3 together, how do they relate? Another way of expressing it
4 is this: How do the two fit together to define a single
5 more or less coherent overall mission for the Agency?
6 Before getting into that, let me note for the record
7 that any opinion I express here is solely my own and not
8 necessarily that of the FTC.
9 If we're trying to define a relationship between
10 the two bureaus, there are two general ways in which we
11 could approach that task. One is relatively narrow and
12 defensive and it aims, at the very least, to keep the
13 two bureaus out of each other's way, to make sure they
14 don't interfere with each other. Alternatively and more
15 ambitiously, you can try to define the relationship in a
16 way that creates synergies, greater insights or greater
17 force for the Agency.
18 In my capacity as introducer and moderator of
19 the panel, I have assigned myself the easy job. I'm
20 going to talk just about the narrower more limited goal
21 by way of background. Then I will leave to the panel
22 the more challenging topics of figuring out how to
23 derive synergies from the two bureaus.
24 Even the minimalist goal has a couple of
25 somewhat challenging attributes though. Among its goals

1 are to create a basic structure of doctrine for the
2 Agency as a whole, to keep the two bureaus from
3 overlapping, and hopefully to keep either one of them from
4 pursuing a particular doctrine in ways that create legal
5 or doctrinal problems for the other bureau.
6 There are a number of ways that one might go
7 about doing that, but the one that's been most current
8 in recent years is a "consumer choice" interpretation of
9 the FTC Act, and that's what I would like to outline here
10 as a background for the panel.
11 The consumer choice interpretation starts with the
12 notion that the FTC is in the business of protecting the
13 market economy, an economy that would be driven
14 primarily in response to consumer preferences as
15 expressed through purchase decisions.
16 If you're going to be having a market economy of
17 that sort, there are two basic things that you need. You
18 need, first of all, an array of options in the marketplace,
19 and that's the task of antitrust. Then the second thing
20 you need is an ability on the part of consumers to choose
21 among those options, and that's the task of the consumer
22 protection. And then the two together will help you defend
23 the American market economy.
24 There are a couple of grace notes to mention, a
25 couple of points of detail here. One is to note that

1 this model doesn't require maximizing variety, and it
2 doesn't automatically condemn any reduction in variety.
3 Here, as elsewhere in trade law, the test is one of
4 reasonable sufficiency rather than perfection. So on the
5 antitrust side, what would be required is a sufficient
6 range of choice, and what would be required on the
7 consumer protection side is a reasonable access to
8 information.
9 Another thing to note is that there's an
10 efficiency defense possible here. The choice
11 interpretation permits this because efficiencies can
12 lead to innovation, and innovation can lead to more
13 options in the future, and that's something that ought
14 to be open for consideration.
15 When you plug all these things in, it becomes
16 possible to come up with a slightly more detailed
17 description of the choice model. The competition
18 mission is to ensure that consumers find a reasonable range
19 of options in the marketplace, undiminished by
20 artificial constraints like price fixing or anti-
21 competitive mergers. Then the consumer protection mission
22 is to ensure that consumers are able to make reasonably
23 free and rational selections from among those options,
24 with those choices unimpeded by artificial constraints
25 like deception or false implications or the withholding

1 of material information.

2 This all has a certain doric simplicity to it,

3 but notwithstanding all that simplicity, there's some

4 real benefits from this model, and those are up there

5 on the screen now.

6 The model is consistent with all of the case law and

7 lets you explain those cases. It gives each bureau a

8 defined task. The tasks are complementary as a result,

9 so that they support the single mission. Because of

10 this differentiation in definition, the essential

11 elements of the offense become relatively clear. And

12 then finally this approach, this interpretation makes it

13 easy to explain the mission of the FTC to the outside

14 world.

15 That probably in fact is pretty important,

16 because the FTC doesn't have the resources to police all

17 of the economy. We can bring only a few litigations, and

18 beyond that we have to communicate the standards to the

19 world and rely on the world to do what's necessary. A

20 choice model can be conveyed in a memorable way, can be

21 conveyed in an intuitive way to lay audiences like the

22 business community, Congress, developing countries, the

23 EU (which might want a simple model as a point of

24 convergence), state AGs, people administering little FTC

25 Acts.

1 There are a couple of other nice features to note.
2 A choice model is consistent with the BCP Unfairness
3 Statement. That statement noted that it was concerned
4 about harms that cannot reasonably be avoided. But the
5 basic way that consumers avoid harm is by exercising choices
6 in the marketplace, and if there's conduct that impedes
7 the exercise of choice, then that becomes almost
8 automatically harm that leaves consumers open to
9 unavoidable harm.
10 For these reasons, the choice interpretation has
11 been followed by the Commission. The issue doesn't come
12 up that often, but when it comes up, this is the model
13 that the Agency has tended to reach for. It did so in
14 the first instance as part of the companion statement to
15 the 1984 Policy Statement on Unfairness. It did so most
16 elaborately in International Harvester. It did so most
17 recently in the Year In Review report for last year's ABA
18 Spring Meeting.
19 Why has it gotten this far? I think fundamentally
20 the great virtue of the choice approach is it gets
21 analysis started on the right foot. It gets you off asking
22 the right question in the first place. It encourages you
23 to do that, nd that's always valuable. Let me give you a
24 couple of examples. On the antitrust side, if you're looking
25 at a vertical restraint and you're looking at it just with

1 price in mind, you become immediately at a loss because you
2 probably see prices going up, but you don't know if
3 that's due to market power, which is bad, or to the
4 suppression of free riding, which might be good. But if
5 you approach it with a choice model in mind, you find
6 yourself asking, "Well, has the conduct resulted in an
7 increase or decrease in options," and that's the right
8 question to be asking.
9 Similarly, on the consumer protection side, the
10 analysis induces you to look to the question, "Has an
11 actual purchase decision been affected," and so that
12 tends to lead you away from a focus on immoral
13 conduct -- perhaps kid's ads -- which doesn't necessarily
14 affect a purchase decision. The purchase is going to
15 be made by the parents. So that's not really apart of
16 our core mission.
17 So in short, choice provides a good, basic
18 doctrine. And yet, and yet, Milton reminds us that
19 mankind is ever restless and never satisfied.
20 So the question is: Can we do better? Is it
21 possible to do more than just use the choice model to
22 avoid problems, which is what I've been talking about?
23 Can we instead use the model to achieve positive
24 synergies in litigation, or greater insights, or to make
25 the Agency more effective?

1 Put differently, having differentiated the
2 missions for the sake of clarity, can they be put back
3 together now so as to increase the force and the wisdom of
4 the Agency? Those will be the questions for our
5 panel.
6 To address these questions we have five very
7 well qualified people. First up will be Cas Hobbs from
8 Morgan Lewis. Cas will be taking on the question: Can
9 we build on those cross-bureau strategies that we used
10 successfully in the past? Those are, for the most
11 part, strategies that brought both competition and consumer
12 protection resources to bear on a single problem. Put
13 in practical terms, the issue or the center of gravity of
14 Cas's remarks will be: When would an FTC chairman want to
15 have both bureau directors, BC and BCP, present in the room
16 when formulating a strategy for dealing with a problem area?
17 How do you coordinate the tanks and the dive bombers?
18 Next up will be Bob Skitol from Drinker Biddle.
19 Bob will be asking: Is it possible to devise additional
20 new cross-bureau strategies for the future? Some might
21 involve reconceptualization or substitution. There might
22 be a matter that's been traditionally handled by one
23 bureau under its side of the FTC Act, yet could
24 be reconceptualized and viewed as a violation of the other
25 side of the Act instead. There may be benefits from doing

1 that in some cases. In other words, how do you design a
2 flying tank?
3 Then the third speaker will be Bob Lande from
4 the University of Baltimore Law School. The previous
5 speakers have all taken BC and BCP law as a given,
6 as it stands. Bob will be asking: Would antitrust law
7 be construed at least a little bit differently if it
8 were construed in the bigger context of a choice model?
9 If we care about choices and options, does that imply
10 that we care about non-price options and non-price
11 competition, and does that in turn imply that this ought
12 to be a somewhat more explicit part of antitrust
13 analysis in the future?
14 Then with all these topics on the table, we have
15 two speakers that will comment on them. The first to do
16 that will be Commissioner Leary from our own Agency, who
17 will be commenting on all three papers. Then next
18 will be Mary Lou Steptoe from Skadden Arps who will be
19 contributing to the discussion also on all three papers.
20 So without further ado, Cas Hobbs.
21 MR. HOBBS: Thank you, Neil. If you think that
22 I'm going to fall for Neil's gambit of trying to get me to
23 characterize one bureau or the other as a tank or a dive
24 bomber, you're going to be disappointed.
25 I would like to develop four propositions in the

1 extraordinarily limited amount of time that Neil has
2 allocated to me, and given that time limitation, I'm
3 going to put them forward upfront. I'll get as far as I
4 can in developing the evidence in support of them, but
5 you'll have to wait for the paper because, despite all
6 of my triage this morning, I didn't get close to getting
7 this paper cut down small enough to cover all of it.
8 In keeping with my assigned focus on the "past as
9 prologue," all four of these propositions are taken from
10 what I consider successful initiatives of the cross-
11 bureau type in the past. The four propositions are the
12 following:
13 First, I think the Commission can and should
14 make greater use of its unfairness authority to address
15 market failures which cause economic harm to consumers.
16 Going back to the luncheon discussion, I probably differ
17 from Tim Muris and Bob Pitofsky in this regard by about
18 20 percent I would say. I have never sat in a Chairman's
19 chair though (at least when anyone was looking), so I have
20 the luxury of saying that.
21 Second, I think the Commission should place
22 greater emphasis on guidelines rather than individual cases.
23 I think industry oriented guidelines, practice
24 oriented guidelines, have been great successes in
25 the Commission's past and ought to become part of the

1 future. I have nothing against individual case
2 adjudications; I just think you get a lot further a lot
3 faster with the guideline approach.
4 Third, I would like to see the Commission resume
5 putting emphasis on consumer information disclosure
6 initiatives. I think providing key performance oriented
7 product information like the R-value Rule did, like the
8 Octane Rule did, and doing it in a standardized way -- and
9 standardization is probably pretty important to this --
10 will improve the competitive functioning of markets
11 in a significant way and improve consumer well-being in
12 a significant way. Information can lead to consumer well-
13 being in the form of lower prices, prices that are better
14 correlated to the key performance characteristics of
15 products, and innovation that is keyed to the key
16 performance characteristics of products.
17 Fourth, I would like to see the Bureau of
18 Consumer Protection do more industry-wide activity where
19 industries are being unresponsive to consumer interests
20 and concerns. I think though we need to do that based
21 on the Bureau of Competition, Bureau of Economics type
22 of analysis that asks: What is the market failure
23 that's leading to this unsatisfactory performance, and
24 do we have a focused remedy that will change market
25 behavior?

1 Obviously these four propositions are
2 closely interrelated in significant ways, and I think
3 that Neil's consumer choice model is a helpful way of
4 evaluating and highlighting those issues. Having given
5 you those four bottom line propositions, let me see how
6 far I can get before my time runs out.
7 Let me start with the guidelines proposition,
8 which also I think supports my industry wide orientation
9 proposition. I think that we need to pay more attention
10 to some of the largely unsung heroes of the past. A
11 significant number of FTC guidelines have been, in my
12 view, significant competitive and consumer protection
13 success stories.
14 I put those in three categories: Industry
15 oriented guidelines, practice oriented guidelines, and
16 then advertising guidelines, just because advertising has
17 always been sort of special.
18 In the list of industry oriented guidelines, we have
19 the Funeral Rule, (the price disclosures in the Funeral Rule),
20 Used Cars (the warranty disclosures), home insulation (the
21 development of the R-value measure and disclosure),
22 franchising (earnings disclosures and related
23 disclosures), care labeling, and vocational schools (with
24 drop-out and placement disclosures).
25 In the practice oriented guides, I think the rules

1 that we take for granted but that have had enormous impact
2 in the market are the cooling-off, door-to-door sales,
3 negative option, holder in due course, mail order, and
4 credit practices rules. I think all of those are great
5 successes.
6 In the advertising area, I think the endorsements
7 and testimonial guidelines have had a remarkable effect
8 on that area of advertising. I think the green
9 environmental advertising guidelines are a great
10 (and under-appreciated) success. I think the green
11 guides provided a framework for competition and competitive
12 advertising that in essence prevented the anarchy
13 that was going to break out in the environmental
14 advertising area, and it provided a level playing field for
15 the members of the industry to advertise and provided
16 the opportunity for those with superior performance
17 characteristics to gain ground in making those claims.
18 It prevented a lot of confusing and contradictory advertising
19 claims being directed to consumers and provided consumers
20 with at least a starting point for a meaningful flow
21 of information.
22 There were also non successes in the information
23 disclosure area, and I think we need to evaluate those as
24 well, but I don't think they should take away from
25 the successes.

1 Let me turn to the Commission's unfairness
2 jurisdiction. As you know, there is an unfair methods
3 of competition provision, and there is an unfair practices
4 provision, and those two mandates, I think, reach in the
5 same direction of protecting consumers' economic
6 well-being. Many of the Commission's initiatives in the
7 late '60s and early '70s were unfairness based consumer
8 protection initiatives based on explicit competition
9 considerations.
10 If you start with the Commission's Pfizer
11 decision, which defined the advertiser's responsibility
12 to possess a reasonable basis for advertising claims, it
13 was based on the rationale that: "Fairness to
14 the consumer as well as fairness to competitors dictates
15 this conclusion. Absent a reasonable basis for a
16 vendor's affirmative product claims, a consumer's
17 ability to make an economically rational product choice
18 and a competitor's ability to compete on the basis of
19 price, quality, service or convenience, are materially
20 impaired or impeded." Pfizer went on to use the
21 FTC's unfairness jurisdiction to lay out an economic
22 cost-benefit framework to define how much ad substantiation
23 is required.
24 The Sperry & Hutchinson decision of the Supreme
25 Court involved a fascinating interplay of antitrust and

1 consumer protection considerations. It was a pioneer, I
2 suggest in legal cross-dressing. The case was litigated
3 before the Commission on an antitrust theory, went to
4 the Supreme Court on a consumer protection theory, and
5 resulted in the unfairness decision that you're all
6 familiar with.
7 The Commission's now infamous cereal case was also
8 a fascinating interplay of consumer protection and
9 antitrust issues. It was described and conceptualized as
10 a shared monopoly case, one in which there was a
11 sustained supra-competitive profits and prices, but a key
12 focus of the complaint was on intensive product
13 differentiation and brand proliferation, the result of which,
14 the Commission alleged, was to impair and subvert the ability
15 of consumers
16 to make product decisions based on the nutritional benefits
17 and
18 prices of the competing products while simultaneously
19 raising barriers to entry to new potential competitors. Now,
20 as you know, the case washed out on unsound economic grounds,
21 but that was a fascinating combined antitrust and
22 consumer protection approach.
23 I think the setbacks in those early years should
24 not lead us to disregard the enormous value of the
25 unfairness jurisdiction on both the consumer protection

1 and antitrust side. I think it allows the Commission to
2 reach behavior on the consumer protection side that
3 deception doesn't reach or doesn't usually reach. I think
4 it also gets us into some important areas in
5 concentrated industries on the antitrust side that are
6 being unsatisfactorily treated in the federal court
7 of jurisprudence and in private litigation.
8 So I think the FTC's past forays under Section 5
9 with unfair methods of competition were aimed at a valuable
10 target. I'm not saying the Commission should bring more
11 cases, but I would like to see the Commission, for example,
12 become an intervener in the federal court Tacit
13 collision/conscious parallelism cases and bring to bear
14 a much more structured analysis to those cases.
15 Let me turn to consumer information. I think
16 consumer information is a very important shared consumer
17 protection and antitrust concern. The Commission, in the
18 '70s explored a large number of market failure problems
19 involving lack of information or market failures that
20 could be improved by information to consumers.
21 The informed consumer stands at the crossroads
22 of consumer protection and antitrust. It's an antitrust
23 objective to have economically efficient markets based
24 on informed consumer decisions. The consumer protection
25 objective is to avoid consumer deception or consumer

1 ignorance concerning the material features of products.
2 When the Commission promulgated the Insulation
3 Disclosure Rule, for example, it indicated this Rule
4 would advance both consumer protection and
5 competition objectives: "Market imperfections impede the
6 process of providing such information, first, discourage
7 consumer consideration of salient product features; second,
8 diminish comparison shopping; third, create unwarranted
9 competitive parity or advantage for inferior products."
10 Skipping probably five pages right now, my last
11 point is that I think the Commission should, in the consumer
12 protection area, go back to focusing on entire industries
13 and focus on them in the way that the Bureau of Competition
14 and the Bureau of Economics does. I think that the examples
15 of guidelines, rule-making proceedings that I mentioned
16 previously, some of which I think have been enormously
17 successful, support that orientation.
18 Those are my four propositions, and I think I'm
19 right in under the red "time's up" card.
20 (Applause.)
21 MR. SKITOL: Well, my intent is to stand on
22 Cas's shoulders, as broad as they are. I want to comment on
23 how the Hobbs vision for cross-bureau information disclosure
24 initiatives can and should inspire some fresh thinking about
25 particularly difficult issues -- competition policy issues

1 that have been problematic when addressed solely from an
2 antitrust standpoint, and consumer protection policy issues
3 when they have been problematic or especially
4 difficult when approached solely from a deception or unfair
5 practices standpoint.
6 The intent is to suggest ways to reconceptualize,
7 that's Neil Averitt's word which he has loaned to
8 me, reconceptualize and thereby strengthen each bureau's
9 existing Section 5 theories by drawing upon the other
10 bureau's doctrines and expertise.
11 I have four examples to suggest. I'm going to
12 go through them pretty quickly and invite you, if you
13 want more detail, to read my paper.
14 The first example concerns professional
15 self-regulation. We don't have to dwell a lot on it
16 because we've heard a lot about the Commission's long
17 history and experience in dealing with professional
18 self-regulation in the last panel, but it is, as we also
19 heard in the last panel, an area that suffered a serious
20 setback in California Dental.
21 The setback suggests to me lost opportunities
22 from sole reliance on the unfair methods of competition
23 authority in this area. The Commission there applied
24 pretty conventional Sherman Act standards in its
25 determination that the California Dentists' advertising

1 code was anti-competitive. The Ninth Circuit second-guessed
2 the Commission's analysis, came up with a different approach,
3 different antitrust based standards, and then the Supreme
4 Court third-guessed the Commission's judgments by
5 essentially accepting the dentists' justifications for
6 what the Commission had found to be overbroad
7 regulation.
8 I would respectfully suggest that the outcome
9 might have been nicely different if, at the outset, the
10 Commission had alleged unfair practices in addition to
11 unfair methods of competition and had employed BCP's
12 experience in advertising regulation under its
13 established deception standards.
14 The dentists' code obviously prohibited more
15 than deceptive kinds of claims, and the resulting
16 over-regulation caused consumer injury of a kind meeting
17 the Commission's definition of an unfair practice, even
18 if not also so clearly a violation of existing antitrust
19 law.
20 Looking ahead, California Dental should not
21 inhibit enforcement efforts against any association
22 crossing the line between desirable and undesirable
23 kinds of self-regulation activity. BC can develop
24 stronger means of inducing associations to address
25 consumer concerns in enlightened ways by enlisting BCP's

1 involvement in this effort.
2 The second example is BC's initiative to address
3 the patent ambushes or patent hold-ups that keep popping
4 up in standards-setting proceedings throughout the
5 information technology sector. This is a problem that's
6 pretty well recognized these days. It comes out of the
7 interaction between proliferating patents and
8 proliferating needs for standards to enable inter-
9 operability amongst lots of different kinds of products
10 employing new technologies.
11 This evolves into situations where desired
12 specifications implicate patents undisclosed during the
13 standard-setting proceeding, patents that would be
14 widely infringed in the absence of licenses from the
15 owners. This has great potential for exclusionary
16 effects.
17 The Commission's efforts to date to address this
18 problem under its unfair methods of competition
19 authority have been controversial. The Agency has
20 struggled to find viable theories under which a patent
21 holder's nondisclosure of its patent claims during the
22 standard-setting can be found to create market power or
23 otherwise to be sufficiently anti-competitive in
24 conventional antitrust terms to amount to a recognized
25 antitrust violation.

1 A related problem is that even when a patent is
2 disclosed, the owner withholds meaningful information on
3 its intended license terms until after the standard is
4 adopted and an entire industry is locked into its use in
5 developing compliant products. Standard setting
6 participants thus vote to buy the patent and input
7 without knowing what it will cost compared to
8 alternatives that might be considered.
9 In short, this is about hiding the ball on both
10 patent claims and license terms in ways that subvert the
11 open standards objectives that everybody talks about.
12 BC might more effectively and holistically address these
13 problems by employing BCP's consumer protection
14 authority. This would include BCP's wide experience in
15 defining conditions under which the failure to disclose
16 material information can be considered deceptive or
17 unfair.
18 I think the unfairness doctrine may be
19 particularly useful in addressing a standard group's
20 explicit prohibition on any consideration of license
21 terms in the course of a standard setting proceeding.
22 The unfairness authority could be invoked to extend, in
23 a creative way, to this problem.
24 These principles derive from the Supreme Court's
25 hydrolevel decision of 22 years ago. There the Supreme

1 Court established a standard setting group's antitrust
2 liability when anti-competitive harm occurs as a result
3 of the group's failure to implement procedures aimed at
4 preventing abuse of its processes. There's no reason
5 why the same idea should not apply to any situation
6 where a standard setting group enables patent owners to
7 hide facts essential to informed decision making.
8 I'm going to move on to a third example
9 involving digital rights management, which really
10 encompasses a mesh of issues surrounding content
11 protection. In our emerging all-digital world, there
12 are sharply conflicting interests between and among
13 content providers, hardware vendors, original equipment
14 manufacturers and aftermarket rivals and consumers,
15 line drawing between piracy versus consumer fair use,
16 unlawful circumvention of IP laws versus legitimate
17 reverse engineering, desirable protection of innovation
18 incentives versus undesirable or excessive limitations
19 on competition in complementary market spaces.
20 The courts and Congress and the FCC have been
21 struggling over all of these issues. The FTC has been
22 sort of missing in action with no visible input to
23 date. This is unfortunate because the Commission has a
24 great deal to contribute to policy evolution in this
25 area.

1 The relevance of BC's competition expertise is
2 obvious, particularly since a lot of the problem lies
3 right at the intersection between IP and competition law
4 where the Commission has invested a lot of time and
5 resources in recent years. But BCP's consumer protection
6 expertise is also quite relevant, since core parts of
7 the problem implicate issues of consumer expectations
8 regarding affected devices and the absence of
9 information at the point of purchase about use
10 restrictions. Consumers are effectively getting locked
11 into DRM solutions imposed by concerted industry
12 actions unknown to them but adversely affecting product
13 usage.
14 So most immediately the Commission could
15 constructively provide its perspectives with input from
16 both of the bureaus on these issues through amicus
17 briefs in pending litigation, appearances in hearings
18 on pending litigation, and particularly comments to the
19 FCC in the course of its pending proceedings in this
20 area as the American Antitrust Institute has cogently
21 argued and urged the Commission to do.
22 BC could also begin close scrutiny of some of
23 the new kinds of collaborative activity under which
24 industry groups are creating standards and technology
25 pools and licensing schemes for DRM solutions without

1 safeguards for anti-competitive abuse. BCP could also
2 take a lead role in addressing information disclosure
3 and adequacies.
4 My time is up, so if you want to know about the
5 fourth example involving the Kodak doctrine, you'll have
6 to wait for my paper.
7 (Applause.)
8 MR. LANDE: Good afternoon. Many of this
9 morning's speakers talked about how consumer protection
10 law is really about consumer choice and how a consumer
11 choice framework is the best way to analyze consumer
12 protection issues. I'm going to try to do the same
13 thing for antitrust, and I'm going to talk about times
14 when antitrust should focus explicitly and directly
15 on consumer choice.
16 Even though I think we would all agree that
17 consumer welfare considerations demand that antitrust
18 consider such consumer choice, non-price issues as
19 quality, variety and innovation, in theory these needs
20 could be accommodated under a price or efficiency
21 approach. That is, in theory a price approach could
22 analyze conduct in terms of "quality adjusted prices."
23 An efficiency model could take account of,
24 quote, "the value that consumers attach to having greater
25 variety." This can be done in theory, but in practice,

1 neither of these things happen very often, arguably because
2 the translations are extremely difficult to do.
3 So, usually in a price analysis the theoretical
4 caveats or adjustments are moved to the footnotes and
5 then forgotten about, and then the analysis proceeds
6 along the familiar lines of cost and price. As an
7 example, consider an example that Mary Lou Steptoe gave
8 me years ago, the Federal Trade Commission's case against
9 firms' jointly set restrictions concerning
10 the advertising of bulletproof vests.
11 In theory we could translate any non-price
12 harms, e.g., consumers buying less safe bulletproof
13 vests, into price terms if we did enough mental
14 gymnastics. But as a practical matter, in the real
15 world, we would only pay attention, in most such cases,
16 to the price and cost savings effects at the expense of
17 the relatively difficult-to-quantify safety issues.
18 Price would be in the text. Safety would be in a
19 footnote and then, as a practical matter, it would be
20 forgotten about.
21 In a case like this, wouldn't it just be better
22 to focus on safety, the item that consumers really care
23 about, explicitly and directly?
24 However, there is often a problem with doing this.
25 The problem is that normally a market that is competitive

1 in price terms will also be competitive in non-price
2 terms. This is true because competitive firms usually
3 will meet whatever price or non-price options the
4 consumers demand, so normally there's no difference
5 between using a price or efficiency approach on the one
6 hand and using the consumer choice approach on the other
7 hand.
8 The consumer choice approach only deserves to be
9 a new lodestar for antitrust if there are significant,
10 frequently encountered areas where it demands to be
11 used, and where its use would be superior to that of a
12 price or efficiency model, and none where it's inferior.
13 I think that there are three important situations where
14 the consumer choice framework meets this test.
15 The first category involves conduct in markets
16 with little or no price competition as a result of
17 regulation, of joint ventures, or third-party payers. In
18 these situations there's no way to properly assess
19 consumer welfare without focusing explicitly and
20 directly on non-price issues.
21 Consider first the situation where markets are
22 regulated. We can use, as an example, airlines in the
23 1960s. Prices were regulated, but we still wanted the
24 airlines to compete on the basis of quality. You might
25 ask, "Why didn't we just let every airline merge in the

1 1960s?" The answer is we wanted them to compete with
2 one another on the basis of quality, even though prices
3 were regulated.
4 How about cases involving industry-wide joint
5 ventures? As you recall, Aspen involved what the court
6 decided was a relevant market for antitrust purposes,
7 and it had an industry-wide joint venture with an
8 industry-wide lift ticket. So there was no price
9 competition for this product.
10 There was, however, choice competition between
11 the firms involved. This gave consumers the ability to
12 choose on the basis of quality, and it also gave the two
13 firms an incentive to compete with one another on the
14 basis of quality. A price analysis wouldn't work very
15 well in such a market.
16 Finally, how about markets involving third-party
17 payers? Whenever a consumer's bills are paid by somebody
18 else, they're likely to care more about quality and variety
19 than price. If a person knows that their health insurance
20 or car repair bills are going to be paid by their
21 insurance companies, a price model will simply be inadequate
22 at fully explaining their behavior.
23 A second category of cases where a consumer
24 choice approach would be superior involves conduct that
25 increases consumers' search costs or otherwise impairs

1 consumers' decision-making ability. This conduct tends
2 to harm consumers not only by raising the prices to the
3 consumers, but also by impeding their selection of
4 products in terms of quality and variety.
5 There are a large number of these cases,
6 many which have been discussed here today. Consider all
7 of the FTC's advertising cases, like Cal Dental, and the
8 list goes on and on and on, and also similar cases that
9 involve collusion to raise consumer search costs, like
10 National Society of Professional Engineers.
11 Efficiencies were claimed for each of the
12 practices, and depending on the case, the efficiencies
13 were more or less believable. Prices of the services in
14 question, whether it was dental services, legal services,
15 optician, engineer, architecture, whatever, probably
16 went up. That was the whole point of the collusion
17 after all. The prohibitions against advertising
18 these professional services also made it difficult for
19 consumers to choose the professional that was best for
20 their needs, so consumer selection of a lawyer, dentist,
21 architect, et cetera, was suboptimal on account of the
22 collusion.
23 Most of these practices are evaluated under the
24 Rule of Reason, and if we were doing a Rule of Reason
25 analysis of these practices, we would balance the

1 efficiencies on the one hand against the price effects
2 and the diminished consumer choice in terms of quality
3 and variety on the other hand.
4 That balance could easily come out different if
5 only the negative price effects were included in the
6 trade-off. A trade-off that includes also the negative
7 non-price effects would much more accurately reflect
8 consumer welfare.
9 Finally, there's an important category of cases
10 that involves markets in which firms compete primarily
11 through independent product development and creativity
12 rather than through price. These markets often involve
13 high-tech innovation or editorial independence in the
14 media.
15 Effective competition in these industries may
16 sometimes require more independent centers of
17 decision-making than are required to ensure price
18 competition, so market concentration principles taken
19 from a price context might not ensure robust competition
20 in the respects that are actually of most interest to
21 consumers. In these markets, we care about artificially
22 diminished consumer choice, even if prices are
23 competitive.
24 Let's take perhaps the poster child in this area:
25 the media. This is an area where we care about

1 independent judgment, decision-making and creativity.
2 Suppose there were only four remaining media sources of
3 a particular type, book publishers, TV news, magazine
4 owners, whatever, and suppose two of them wanted to
5 merge. Suppose we believe that three companies would be
6 enough for effective price competition.
7 Would you approve of this four to three merger,
8 or would you fear diminished consumer choice, fewer
9 independent sources of opinion and information? If so,
10 some large media mergers might well be evaluated
11 differently under a consumer choice standard than a
12 price standard.
13 Let me contrast what I'm saying with a very
14 conventional merger. Suppose there were only four firms
15 that made cookies, and they wanted to merge down to
16 three firms. Suppose that three firms would be enough to
17 have price competition in the cookie market. If consumers
18 want 30 or 300 variety of cookies, we could trust the
19 remaining three firms to supply them.
20 For a hypothetical cookie merger, it wouldn't
21 make any difference whether we use a price approach or a
22 choice approach. The key difference is that the owners
23 of the cookie companies don't care which cookies their
24 customers eat, so they'll produce whatever kind of
25 cookies consumers want. But this might not always be

1 true for the media.
2 The owners of the media might have distinct
3 preferences concerning the editorial slants of the
4 news. Within limits they might be able to slant the
5 content of the news coverage.
6 Moreover, the media owners might have
7 unconscious biases, and even if they have the best
8 intentions, they might not be able to supply the full
9 range of views. While companies easily can supply all
10 different types of cookies, it's much more difficult to
11 hold all different types of world views.
12 To emphasize the point: Why don't we let every TV
13 news network merge? That is, why not let them merge
14 the entirety of all the network news operations into one?
15 Would there be cost savings efficiencies? There would be
16 tremendous cost savings efficiencies. Would there be
17 any bad effects on prices? Well, if you're more
18 creative than I am, you might be able to find a few
19 minor ones. But remember that they're competing for
20 advertising dollars and personnel with many other TV
21 shows and many other non-TV entities.
22 The real harm from merging every news operation
23 into one can best be expressed in terms of choice, in
24 terms of perspective, quality, variety of approaches to
25 news coverage. A choice model would account for this

1 much better than a price or efficiency model.
2 Finally, what about high technology where
3 innovation is crucial? It's virtually meaningless to
4 try to use a price standard to evaluate the effects of a
5 merger or a joint venture on future technology.
6 For mergers in the defense, pharmaceutical, computer
7 or other high-tech sectors, to ensure the optimal level
8 of future consumer choice we want divergent sources of
9 attempts to maximize innovations. In fact innovation
10 is often more important in these industries than prices
11 of existing products.
12 These mergers should be evaluated explicitly and
13 directly in terms of whether the research might need
14 lead to new and better products, in terms of whether consumer
15 choice will be enhanced or diminished. Prices are also
16 important, of course, but a consumer choice approach
17 would, quite properly, intensify our focus on products
18 that might never be invented but for a merger.
19 In conclusion, under a consumer choice standard,
20 factors like innovation, perspectives, quality and
21 safety would be moved up from the footnotes, where
22 they're all too often ignored, into the text where they
23 would play a much more prominent role in the antitrust
24 analysis.
25 Thank you.

1 (Applause.)
2 COMMISSIONER LEARY: I don't think I'll bother
3 standing up, if you don't mind. Just a few quick
4 comments here on the speeches and papers prepared.
5 This segment of this conference is I think
6 critical to long-term development of law in both
7 consumer protection and competition areas. They share a
8 common framework that most people don't think of.
9 The competition wing of our house focuses on distortions
10 of the supply side. It focuses on price fixing schemes
11 or exclusionary behavior that has the effect of increasing
12 the price at which goods are offered. The consumer
13 protection side of the house focuses on distortions on
14 the demand side because they focus on false representations
15 that convey the impression that goods are worth a great
16 deal more than they are. As anybody who has studied
17 Economics 101 understands, the prices offered and the
18 quantities manufactured depend upon the interaction of
19 supply side and demand side.
20 So if there's a distortion on either one of
21 them, you get a false result, a distorted market result,
22 and that's the best argument, by the way, for having
23 both functions in the same house.
24 It's interesting that the traditional view
25 of competition law is that competition law is economic

1 equals statistical -- a kind of a left brain sort of a
2 thing. The traditional view of consumer protection
3 law is that it depends upon subjective impressions and
4 so on -- a kind of a softer right brain kind of thing.
5 That's no longer true either.
6 Since 1994 with the unfairness statute, consumer
7 protection law is much more overtly grounded in economic
8 criteria than it was before, and on the other hand,
9 particularly with the developments in our merger guidelines,
10 our general way of looking at competition issues is a great
11 deal less statistical than it used to be. If anybody tries
12 to tell you that there isn't an element of subjectivity
13 involved when you're trying to predict what a merger is going
14 to do, they don't know what they're talking about. Of course
15 there's some subjectivity involved, and so the two areas are
16 a lot closer than we like to think.
17 All of these papers make that point in one way
18 or the other, and I generally agree with the points that
19 are made in all of them. Please understand that my
20 individual critique here is intended to be constructive
21 and intended to be friendly, and because of time, it's
22 necessarily selective.
23 Let me turn to the Averitt and Lande paper
24 first. This one is the most ambitious and extensive,
25 and when you read it, I think you will find it rich

1 indeed. I think they are clearly correct that consumer
2 responses are more active and complex than many of our
3 competition cases assume.
4 Consumers are not just an undifferentiated mass
5 of people who disappear if the prices go up 5 percent,
6 and then a larger number who will walk out of the door if
7 they go up 10 percent and so on. They're much, much
8 more complicated than that.
9 I don't think I'm an atypical consumer, but I
10 don't mind telling you, I will not drive a car with a
11 foreign nameplate, period, and I don't care what
12 Consumer Reports said. I would be embarrassed to be
13 seen in one. I will not wear dungarees unless I'm
14 riding a horse because I don't want to look like a
15 superannuated hippie, and I don't care what the
16 cost/benefit is of wearing that garment. I won't do it.
17 A lot of people say, "Oh, well, these things are
18 so-called fashion exceptions to the normal rules of
19 economics," but we live in a society where the
20 fashion exceptions are becoming the rule, and the
21 commodity products are the exceptions.
22 So we have to have a richer understanding of
23 what economics is because consumers are much, much more
24 complicated. It's not just consumers, it's businesses
25 as well.

1 Do you remember the big excitement over B2B a
2 few years ago? We had these gigantic conferences about
3 what the impact of B2B is going to be because the
4 efficiencies are overwhelming and because companies
5 are going to be able to get all these anonymous
6 quotations, and they're going to be able to array them
7 and make all these efficient decisions. This is
8 going to take over, and what are the antitrust
9 implications?
10 Well, what happened to them? What happened to
11 them? We have talked to some people. We, the Federal
12 Trade Commission, reviewed a venture in my old industry,
13 the auto industry, before I came on to the Commission,
14 and I recently asked some people in the auto business,
15 "Whatever happened to this? This was supposed to take
16 over. Why not?"
17 Well, it was because people wanted to deal
18 face-to-face with their suppliers, because their choice
19 of suppliers is not made just on price alone, not just
20 on statistics. It's made on a much richer thing. They
21 want to sit across the table, and they want to have a
22 conversation about what are you going to do if X happens
23 and if Y happens, and that's not the sort of the thing
24 you can handle on the Internet. It's richer, and
25 so I think here the fundamental message of your paper is

1 right on.
2 Where I fall off the sled a little bit is when
3 you start moving from that insight to a discussion of
4 tweaking the HHI presumptions or something of that sort,
5 because I think the problem is much, much more
6 fundamental than that.
7 Let's try a thought experiment. I read in the
8 press just recently that the woman who created Harry
9 Potter, a welfare mother ten years ago, is now a
10 billionaire. My guess is that the Harry Potter
11 Enterprise -- if you apply a standard guidelines test of
12 whether people will flee with a 5 or 10 percent price
13 increase -- is a monopoly.
14 Okay. What does it mean to say that the Harry
15 Potter Enterprise is a monopoly? Suppose hypothetically
16 that this woman wants to diversify her investment and
17 wants to sell out Harry Potter to Walt Disney. Is it a
18 horizontal merger in the first place because I suspect
19 in many respects that the Walt Disney enterprise is a
20 monopoly under standard guidelines testing?
21 If it's not a horizontal merger, do we care? If
22 it is a horizontal merger, what is the market? What is
23 the HHI in the first place? So, that is one of the
24 questions that you might want to be asking in your paper,
25 before you start talking about whether we should worry

1 about four to three or something. You might ask
2 yourself: What is the market for these kinds of highly
3 differentiated products?
4 If we can't even define a market in the first
5 place, then why go down the statistical pathway at all?
6 Is there some more direct way to determine whether or
7 not there's consumer harm? I agree with you 100 percent
8 that if there is consumer harm, it's a variety issue. If
9 Walt Disney were to acquire Harry Potter, does anybody
10 think that the big problem would be a price impact?
11 I suspect what people would be worried about is
12 whether or not the unique appeal of Harry Potter --
13 whatever it is I have no idea, but my grandchildren seem
14 excited about it -- the worry would be that the unique
15 appeal of Harry Potter would somehow or another get
16 smeared into the different views of the Disney empire,
17 and how do you predict that? But that's a real element
18 of consumer harm. That's what we've got to be looking
19 at.
20 Cas Hobbs: Cas's paper is quite frankly a lot
21 more interesting and a lot less scary to me than his
22 presentation. It's got great inside history about some
23 of the decisions in the Federal Trade Commission. I
24 hope you keep that part in, Cas. But Cas Hobbs recently
25 sent an e-mail to a lot of his friends saying he's about to

1 depart from practicing law, to focus on golf, tennis,
2 gardening and cooking, and then he leaves behind this big
3 ticking time bomb.
4 For example, the whole notion of identifying industries
5 where there is market failure and then intensively regulating
6 them is kind of interesting, if you take it in juxtaposition
7 with what Messrs. Lande and Averitt are telling us, because
8 how do you identify market failure? Traditionally we want
9 to identify it by price that is well in excess of marginal
10 costs, right? That's what Lou Engman's Line of Business
11 inquiry was all about.
12 Well, the fact of the matter is when you're
13 dealing with businesses like Harry Potter, marginal
14 costs are totally irrelevant. When you're dealing with
15 some of these high-tech-businesses, marginal costs are
16 totally irrelevant. So how do we determine what is a
17 good performing industry and a bad performing industry
18 in the first place?
19 I'm not saying that there isn't some way to do
20 it, but we have to find some new ways to do it before we
21 undertake regulation in the Federal Trade Commission
22 that identifies these industries and tries to tweak
23 them.
24 I'm not smart enough to say that the cereal
25 industry is performing poorly economically. I have no

1 idea. I think most of the stuff they sell is inedible,
2 but that's just me. Obviously they appeal to somebody,
3 and I'm not about to say -- with my own views on
4 automobiles and dungarees -- that their tastes are any
5 necessarily better or worse than mine.
6 I am particularly concerned as well about the
7 suggestion that across the board, the Federal Trade
8 Commission should determine which industries are
9 providing sufficient information to consumers and which
10 are not.
11 Cas, in your own paper you say that the problem
12 isn't as hard as it used to be because you have E-Commerce
13 now, and with E-Commerce, if you mandate the provision
14 of information, it's a great deal less costly than it used
15 to be. But the fact of the matter is because of
16 E-Commerce, there's also a great deal more information out
17 there than there used to be.
18 There is frankly a blizzard of information out
19 there, and I have no idea how significant that
20 information is to a significant number of people. I'm
21 not even sure I know how we would find out because
22 if you ask people what is important to them or what is
23 not important to them, frequently the answer you will
24 get is what they think is the socially responsible thing
25 to say.

1 Boy, we knew that in the automobile business.
2 You ask people, "What is important to you in driving an
3 automobile," and the answers you will get invariably are
4 economy, utility and so on and so forth, and then they
5 all go out and buy these massive SUVs. Don't fool
6 yourself, it's not advertising that makes them buy the
7 massive SUVs. Somehow or another, when they see them on
8 the road, it means something to them. It's an image of
9 power, or devil-may-care or I'm rich enough to be stupid.
10 I don't know, but it's something. I suspect there's
11 a great deal more information out there about automobiles
12 today than there used to be, and I don't know whether people
13 are making intelligent choices or not, certainly not by
14 my lights.
15 So what do I want to say in conclusion here? I
16 think I can remember my conclusion. Look, this is an idea
17 that we are working on. We are bringing cases now that
18 are rooted in much, much more sophisticated motions.
19 I think what Susan Creighton said is an indication
20 of some of the things that we are doing. I don't know
21 whether those cases are going to prove out in fact or not,
22 but the way the complaints are framed, you will see they are
23 framed to take some of these consumer choice things in mind.
24 Secondly, we are overtly facing up to something
25 that we haven't talked about today, and that is

1 potential conflict between what people think of as
2 consumer protection objectives and competition
3 objectives, and that is something that was identified.
4 The Supreme Court saw it.
5 I'm not as critical at the Cal Dental decision
6 as some other people may be. In part, I'm not invested
7 in it emotionally because it was all litigated before I
8 arrived, but what the Supreme Court was telling us
9 there, I think, was that there may be some consumer
10 protection objectives that you lost sight of when you
11 declared the Cal Dental restrictions as illegal per se.
12 There is perhaps in this industry -- at least you
13 might want to consider -- the potential for some kind of
14 demand side distortion because people do not readily
15 understand information that is conveyed to them in these
16 settings.
17 It's not because there's something magic about
18 professionals. It's because their business is mysterious
19 to ordinary people, and therefore some kind of
20 industry self-regulation aimed at avoiding distortions
21 which might be intolerable in a different context might
22 be tolerable here. I think we are taking that to heart
23 as well.
24 I'll give you an example. We urge industry
25 people collectively not to advertise bogus weight loss

1 products, and what we are doing is we are saying something
2 that is an anathema to some antitrust lawyers. What
3 we're saying is that the demand side distortion is so
4 great as a result of this false advertising which
5 contributes nothing to efficiency, that we are willing to
6 run the risk perhaps of some very, very small supply side
7 effects.
8 I think, without being explicit, that's what we're
9 saying to the world today, and that's enough out of me.
10 Thank you.
11 (Applause.)
12 MR. AVERITT: We're going to move at this point
13 into a general discussion, and we'll start with Mary Lou
14 Steptoe.
15 MS. STEPTOE: I will start by saying I disagree. I
16 think actually, Commissioner, that BC people are sort of
17 hard wired and left brained. And in that regard I'm going to
18 be very hard wired and note that we're a little behind
19 schedule, so I will try to be very brief, but two things:
20 One is that when the papers come out, you have
21 to read both Bob and Cas's papers because of their
22 historical portions. If nothing else, it's fascinating
23 how we arrived here. I've lived with the FTC all my
24 life, and I didn't know some of the stuff that I lived
25 through. I think the history is an excellent springboard

1 to some very stimulating and provocative ideas, all of
2 which deserve some consideration.
3 That having been said, my own reactions as a
4 left brainer to Bob and Neil's choice approach is that I
5 think it's very valid. I tend to agree with
6 Commissioner that where I have the most concerns about
7 it is trying to import it right now into merger analysis
8 which, by definition, is one step removed as a
9 predictive exercise, so the uncertainties associated
10 with this choice approach I think are harder to play out.
11 I do, however, think it is a wonderful model and
12 should be pushed into antitrust more on the conduct
13 side, and I say that having brought a couple of the
14 cases that I know Bob has considered, the Detroit Auto
15 Dealers case and the Personal Protective Armor, the
16 bulletproof vest case, in both of which I think as attorneys
17 at the time we were intuiting our way into a choice
18 approach.
19 We knew that something was distorting
20 competition. It really wasn't in the first instance about
21 price. We got over that rather shakily I think. We just
22 knew the conduct was wrong. We were in the lucky position
23 of being able to extract a consent so we didn't have to
24 articulate the analysis very clearly. But I think, now
25 speaking with a hard wired left brain, that if you tried to

1 work this choice approach into conduct issues like
2 suppressions that raise search costs or restrict
3 important information and maybe articulate the theory in
4 a more disciplined report, that would inform all of
5 our analysis.
6 It would be good for competition, and at the end
7 of the day, you might improve your understanding so that
8 eventually you could import it into the merger area, and
9 that's my quick take on that.
10 Do I get an award for being fastest at finishing time?
11 (Applause.)
12 MR. AVERITT: Thank you, Mary Lou.
13 Picking up on your thought that it might make
14 sense to focus initially on conduct cases rather than
15 merger cases, would you think it would make sense to
16 differentiate among different kinds of situations in
17 which the Agency might want to consider calling for more
18 information.
19 Might we say one possibility is there's been a
20 market failure; another possibility is the Commission is
21 establishing a standard vocabulary for people that do
22 wish to talk about a certain thing? Still another
23 possibility might be as a remedy if there's been a
24 preexisting conspiracy to limit information in some
25 way, maybe a remedy might call for affirmative disclosures

1 in order to speed up the restoration of the market?
2 Are those kind of differentiations worth
3 thinking about, rather than saying, "Information, yes
4 or no?" In other words, can we identify particular kinds
5 of information short falls as raising special competition
6 concern?
7 MS. STEPTOE: I think I may have misunderstood
8 your question, but did you put it in a merger context?
9 MR. AVERITT: No. I meant to put it in a non-
10 merger context.
11 MS. STEPTOE: Well, I think in a conduct context
12 where you can have a before and after, you saw perhaps what
13 the market was like before the restraints were imposed or
14 perhaps you have an analogous market that doesn't have
15 the restraints from which you can make comparisons, that
16 those sort of creative remedies are appropriate.
17 In fact I think in Detroit Auto Dealers, for
18 example, we did the equivalent of affirmative action
19 remedy. The dealers had been conspiring to limit their
20 hours, which meant that people couldn't search for cars,
21 and we imposed a remedy that said, "You have to be open."
22 We tried to be creative. We didn't tell them exactly
23 what days or how long.
24 We gave an overall number of hours they had to
25 be open in the week and then left it up to the dealers

1 to try to work it out, unilaterally, as how best to fit
2 in with the contours of the order.
3 That was a creative order. It was also a flawed
4 order. It was a flawed order because we forgot that
5 the total number of hours might make it prohibitively
6 dangerous for inner-city car dealers to remain open that
7 length of time. The order was amended when this was
8 brought to our attention. So, I think you ought to be
9 both creative in the original order and flexible in any
10 adjustments as the order operates in the market.
11 MR. AVERITT: Mary Lou, you've been a Bureau
12 Director. Are there sociological or institutional
13 factors that could work to encourage or to discourage
14 collaboration on this? Are there things that you would
15 suggest that either you ought to consider doing or ought
16 to consider avoiding?
17 MS. STEPTOE: I think my experience predates the
18 golden age that Commissioner Leary described where BCP
19 has become more rigorous and BC has become more
20 flexible. So while I do remember institutional barriers, I
21 guess I would say that it sounds like they have vanished,
22 and there is an attempt at being a more cohesive Agency
23 than I was there, so I'm not going to walk into that
24 particular bog.
25 MR. AVERITT: Bob Skitol, what would be the role

1 of a market power screen in the matters that you were
2 discussing? If a firm is engaging in deception of a
3 corporate purchaser, do you feel that we ought to be
4 ignoring market power on the theory that deception
5 distorts markets for reasons of its own unrelated to
6 market power, or do you feel that market power ought to
7 be shown nonetheless as an exercise in self-discipline?
8 MR. SKITOL: Well, my thought would be that
9 market power or some proxy, some alternative test should
10 be required before the Commission expends substantial
11 resources on anything, but a reasonable proxy or an
12 alternative would be the consumer injury, the
13 substantial consumer injury element of the test for
14 unfair practices under the unfairness protocol.
15 If you really have got the objective evidence to
16 show substantial consumer injury under the protocol,
17 then you probably, with some more effort, would also be
18 able to show market power, but you shouldn't have to
19 also go that additional step.
20 MR. AVERITT: So you're saying it ought to be
21 shown as in the Commission's internal debates but not
22 necessarily proven?
23 MR. SKITOL: Well, I think proven as well. I
24 think if the Commission is going to bring an enforcement
25 action in the patent hold-up kind of circumstance, for

1 example, I think it's appropriate for the Commission to
2 bear the burden of proving either market power in a
3 conventional antitrust sense or some other measure or
4 some other indicium of substantial consumer injury, if
5 you want to alternatively pursue the case on an
6 unfairness theory.
7 MR. AVERITT: Any other thoughts, comments,
8 responses?
9 COMMISSIONER LEARY: I wanted to pick up on this.
10 I'm not sure Mary Lou and I really disagree. I always
11 was a left brained person too, until I got into the job
12 I have now, and it doesn't have anything to do with
13 the difference between the private sector and the public
14 sector. The difference is between being an advocate,
15 which I have been all my life, and trying to decide cases.
16 Most of the matters we see in the Federal Trade
17 Commission on the competition side involve incipiency
18 concerns. It's not just mergers, unless you're
19 talking about dealing with hard core price fixing where
20 the market impact is not really an issue, and those tend
21 to be over in the Department of Justice anyway. In most
22 of the things that we're dealing with, we are trying to
23 predict the future, and predicting the future is not
24 something that can be done just by a computer. If
25 you're sitting where I am on the tough cases, you find

1 people who come in on both sides who proceed from the
2 same economic premise, so it's not an ideological
3 question either.
4 They both are using statistical methods.
5 They're both eminent. Both sides are represented by
6 eminent advocates and economists, and they're telling
7 you diametrically opposite things, and so ultimately, in
8 weighing these things you have to try to apply some kind
9 of an intuitive feeling based on your own experience or
10 something, always with the realization that you can be
11 wrong.
12 So the first thing and the final reaction I have in
13 reading all of these papers is that they appeal to our
14 humility. It's an appeal to realization of our own
15 fallibility. We have to make these choices
16 because that's what we took an oath to do, but I don't
17 feel that I can be replaced by a computer.
18 It's interesting, when you talk to a whole bunch
19 of business people in an audience, you know, they keep
20 talking about why can't the law be more predictable and
21 certain and all this kind of stuff, and I'll say, Talk
22 to your CEO and ask your CEO whether he can be replaced
23 by a computer.
24 Of course they get hotly indignant. Yet they
25 have all these tools to measure and predict, all of

1 these economic tools, and intuitively they know a lot more
2 about their own businesses than any outside commissioner
3 can. They still would be furious if you suggested that
4 this law could be reduced to a mathematical
5 calculation.
6 I would say, "Well, why do you think that I can
7 make decisions the same way?" That's not a repudiation
8 of economics. It's just that economics is not the same
9 as physics, and I think an awful lot of people forgot that
10 at one period of time.
11 MR. AVERITT: I think that gives you the last
12 word, and it's exactly five o'clock. I am told that the
13 reception begins at six at the hotel, the Marriott, down
14 on Pennsylvania Avenue. I hope to see you all there.
15 We hope to see you all tomorrow as well.
16 (Time noted: 5:00 p.m.)
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2 C E R T I F I C A T I O N O F R E P O R T E R S
3
4 TITLE: 90TH ANNIVERSARY SYMPOSIUM
5 SYMPOSIUM DATE: SEPTEMBER 22, 2004
6
7 WE HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the tapes
9 transcribed by us on the above matter before the FEDERAL
10 TRADE COMMISSION to the best of our knowledge and
11 belief.
12
13 DATED: OCTOBER 6, 2004
14
15 SALLY J. BOWLING
16
17 DEBRA L. MAHEUX
18
19 C E R T I F I C A T I O N O F P R O O F R E A D E R
20
21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.
24
25 DIANE QUADE