This transcript has been lightly edited for clarity

INJUNCTIONS, DIVESTITURE AND DISGORGEMENT

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MODERATOR: JOHN D. GRAUBERT

MR. GRAUBERT: Thank you, Judy.

Good morning and thank you all for coming at this difficult hour. In addition to the substantive policy areas that we discussed yesterday, another significant aspect of the evolution of the FTC over the past 90 years has been in the area of remedies, and many observers of the Agency, including some in this group and some of our participants in other panels have observed that the traditional remedial tool, which is the cease and desist order, go and sin no more, is not a particularly effective way to redress harm to consumers or to deter future unlawful conduct. Particularly if such an order is issued years after the conduct at issue.

So, there's been a lot of effort, particularly in the last 10 to 15 years, but over a longer period as well, to try to make the FTC's remedies more meaningful. And this morning we will first consider two specific aspects of that quest, the development of the 13(b) injunction and its associated remedies, and merger remedies. And I'm pleased to welcome back to the Commission Dave Fitzgerald on my left who will talk about the 13(b) program and Claudia Higgins and Ann Malester who will talk about merger remedies, and our own Mel Orlans will offer some thoughts on the injunction program.

In the interest of time, I will skip over biographical information and refer you to the bios in the program.

Finally, David Balto will pull it all together for us and give us some of his always insightful and often provocative views on where we stand at the moment. In fact, based on my conversations with David over the last week or two, I would like at this time to completely disassociate myself and my family...

(Laughter.)

MR. GRAUBERT: ... from any remarks that David makes. I thank the panelists very much for their contributions, and I add Judy's disclaimer that the views expressed by any employees of the Federal Trade Commission are their own and not the views of the

Commission or their Commissioners.

On November 16th, 1973, facing a severe energy crisis characterized by shortages and high prices of gasoline, President Nixon signed the TransAlaska Pipeline Act, authorizing the construction of an 800-mile pipeline crossing three mountain ranges and over 800 rivers and streams, from the oil rich north slope of Alaska to Port Valdez. This was a controversial matter complicated by environmental considerations and others. But the pipeline was expected to eventually bring two million barrels a day to U.S. consumers and was a critical part of the president's plan for the U.S. to be energy independent by the year 1980. Optimistic.

Dave Fitzgerald, for 100 points, what does any of this have to do with what we're talking about today?

MR. FITZGERALD: You know, I really don't have the faintest idea. Well, Section 13(b), by sheer coincidence -- can't hear? Is that better? Section 13(b) was enacted as part of the TransAlaska Pipeline Act. Can I get 100 points for that?

MR. GRAUBERT: Yes.

MR. FITZGERALD: John sort of dragged me back from never-neverland and asked me to talk about the early development of Section 13(b) back when I was at the FTC, which was during the period 1976 to 1990. So, I don't know much about what's happened in the last 15 years, but I kind of remember what happened way back then and there are actually a lot of people here who look pretty familiar as though they probably have their own ideas about what happened back then. So, this is what my recollection is.

The enactment of the TransAlaska Pipeline Act and 13(b) did not start a wave of 13(b) actions with the Federal Trade Commission. In fact, when I came in '76, three years later, there had been only one 13(b) case, and that was a competition case. It had not been used at all in the consumer protection area. And in fact, it didn't even look like it was going to be a particularly useful remedy in the consumer protection area for a number of reasons.

Primarily, it gave the Commission authority to seek a preliminary injunction, to stop ongoing practices or threaten practices pending the outcome of Commission cease and desist proceedings.

Well, in the 1970s, that wasn't really where the Commission was at. They were primarily into rule-making, trade regulation rule-making. The BCP resources were consumed primarily by rule-making and not by adjudication. Not that the Commission didn't do any cases, they did, but even there, the nature of the investigations and deceptive practices is that very often the practices were no longer being actively pursued by the time the Commission brought a case.

So, why would you need a preliminary injunction? And in those cases the Commission was principally focused on getting cease and desist relief that was brought. Fencing in relief we used to call it, maybe they still do.

So, there really wasn't much apparent use for 13(b). In 1977, I believe that the Commission filed its first 13(b) case, it was a case called Australian Land Title, nobody remembers it, probably, but it was the first use of 13(b) in the consumer protection field, and it was a case in which, as was often the case, the deceptive practices had passed. There were land sales, using deceptive practices, land in Australia, and the staff said, well, you know, those are gone, we'll bring a Section 5 administrative proceeding, but you know that people are still paying for this land under long-term contracts, and for reasons that I won't go into, but you can accept it, the land was objectively worthless. These people were never going to get any money from their investment in the land. But they were still paying.

Could we do anything about that? So, the idea was, well, let's go to federal court and let's see if we can get a preliminary injunction to stop the payment of the money, stop the company from collecting from customers and purchasers during the pendency of the administrative proceedings. Alternatively could we force them to put the money in escrow, and we did that, arguing that although that didn't sound like what Section 13(b) was about on its face, it was an equitable remedy, and this was a court of equity, and why couldn't a court do this to protect the purchasers?

What happened was that we filed the case and the companies settled, and they agreed to that kind of preliminary relief and they agreed to a cease and desist order, and they agreed to consumer redress, and it worked out very well, but the Commission didn't then go forward with that program, actually we didn't use 13(b) again, I believe, for another two years until Southwest Sunsites. A case that people probably are aware of if they've looked into the 13(b) history. It was a very similar case, land sales, sales were over, but customers were paying on long-term contracts, and again the Commission went to court and said we would like an injunction, pending the outcome of the cease and desist proceedings, and potentially a Section 19 case, escrowing the payments so people don't have to continue paying on worthless land.

In that case, the company did defend, the district court rejected the Commission's plea, but the

Fifth Circuit, and I think John knows about this, the Fifth Circuit was very receptive, and it was a big win for the Commission. The Fifth Circuit issued a decision saying that even though Section 13(b) preliminary relief talked about injunctions, in fact the courts were entitled to use the full panoply of equitable remedies that were available to a court of equity. And that included the authority to preliminarily enjoin the disposition of funds, to freeze assets, to require escrowing of any payments, even if that money was being preserved for a Section 19 case, which was sort of pie in the sky at that point, because it was a potential remedy down the road, and the court of equity had the ability to preserve the ability to do that effectively.

But the problem with Southwest Sunsites was that the remedy of a preliminary injunction in that kind of context was very awkward. You needed three separate lawsuits to get final relief. You had to bring a preliminary injunction in federal court and you had to bring a complete Section 5 case, administrative case, all the way through, and then you have to go for a Section 19 case. That is time consuming, and it is very inefficient.

So, actually by the time Southwest Sunsites was decided, the Commission was already looking at alternatives, because at the very tail end of Section 13(b), as you're probably all aware, there are 14 key words, in proper cases the Commission may seek, and after proper proof the court may issue a permanent injunction.

And so, as a practical matter, today those 14 words are the basis for the 13(b) program. This legislative history doesn't mention very much about what that little proviso was intended to do, except that it was thought that, well, the Commission could go to court in routine fraud cases and get a permanent injunction. The first case in which we actually used it was not a routine fraud case, it was a case called Virginia Homes under the Magnuson-Moss Warranty Act, where a firm had issued warranties, written warranties that did not comply with the warranty act. They misrepresented the rights of the purchasers under the warranty act, and so the warranties were no longer in use, and so we could have gone with a Section 5 administrative case, that really wasn't very valuable, because the only remedy that the Commission wanted was to force the company to notify the people who had gotten the bad warranties their true warranties rights.

Preliminary injunction didn't make any sense because it was either up or down, either they got the notice or they didn't get the notice. So, what we did was we went to court and asked the court to order, as under the permanent injunction proviso, to order the companies to send out notifications to past purchasers of their correct warranty rights.

Now, the limited response from the defense was well that's not a remedy. That's not the remedy. The remedy is permanent injunctions, and but the court said, no, we're a court of equity, we've got the broad enough authority to do this if that's what's necessary to protect the consumers.

At the same time, the Commission was starting to pursue what you're probably seeing now, which is the fraud cases where we went to court and said, we want consumer redress as an equitable remedy, and all that is premised on a line of cases that begins with the Supreme Court's decision in Porter versus Warner Holding Company in 1946. There's a lot of cases that followed that. They all say basically that when Congress in an enforcement action gives a district court equitable authority to grant injunctive relief, what Congress means, unless it very clearly says otherwise, is equitable remedies.

Basically courts think that they know what has to be done, and they should have the authority to do that, unless Congress says otherwise. And so premised on that case, we went to court said, okay, it says that the court may issue a permanent injunction, what that means is anything, any kind of equitable relief. Injunctions, consumer redress, restitution, asset freezes, appointing receivers, and in the early cases, particularly the H. N. Singer case, guess what, they actually bought that. And so by 1982, that Singer case was in place and the Commission moved forward with what is now the fraud program using 13(b). And what happened was there was a new administration came to the FTC, they did not want to particularly pursue rule-making, they wanted to do adjudication, they wanted to pursue consumer frauds. They saw this 13(b) action as a potential, and we spent the next several years while I was there regearing the Bureau of Consumer Protection from rule-making and administrative adjudication to 13(b) cases in federal court, which was, I note, many of you were here then and it was a re-education process, a re-orientation process, and I was stunned to see when I looked at the website that now there were, at least as of the end of June, there were 86 I think injunction consumer redress cases pending in federal court, and only maybe a couple of administrative cases.

I know my ten minutes is gone, but the one thing I do want to say is that, you know, we got there, we got to the point where we were by really very carefully considering what remedies were appropriate in each case. We didn't get there by deciding on a remedy and then looking for the cases.

Cease and desist orders are still probably very important in some cases. Even in the '80s, we were doing administrative cases followed by Section 19 cases.

I'm not convinced that there aren't cases in which the Southwest Sunsites approach wouldn't be the best approach. And so I do think it's real important that success of the 13(b) program has been, I hope everybody is thinking about other ways to do things, I hope you're trying to be as creative as we were trying to be back in the '70s.

MR. GRAUBERT: Thanks, Dave. Mel, your thoughts?

MR. ORLANS: Thank you, John.

Well, when John gave me this task, I was delegated the responsibility of discussing and critiquing Dave's presentation, and when Dave was at the Commission years ago, he and I had spirited discussions and debates about a number of policy issues, so I was very much looking forward to this. Unfortunately, I agree with basically everything that Dave said.

So, rather than doing that, what I thought I would do is spend a few minutes essentially amplifying and clarifying some of his thoughts and adding a few of my own.

First of all, as I think David alluded to, I think the Commission deserves considerable credit for its step-by-step development of 13(b) law. The Agency went from a statute that basically provides a one-sentence permanent injunction proviso -- it says that in proper cases the Commission may seek and the court may grant a permanent injunction -- and it has on a step-by-step basis expanded that.

The first major litigated case was Virginia Homes, went from there to the Ninth Circuit in the Singer case, the Singer court as David indicated relied on a line of cases, Porter v. Warner Holding Company and its progeny. Basically what those cases say is that a district court is entitled to exercise the full scope of its inherent equitable authority, unless the statute expressly, or by necessary and inescapable inference, provides to the contrary. And having established that point in the Ninth Circuit, the Commission then took that step by step and went through a number of other circuits, to the point now where there are probably five or six circuits that have all ruled on this and accepted that basic proposition in a 13(b) case -- the Commission or a district court were appropriate to exercise the full scope of its inherent equitable authority, and that includes the authority to award monetary equitable relief.

Keep in mind that a 13(b) case involves

equitable relief, and so while there is a full range of equitable relief, including monetary relief available, it does not include legal remedies such as damages. So, in that respect, when people sometimes talk about 13(b) as a redress statute, the actual redress statute the Commission uses is Section 19, which provides not only for forms of equitable relief, but also for legal relief. And the technically correct view of 13(b), at least the permanent injunction proviso, is that it provides for all forms of monetary equitable relief.

Typically that means rescission restitution, and in some instances disgorgement. And as I said, what the Commission then did was build on that and move step by step along to the point where all the circuits now, or all the circuits who have considered the issue, have ruled with the Commission, and at the same time the Commission also altered the forms of relief that it was seeking and expanded those. So, we went from notice in the case of Virginia Homes, to rescission restitution, and then to some disgorgement cases.

Similarly, the first cases involved the issue of corporate liability, we went from there to individual liability for the individual's own acts and now we have cases involving individual liability -- the scope of individual liability -- for the corporate bad acts to the extent that the individual was either involved in those acts or knew of the acts and was in a position to control them.

One of the cases that's interesting and important in the evolution of all this was the Heater case, which David mentioned in his paper but didn't have the chance to address today. In Heater, or prior to Heater, I should say, the Commission had been providing monetary relief administratively, and had some history of doing that.

That was challenged in the Ninth Circuit in the Heater case, and the court concluded that -- and again, the Heater case involved the Commission's authority, not the district court's -- and the Ninth Circuit in Heater concluded that, no, the Commission did not have the authority to award monetary relief, but that authority may be available to the court, but was not available to the Commission.

And as a result of that, it left a big gap in Commission law, and that gap has been rather ably filled by Section 13(b). So, we're at the point now where Heater is sort of largely an irrelevant footnote, although there were people at the Commission then, and still are today, and at least in my case, who believe that Heater was wrongly decided, and there was some sentiment early on to try to challenge Heater in some other circuits, but as I say, 13(b) so ably filled that gap that at this point, Heater is just sort of an interesting historical footnote.

For those of you who are really involved in this, you should know that the Commission does still occasionally take monetary settlements in administrative cases, and that is done not under Section 13(b), but rather that's viewed as essentially a settlement resolution of a potential Section 19 case.

So, on that basis, in a pending administrative case, the Commission can take a monetary settlement. The Commission has not, since Heater, actually brought an administrative case seeking monetary relief.

In addition, as the Commission has expanded Section 13(b), the permanent injunction proviso of 13(b), that expansion in the '90s included competition cases for the first time. Competition matters had been brought under the preliminary injunction proviso of 13(b) quite routinely, but the permanent injunction proviso had initially been entirely a BCP focus until the 1990s.

Since then, there have been a handful of BC cases, I think in the range of four, that have utilized Section 13(b), the permanent injunction proviso, as a basis for seeking monetary relief, typically disgorgement in the competition context. I think some of the other panelists may discuss that, or may have some further thoughts to offer, but you should also be aware that a 13(b) permanent injunction proviso is not solely a BCP remedy at this point in time.

There are, of course, two kinds of preliminary injunctions under Section 13(b). There's a preliminary injunction in the aid of an administrative proceeding and then there are preliminary injunctions under the permanent injunction proviso in aid of an ongoing federal court litigation.

Keep in mind that the first type, that is in aid of an administrative proceeding, the full remedy sought in federal court and the final remedy is a preliminary injunction. And of course, that's typically used in merger cases as a way of stopping the merger to allow an administrative proceeding to follow thereafter.

BCP has actually used the preliminary injunction aid of administrative proceeding portion of the statute fairly rarely, but has used it particularly in a couple of advertising cases like Pharmtech, but that part of the statute is primarily a competition portion of the statute.

One of the issues David raised in passing was the question of ongoing violations, and that's to me a fairly interesting issue. I was involved in the Evans Products case, which raised exactly that question. And the Virginia Homes manufacturing case also raised that issue.

Clearly, there is no preliminary injunction available if the violation is neither ongoing nor threatened; however, it is still possible in a consumer protection case to get a permanent injunction in the event that the violation has ceased, so long as there is a cognizable risk of reoccurrence. And since a good number of the Bureau of Consumer Protection cases are, in fact, cases where you have ongoing or you have consumer fraud involved, in those sorts of situations, there is almost always a cognizable risk of recurrence, because of the inherently fraudulent nature of the conduct, particularly where individuals are involved.

I would note in passing one of the more interesting areas of the law that, even in a situation where there is no cognizable risk of recurrence and hence no permanent injunction, a 13(b) action could still be maintained and monetary equitable relief could still be awarded.

There are a couple of cases which I find rather interesting, not FTC cases, where the person who is engaged in fraud subsequently became ill, clearly could never repeat the conduct; in one instance was on his deathbed, and as a result of that, the court in an SEC case declined to enter a permanent injunction because there was no cognizable risk of occurrence. So the lawyer said in that case that having gone this far, let me suggest, court, that since you agree that a permanent injunction is impossible, you should also agree that there shouldn't be any monetary relief because, after all, there's no cognizable risk of recurrence, hence no permanent injunction, hence no basis for awarding monetary equitable relief. And the court said, well, that's an interesting argument, but wrong. Once a court of equity takes jurisdiction over a case, even if it doesn't end in a permanent injunction, we could still award additional equitable relief, and that can include monetary relief to deprive the defendant of the ill-gotten gains.

So, in this instance, even the fact that this guy was on his deathbed, while the court said that that didn't justify a permanent injunction, there was no cognizable risk of recurrence, nonetheless it also didn't warrant allowing the man or his heirs to keep the money.

The other point I would like to make in passing, and my time is just about up, is that the early 13(b) cases were the cases of routine fraud. I would emphasize at this point that although most of the BCP cases have been routine fraud cases, we do not view 13(b) permanent injunction actions as limited to cases involving routine fraud.

Some courts have actually used broader language and suggested that 13(b) can be used for a violation of any law enforced by the Federal Trade Commission, but at a minimum we think that any clear violation of the law, that any violation that does not require administrative elaboration or articulation of the law, would be appropriate for Section 13(b). Thank you.

MR. GRAUBERT: Thank you, Mel.

David, do you want to add anything?

MR. FITZGERALD: No, don't want to at this point.

MR. GRAUBERT: Just a note for fans of the Heater case in the Ninth Circuit, the Ninth Circuit decided a case last month involving FERC, I think it was brought by the California Public Utility Commission, and it's arguable that it might undercut some of the reasoning from Heater, and if any of you would like to share your views with me on that case, I would be delighted.

MR. FITZGERALD: I guess I would offer one thought on that is that it's interesting the Heater decision and the Singer decision were from the same court, the Ninth Circuit. And in one decision the court said it would be inconsistent with the whole structure of the FTC Act for the Commission to order consumer redress, but it is entirely consistent in the next case for the court to exercise broad discretion order and you have to sort of think about the question is does that turn on who's doing the deciding on that case.

MR. GRAUBERT: Okay.

MR. ORLANS: And I think the answer is clearly yes in that instance.

MR. GRAUBERT: All right, thank you. Let's move on to merge remedies, and I'll give it to Claudia.

MS. HIGGINS: Well, good morning. It's delightful for me to get to be here to discuss merger remedies with you and I hope that my insights based on, gosh, I can't believe it when I say it all the time, 25 years at the Federal Trade Commission and then a few years of private practice. I hope those years of insight will add to our discussions as we talk about both where the FTC has been and where it might be heading.

I don't think we can project out for 90 years, but maybe we can talk about, you know, the next few.

Can everyone hear me, am I actually on the mic? Okay. I hate these things. I would rather yell.

But, to prepare for today's panel, I worked closely with my former colleague and good friend Judy Bailey, and I believe Judy is the only person who is currently part of the Federal Trade Commission and who actually worked for former House Judiciary Chair Pete Rodino. To me that's a very fitting connection for the purpose of at least my part of this discussion this morning, because I think all of us have to recognize that the Hart-Scott-Rodino Act of 1976 is really the foundation upon which FTC merger remedies exist.

So that for the purposes of merger remedies, in my opinion, we don't have to go back 90 years to really look at something. When Pete Rodino sent remarks to commemorate the 25th Anniversary of the HSR Act, he emphasized the difference that legislation had made to the enforcement of the merger laws, and he reminded us that the harm caused by certain mergers in pre-HSR days was certainly irreparable, that even when the government won a merger challenge, its competition, it was almost impossible to restore competition. The merged company had already closed its plants and cut jobs and scrambled assets. So, consumers were the losers, even though the FTC may have won the case.

Today, thanks to the passage of the HSR 28 years ago, we can recall and appreciate the development of the FTC's merger remedies. Many current staff members and private practitioners either were not around or have largely forgotten the pre-HSR era, but I'm told by some folks, and I don't see the person who told me that in this audience, but I'm told by some folks that before 1977 when the HSR came into effect, that what today would be called the merger screening committee was really termed the merger screaming committee, evidencing the staff's frustration that by the time they learned of a merger, it was typically just too late.

Professor Elzinga in 1969 had written a seminal article referring to the FTC's victories in court in mergers as really being phyrric ones, and as I look back on it, I wonder why the FTC even bothered to try them. It must have been so terribly frustrating to know that the merger assets were completely commingled and there was nothing really left that the Agency could do.

So, today's world is different indeed. The HSR radically reformed merger enforcement procedures and provided a means for effective remedies. And today we take for granted that automatic waiting period that gives the Agency the opportunity to learn something about the industry and possibly, you know, go seek relief in those few instances where that relief is needed.

Just to spend a touch more on the history, because I think that's something that is really interesting in terms of this symposium. In 1951 the Celler-Kefauver Act had been passed, which affected asset transfers and brought into the scope of Section 7 of the Clayton Act those asset transfers where before that just stock transfers had taken place. As that Act was just being passed, both Celler and Kefauver realized that midnight mergers were really still the normal course of events. And they both, both those legislators sought to plug the gaps of their 1950 legislation.

Interestingly, Representative Celler was involved in getting a 1956 act passed, or a 1956 House Bill passed, not an act, that would have provided waiting periods such as those of the HSR, but it wasn't until 20 years later that we end up with HSR. It was really a tremendous battle in the legislature.

As I look on the evolution of those merger remedies in connection with current day actions of the Commission, beginning in 1976 through I would say the mid-'90s, the Agency either sought to block transactions or sought to divest mostly ongoing businesses or stores or plants or things like that if it was willing to settle a transaction. But with the coming of one major transaction, I believe the Agency began looking at things a little differently, and people may argue with me about which case it was that brought this thinking to the forefront, but in my opinion, it's the merger of American Home Products and American Cyanamid.

That matter which was begun, I believe, in 1993, but finished in 1994, was a $10 billion merger, which at the time was an enormous transaction for the Agency to grapple with. And there was a wide ranging investigation that soon narrowed down to a real focus on three major product areas that seemed to be implicated in the merger.

Out of the whole $10 billion, maybe there were possibly as many as like $10 million, out of $10 billion, there was maybe only $10 million of commerce that was really adversely affected or potentially adversely affected in terms of that merger.

One of those three markets, or alleged markets I suppose the opponents on the other side would say, was the market for Tetanus and diphtheria vaccines, and not all Tetanus and diphtheria, but really only that Tetanus and diphtheria that's given to adults. Childhood Tetanus and diphtheria was a competitive circumstance that wasn't terribly adversely affected by the merger.

So, in this one small little thing, the staff knew that there was a real case, and you know, in that case, they also knew, well, you know, I'm a part of this, we knew it was a clear-cut case, and I think our opponents knew that as well. It was almost a laydown. FDA regulatory procedures were right there that showed barriers to entry. There was no possible new entry coming.

But as one thinks about that case, one knew that it would be difficult for the Commission to say, let's stop the whole $10 billion merger. And negotiations went on, and finally a decision was made, and I have to be very careful, because there are internal deliberative processes that I cannot reveal, but finally a decision was made to accept a very novel kind of settlement. It was a settlement that did not require any physical assets to be divested, only intellectual property that was divested. It really set the stage for a number of settlements coming on.

As part of that discussion, though, the Commission knew it had to make sure that that remedy would work. You weren't divesting an ongoing business, you weren't divesting even a store. You had intellectual property. So, the Commission required a monitor trustee, and it required that a significant amount of help be provided to the new acquirer of those assets.

It was really a very phenomenal order in my opinion, and if Naomi Licker were here in the audience, I would probably try to make her stand up, because I think she was phenomenal in putting that together.

UNIDENTIFIED SPEAKER: She's here.

MS. HIGGINS: Oh, is she? Good.

But that set a stage. And from there on, soon thereafter Bill Baer and Pitofsky came into the Commission and began implementing a series of other kinds of changes, including requiring buyers up front.

We had been using crown jewels as impetus to make sure orders were followed through effectively. We had been already under Baer and Pitofsky, the push was to severely shorten the amount of time for divestiture assets, if there were no buyer up front. A number of kinds of things.

Under Muris' regime, there have been major moves toward increasing the transparency of the actions, and in fact, the divestiture report that Naomi and Ken Davidson worked on even before Pitofsky left, helped to begin that transparency move tremendously.

So, as we look from 1994 through 2004, to me the hallmark of the Agency's action is that it's been flexible, both to allow companies to accomplish their merger, where it was a legitimate one, but to carve out those things that would have harmed consumers and to provide an opportunity for the companies to set up a situation with the Commission oversight to maintain the status quo entity before the merger took place.

I've over exceeded my time, so I will turn it over now.

MR. GRAUBERT: Thank you, Claudia.

Ann Malester.

MS. MALESTER: Well, Claudia has really highlighted the evolution of merger remedies at the Commission, and I think what I would want to stress is that the ten years, the ten last years that Claudia tried to summarize by the American Home Products case and its progeny, has really led us today to a situation where negotiating merger remedies at the Commission has become in many cases very complicated, and because of the complexities, often takes a long time.

So, not surprisingly, at the Commission, the staff hears concerns raised by merging companies and their counsel that during all the months that the deal is in limbo, employees are leaving, and the companies are losing focus on business, and ultimately really competition is harmed because of that.

At the same time, I think that too many years have passed for people to remember that, in fact, this is true because the Commission in those cases is giving up its option of seeking to block the entire deal, or giving up its option of seeking a larger package of assets to divest, which poses less risk to competition.

So, there's a tension between parties wanting to sell as narrow a package of assets as they can, versus the concern that that kind of divestiture package poses a risk to competition and the Commission wants to be sure that it's doing all possible to keep the status quo postmerger.

One thing that I think is important in this context, and I hope to try to get a discussion amongst the panelists, because most of us have done merger remedies, but one thing to keep in mind here is in the entire merger enforcement program, there is probably no one area where there's more divergence between the FTC and the Justice Department as in merger remedy negotiations. And that in itself is something that I think both agencies need to be thinking about, because there's an inherent feeling of: "why is it appropriate for companies to be in a really different scenario depending purely on the chance of which agency is reviewing their deal?"

So, I thought it might be useful to throw out a couple of the key areas where the agencies tend to differ and where there's the most tension between the FTC seeking a really good remedy, and the parties trying to close their deal in a relatively short time, and see what everyone thinks about those issues, and where we should go on a looking-forward basis.

And the first one is what is called fix it first. The Justice Department in the past few years has used a fix it first approach in close to about a quarter of the mergers where they have found a competitive problem. And what they tend to do there is tell the companies, here's the problem, the companies go off and fix it, and then the deal is allowed to close without any consent agreement, and without any ongoing supervision by the Agency in the future.

And the question I wanted to raise and see if the panelists have any views on, is whether that's something the FTC should consider in certain circumstances, whether it's appropriate or whether it's feasible.

MR. BALTO: Can I respond to that? This is an example where the FTC should not take after the Antitrust Division Ann is absolutely correct in identifying a significant divergence between the two agencies on the fix-it-first policy and that's because the FTC has it right, and the Antitrust Division doesn't know that they've got it wrong.

You need to go no further than to look at the fix it first approach that the DOJ used in the MCI/WorldCom merger where they resolved the merger with a fix-it-first divestiture without securing a consent decree. The divestiture failed, and clearly it didn't restore competition.

People may criticize the, quote unquote, overly regulatory approach of the FTC on merger remedies, but it's exactly right.

MS. HIGGINS: And I hate to have a lovefest up here on the panel, but I have to agree as well. I mean, the Agency has an obligation to protect consumers from harm and it could only exercise that obligation if it has an order in place, in my opinion.

MS. MALESTER: Well, let's try a next approach.

MR. GRAUBERT: Let me throw in one more thing, Ann, and this is something you mentioned, one of the things that you can do by having an ongoing supervisory relationship under an order is to have various forms of monitor trustees, which there have been many, I don't know if you're going to address this later. Although some people initially reacted with some skepticism that this would be an overly regulatory type of thing, despite the imposition of this procedure in dozens of cases, I'm not aware of any significant complaint that's come out of the monitor trustee process.

MS. HIGGINS: I think that's right. American Home Products was indeed the first time we used the monitor trustee, although there it's called an auditor trustee, I believe, and it then became commonplace, and I don't believe that there have been complaints about the use of those trustees.

As a private practitioner representing a buyer of divested assets, I have on more than one occasion gone to the monitor trustees responsible for those assets and sought that person's help in coming back to the Commission to say, the order is not quite being complied with, because of course the people from whom my clients bought the assets have no interest in making sure that my client made, you know, good competitive footing in the marketplace.

MS. MALESTER: Let me just take issue with one word that David used in his response, which is regulatory. He said the Commission is right in having regulatory orders. I don't think the Commission has regulatory orders, and I think on the contrary, the whole focus of the consent agreements that the Commission tries to issue is to avoid being regulatory and to put the marketplace back in the same position it was before. So, I just wanted to clarify what I think David probably meant, but we'll talk about that later.

(Laughter.)

MS. MALESTER: Well, I'm very happy to see that Bill Baer just walked into the room, because the next point that I want to raise is probably the most controversial and where there is the most divergence with the Justice Department, and that is the whole issue of requiring companies to find a buyer up front and to negotiate an asset purchase agreement before the underlying merger is closed.

And as far as I know, with the exception of the fix it first, that in some ways is finding a buyer, but then you don't have to negotiate a consent, the DOJ has really stayed away from the buyer up front requirement, allowing companies to sell assets later.

In looking at where the FTC is today, statistically I think in about 50 percent of the consent agreements that the Commission has issued over the past year or two, there have been buyers up front required. And again, I wanted to throw out to my fellow panelists the question of whether that is something that the FTC should be pursuing, pursuing more aggressively, or retrenching from as we go forward.

MS. HIGGINS: I mean, it looks to me that in recent years, although current FTC people may be able to tell me otherwise, that the buyer up front almost near requirement of the Baer/Pitofsky years has been winnowed down to more of a situational basis that you have to bring a buyer up front to the Agency when and if you are trying to negotiate sort of a novel settlement where it's somewhat unclear that your asset package can be sold.

That seems about right to me. It seems a rational approach to the phenomenon, so as long as the divestiture time period is kept short, and the Commission and its staff have some real comfort that that asset package can and will be sold readily without too much effort.

MS. MALESTER: I would characterize it, I guess, a little bit differently. I think where the Commission is today, and I think really what the policy was all along, although as you go through a number of the cases, you become a little more sophisticated and may be better able to judge when you need it, is how close the assets are to a business that is on going and clearly where there are a number of buyers that are interested in buying the assets.

The closer you get to a product on its own without manufacturing facilities, without ongoing sales, marketing and other attributes of a business, the more I think there's a reluctance at the FTC to accept a consent without a buyer up front.

The last point I would make on this is that it would be great to have some empirical evidence to be able to support the point David made earlier that, in fact, we, the FTC, gets it better than DOJ and that in these cases the FTC is right in making the companies go through this exercise, because I think there is a lot of feelings on companies and outside counsel part that they really are left with a very long, difficult process which they don't face at the FTC.

MR. BALTO: Two points. As a consumer, I want to make sure competition is restored as quickly as possible, and I would like to know that competition is restored completely. It seems to me that the buyer up front tends to do that, and puts all the risks on the merging party's shoulders instead of on the consuming public's shoulders. And I'll leave it at that.

MR. GRAUBERT: Let's move on for a second. I see that Dan and others from compliance are here, so if we have a few minutes at the end during the question period, I'll yield a minute to anyone who wants to add to this discussion, but let's turn it over to Dave and buckle your seat belts.

MR. BALTO: The title of my talk is returning to the Elman vision of the FTC: recognizing the unique capability of the FTC in antitrust remedies. I'm of course referring to Phil Elman who was a distinguished commissioner during the 1960s. My thesis is that the FTC should recognize its unique institutional capabilities and its limitations, in fulfilling the real vision that Brandeis and Wilson had for the Commission.

What Elman said back 40 years ago, was the Congress of 1914 intended the Commission to supplement and not duplicate the work of the Antitrust Division in antitrust enforcement. The creation of the FTC was a basic shift in emphasis from punishment and moral opprobrium to administrative adjudication, correction and regulation.

He said that the Commission's role as a policeman and prosecutor should be de-emphasized and the Commission should focus on areas where its role as an administrative agency with distinct powers of gathering information and unique expertise should be recognized.

What are the special unique characteristics of the FTC that gives it that special role, above that of the courts or the Antitrust Division? I'll name seven and I'm sure you can name more. And many of these things were things that Wilson and Brandeis envisioned in the creation of the Commission.

First, the use of administrative litigation which gives you an opportunity to really flesh out the issues of remedy. Second, the commission has experience and expertise in various competition and consumer protection issues. Third, the Commission was given the power under Section 6 to do specific studies. Fourth, the Commission was given the power to issue trade regulations and guidelines, it was given a broader mandate than just enforcement. Fifth, the Commission has the ability to review consents and remedies, including the ability to review Justice Department consent decrees. In fact, in 1955, the Attorney General's on the Antitrust laws report said that they had the power to review Justice Department actions would be frequently useful. Yet it has never been used.

Sixth, the FTC has the power under Section 7 to be a special master to the court in determining remedies, that's only been used once. The seventh is perhaps the most important, and that's the expertise of the staff. It's the expertise of the staff attorneys and economists who secure years of industry expertise. It's the expertise of a unique compliance staff, both in consumer protection and competition that focuses strictly on those issues of how to devise remedies, how to implement them, and what works. And that gives the FTC an incredible advantage over that other antitrust agency, over courts.

Now, what does this mean? Well, first the noncontroversial part. I think the FTC is totally wrongheaded to seek disgorgement or restitution under Section 13(b). The reason is, that these efforts duplicate other cases by private or government litigants. There are certainly enough other regulators or enough other entities to seek restitution and disgorgement. There are endless articles now being written about the incoherence of antitrust remedies of all the different parties, states, private players who seek to redress funds for consumers.

It would be okay if, as Judge Posner suggests, there was a single federal entity that could go and bring disgorgement and restitution actions and that would preempt private antitrust suits. That would be fine. Or such actions would be appropriate if there was some kind of coherence that would be brought about by FTC 13b actions. If you look at what actually happens, using Mylan as an example, a case that Mel worked really hard about, six years after the FTC suit the private parties are still fighting it out in court.

And we should recognize that a battle fought here is a battle lost some place else. There are limited resources at the agency, and efforts at 13b take away from the FTC's unique institutional capability. The better approach is for the FTC to seek injunctive relief and use its special expertise and have the states and private parties seek restitution such as in the Buspar case.

Second, in some cases, the Commission should stay its hand, not enforce and issue guidelines instead of adjudication. Phil Elman said, case-by-case adjudication is perhaps the least efficient, most costly and time consuming way to deal with a pervasive economic problem. Case-by-case adjudication only resolves the matter for that entity. And eventually, you know, courts may be very reluctant to apply remedies in uncertain areas if liability is not clear.

Let me give two examples. Where rulemaking may be more effortive than adjudication. First, Jon Baker has a terrific article in which he talks about using trade regulation rules to deal with the problem of oligopoly, the problem that cannot be addressed through enforcement action. We know that through the FTC 1980's case against Ethyla.

We're not about to go and bring cases to break up companies to eliminate the problem of oligopoly. Let's consider using trade regulation rules.

Let me give another one. Standard setting. Now, the Rambus case is a fabulously litigated case. Everybody who has worked on that case has done an incredible job. It deals with a straightforward issue, the question of disclosure in a standard setting process. When that case is resolved, it will determine liability of Rambus. It will not solve the problem.

The way to solve the problem is through guidelines or through a trade regulation rule. The FTC has already held hearings through the IP program on this issue. Guidelines in this area certainly couldn't be any less costly or more time consuming than the Rambus enforcement action.

Third, I think there should be greater consideration of more regulatory orders. The Justice Department and the courts know they don't want to regulate. They look at a case and they go, oh, my God, what would I do to solve this problem, I'm going to have to regulate, forget this. And because of this fear of regulation perhaps the scales tip and they find no liability.

The FTC doesn't face that problem. They have that exceptional compliance staff. One of the great innovations during the last decade was access

requirements and some of the important consent decrees such as Time Warner/AOL or Time Warner/Turner required access. This provides an avenue for the FTC to be more active and to perhaps seek and come up with more interesting,
more intriguing and novel ways of addressing some types of nonmerger enforcement problems.

Fourth, as Phil Elman said, the quality and value of antitrust enforcement is not based on the number of enforcement actions, but on the results achieved. The FTC should fully embrace and completely fund a strong review process of remedies after the fact, including those Justice Department cases.

This will better advise both the courts and the FTC, and the Antitrust Division, what works in remedies and what doesn't work. It will give a benchmark for assessing whether or not things like upfront buyers, monitor trustees, so forth, should work.

Now, the 1999 merger remedy report, which was authored by Naomi Licker and Ken Davidson, who deserve tremendous credit for it, was a good initial step, but it was a teaser, and we need more. There's lots of things to look at, including the use of monitor trustees and regulatory orders. In addition, there's very little literature out there about what remedies work and what remedies don't work.

Fifth, it is important in administrative proceedings to actually litigate remedy issues. I was struck when the remedy issue in Microsoft was evaluated how little litigation there ever had been of the issue. Not surprisingly the courts had difficulty with it. No wonder Judge Jackson didn't hold a remedy hearing. He forgot about Section 7, he should have sent it to the FTC.

The FTC should actively litigate remedies in the cases they bring adjudicatively, and in doing that, it's critical for them to seek the views of customers about what the appropriate remedy is. By doing this, they will build up a common law of remedies in antitrust cases which is desperately needed.

And then finally, as you might have guessed, I think that the courts should rely on the FTC and ask them to be a special master to devise remedies.

The purpose of the FTC in competition cases is not to compete with the Justice Department, state attorney generals and the private antitrust bar in the cops and robbers endeavor of stopping black and white antitrust violation.

The FTC should embrace its role as a regulator. As Brandeis said, the FTC is the instrumentality for doing justice to business, where the processes of the courts are the natural forces of correction are inadequate. We should fulfill the visions of both Justice Brandeis and Phil Elman and

recognize the FTC's unique ability to solve the difficult competitive
problems of the 21st Century and use its entire range of powers to solve those problems.

MR. GRAUBERT: Thank you, David. But what do you really think?

(Laughter.)

MR. GRAUBERT: Let's start perhaps with one question, on your point about there being enough other people to bring lawsuits and seek damages, the Commission alluded to this point in its policy statement on the use of disgorgement in competition cases. Maybe Mel or even Dave, do you want to give some thoughts on how we got into this situation, even if there are all these other people out there who could sue?

MR. ORLANS: Yes, I do believe that contrary to David's views, that the ability in a competition case to seek monetary equitable relief under Section 13(b) is a useful and appropriate weapon in the arsenal. It's a weapon that the Commission has used sparingly. There have been only a handful of cases in the eight or ten years the Commission has considered that remedy.

As John said, the Commission has come up with a policy statement and has articulated three criteria before it would consider disgorgement in an antitrust case. First of all, the Commission looks to whether there is a clear violation. Clear violation being one that there's no need for administrative elaboration or articulation, but rather the violation is apparent under existing law.

Number two, the amount has to be easy to calculate and readily calculable. And third, and perhaps most importantly, in light of David's point, is the Commission prior to issuing or authorizing the issuance of such a case, would look at the value added. That is, before issuing such a case, the Commission will consider whether, in fact, any monetary relief the Commission might be awarded is necessary.

And Mylan is, I think, a perfect example of that. When we looked at Mylan, not only was it at that point unclear whether there would be any follow-on private class actions or state actions on an FTC administrative proceeding, but more importantly, we recognized that the direct purchasers who would be entitled to recover, for the most part, in that case, were drug wholesalers who, number one, had benefited substantially from the price increases on the Mylan products, and therefore had no real incentive to go forward with the antitrust case, and number two, in any event, were heavily dependent upon drug manufacturers like Mylan and, therefore, would not be desirous of rocking the boat in a case like that, and in fact, that's proven to be the case.

In the class action on behalf of the direct purchasers, most of the direct purchasers of the drug wholesalers have opted out of that action. There are a few still in it, but most of them have opted out. Which is what we envisioned would happen.

So, in a case like Mylan in terms of the ill-gotten gains, because had the Commission not brought the case in my view, the defendants, even ultimately had they been subject to a cease and disease order, would have ended up, after all was said and done, retaining a fair amount of the ill-gotten gains and consequently the future behavior of that sort would not be deterred.

So, in my view, again, it's a remedy to be used sparingly, but in my view in the appropriate case it is important for the Commission to utilize its 13(b) authority, the court's 13(b) authority, to obtain monetary equitable relief, i.e. disgorgement in antitrust cases.

MR. FITZGERALD: Well, and I guess I would just say sort of on the consumer protection side, I thought there was a lot to what David said. I thought, you know, the Commission as a unique institution should be using all of its powers and all of its remedies and all of its authority and shouldn't get locked into anything.

On the other hand, to sort of say and as part of that you ought to throw away one of those remedies, which is sort of the redress remedy which is very powerful. You know, money next to going to jail is the most powerful law enforcement remedy there is. That seems to me to be sort of silly, but I do agree that the Commission has a lot going for it, and as I said before, I was kind of surprised that it seemed to me that 13(b) has gone from being really a complete sideline to the whole ball game in consumer protection cases, and there are a lot of other opportunities there, and maybe the Commission is using them, obviously, I'm just a visitor.

MR. GRAUBERT: Thank you, David.

David, your discussion of the use of trade regulation as guidelines is an intriguing subject, and based on one of the questions from the audience here, what would you do with situations like the physician cases that the Commission has been very involved in over the past couple of years involving conduct that's pretty straightforward price fixing. How could you use the trade regulation rule to address that kind of conduct that seems to be on its face fairly well understood to be lawful?

MR. BALTO: Well, in the best of all possible world, I guess we bring all the price fixers in together like the old days and we show them the door.

I think what was envisioned here was trade regulation rules and guidelines would be used for particularly difficult areas. I mean, if it's something very straightforward then there should be appropriate enforcement actions taken, but you know, I think the two areas are Jon Baker's example of the oligopoly problem and my example of standard setting. I think those are excellent examples where there are real limitations of individual enforcement actions and individual litigation, and a much more superior approach may be to use guidelines.

By the way, going back to the 13(b) comments, those are only focusing in on competition, not consumer protection, but I think the Agency needs to recognize that even if it has the power, a diversion like that takes resources away from other things, and would really take the Agency away from much more important things.

MR. GRAUBERT: Any other questions, comments? Go ahead, Ann.

MS. MALESTER: Following up on David's point about what we use our resources for, I can't think of anything that we should not use our resources for more than trying to be in a position of regulating companies and prices and industries. I don't think the FTC does have special expertise to do that. I think that it is a real waste of our resources, and on the contrary, we should really continue to look at trying to keep the marketplace free of anticompetitive behavior or mergers so that it can work. I think that some of the orders in mergers, one in particular that actually the Justice Department brought in a defense case where they and the defense department are now involved in trying to run a particular subsidiary of the defense company, has proven to be nothing short of disastrous, both for the company and the agencies, and I think really reinforces the idea that the agencies are much better off when they make sure that competition is protected and don't try to put themselves in the place of running businesses.

MR. BALTO: Well, you know, your regulatory may be nonregulatory from a different perspective. I mean, when I go before the Antitrust Division and I say, this is what the FTC does in these kind of cases, the Justice Department looks at me and says, oh, well that's a different agency, we don't do those regulatory kind of things.

So, when you take provisions from things like CIBA/Sandoz or some of the pharmaceutical cases, the Division will say those are regulatory. You don't think they're regulatory it's all a question of perspective. I mean, obviously, you're not going to place the FTC in the role of regulating on a daily basis terms and conditions, but I think a lot is achieved in cases like the cases that the FTC -- the pharmaceutical cases the FTC brought where they provide, you know, access under certain conditions.

MR. GRAUBERT: Yes?

MR. BEALES: John, I just wanted to note in talking about the rule-making and redress standards issues, the Commission has been down that road in the glory days of consumer protection rule-making. It launched a rule-making to address standards and certifications that labored for about a decade and produced a lengthy staff report. It was terminated, it was essentially unworkable as an across-the-board kind of remedy, but there might be appropriate cases.

I don't know that it would be wise for the Bureau of Competition to try to circle back that way. I'm pretty sure the Bureau of Consumer Protection wouldn't particularly like to go there again.

MR. GRAUBERT: I'm sure David wasn't suggesting that. Ken, go ahead.

MR. KEN DAVIDSON: On the question of disgorgement, on the well-known plan out of that particular remedy, and I think recent experience has shown, Mylan is one example, Perrigo/Alpharma is another example where you look at the conduct remedies that are in those cases and you say would these cases be worth bringing to get that kind of remedy. And I think the answer is pretty clear that it wouldn't serve any deterrent function, what were the first criteria that you mentioned is that the cases have to be obvious. Well, the case in Alpharma/Perrigo, at least what we believe, is an obvious case. It's a monopolization case. It's an agreement not to compete.

What do you get out of something that says don't agree not to compete? You don't get anything. What you get out of the Commission bringing the case is it learns about it, it initiates the knowledge of the violation, it collects the evidence, and it happens.

It is true that the private bar piles on millions of cases and David calls me up and asks me where a case is after it's done, but the case wouldn't happen unless we brought it. And that fact, to me, is critical in terms of a whole series of actions which meet the first criteria that you mentioned, namely they're obvious, serious violations.

MR. GRAUBERT: Thank you, Ken, I think we have about 30 seconds left. Is there any final comment that you would like to add? Dan, please.

MR. DAN DUCORE: Not to rain on David's parade, but let me speak for the other agencies for a moment. I haven't gone back and done an empirical study, but I think they're using fix it first less frequently than they used to. I think we're using upfront buyers less automatically than we used to. I think there's more of a convergence going on than people might get out of the discussion this morning, but I also think it's driven by the kind of industry.

I think this Agency has taken fix it first remedies in cases where it's a pretty straightforward remedy, the parties are viable for a whole line of business and we say it's already cut, can we be done with it and we've actually closed investigations. So, it's not a black and white thing. I think there's a spectrum of remedies that both agencies have looked at, depending on where you are, which decade you're talking about, but also depending on the industry, and I think we're closer together than I think you're letting people believe.

MR. GRAUBERT: Thanks, Dan. Excellent comments. Well, thank you all, thank the panel and thank you all for coming.

(Applause.)

MR. GRAUBERT: We'll take a 15-minute break before the next panel.

(A brief recess was taken.)