This transcript has been lightly edited for clarity

PANEL ENTITLED: "PRICE DISCRIMINATION, PROFESSIONS, JOINT VENTURES, AND EXCLUSIONARY CONDUCT: FROM PROTECTING COMPETITORS TO PROTECTING COMPETITION."

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MODERATOR: ALDEN F. ABBOTT

MR. ABBOTT: People are drifting back from lunch. I think we're on a very tight time schedule, so we better get started. Welcome back. Welcome back, and my name is Alden Abbott from the Bureau of Competition of the Federal Trade Commission.

It's hard to top a panel involving Tim Muris and Bob Pitofsky, who are sort of the super stars of the regulatory scene over the past decade, but I do hope this session will provide us with some additional food for thought to add to your physical nourishment.

Now, we've already heard that seeing the FTC's initiatives in historical perspective is what this symposium is all about. In that vein, this panel features an all-star lineup of antitrust superstars who surveyed the historical changes that have come about in the FTC's antitrust enforcement mission by focusing on three sets of cases spread out over many years and by a surprise guest star who will talk about fishing, a hot new topic in the antitrust firmament, and I will leave you in suspense, and she will explain that in greater detail later on.

First, we're going to start out with an explication of a case over 50 years old, the Morton Salt case, which epitomizes the high watermark of the Federal Trade Commission's concern for protecting competitors, and in particular small businesses, through enforcement of the Robinson-Patman Act, which has been alluded to earlier, which is a byzantine statute that bans certain forms of price differences in sales to different buyers.

Dr. John Peterman, who has had the distinguished background as a teacher, including the University of Chicago, former director of the Bureau of Economics and later director of Law and Economics Consulting Group, will present a paper discussing Morton Salt.

Second, the joint venture between GM and Toyota, which was blessed by the FTC roughly 20 years ago. This case represents an early effort to weigh efficiencies seriously, and I would argue that unlike Morton Salt -- and I should say before going on, I will say there is a standard disclaimer that applies to all of us in the government, that the views I am putting forth are most assuredly my own and don't represent the views of anyone else at the Federal Trade Commission or any of the Commissioners.

Now, back to my commentary. Unlike Morton Salt, the GM Toyota decision may be viewed as an effort to protect competition, not competitors. By competition, I understand the consumer welfare notion of competition, which is currently shared.

Now, Kathy Fenton, the partner at the Jones Day law firm who worked on the GM Toyota decision as an attorney advisor to Chairman Miller and someone who is closely related to one of our former speakers, Bill Kovacic, will discuss her paper highlighting this path breaking case.

Now, third, the FTC's ongoing enforcement program aimed at professional advertising restrictions, over 25 years old, and there are two bookend cases that sort of epitomize the beginning of that program, and if not its highlight, at least a point at which the Supreme Court has directly addressed the analysis of advertising. Those cases are the AMA, American Medical Association case, and Cal Dental.

Dr. John Kwoka, Finnegan Distinguished Professor of Economics at Northeastern University, will discuss this trend of cases and more generally professional regulation. Now, John, like our first two presenters, once served at the FTC.

Fourth, as an added bonus, we're delighted to have, to talk about fishing, Susan Creighton, the Director of the Bureau of Competition, who has had a distinguished career in private practice at the Wilson, Sonsini firm, a former clerk to Sandra Day O'Connor at the Supreme Court, and I think you'll find her views on fishing and on exclusionary conduct provocative.

Two commenters on our presentations. First up, the individual who first taught me antitrust law and economics many years ago, although I'm too blame for all my deficiencies, he isn't, Kenneth Elzinga, Robert Taylor Professor of Economics at the University of Virginia, whose article "The Antimerger Law: Pyrrhic Victories" was later cited by the Supreme Court in Ford Motor Company v. US.

He'll be followed by Dr. Jonathan Baker. Jon is a Professor of Law at the Washington College of Law, American University, and a former director of the Bureau of Economics.

Finally, we will end our session with a spirited round table among our guests, and that will be that.

So let me turn now to John Peterman and start out by asking: What's so special about Morton Salt?

DR. PETERMAN: It's a good brand, but anyway, it's a pleasure to be here, and thank you very much, Alden, for the great comments.

Now, my talk today will be a little fact heavy, but I think it's important to start it off that way to get where this case ends up directing the Commission. My comments stem entirely from a study of the old Morton Salt case, which I undertook took many years ago, and this is one of the FTC's early, FTC RP, Robinson-Patman, cases.

The case wound its way to the Supreme Court, which upheld the Commission. The FTC decision, as confirmed and strengthened by the Supreme Court, reflected, for many years, the FTC's approach to the regulation of price discrimination.

During the '50s, '60s and '70s, substantial Commission resources were devoted to RP enforcement, and behind this effort, the Supreme Court's Morton decision provided very strong support. The RP Act reflected a change in the government's regulation of price discrimination.

Previously, the aim seems to have been to protect small competitors from predatory price cutting by the large competitor. The new aim was to protect the small buyer from the large buyer who used his power to secure advantages not available to the small buyer. This concern is reflected very clearly and strongly in the Supreme Court's opinion.

According to the Supreme Court, the Act's purpose was to limit the use of quantity or other price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression.

In Morton, the FTC found that the discounts granted by Morton on its sales of table salt to grocery wholesalers and retail chains were illegal price discriminations. The discounts were said to injure competition between resellers who received discounts and those who did not, and Morton failed to show that the discounts were cost-based.

The Commission made clear that it would

challenge similar discounts granted by the other salt producers if it succeeded against Morton. The Commission's order required Morton to eliminate all of its discounts, after which all the other salt producers followed suit.

There are three types of discounts challenged in Morton. The first relates to shipments of salt in full carloads at carload freight rates, and here are some of the facts that you need to know. A discount of 5 percent per case was alleged to be granted to an individual buyer who ordered a carload shipment from the higher price charged to buyers of smaller quantities whose orders were combined or pooled to make up a carload shipment. That's the first discount.

The second discount relates to a lower price for orders shipped in carloads versus orders shipped less than carload. The discount here, of ten cents per case, was granted to a buyer whose order was shipped in a carload at carload freight rates from the higher price charged to a buyer whose order was shipped in less than a carload at less than carload freight rates.

Finally, there were a group of discounts granted to large grocery chains that purchased certain very large annual volumes of table salt. Morton made an effort to cost-justify these annual volume discounts but without success.

These annual volume discounts did seem to fit the concerns addressed by the RP Act, large buyers versus small, but the large chains that received these discounts purchased only about 6 percent of the total output of table salt, and there was no evidence that these buyers acted jointly in purchasing salt or that the producers of salt, of which there were then 15, behaved other than competitively in supplying salt.

For systematic price discrimination to occur, market power would be expected on the buying or selling side or both. Throughout the proceedings, neither the Commission nor the Supreme Court explained why the salt producers were believed to grant discounts. What is clear is that the discounts were not believed to be cost-based.

I can't go into detail about all these discounts, so I will just mention the way the carload discount was handled, and how less than carload pricing was handled, by the Commission and the Supreme Court. This will give, I think, a clear sense of the approach to the regulation of price discrimination.

The carload discount that was found illegal was basically a fiction. Well over 99 percent of all table salt was shipped in carloads at carload freight rates.

Each of the salt companies charged the same price per case to an individual buyer of a carload, and to the buyers of smaller quantities whose orders were pooled to make up a carload. The sales forces of the salt companies assembled the pool cars.

Virtually all buyers' orders were shipped in pool cars or as individual carload orders; that is, virtually all salt was shipped in carloads. The evidence shows that buyers paid the same price if they ordered a straight carload or for shipment in a pool car. There were no complaints by wholesalers about the producers' carload pricing.

The Commission claimed that a buyer who ordered a carload received a discount from the higher price paid by small buyers whose orders were pooled to make up a carload.

The Commission relied on the fact that, on occasion, certain salt producers had published price schedules that reflected such a discount. But this discount was never established in practice throughout the years covered by the Commission's investigation, nor over the prior 25 years. There was a great deal of evidence that carload and pool car orders were priced exactly the same.

Nonetheless, the Commission and the Supreme

Court found that the carload discount was illegal because it injured competition between large buyers, who (it was said) could order a carload and receive the discount, and small buyers, who ordered in pool cars and did not receive the discount, and because Morton failed to cost-justify its discount.

Morton argued that a carload discount did not exist, so competitive injury could not occur under the Robinson-Patman Act. Morton presented no cost justification because there was no price difference to justify. The Commission's order eliminated the carload discount. Since no such discount existed, the order left the producers' carload pricing practices unchanged.

For less than carload pricing, a higher price was charged to a buyer whose order was shipped less than carload, but only rarely did buyers order less than carload. The universal practice was to order in carloads or pool cars.

Of the 74 wholesalers who testified in Morton, only two had ever ordered less than carload, and they did so only on occasion. Of the invoices the 74 wholesalers submitted, about 17,600 cases of Morton's Blue Label Salt were shown to be shipped in carloads or in pool cars and priced the same. Only 80 cases were shipped LCL and charged the higher price.

Even if the higher price was fully discriminatory, the overpayment would be $8, and this reflected orders over several years. Of Morton's total shipments of Blue Label Salt, only 1/10th of 1 percent were shipped LCL.

The higher price charge for less than carload shipments was found to injure competition between buyers who paid the higher price and buyers who did not, and was illegal because Morton did not cost-justify the higher price. It was possible to estimate that the higher LCL price just covered the higher freight costs that Morton incurred on these shipments.

Morton's position was that its LCL price did not injure competition because such shipments were too infrequent and small to have competitive implications. Morton did not try to cost-justify its LCL price, again on the ground that it need not justify what caused no competitive injury.

The Commission's order led Morton and the other producers to refuse to accept LCL orders in the future. This would not help buyers who occasionally ordered LCL, nor would it help competition.

The Supreme Court centers its analysis of competitive injury on the harm caused by Morton's granting a carload discount and charging a higher price for less than carload shipments.

I won't go into the annual volume discounts. I won't have time. There was an effort to cost-justify these discounts, but the effort failed, partly because the companies, including Morton, made a very poor showing why costs might have been lower in supplying the large chains.

The approach in Morton can be summed up. A systematic price difference, perhaps even a price difference that does not exist, is equated with competitive injury and is illegal unless cost justified.

In future, this approach was followed, and almost all complaints have been settled by consent orders without any cost evidence presented. The cases contain no analysis suggesting that market conditions and contracting practices are consistent with price discrimination, or that cost differences considered realistically support (or not) the firm's or the industry's pricing, particularly when assessed in light of whether market conditions favorable to price discrimination exist.

Almost all cases have been brought in industries that have extremely low concentration and where competition is almost certainly likely.

To conclude, I would just say that in its RP enforcement, the Commission seems to have challenged price differences and not price discrimination. Overall the effort likely made the economic system a bit less efficient, contrary to the goal of the Commission's maintaining competition mission. I don't know why or what forces led to this approach.

Contrary to most areas of antitrust, the FTC's economists and economic analysis are not evident in RP cases, and although I've looked into this, I've never been able to discover why that has been the case.

Thank you very much.

(Applause.)

MR. ABBOTT: Thank you, John.

I think we'll see from our next speaker that things got a bit better. Antitrust analysis got a bit better, so, Kathy, will you tell us about GM/Toyota?

MS. FENTON: Thank you. As Alden mentioned in his introduction, I was involved in the GM/Toyota investigation as an attorney advisor to Chairman Jim Miller. My current law firm, Jones Day, also represented GM in that matter, but the views I'm going to present now are entirely my own.

When the Commission issued its provisional approval of GM/Toyota, one of the dissenting

Commissioners issued a statement raising the following question: "If this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will violate those antitrust laws?"

Shortly thereafter, at a Congressional hearing on the subject of the Commission's approval, a commentator also made a prognostication about the future of the automobile industry. "It is a safe bet that 20 years from now, General Motors cars will bear no special relationship to the United States, and Toyota will bear no special connection with Japan."

From the perspective of 20 years, these concerns may have a certain quaintness associated with them, but they do give an indication of the very strong reactions that the GM/Toyota decision evoked. What I would like to do in the time available to me, and in keeping with the historical theme of this program, is to review briefly the factual background of the GM/Toyota joint venture, summarize the FTC's investigation and decision to approve the joint venture with conditions, describe the subsequent history of the venture and its impact on the U.S. auto industry and, finally, offer some perspectives on the possible legacies of GM and Toyota, in terms of the automobile industry, the substantive antitrust analysis of joint ventures, and the FTC's internal policies and practices.

The key facts about the joint venture are relatively simple. By the early 1980s, GM, the largest U.S. automobile company, with approximately a 44 percent share of U.S. auto sales, concluded that it did not know how to make small cars efficiently.

Toyota, the leading Japanese manufacturer and the third largest worldwide auto manufacturer, in turn, wanted to begin production of cars in the United States. However, it ad concerns about supplier relationships and, most importantly, dealing with the largely unionized American labor force.

To address both these needs, GM and Toyota proposed a production joint venture to be called New United Motor Manufacturing, Inc., or NUMMI. This would produce subcompact cars for GM at a closed GM facility located in Fremont, California.

The original thought was that approximately 250,000 cars would be produced each year, based on a Toyota designed vehicle, the Sprinter, which currently was not available for sale in the U.S.

The joint venture would be owned and controlled 50/50. Toyota would be responsible for appointing the chief management personnel, and GM would market and price the joint venture vehicle without any involvement by Toyota.

Following the first public reports of the joint venture, the FTC opened an investigation of the transaction. Over the next 15 months, which included the filing of a Hart-Scott premerger notification form on behalf of the joint venture, the Bureaus of Economics and Competition at the FTC conducted a detailed investigation. By one estimate, over 20,000 hours of FTC professional staff time, excluding work by the Commissioners or their offices, were devoted to the FTC review.

The staff recommendation memoranda totaled over 1,300 pages, and several outside parties, including Professor Kwoka, were retained as consultants to assist the FTC in its review. When the matter was presented for a Commission decision, by a three to two vote, the Commission decided to provisionally approve the joint venture with a consent agreement that placed a number of restrictions on the joint venture's operations.

It was limited to a total of 12 years of operation, could produce only one module (250,000 cars) a year, and faced a series of restrictions limiting the ability of GM and Toyota personnel to communicate on prices or other strategic aspects of the joint venture. It was contemplated, of course, that the FTC would have visitation rights and other oversight provisions to ensure compliance.

With these safeguards, a majority of the Commission -- Chairman Miller and Commissioners Douglas and Calvani -- voted to approve the transactions.

The reasons for their decisions were as follows: The joint venture would increase the total number of small cars manufactured in the U.S.; the cars produced by the joint venture would cost less than any other alternatives available to GM; it would provide opportunities for GM to learn Toyota's efficient manufacturing and management methods, which in turn could be applied to other GM operations; and the venture would serve as a positive demonstration project for U.S. labor management relations, which in turn might encourage Toyota and other Japanese and non U.S. manufacturers to begin operations in the United States.

This positive assessment of the joint venture was not shared by the two dissenting Commissioners, Pertschuk and Bailey. Commissioner Bailey concluded in voting against the joint venture that: "In this decision, the Commission has swept away another generally recognized set of antitrust law principles into the dust bin, using again incorporeal economic rhetoric that now dominates the Commission's decision making."

In a similar vein, Commissioner Pertschuk said: "Battalions of neoclassical economists dancing on the head of a pin, cannot obscure the threat that this marriage of competitors poses to the American consumer, nor the fact that the joint venture is a plain and unambiguous violation of the antitrust laws. The Commission's settlement requiring Toyota and GM to abide by the precise terms of their legal agreement hardly qualifies as antitrust enforcement."

Following a public comment period in which over a hundred comments, split roughly evenly for and against acceptance of the settlement, were received and reviewed by the Commission, the final order was accepted in April 1984.

The joint venture began operations almost immediately. The Fremont plant was retrofitted. The first cars were available for sale in the end of 1984, and full production was achieved in 1986.

NUMMI continued to operate successfully for the next several years, but the 12-year termination date of the venture always loomed on the horizon. As a result in 1983, GM, NUMMI and Toyota all petitioned to reopen the proceeding and to vacate the consent agreement in its entirety. The basis for this requested termination was that fundamental changes in the auto industry since 1984 required setting aside the order. Following a public comment period, in which 17 public comments were received, all in favor of terminating the joint venture, the Commission unanimously decided to remove the consent agreement in its entirety.

The order accompanying this decision provides a very detailed description of changes in the automobile industry, including a decline in the shares attributable to U.S. owned auto manufacturers, a substantial growth in the number of operations and facilities owned by non-U.S. manufacturers, and other dynamic changes that caused the unanimous Commission to conclude there was no continuing need for the order's restrictions. Moreover, the Commission also recognized that continuing restrictions on the conduct of the joint venture may hinder the ability of the joint venture to respond to consumer demand.

What has been the subsequent history since termination of the order? NUMMI has been a success from the business perspective. The venture continues to operate at Fremont. Today it is manufacturing Toyota compact pickups, and its products have earned several J.D. Power awards. A total of over five million cars have been produced at the Fremont facility, which also is continuing to make GM cars, most recently the Vibe produced for Pontiac.

GM has stated in numerous public forums that the experience it obtained in the joint venture has been invaluable in assisting it, for example, with its Saturn operations, which again has been recognized as a quality and product leader by many outside forces.

Toyota and the other Japanese manufacturers have increased significantly the number of their U.S. facilities. Toyota, by the end of next year, will operate six plants in the United States, and those facilities will account for over 62 percent of the Toyota nameplated cars that are sold in the U.S.

The parade of horribles envisioned, including the loss of GM as a U.S. competitor, clearly hasn't happened, so on the industry side, the venture seems to have been a success. It appears equally true that the joint venture produced positive developments on substantive antitrust analysis.

First, its interesting to note that 1984 perhaps should be deemed the year of the joint venture in the antitrust world. In addition to GM/Toyota, 1984 is the year which saw enactment of the National

Cooperative Research Act, which has been amended twice since, to allow more favorable treatment for joint ventures. 1984 the year of the Supreme Court decision in NCAA. In 1984 the Justice Department also approved another controversial joint venture of the Alcan Arco production joint venture. All of these developments, however, it's probably the GM/Toyota experience that is cited most in counseling and subsequent review of joint ventures.

This is particularly remarkable because the venture did not produce a formal opinion. You have public statements by the Commissioners explaining their actions, but there is no format decision of the Commission that can be cited with respect to the analysis used.

With respect to the analysis, the Commission clearly dealt with two issues that have continuing importance in the joint venture area and for antitrust enforcement generally: How to deal with efficiencies, still a controversial topic, and how to incorporate into the analysis non-U.S. competitors. GM/Toyota was clearly one of the first forays in this direction and remains a significant benchmark.

It clearly also resulted in positive changes and improvements in some FTC internal processes. This was only six years, remember, after the Hart-Scott regulations became effective, and this was one of the largest investigations of a merger or joint venture conduct under the Hart-Scott Act to date.

It also had foreign documents issues. It had intensive political and public scrutiny, and the Commission's ability to deal with these issues was I think a very positive learning experience.

Finally, it suggests a way for the Commission to deal with basic antitrust issues in a time of change. Just as the Antitrust Modernization Commission today is going to be dealing with how to treat U.S. antitrust in a global economy, GM/Toyota provides a positive benchmark in that regard.

In concluding, one of the clear lessons that one should take away from GM/Toyota is the humility required in making prognostications about the future. However, I think you will continue to see this Commission experience as being one of the benchmarks that shapes its consideration of controversial competition matters going forward.

Thank you.

(Applause.)

MR. ABBOTT: Thank you, Kathy.

Now we're going to move from two health hazards, salt and cars, to the cures, doctors and dentists. John?

MR. KWOKA: Thank you, Alden. Let me begin by saying how pleased I am to be here today. I was at the Commission in the Bureau of Economics from 1975 until 1981, a period of time where many people would characterize the FTC as an undisciplined, if not chaotic, force. I found it to be enormously creative, an exciting place to be and very productive in very many ways.

I've been back to the Commission many times in the past 25 years, always I think as a friend to its mission, and I continue to find it an enormously creative and exciting and productive place.

Coincidentally or perhaps not, my story today begins in the 1970s. Back in the 1970s, the professions, most of the professions operated as they had for many decades. Professions thought of themselves as having special missions subject more to their own standards of conduct than the discipline of market forces.

They avoided direct competition, sometimes informally, but more often formally through codes of conduct adopted by their associations or through the state regulations that reflected these preferences.

The Principles of Medical Ethics of the American Medical Association were typical. Adopted in 1957, they prohibited physician advertising, solicitation and contractual relationships with non physicians.

The result was an uneasy mix of competition and collusion in the profession, but over the next quarter century this would change profoundly. In 1975 the FTC issued an historic complaint alleging that the AMA's principles were anti-competitive and harmed consumers.

The Commission's opinion in 1979 prohibited the AMA from any effort at preventing advertising or solicitation, interfering with fee setting or restricting participation in health care organizations with non physician ownership. This decision was upheld, with minor modification, by a divided Appeals Court and affirmed by a tie vote of the Supreme Court in 1982.

The AMA case was a watershed event for the FTC. It significantly extended the reach of competition policy. It triggered evaluations of the competitive implications of restraints on conduct by numerous professions, including doctors, lawyers, optometrists, dentists, chiropractors, podiatrists, psychologists, physical therapists, obstetricians, veterinarians, anesthesiologists, dermatologists, accountants, arbitrators, music dealers, interpreters, real estate brokers, and the list does go indeed on and on.

I've done a rough calculation, which falls somewhere between the back of the envelope and a napkin calculation, that these services fall in sectors, NAICS sectors, of the economy that account for at least 15, maybe as much as 18 or 19 percent of GDP in this country.

By this measure I think that there are very few actions by the FTC over its entire history with more sweeping consequences. The path, however, has not been straightforward. Now, there are one or two significant new challenges that have surfaced.

What I want to do is today is to discuss two later cases involving horizontal restraints in the professions and then offer some observations on the underlying economics, as I understand economics as applied to the professions, and as the Supreme Court now appears to understand it, which are not quite the same thing.

The two cases involved FTC actions against the Massachusetts Board of Registration and Optometry and against the California Dental Association. For the record, I should say that I testified on behalf of the Commission in the Massachusetts Board case and was scheduled to testify but did not in Cal Dental.

The Mass Board case was prompted by bans the Board had imposed on advertising of price discounts, testimonials, all ads deemed sensational, its term, or flamboyant, and any ad that mentioned an affiliation between an optometrist and an optician.

At trial the staff argued that these restraints were truthful advertising and should be condemned without the elaborate economic analysis, the latter term being the staff's, but the Staff nonetheless introduced evidence, I did, on behalf of the Commission that bans on price and other informative advertising and on commercial advertising in professions did, in fact, raise price.

Restrictions were struck done by a Commission decision in 1988. The Commission's reasoning relied on extensive work by Tim Muris at the time that articulated the so-called Structured Rule of Reason. This approach was an effort to accommodate the possibility of efficiency enhancing restriction, of some restriction being efficiency enhancing, without embarking on a full-scale reason inquiry into cases where the efficiency benefits were implausible on their face.

The Mass Board case was important largely for its articulation of the Structured Rule of Reason, but within a few years, the Commission had modified its approach to horizontal restraints in the profession.

In 1993 Commission filed a complaint against the California Dental Association, whose code of ethics prohibited, among other things, what it termed false and misleading advertising, but it defined false and misleading advertising as anything that was, quote, likely to mislead because in context, it makes only a partial disclosure of relevant facts.

In conjunction with other provisions of its code, Cal Dental essentially prohibited price and discount advertising, claims about quality or superiority and advertising of guarantees. At trial, the staff argued that the restrictions were inherently anti-competitive, and staff chose not to offer into the record any evidence of actual effects.

The Commission found against the restrictions. Now, moving away from the Structured Rule of Reason, they rejected the restraints on price advertising as per se interference with the price mechanism and rejected non price restraints under what was then termed the quick look version Rule of Reason.

The Appeals Court upheld the Commission after applying the quick look standard to both price and non price restraints, but the real surprise came with the Supreme Court. On a five to four vote, the Supreme

Court overturned the circuit ruling in its entirety and remanded the case for a full Rule of Reason evaluation.

It said that, and I quote now: "When any anti-competitive effects of given restraints are far from intuitively obvious, the Rule of Reason demands a more thorough inquiry into the consequences of those restraints than the Court of Appeals performed."

The reason given as to why the effects of these largely familiar restraints were not obvious was that they arose in the context of a market for professional services, and in several other passages, the court asserted that the effects of advertising might be different from the case of ordinary goods and services.

It said, for example, that in the case of professional services, price advertising may be a bad thing because it constitutes inherently incomplete information in a setting where information is already asymmetric between buyers and sellers.

With regard to non price advertising, the court rejected the circuit's view that the CDA ban was anti-competitive simply because it failed to distinguish between truthful advertising and advertising that might be false and misleading.

The Supreme Court also said that the circuit erred in giving no weight to what it termed the equally plausible suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a pro-competitive effect by preventing misleading or false claims that distort the market.

Well, in this and other passages in Cal Dental, the Supreme Court's holding was really quite unexpected. It reopened the question that many thought had largely been resolved; namely, are the professions different?

The professions, of course, have always asserted that they are different in some important way, and it appears that that issue will need to be revisited, so let me take a few moments and talk about my understanding of the economics of the question: Are the professions different?

I believe that the professions best case as to the argument that they are different in some relevant way rests on two propositions. The first is that the market for professional services, many of them at least, are afflicted with informational asymmetry. This is different from simple information imperfection where both sides of the market lack information.

Here the seller knows what's being provided, but the buyer does not, and so good quality services is sustained not by informed consumers but by the honesty and integrity of the professionals that are providing the service.

The second claim is that even this precarious balance was disrupted by advertising, and perhaps most especially by price advertising, the same price advertising that in an ordinary market is so helpful to consumers. In professional services, price advertising shifts consumers toward low price suppliers who are inevitably offering low quality service.

Practitioners who wish to provide high quality service for personal or professional reasons find that their customers are defecting, and the equilibrium in this market has only low quality service.

Most of us will recognize in this scenario George Akerlof's model of the economics of lemons, that is, bad or defective products, and the professions and even the Supreme Court, unprompted in Cal Dental, offered a citation to Akerlof's work, but I think the citation is facile, if not faulty, for three reasons.

First is that Akerlof himself, if one actually reads the article, which I think those who cite it do not, Akerlof himself recognized that the doomsday scenario can be and often is forestalled by offsetting mechanisms or institutions. For example, warranties and guarantees, reputational effects, chain firms, licensing, all provide information or assurances to consumers, and all of these exist in professional services.

In fact, I would assert that it's difficult to identify any real world market that has followed Akerlof's doomsday scenario, including his own example of used cars. For that reason, I have long argued that Akerlof's work is more important in explaining the role of these counteracting mechanisms than in explaining any real world market failure.

Second and quickly, because I'm getting the hook here, the policy question is not really whether the markets for professional services have informational asymmetry or perhaps even the kind of lemons process at work, but whether and on how advertising exacerbates any adverse effect. The policy question involves the incremental effects of advertising, and for the professions to defend restrictions on advertising, I believe they should bear a burden that they have not namely of demonstrating incremental adverse effects of advertising on the process.

Thirdly, apart from these theoretical matters, there's considerable empirical evidence on the effects of advertising and commercial practice in the professions, and that evidence provides no support for a doomsday scenario.

Among a number of studies, the one that focused most closely on this question was a study of the optometry profession conducted by Ron Bond, Jack Phelan, Ira Whitten and myself undertaken here at the FTC in the late 1970s.

This study in fact was a good example of cooperation among the bureaus, whereby the Bureau of Economics and the Bureau of Consumer Protection, together with the Bureau of Competition, were all engaged in an effort to support the Commission's initiatives in the professions.

The Bureau of Economics study examined the quality of service provided in the optometry profession most thoroughly of any study I know, essentially by having trained subjects, subjects trained by schools of optometry to get eye exams and glasses in a number of cities across the country that had different types or degrees of restrictiveness over advertising and chain firms.

The results in short were quite remarkable. They showed that there were no differences in the average quality by any measure of exam thoroughness, accuracy of prescription or accuracy of eye glasses in any city regardless of the degree to which there was advertising in place or commercial practice presence.

So the Cal Dental holding seems to me to be at odds with current economic understanding of the effects of these restraints. While the court, 25 years earlier, had planted the seed of its concern about the professions, and perhaps in 1975, there was some reason for its concern, by the late 1990s and surely in the current era, I think that economic understanding about the effects of advertising and commercial practice in the professions considerably exceeds what the court in Cal Dental found "intuitively obvious."

I would only hope that the full weight of this evidence does become clear to the court in order not to impede what I think to be one of the center pieces of the Commission action in the last 20 or 30 years, namely its long standing and hugely beneficial initiative with respect to competition in the professions.

Thank you.

(Applause.)

MR. ABBOTT: Thank you. Thank you, John.

We know that thieves rob banks because that's where the money is. Presumably enforcers of Section 2 of the Sherman Act, in looking for targets, should fish where the fish are, but where are those fish? Susan, can you enlighten us?

MS. CREIGHTON: Thank you, Alden. Can you all hear me okay at the ends there? You can hear me okay?

I was a late edition to this panel when Bill Kovacic, actually I showed him a draft of the article I was working on, and I think he concluded that it can aptly be characterized as a summary of recent history, so I'm here to be rounding out the panel by bringing us up to the last two or three years, and as Alden mentioned, the working title of this draft, which is still very much a draft, is called "Cheap Exclusion, Fishing Where the Fish Are."

I'll have to explain that title here in a minute, and it's an attempt to find some common themes that run through the Commission's cases in the last few years in the area of exclusion. By exclusion, I mean here just to be descriptive, not normative or analytical. What I mean is cases arising either under Section 1 or Section 2 that involve restrictions on others' output as opposed to restrictions on your own output.

Now, obviously in the last several years the Commission has continued what has always been a core component of our enforcement agenda in restrictions on its own input ranging from cases like Schering, the patent settlement cases, the horizontal merger cases, our physician price fixing cases and so forth.

I think it would be fair to say that not withstanding disagreements around the edges, that there's a great deal of consensus in those kinds of cases about what the shape is of policy and practice in terms of our analytical approach to those cases.

I think it would be fair to say and not very much a ground of dispute to say that we've got much less far in terms of a common understanding of a proper approach or analytical perspective to bring to cases involving exclusion or restrictions on other's output.

The paper, there's actually going to be some drafts probably in the back at some point, it's got some glitches in the drafts that were photocopied, so with your indulgence, if you would care to read it, it will be otherwise posted on the web site sometime. This is an attempt to describe what Bruce Hoffman, Deputy Director in the bureau, has dubbed cheap predation. I gave it the less catchy title Cheap Exclusion because some people don't like the predation nomenclature.

What I would like to describe for you briefly, and the article will describe it in greater detail are, what are the characteristics that I think run through a number of our cheap exclusion cases.

Before getting there though, let me say that a starting point and I think in probably most contemporary discussion about exclusion cases generally has arisen in the context of Section 2 cases, and in particular with regard to the conduct element under Section 2 test for monopolization.

In particular I think we can probably trace back much of the contemporaneous discussion about exclusion. The springboard for that discussion has been the analysis of predatory pricing cases going back to the 1970s and early 1980s. I think today a lot of the discussion about proper sacrifice test, economic irrationality, all those can really be traced back to Professor Areeda, Professor Bork and a lot of the other writings that arose in the context of predatory pricing analysis.

I think the idea from an enforcer though, since we're stepping back and thinking about a lot of the debate in this area, I would submit that predatory pricing may have been an unfortunate point of departure for our discussion about exclusion cases because I think I would submit that predatory pricing is the quintessential example of what I will call costly exclusion or cost predation.

It's a method of predation that is expensive, often more so for the predator than for the victim.

It's difficult to accomplish. It's difficult to sustain, and from an enforcer's perspective, it's difficult to distinguish from competition on the merits.

Maybe the most practical matter of all is if you step back as an enforcer thinking about where to put scarce Agency resources, I think it's fair to ask the question, How likely is it that firms, which are profit maximizers, are going to choose a costly predation strategy?

As profit maximizers, you take into consideration the costs of any alternative that they pick, isn't it more likely, all else equal, that they would prefer exclusion strategies that are cheap, both absolutely and relative to the potential upside.

So assuming as a hypothesis, one could say in a pond of exclusion that the question is: Isn't it more likely that in terms of where we would put resources to be searching out for exclusionary behavior -- isn't it more likely that we would find rich fishing where the exclusion strategies are cheap rather than expensive?

Now, that is of course not to say that if you caught a fish elsewhere in the pond, you don't reel it in, but it is to say, in terms of deciding where to put down your hook, that you should fish where the fish are.

What we have hypothesized and I think the last three years have proved is that the fishing for cheap exclusion is rich and deep and that there is a lot at stake. By cheap exclusion, I mean exclusion that is cheap absolutely, that it preferably imposes a symmetrically higher costs on the victims, and third it provides a strong upside, so it's a good cost benefit analysis from the point of view of firms seeking to obtain monopoly power.

Now, where have we found cheap exclusion to flourish? The cases that we've grouped and are calling cheap predation involve conduct that cannot even arguably be claimed to further competition on the merits; that is, it does not even arguably advance efficiencies.

Maybe to make that more concrete, let me give you two specific examples from our recent cases, and for those of you, some of you may be familiar with the facts of these cases, but I'll go through them briefly, and because they're in litigation, I'm only asserting them on the basis because of the allegations in the complaint which have not been proved because the cases are still pending.

The first such case is the South Carolina Board of Dentist case, a Section 1 case. Now, the facts, as alleged in the complaint in that case, are that the board of the dentists in South Carolina, in the face of a state legislative act that opened up the possibility of hygienists providing dental hygienist health care to children, for children in South Carolina public schools, enacted an emergency regulation that required pre examination by dentists before such hygienist services could be provided, in the allegation in the complaint is that there was, in fact, no medical benefit to that regulation. Other states don't have such requirements, for example.

So assuming that the medical defense is out, I think you could say this is a classic example of cheap predation. From the point of view of the dentist, the costs are probably zero. The dentists already have to attend the board meetings, so there's no additional cost from having to attend.

Better yet, the cost of having to enforce the regulation fell to the state of South Carolina, so South Carolina taxpayers pick up the tab for enforcing the regulation. The hygienist have to pay considerable amounts to try to get the regulation overthrown. There's a very good chance of achieving substantial durable market power from the exclusion of the hygienists, and finally there's no argument by which the conduct could be deemed to be efficiency enhancing.

Simply it effects a wealth transfer from the hygienists to the dentists.

A second case is our Unocal case, which is scheduled to go to trial in mid October. The allegations in that case are that Unocal, in the course of regulatory proceedings regarding the adoption of reformulated gasoline standards in California, that Unocal made representations to the California Air Resources Board saying, Here's a bunch of information that you can include in your regulations, and it will be in the public domain, free of charge, free to use.

On the basis of those representations, the CARB incorporated the information into the regulations, and only thereafter did Unocal reveal that it had a patent, and it intended to enforce that patent against all the refiners who, as a result of the regulation, were required to practice Unocal's technology.

Again the conduct is from Unocal's perspective cheap. It was participating in the regulatory proceedings already. It's likely to be durable. The CARB regulations in effect are now locked in, and the refiners have spent hundreds of millions of dollars developing refineries that were compliant with those regulations.

There's no benefit to consumers short-term or long-term. There is substantial harm to victims. There's a wealth transfer. It's not efficiency enhancing, and the allegation is that it violates Section 2 because it creates a likelihood of monopoly power.

Now, those two examples involve manipulation of government processes, but the same analysis of cheap exclusion in the characteristics I've just described I think apply to a wide range of cases, both that we've brought, that have been brought by the Department of Justice, and in fact turning back in time and looking at other Commission cases, characterize Commission cases going back for at least 40 years.

Let me give you some other quick examples of cheap exclusion. I gave the Unocal example, but there's also private standard setting, which actually involves a classic kind of opportunistic type of behavior, cases likes Rambus, Dell, also earlier cases involving what the Supreme Court had found to be Section 1 violations, but if you go back and look at those cases, really whether it was Section 1 or Section 2, just as in South Carolina Dentist and Unocal, what's really at issue isn't whether it was collective or unilateral.

It's quite different from own output restriction cases. In all those standard setting cases, really what was at issue was taking advantage, through opportunistic behavior, of the ability to obtain lock-in through plainly inefficient conduct typically involving some type of fraud or other similar conduct which had the effect of creating monopoly power.

Some types of tort cases can also fall within the category of cheap exclusion. In the Microsoft case, for example, the allegation that Microsoft had deceived developers through its efforts to pollute Java I would submit would constitute a form of cheap exclusion.

Our Orange Book listing cases, such as BristolMyers and Biovale, abuse of litigation cases, such as the Commission's case in the U-Haul case about 20 years ago. A fuller attempt to describe sort of what constitutes cheap exclusion, as I said, is in our draft article.

Let me close though with just a few observations. The first is that these kinds of cheap exclusion cases don't pose the same kind of risks of type two error that often cause us to wrestle with some other types of alleged forms of exclusion because typically this conduct -- again to the extent that there's a defense, typically it involves a defense that falls outside the kinds of issues that generally are recognized within antitrust.

For example, in Unocal it might be the allegation or the defense is, We had a right to petition the government, so this might be a constitutional claim, for example, but obviously in terms of public policy, one needs to weigh the antitrust issues against those broader public policy issues, but there's not the same kind of internal conflict between concerns about chilling pro-competitive conduct that often arise in cases such as refusals to deal in predatory pricing.

The second observation is that I would submit these kinds of cases of cheap exclusion are going to be the most prevalent forms of exclusion and ones that should therefore really be at the core of any antitrust enforcement agenda involving exclusion, it really puts front and center the importance of the Noerr and state action immunities that have been at issue in the last couple years and a major part of the efforts of many other divisions within the Commission.

I think it really makes clear that this isn't some peripheral kind of issue on the fringes of antitrust but really should be at the core of and directly impacts our ability to get at what should be very central part of our enforcement in the exclusionary area.

Finally, an issue that often gets raised in this area is the argument that, well, for example, if it's a tort action, shouldn't we just let tort law handle it? I guess I would have are two responses to that.

The first is typically in those cases, neither the private party who might vindicate such an interest nor the remedy obtained in such cases typically are very well aligned with the interest that we would be seeking to vindicate in antitrust. Second, also Tom Krattenmaker, one of our coauthors on this article, and I was joking with him that just because conduct is inefficient doesn't mean that it's not anti-competitive.

I would submit that simply because conduct is otherwise conduct that we're trying to chill or have found to be illegal for other reasons is not a reason to give it a pass under the antitrust laws.

Thank you.

(Applause.)

MR. ABBOTT: Thank you, Susan.

Ken, your comments?

MR. ELZINGA: Well, you can see that a professor is always eager to profess. I couldn't wait to get up here after John Peterman's remarks. My remarks will be brief. It takes less time to lead the applause than to criticize a paper.

I do have a biblical text for my remarks on John Peterman's Morton Salt Paper, and the text is from the gospel according to Matthew where Jesus says, as if anticipating the Morton Salt opinion, "if the salt has lost its savor, it is no longer good for anything, except to be cast out and to be trodden under foot." Now, John's paper is in the grain, no pun intended, of this biblical text.

One of the traits that John and I have in common is that we have a common hero. One of our heroes in economics is Ronald Coase (and if you don't know the Coase name, shame on you). He is one of the leaders in the law in economics movement, a Nobel Laureate in economics, and the author of the second most cited article in economics.

John's paper is Coasian through and through. There are no graphs, no regressions, no equations, but rather a painstaking archival examination of documents, records, tables, exhibits, all pushed through the lens of economic analysis, the kind of stuff John does so well.

Now, those of us who have studied or taught the Morton case thought we knew the economic shortcomings of the case. But John's paper reveals at least for me two new twists on the Morton Salt plot.

The first one is that the smaller buyers often simply pooled their purchases into carload lots, and the salt producers almost invariably charged the same price for pool car orders as for individual carload orders.

The second is that the discount structure of the salt companies came out of their experiences in the National Recovery Administration. So we learn, through John's paper, that the NRA, which is already considered perverse to anybody who is in the antitrust grain, was even more perverse than we thought.

Now, I'm an antitrust pack rat. Bill Kovacic is as well. He brought his old copy of the Nader book on the FTC. I brought an old copy of a book that the DOJ put out, a DOJ report on the Robinson-Patman Act, and this came out in 1975. Some of the antitrust older people here will remember this. It summarized a lot of the literature critical of the Robinson-Patman Act, and it very clearly showed that the Department of Justice could restrain its enthusiasm for this particular piece of legislation.

I'm going to read just a couple portions from this. The authors are talking about Morton and its progeny, and they conclude: "The total effect of the majority of the secondary line cases is to create a virtually irrebuttable presumption that any price discrimination is injurious to competition, thus the legal advice to a businessman contemplating a price cut to less than all customers will likely persuade the client that if he proceeds, it is at his considerable peril."

In talking about a case that followed Morton Salt, the United States Biscuit case from the Seventh Circuit of all things, this is certainly prior to Judges Posner and Easterbrook, the Seventh Circuit held that: "The incipiency standard of the Robinson-Patman Act allows the FTC to infer injury to competition, even in the face of direct evidence to the contrary."

And that led an FTC Commissioner to conclude, "I am still not even certain, for example, whether a new entrant in a market can, for awhile, price lower in one part of the country than elsewhere."

Now, if that's true, that an FTC Commissioner is even uncertain about a new entrant being able to cut prices in one part of the country, then Morton Salt really is a form of antitrust madness. It is out of kilter with what Adam Smith called an "obvious and simple system of natural liberty."

Just an antitrust footnote on this document. I am told by pretty good sources that Don Baker, who was the one who promoted this examination and critique of the Robinson-Patman Act, it was because of this report that he was unacceptable to continue as head of the Antitrust Division in the Carter Administration. The Robinson-Patman Act then, as now, has its friends.

The other document I brought long is the 1989 ABA report. I was the token economist on this ABA committee, although I would count members like Tim Muris and Ernie Gellhorn as honorary economists who served on this committee. The interesting thing about this report, this is 1989, is how little it says about the Robinson-Patman Act. This is all it says. "The FTC's non-merger antitrust plate was once filled with Robinson-Patman Act enforcement. That era ended around the time of the 1969 report and few commentators have lamented its passing."

In addition to the Chicago School undermining the Robinson-Patman Act, I would mention two other people from outside the Chicago School, and one is F.M. Rowe on the Robinson-Patman Act, and the other is the articles of H. Thomas Astern, who used a form of satire to help undermine the act.

What's the value of the Robinson-Patman Act today? When I was on the ABA committee, several members, not the two that I just mentioned, indicated that it still provided a stream of income to members of the antitrust bar. So it had a value of sorts of redistributing income, and perhaps we should be cautious about dispensing with it, for that reason.

Don Baker argued that the real social value of the Robinson-Patman Act was that it provided comic relief in the teaching of antitrust law. Then who can forget Terry Calvani dressing up as a clown when he would discuss the Robinson-Patman Act.

So to come back to John Peterman, who spent many years at the FTC, I would raise the question that his paper does not answer, and that is: Can there be a good secondary line price discrimination case, and if so, what would it look like?

If good cases don't exist, then shouldn't the FTC -- we're celebrating a 90th birthday, but it's been about 70 years now of experience of the Robinson-Patman Act, shouldn't the FTC call for its repeal or legislative change so that the lingering effects of cases like Morton might finally be swept away or, as the Bible put it, be cast out and trodden under foot. Or if not cast out, then isn't it time for the FTC to push to make secondary line price discrimination congruent with the Brooke Group principle of primary line price discrimination.

I will just say as a final measure here of self-applause, I'm the first one to finish before the time's up deadline went up. Thank you very much.

(Applause.)

MR. ABBOTT: Thanks for those spiffy comments, Ken, and I won't comment on if we are the salt of the earth or not.

Now, let us turn to Professor Jonathan Baker for some additional comments on I think our second and third papers. John?

MR. BAKER: Thank you to everyone here who invited me and I've worked with. This is a wonderful occasion, accented by Allen Fisher's dahligs at the end, and the papers that I'm here to talk about, Kathy Fenton's and John Kwoka's, are wonderful papers, too, clear and thoughtful and convincing.

I want to use their stories to highlight two interesting moments in antitrust history, and I will emphasize the legal side of antitrust mostly in my remarks today. If you want to hear me on economics, come back for lunch tomorrow.

First, the General Motors/Toyota joint venture. I am of course an expert on this joint venture because in the mid 1980s I bought the car. The FTC's review took place in that very interesting moment in antitrust history when there was a transition beginning between the structural era of antitrust and the Chicago School era. BMI, for example, had been decided but Maricopa had followed it, and you weren't sure how far BMI went. This was all before NCAA in horizontal restraints. In the Section 7 area where this case was reviewed, for joint ventures, the Penn Oil decision from 1964 involved loss of potential competition as the main concern.

The fight in the Commission was not between Democrats and Republicans. There was at least one of each party on both sides. It was about how antitrust should change and how far it should go in response to criticisms that the rules unduly discouraged pro-competitive conduct, and the answer in 1984 was passionately contested.

Let me start by just rehabilitating this case because Kathy sees all of this from a modern point of view, by putting it a little more in the context of the times. From a structural perspective, this was actually an easy case.

We had a tight oligopoly in the auto industry with General Motors as the price leader. Entry was difficult. Entrants from Japan were restricted by the Trade Agreement. This venture involved the first and fourth leading U.S. sellers of automobiles.

General Motors could have picked Isuzu to partner with, which it owned, but it didn't. It picked Toyota, a bigger firm. It was a part owner of Isuzu. General Motors and Toyota could have competed to produce small cars, but they choose to cooperate to make them instead, and this joint manufacturing venture put them in a position to exchange all sorts of competitively sensitive information.

Now, the competing Chicago School perspective didn't presume that concentration would lead to high prices and was more attentive to efficiencies from collaboration, even collaboration among rivals. This case I think also seemed easy from that perspective to the majority of the Commission.

General Motors had been unsuccessful in producing small cars and it wanted to learn on how to do it. Toyota had successes as an importer, but it couldn't expand imports because of trade restraints. Perhaps it was thinking of manufacturing in the U.S., but wanted experience with what was distinctive about the production in the U.S. in labor relations and the like, and the rules of the game, before building plants here.

The promise of the venture was that General Motors could make small cars better by learning how from Toyota and that Toyota could expand its U.S. sales more easily by producing here. I think the majority saw the competitive danger as limited because there was only one little plant.

Now, as a practical matter, the final decision of the Commission was largely a Chicago School victory,. But recall that this venture technically violated Section 7, according to the Commission. It was allowed to proceed through an order that placed restrictions on information sharing and the like.

The fact that this venture was framed as a violation of Section 7 rather than getting a free pass was a way of harmonizing the wide-ranging competitive effects and efficiencies analysis that the Chicago School perspective encouraged with the preexisting case law that presumed harm from concentrated market structures.

So it was a similar kind of trick to the one that Bill Baxter used in writing the 1982 merger guidelines where his job also was to try and harmonize the structural perspective with the more complete competitive effects or efficiencies inquiry that he wanted to conduct in an individual case.

And as Kathy explained, in the paper, this case seems like it kind of grows out of a very different era from the Yamaha-Brunswick joint venture from just three years before that the FTC had reviewed. With the appointment of Terry Calvani to the Commission, which gave the Chicago forces a majority, and this decision, we were at the interesting moment where we see the FTC embracing an economic approach to antitrust.

That's the real legacy I think of the GM/Toyota case. Of course, in the passage of the time, certain claims about what happened were quite extreme, I think on both sides actually. Kathy emphasized the way the risks to competition appeared overstated in retrospect.

John Kwoka wrote an article reviewing the case, and I think I agree with him, that the efficiency gains were likely overstated too, but I think that's a longer conversation than we have time for today. The real influence of this case and its legacy is on antitrust, doctrine, not on its effect on the automobile industry.

To turn to John Kwoka and California Dental, here we are a decade later. The Supreme Court had largely completed its reconstruction of antitrust along Chicago School lines with bipartisan support largely, except I think in the second term of the Reagan Administration where I think both antitrust enforcement agencies there were some leaders who had a less interventionist perspective than what was the mainstream after assimilating the Chicago School economic criticisms.

Bill Clinton had just been elected. The

Democrats were in control of the Executive Branch for the first time since 1981, and it took a few years before that changed the composition of the FTC, but the promise of having the Democrats in power was that it would reveal what was partisan and what was permanent in the antitrust Chicago's School revolution. At the FTC the specific question would be, "Where would Bob Pitofsky accept changes in antitrust and where would he try to push back?"

As you know, I worked for Bob. I did not work at all on California Dental that I can recall. I think when we arrived, it was just before the Administrative Law Judge decision came down, and so the whole proceeding from my point of view was taking place as an oral argument in front of the Commission, and then later on in the courts, where I was just -- BE wasn't really involved and I was just an academic observer.

You know that Bob knows everything important about antitrust and its history, and all the old precedents are part of the rich store of reference that he has. I think he sees the whole line of decisions of antitrust history as a continuous evolution, and he synthesizes in his mind all the recent decisions with the older ones and tries to find their common core.

Bob essentially accepts the modern efficiency emphasis as a healthy corrective to earlier antitrust principles. In fact, like he told you earlier today, he reminded us really, he was the one who was the reason we have the efficiency modifications of the merger guidelines in 1997. But I think he would tell you that he emphasizes that you have to demonstrate efficiencies, not assume them, and of particular importance not discard core antitrust principles in the enthusiasm for efficiencies.

So one key feature of his for the Commission majority or for the Commission's California Dental opinion that I took from it was his insistence on the clear distinction between per se rules and the rule of reason. It's also a theme of the competitive collaboration guidelines that came out on his watch a little later. My guess is what Bob was trying to do was protect the per se rule against negative price fixing from erosion by those who were presuming efficiencies everywhere.

He worried that if you use the "inherently suspect" analysis of Mass Board, and I guess now it's in Three Tenors, that by moving closer to a continuum of rules, I think he would say, this is me, not Bob talking here, my interpretation, that he would say that you get less protection against doctrinal erosion.

On the Supreme Court's opinion -- I know I have to conclude, so let me sort of jump to it quickly -- I think it implicates the central issue that Bob was worrying about in the California Dental, the way it dealt with quick look rules. I think after that decision, it's hard to know which quick look rules really exist and whether, if you're going to litigate a case or investigate a case, whether you have to investigate all but the most core pricing fixing violations and the like as though they were under the full Rule of Reason because you're not sure whether or when you're going to have a quick look review by the Court.

So this is really Bob's old problem about per se rules in a new guise. If the quick look is on a continuum without clear categories, we risk losing all the guidance benefits and low transaction cost benefits of truncated analysis, I think that is all teed up by California Dental.

Let me just conclude with a final short point about economics, which is you can't draw a direct line from advances in economics to this or that antitrust case or doctrinal changes. But you can see clearly in the papers here and the cases they reflect the influence of economic developments -- from George Stigler subverting the idea that concentrated markets are not necessarily going to have high prices to empirical research in advertising that John talked about, John Kwoka, by professionals that was going on in BE, supporting the long engagement with the professions on the antitrust side of this Agency, to the work in BE on raising rival's costs that Steve Salop and Dave Scheffman and others worked on. I think they were thinking about exclusion, and now we see Susan's discussions of cheap exclusion.

From Allen Fisher's dahlias to BE research, if you'll look behind everything that the FTC does, at least everything good and useful, I think you'll find the Bureau of Economics. Thank you.

(Applause.)

MR. ABBOTT: It sounds like a bit of economic imperialism. Does anyone have any response to any of the comments, any of the authors? John?

MR. KWOKA: I would just like to make one brief comment about GM/Toyota which I've heard characterized in several ways, both by Kathy Fenton and Jon Baker. I don't really disagree with most of what both said, and I certainly don't want to debate 20 year old issues. However, I think there were some serious issues that the Commission at the time, the three votes of the Commission in favor of letting the joint venture go forward, did not address, and I think they were serious economic issues, and so I would disagree with I think Jon's characterization as this being the turning point toward economic analysis implicitly away from something else, which of course is what I did.

I think among the serious questions that the Commission did not satisfactorily answer was the standard question I believe of what the counter factual was. What it is that GM in particular, and Toyota was less of an issue, would have done in the absence of the joint venture.

There was good documentary evidence, and eventually some of it was disclosed, that GM, as Jon mentioned, would have in fact engaged in a very similar joint venture with Isuzu. It's doing that, with its ownership of Isuzu, really made the alternative competitively innocuous, and it may not have conferred all of the benefits, but it seems to me a standard and very good economic question as to what the alternative would have been.

The idea that it would have done nothing and GM would have been without a supply of small cars or without the technology I think is inconsistent, even with the common view within the Commission at the time, that this was very important to GM and therefore surely I think almost everyone was in agreement it would do something, so that was one issue I think that I thought to raise, and obviously we came to different conclusions about it, but I think it was a good sound economic condition.

The other, of course, was as Jon noted, I've written on this and have discussed the issue of the magnitude of efficiency, and Kathy noted that this was an important milestone in the Commission's examination of efficiencies, but I think it would repay some effort going back to how the Commission evaluated it because I do believe in fact there were far less substantial -- the attributable and cognizable efficiencies were far less substantial than the common view amongst many commentators at the time.

MR. ABBOTT: Kathy, do you have a rejoinder to that?

MS. FENTON: I would pick up on John's last comment by saying that one of the unfilled perhaps promises of GM/Toyota is given the very rich factual history that is available, and for reasons that are too complicated to go into now, a great deal of the Commission's decision making materials are available in redacted form on the public record, you have a wonderful opportunity that has not yet been fully utilized of looking at the assumptions of the Commission, the predicates underlying the Commission decision and testing them against subsequent events, and to the extent there is a target crying out for some kind of retrospective review, I think GM/Toyota represents that type of opportunity.

MR. ABBOTT: Thanks, Kathy. I had one interesting footnote. We talk about a Structured Rule of Reason, and John mentioned Mass Board. Some of those issues were raised in the Three Tenors case, which is now before the D.C. Circuit, was argued a week ago, and talking about continuing analysis of antitrust, I think it will be interesting to see how the courts struggle with these difficult issues about the continuum of analysis.

Unfortunately, I think the rug is about to be pulled out from under our chairs, so I want to thank everyone, all the panelists and commentators for outstanding presentations, and I hope everyone enjoyed it, and I know I learned a lot. Thank you.

(Applause.)

(Break in the proceedings.)