

>> Robin Thurston: Well, welcome back from lunch. I hope you all were able to find something good to eat in the area. We're back with panel four, which is titled "Which Practices, If Any, Cause Significant Harm To Consumers, And What Are Potential Solutions?" My name's Robin Thurston. I'm an attorney with the FTC. We have a great panel here to discuss this topic. To my left is Bill Brauch, who's a special assistant attorney general with the consumer-protection division of Iowa's Office of the Attorney General. Next is Jack Gillis, the director of public affairs at the Consumer Federation of America. We also have Tom Hudson, a partner at Hudson Cook. And Andy Koblenz is back from this morning, vice president and general counsel of the National Automobile Dealers Association. To his left is Ian Lyngklip, Senior member of Ian Lyngklip & Associates. And at the end of the table, by virtue of having the last name starting at the end of the alphabet, is Keith Whann, general counsel for the National Independent Automobile Dealers Association. So, this panel, the focus is gonna be on practices that cause particularly significant harm to consumers when they occur, but they might not occur that frequently or which occur primarily in particular regions or in particular types of consumers. I think that most people would agree that these sort of practices are problematic -- for example, failing to provide good title to a consumer following a car purchase. And the focus of the panel will be on what, if anything, the FTC should do to curb them, rather than whether the practices themselves are good or bad. For the most part, we'll leave the discussion of practices that are widespread in the auto industry and for which people disagree on when whether they cause consumer-protection issues for panel five. So, as the panel progresses, I'll be soliciting ideas from our panelists about particularly harmful practices, but one that I wanted to start with, which we heard a bit about in the leasing context in panel two, is spot delivery and in particular when spot deliveries turn into yo-yo financing. So when the contract isn't assigned and the consumer winds up back in the dealership and often winds up in a less favorable deal. If one of the panelists could start with discussing the harms that this causes to a consumer. Bill, go ahead.

>> Bill Brauch: Thank you very much. And just wanted to quickly note that in my role as chair of the NAG automobiles working group, we have about 36 states, plus D.C., as members of the working group meet monthly and talk about issues, and we identified issues that we wanted to bring to the attention of the FTC and its new role, and yo-yo spot delivery was number one on our

list. Not necessarily meaning that it's prevalent in the sense of being extremely common all across the country, but it's causing enough harm that the attorneys general around the country have listed it as number one as far as the harm to consumers. Obviously, if you have a situation where a consumer is trapped, where they believed they had financing, they believed that they had a deal, and they got a call that said, "Come on back, and you're gonna have to work this out with us," it's a very difficult situation, particularly if the trade-in that the customer had was sold. Nothing could be more unfair than that. You literally are trapped, and now you probably have no choice but to take a deal you may not be able to afford. You may not have even been in the market if you thought that you were gonna have to pay that rate. That causes substantial harm to consumers, and, again, it's why this is number one for us.

>> Robin Thurston Ian?

>> Ian Lyngklip: Dealing with the subset of deals where deals -- thank you -- where the consumer is gonna have to go back to the dealer, that's probably the most benign harm that we see visited on consumers from those transactions. Easily, the most severe of them is where we see that the dealers are conscripting the assistance of police officers and the judicial system to force the consumers to bring the car back, either by threatening arrest or actually, in the cases that I've had, consumers being prosecuted for stealing cars where the only crime that they've committed is that the dealer couldn't make enough money on the deal and they didn't want to go through with it and didn't want to honor the transaction. We see any number of other kinds of harms being brought on consumers because a few of the dealers want to come back and have the consumers re-contract. What they will regularly do is they will simply trick the consumers into coming back by offering them things like bumping out the fender ding that they promised they would bump out, free oil change. We need you to sign just a couple more papers, just a ministerial thing offering a free key to the car. And when they get there, a porter walks up to the car with an extra key and takes the car away, leaving them without any transportation away, taking with their down payments already gone, leaving them absolutely bound to this dealer to go through with the next transaction, putting them at a very significant disadvantage. They have no ability to shop in the marketplace, 'cause everything that they had to give on a deal is gone, and they're really at the dealer's mercy. These are absolutely awful transactions, and they absolutely need to be prohibited, and they need to be

prohibited from the moment that that first misrepresentation is made to the consumer, namely you've been approved, and that happens all of the time. And until the dealers start telling them truthfully whether they've been approved, we're not gonna be able to do much about the problem of bringing them back. Those deals are done. At least in Michigan, they're done when they're done.

>> Robin Thurston: Keith?

>> Keith Whann: Well, I think the -- excuse me -- the distinction between the spot delivery and then the yo-yo deal, I mean, if it gets blurred if we're talking about a spot delivery. And I think Terry made the point earlier in terms of documentation, if it's the financing is still contingent, okay, we've got a spot delivery, and there's a regulatory scheme and paperwork to go with that, if what we're talking about here in these two examples that both Ian and Bill are raising is that misrepresentation to the consumer that financing is approved, then we're going down a slippery slope of violations of law, because they're not approved at that point. If you were approved, there'd be no need to spot-deliver the car. And if, in fact, there's going to be a spot delivery in these cases - - I mean, very clearly it's not a theft. They've been given the car. So the car is not stolen. I don't know why the police would be involved in that in the first place. It's not a stolen vehicle. And it sounds to me like we're going down a path here with repossession law that probably doesn't even apply to this situation. But I would agree with what they're saying. If we have a customer or a consumer who's being misrepresented in this fashion and his vehicle is sold -- and I would think that almost under every situation that trade should have to be held until the deal has been finalized. But that's a pretty awful ending for a consumer. But it sounds to me like in those situations, we have at least numerous violations of existing law to get there.

>> Robin Thurston: Tom?

>> Tom Hudson: One of the subtitles for this session I think was "What have we learned from the roundtables?" Is my mike all right?

>> Male Speaker: Yeah.

>> Tom Hudson: One of the things I've learned is that a good number of us are from Mars, and some of us are from Venus, I think, so we see things completely differently. In the eyes of the consumer advocates this morning I heard this morning, they see nothing but troublesome transactions. The world I live in, I see a completely different set of transactions. And let me mention spot delivery as sort of an example of how that fits into my frame of reference. I define spot deliveries the way that Terry did this morning. Basically, a dealer engages in a transaction, and he has not finally determined who the assignee will be, and the customer drives off with the car. That is in my view a spot-delivery transaction. A dealer who is sure that he can get that customer financed will not bother to get any sort of unwind agreement from that customer. Very occasionally, there'll be a problem with a deal like that, and when that problem arises, we tell the dealer that he has just become a sales-finance company, and it's his job to hold that paper and collect it. If he doesn't have an agreement, he's dead. And then there are transactions where the dealer is pretty confident he can get the deal done, but he's not positive. And in those transactions, he and the customer agree that in the event -- the dealer will make his effort. In the event he can't get the deal done, then the deal will have to be either re-contracted, or the customer can walk away. And then there are the ones I've been listening to today and at the last roundtable, the abusive spot deliveries where something's being done to the customer that's already illegal six ways from Sunday -- misrepresentations, fraud, problems like that -- and I think what the FTC and other enforcement agencies should do with those kinds of things is enforce the existing laws that prohibit that activity.

>> Robin Thurston: Andy?

>> Andy Koblenz: Actually, I don't have a lot to add. Maybe I'll just add a little numerical quantification. There are literally millions of transactions, and there are many, many, of them are done, as Tom described, as spot deliveries, and they are not of the type that Ian has been describing or Tom Domonoske this morning described, where we're talking about affirmative misrepresentation. Tom said it three times. The customer was misled by the dealer. The dealer misled the customer. The dealer misled the customer. That is rank fraud, and fraud is illegal in every state. It's illegal under common law. It's illegal under UDAP statutes in every state. It probably violates the general FTC prohibition against unfair and deceptive actions and is subject to

enforcement action. And we think that the laws should be enforced, and there are lots of remedies, and we hear stories all the time. I think Tom Domonoske this morning mentioned one where he brought it in. He was able to succeed in getting a significant -- I think he said he settled because of the threat of a significant number of damages. The law needs to be enforced. However, there are a large number of conditional-sale agreements that are not of that variety that bring tremendous benefit to the marketplace, and they should not be thrown into this discussion, because they're not part of it.

>> Robin Thurston: Okay, Bill. And, Bill, in addition to making the point that you had in mind, I'd like for you and subsequent panelists to comment on how frequently these abusive spot deliveries or yo-yos occur as part of the broader spot-delivery practice.

>> Bill Brauch: Obviously, we don't have numbers. It's not something the states track to that degree. We're too busy chasing bad guys to count everything to the Nth degree. But the fact that you had the NAG autos working group identifying this as the number-one issue -- and these are folks who enforce auto laws, UDAP in auto situations, every day -- tells you, I think, that it's a problem that we're seeing. And we talk to thousands of consumers every year and see thousands and thousands of complaints. I just want to correct one, I think, misconception, and that is that there's always a misrepresentation at the outset. There isn't always a misrepresentation at the outset. It may be, in fact, that the dealer says something in effect of "we're pretty confident we can get you a loan," but not necessarily that they promise it or say "you are approved," but then go ahead and sell the trade-in, call the police. Now we're seeing dealers charging wear and tear and mileage fees on people on the new vehicle when they bring it back in. Absolutely outrageous conduct. And for those industry folks who are on this panel who said, you know, there are some violations of law going on here, we say amen. You're right. There are, and the FTC should join us in taking action.

>> Robin Thurston: Ian. And, again, if you have data or other indicators of how frequently these practices occur, that would be great.

>> Ian Lyngklip: Let me start with that. I made an effort to try and obtain from the state of Michigan some data on what they saw as the numbers on spot delivery and many of the common consumer frauds in Michigan when they complaints are received by the attorney general. They have a special code for those. I was told repeatedly that there was no coding for this. They had no way of tracking it, and all that they did was any complaints that came in about cars they sent on to the DMV. So there was no data available. But what I can tell you is it's significant enough of a problem that it's already been a subject of an opinion letter from our state's financial regulators. It's in the dealer manual, and there's most recently been another opinion letter written. So it's going on. It's going on to the point where it's getting back to the state, and people are being harmed enough that they're complaining to the state about it. Although they have not done anything to curb it or track it officially, that's a problem. But what I wanted to say in response to the prior comments is there's a serious problem with the way that these deals are being viewed by dealerships, namely that they don't treat these deals as being done until they've gotten funding. They view these credit contracts somehow or another as conditional, and the problem here is this. There is no other transaction that I can think of, any similar moment or consequence where this can happen. I don't go down to the grocery store, buy an apple, start eating it, and then have the clerk chase me out the door saying, "Oh, no, no, no, sir. Your sale has fallen through." That ranges from the most simple transactions all the way to the most complex transactions we have in the consumer economy, namely a mortgage. When I walk out of the mortgage closing office with a title in hand, with the keys to the house, and somebody says "it's yours," it's mine. I don't see the banks coming back later saying, "Oh, no, your financing is falling through. The house isn't yours," two weeks later and making me move out of the house. That doesn't happen. There is nothing so unique, so special about a car transaction, and I think I agree with Mr. Hudson when he says if they can't place that contract, congratulations, Mr. Dealer, you've become a finance company. They should be required to honor the contracts to the same extent that consumers are required to honor that contract. Any consumer who is ready, willing, and able to honor the deal that they've undertaken, has payments to give, should be allowed to have the benefit of the contract that they signed on to, and there are no conditions other than the raw condition that the dealer can't make enough money on them. Those contracts are saleable. You know, even the most distressed of them are saleable, you know, for enough money. You can find somebody who will buy that contract. The dealer may have to pay the finance company money to take it, but that's not the true condition. That's not the condition

that's being disclosed, and that's not what's being told to the consumer. And the problem is that these transactions, the conditional credit is such a complicated transaction, it is so unlike anything that the consumers are likely to see any place else in the economy. It is absolutely fraught with the possibilities of abuse by the dealers. And, of course, when the deals go bad, that is, in fact, the abuse that they see. And some of the dealers will exercise any means possible by hook or by crook to get those cars back, and that may mean sending the repo trucks out to go get the car in the middle of the night, or it may mean having your brother-in-law who's the district attorney prosecute somebody to get it back. In some cases, yeah, dealers will step up to the plate and be finance companies, and when they do, that's the right thing to do, and they should. But the transactions -- there's no good policy reason why it is that we should support this idea of even permitting the possibility that the consumer can be taken out of that vehicle after that sale is done.

>> Robin Thurston: Okay. I know that several of the panelists have their table tents up, and you all have a chance to make your points, but I would like to focus our discussion on the forward-looking part of this panel. What can the FTC do or what should it be doing to limit the harms that result from abusive spot deliveries/yo-yo financing? Jack?

>> Jack Gillis: Well, I think one of the things they can do is take Tom's suggestion here and build that in as a requirement for spot financing. If the dealer is going allow the consumer to take the car out of the facility and sign all the paperwork and the dealer can't live up to the promises in that contract, then the dealer should take responsibility and agree to the financing terms that were there.

>> Robin Thurston: Andy?

>> Andy Koblenz: Um.

>> Keith Whann: Wake up, Andy.

>> Andy Koblenz: Sorry. I thought Tom was next.

>> Robin Thurston: Oh, sorry.

>> Andy Koblenz: First of all, Tom -- We -- Tom talked about the situation where there was no agreement between the two parties that made the deal conditional, and that's when he said that the finance -- the dealer becomes the finance company. He did not say that was the case when the -- when the contract was conditional.

>> Tom Hudson: Correct.

>> Andy Koblenz: And that's a big difference because the -- as Terry O'Loughlin explained this morning, that there -- that a lot of these are situations where the -- where the contract is conditional. The -- Just two further points -- one, to -- Ian made the point that there's no good policy reason for this behavior at all to be occurring in, and that's just -- it couldn't be farther from the truth. There are very good reasons -- There's a lot of societal benefit. The consumers want this -- the functionality of a -- of the spot delivery. They want to take the car frequently. This is -- You know, Jack, this morning, talked about the consumer who needs the transportation. There are consumers who are getting transportation through this, perfectly fine, and without any incident because of the availability of the conditional sale, and they would not be able to get the transportation that they need without it. So there are tremendous amounts of benefits associated with this. This is not -- I'm not talking about the abusive spot delivery that people are calling the "yo-yo financing," where there is the misrepresentation -- and that, again, we're -- no movement going off that. I'm talking about the much larger universe of completely legitimate conditional sales. But with respect to the remedy which you asked about, Robin, that -- and now I'm talking about the one where the person has a conditional sale and they can't go forward, the law provides a -- it's a rescission right, and the -- you have to put the parties into the status quo ante. And so that -- the law already provides that you're gonna have to return the down payment. You have to return the car. I got home last night, and I turned on the news, and I saw a report about someone who had a transaction in which, when they unwound the sale, they -- the person said, "They didn't give me back my car, and they didn't give me back my -- the payment." Well, that's wrong. I mean, then -- And they should do both of those, and the law requires them to do both of those. And so, to ultimately answer the going forward, enforce the law.

>> Robin Thurston: Tom?

>> Tom Hudson: Yeah, a couple of points -- I think it's possible to write a conditional delivery agreement that would provide that the dealer could sell the car during the interim period and could charge mileage and do all those other things. I don't think any -- It would be tough to get it enforced in an awful lot of courts. When I do dealer audits, I worry about Bill and his A.G. friends. And one of the things I do is I go in and tell dealers, "If you've got documentation that says you're gonna sell the customers' trade before you place the paper, change the documentation. You don't want that. You don't want that right. Even if you could theoretically get it, you don't want it." And the same with charging mileage and the other things that most of us would agree would constitute overreaching. Now, I actually have a little bit of data to add, believe it or not.

>> Robin Thurston: [Chuckles] Always welcome.

>> Tom Hudson: And this takes a little bit of explaining, and I apologize. It'll take me just a minute. One of the things we do is to collect, every month, reported cases in automobile sales, lease, and financing, and we report that stuff to the industry. I don't purport to tell you that we collect every single case that deals with these topics. If, for instance, the case involves a procedural point, a discovery argument or something like that and doesn't have any substance in it, we don't report those cases. We just report the ones that we think have something that the industry needs to hear. Typically, in a given month, we'll report 60 to 80 cases to the industry, so figure maybe, at most, maybe about 1,000 a year. And we've be doing this in computerized form since 1997. So we've got that many years of just under 1,000 cases a year. And in preparation for this, I sat down and typed in -- just using a very basic search term, I typed in a bunch of things to see how many cases dealt with various topics. And there were -- I typed in "spot delivery." I got back 82 hits. By comparison, "equal credit," 264 hits, "fair credit," 1,262, "fraud," 1233, "arbitration," 795, "warranties," 1,509. I can't even read my own writing here -- "credit insurance," 419, "unfair and deceptive acts and practices," 662 times, and the Consumer Leasing Act turned up 186 reported cases. So that doesn't purport to address the question of how frequent these issues are, but it does show the relative frequency, I think, of spot-delivery transactions, compared to other kinds of things that get litigated on a month-to-month basis.

>> Robin Thurston: Keith?

>> Keith Whann: I don't know if there is any data with respect to this, but I do know that most of the places that would log complaints in the way we did it back in the Ohio A.G.'s Office were motor vehicles and other things -- motor-vehicle sales or service and maybe financing. So I don't know that we ever get to data, other than something that Tom has done or maybe someone like Experian that tracks this type of financing, but do I think, when we look at the spot delivery, very clearly what we're talking about here is a lack of whether it's communication, understanding to the consumer that this is, in fact, a conditional deal, and I don't know if financing hasn't been approved. I guess I'll agree with Tom on this, where the dealer would have the right to go and sell a car and take someone's car or money if the deal is contingent. So if it's contingent on finance approval and there's no finance approval, it seems to me that there's no deal to go through with. By the same token, we're having a lot of discussion here about, is it the right information? Does the consumer know it? It would seem to me that some sort of uniform disclosure in the spot delivery that would be something that, you know, everyone up here could agree on -- this is what says to the consumer and the dealer, "This is not a done deal," and remembering that this has to be integrated into the purchase agreement and/or included somewhere in the finance contract, I think if you had some sort of disclosure on the purchase contract so you avoid it having it be the 8th or 10th document signed, depending what state you're in. So if you've got a disclosure on the purchase contract saying that it is, in fact, whatever we want to call a spot delivery and that it's contingent and you have a document -- we all agree on what the parameters are and the dealer is not selling the trade and is not taking the money and there's a way to unwind it if, in fact, financing doesn't go through, then I think the ones that don't do that -- that's where enforcement comes in. And I would also agree with Tom -- if you have a dealer who does not have this mechanism and, in fact, financing doesn't go through, then they've just become the creditor. They're the one gonna be responsible for financing the deal.

>> Robin Thurston: Ian?

>> Ian Lyngklip: Thank you. Just in response to the idea that this is -- there's a good reason for this kind of a transaction, and really underlying that, what I heard was that this is a significant convenience to the consumers and that they're gonna choose this kind of transaction for that convenience. That is entirely predicated on the idea that the consumers are making a choice with full, truthful information -- full disclosure of truthful information. And the fact of the matter is there isn't a single one of the consumers who gets yanked back into a dealer, loses their car, has to come back and sign papers, who ever thought that they were walking back into the dealer because the true disclosures are not being made. And the disclosure that needs to be made is that, "This deal is contingent upon whether or not we can figure out a way to make enough money on this later." That's what these conditions boil down to. That is the condition that we're talking about here, not whether or not they can sell the deal to a finance company because, again, you know, this is an open, free economy. The deal can always be sold for a low enough price. You can sell a car for \$10,000. Would you be willing to buy the contract for a penny? Well, yeah. It's just a question of whether the dealer is willing to go through and sell that at that loss and if they need to, whether they're willing to honor that contract. And the fact of the matter is that we're here to discuss whether or not this transaction, this type of transaction, conditional credit sales, is unreasonably dangerous to the public and whether there's a good reason to have it. I mean, my kids want lots of things that are very dangerous for them. They would choose to have Lawn Jarts if they could, but we don't let them have those things because they are -- they impose an unreasonable risk. And, again, because of the very -- the unique nature of this transaction, there's no other common consumer transaction that is like this, that they're able to analogize this to. It is dangerous for them, and the dealers have all the authority, or the power, in that transaction. Now, "What do you do about it?" is the next question. And I think that the problem is that the only reasonable way we can approach this is to look at what's not working right now. And certainly, you have no way of educating a consumer about how to protect themselves from a dealer that's gonna commit a fraudulent or a criminal act. You educate the consumers about how they use the information, the legitimate information that's available to them in the marketplace, how to shop for deals. But you don't educate a consumer about what to do when a policeman knocks on your door and says, "I'm here from the dealership. You're gonna be charged with a crime." That's not gonna help that consumer at all. What's gonna help that consumer is the availability of a good remedy that they can use and they can enforce uniformly. The other problem with an education kind of campaign is, I've

litigated spot-delivery cases in a number of states. Michigan outright absolutely bars spot deliveries. There are some states, like Louisiana, that certainly allow bailment agreements and have conditions that they've written right into the statute and allow them. So unless you are prepared to address an educational campaign across a patchwork of 50 states' laws, that's not gonna work. What is gonna work, what will work is a uniform fiat that says, "This kind of transaction is illegal." When the deal is done, when the consumer leaves that dealership with the car, with the keys, with the title, it's like any other transaction that you have. You've got the car. It's your car. Make the payments. Fulfill your contract.

>> Robin Thurston: Okay. Bill and Andy, and then I'm gonna ask another question. Bill, go ahead.

>> Bill Brauch: I'd certainly like for us to follow the route that Ian has laid out there. But I don't think the FTC has the authority, standing on its own, to adopt a rule to ban the practice -- just be clear about that. But the FTC does have rule-making authority. And I think that this is an area where a baseline protection from the federal government is warranted, and it could follow the following. You could require the dealer to retain the trade-in, number one. Number two, require the dealer to disclose, probably in writing and orally, to the consumer that, if the first finance agreement is rejected, the consumer has the right to walk away. Require the dealer to offer the consumer either a complete unwinding of the deal or credit under terms that are acceptable at the consumer at the consumer's choice as to which alternative to follow. Those basic protections are mirrored in some of the states that have laws that govern this particular issue, but that's only a handful of states. This is not covered by all 50 states, at least, as to specific regulation of spot delivery/yo-yo sales. So I think that's important for the FTC to consider. Just like you have the Cooling-Off Rule, a three-day right cancel -- that is a baseline, and states -- many states have their own state laws and some which go beyond the FTC Rule. The same kind of situation could apply here -- a basic baseline of protection. In addition, as I mentioned a moment ago, the FTC could join the states and others in bringing actions against dealers who engage in this kind of conduct.

>> Robin Thurston: Andy?

>> Andy Koblenz: Just a couple of points -- You know, Ian mentioned that he's never seen the people who -- for whom -- that they're not, you know, not upset or not surprised when they have to redo it. Of course not, because those are -- understand what the rights are, and they're not gonna go to utilize his services. And I'm not -- Again, I'm not talking about the people who have been the victims of abject fraud. But the fact that he doesn't see them shouldn't surprise anybody. And there are lots and lots and lots of those people who we do not want to marginalize. I guess just -- and this informs, I think, you know, the consideration of what the appropriate go-forward steps are, that it is just -- The dealers don't come out ahead. I think there's a -- floating through here, there's the notion that, when a recontracting occurs, somehow whatever those terms, if they are less favorable to the consumers, the difference between the terms in the first contract and the recontracted terms are down to the benefit of the dealer. They don't. They never do. They -- The dealer, almost invariably is -- this is a less attractive deal from the dealer's perspective. So this is not a gambit to get someone over the barrel for the purpose of engaging in opportunism. The -- This is -- It is what it says it is, which is a good-faith attempt to get the customer in the car when they want to be in there, with an expectation of the financing. And then, for various reasons -- and there could be a lot of reasons why these transactions don't go through that have nothing to do with anything on the dealer's end. It's quite frequently that there are stipulations that the finance company might put on that were unanticipated -- the, you know, verification of employment is something that you can't get from your credit report. You can't -- You don't know how much someone's making from your credit report and that the -- and that, when that requirement can't be met, then the deal doesn't go through. So it's not an -- the -- it's just not always the case that -- Ian says these are situations -- What's going on here is the dealer's out there, trying to -- you know, dissatisfied with the amount of money he's making. Well, he's gonna make less here, and there are -- there are frequently examples of many, many, many other stipulations and other reasons why these things that -- that don't go through. And so you've got to -- When you consider the going-forward steps, you've got to look at this small box, this small universe of these truly abusive, fraudulent activities and say, "Okay, what can we do to address them?" They are illegal. There are remedies under law, and there should be enhanced... of the violators with those remedies. And they -- the, you know, the FTC has resources, and it should consider using those resources towards, along with Bill and along with Ian, towards putting the people who are cheating out of business -- or not out of business -- but, well,

maybe out of business, but addressing the cheaters, but don't throw the large universe of people who aren't cheating in with them.

>> Robin Thurston: Can anyone with a dealer perspective comment on the proposals Bill has made, with regard to a potential rule?

>> Andy Koblenz: I think I hear -- I would -- a rule that -- I mean, it...

>> Bill Brauch: Retain the trade-in.

>> Andy Koblenz: Already in the law.

>> Bill Brauch: Disclose to the consumer that the --

>> Andy Koblenz: Already the law, and in fact, they are disclosing. And don't forget -- if the dealer, in a conditional sale, wants to be able to unwind the contract and get the contract back, that he's going to -- in order to make that provision enforceable in court he's going to have to make sure that it was there on the contract and able to be deciphered -- it's not in six-point type on the back. It's -- And frequently, there's a -- in these conditional sales contracts, there's a -- there's a signature on the front pointing it out to the dealer. Some of those are the result of state law initiatives and others are not. And the -- You know, the things that you're ticking off are the law already, and so we should enforce the law.

>> Bill Brauch: Well, actually, there is no specific law on them in most states.

>> Andy Koblenz: The Uniform Commercial Code provides it.

>> Bill Brauch: Well, I can't enforce that, and neither can the FTC.

>> Robin Thurston: Tom?

>> Tom Hudson: Bill, I was gonna ask -- you have an Unfair or Deceptive Acts or Practices Statute.

>> Bill Brauch: Absolutely.

>> Tom Hudson: Would you bring a claim for selling the trade? Would you say that selling the trade's an unfair or deceptive act or practice under your state's law? Is that a case you think you could bring?

>> Bill Brauch: If the facts are adequate, we could, absolutely. Yeah.

>> Robin Thurston: Okay. To look at the proposal that the FTC engage in more enforcement actions for a minute -- Do the enforcement actions have a deterrent effect on other dealers...

>> Tom Hudson: Yes. [Chuckles]

>> Robin Thurston: ...and by which I mean to the extent that neither the FTC or any other actor can file a lawsuit against every dealer who engages in abusive spot delivery. How do we prioritize our enforcement actions to have the greatest effect?

>> Ian Lyngklip: Andy wanted to...

>> Andy Koblenz: Yes, I do.

>> Robin Thurston: It looks like everyone has their tables up.

>> Tom Hudson: You could file a suit.

>> Jack Gillis: Begin by doing it.

>> Robin Thurston: Okay, Jack.

>> Jack Gillis: We begin by doing it, and I think the bottom line is, you know, with all due respect to Andy, there is a problem here. There's a very serious problem. The FTC has gathered groups of people, three successive in three different cities, and there is a serious problem here. And the FTC has the ability to step in and promulgate regulations -- promulgate regulations as simple as simply requiring that all transactions must be filed upon vehicle delivery -- period. Now, what would this mean? Would this hurt the car dealers? I don't think so. I think that what I'm hearing from Andy is these spot dealers -- spot deals may really be causing a lot of trouble for them, maybe causing them to expend a lot of time, money, and effort. So I don't think it's in anyone's best interest to preserve the right of a spot deal. What we should be focusing on is getting that transaction done quickly, efficiently, with the ability that most dealers have today to access credit records and information about the consumer. This process is much, much easier than it was two years ago, five years ago, 10 years ago. So I think that the FTC could step in. And if you do promulgate a requirement or you do enforce the requirements that are on the books now, that sends a very powerful message. You don't have to go after every single dealer. Most dealers are trying to do the right thing, and they want to do the right thing, and they hire people like Tom to make sure they do the right thing. So a little bit of enforcement action, I think, can go a long way.

>> Robin Thurston: Keith?

>> Keith Whann: Well, I'm not gonna get into whether you have authority to outlaw the practice or not. Let's assume the practice is gonna go forward, at least, for the time being. And if that's the case -- I mean, I heard, Bill, what you were saying. I don't know that it was a whole lot different than what I said, in terms of what I thought was good business practice. So, that being the case, I think, from my perspective, I'd support that because it gives us a bright-line test of what probably is already a violation of UDAP now. So I don't know that that goes further to say that things that are occurring now -- in the future -- now they're in violation of law. I think they're in violation of the law now, but a bright-line test might be helpful. And I will say enforcement actions go a long way. As someone who's been doing this, you know, 27 years now, when we're out and you're speaking to dealers and you're traveling across the country, somebody getting an enforcement action brought against them -- and not always the biggest dealer. Quite candidly, you know, it's not just go out and

pick on the biggest dealer who's out there, but to have enforcement actions that are brought across the board for these types of practices, I think, will go a long way, in terms of compliance. There needs to be a deterrent effect, and I think there needs to be a more unified approach between the FTC and the states.

>> Robin Thurston: Okay, I'm gonna go Andy, Ian, then Tom, and then move on to a different issue. Andy.

>> Andy Koblenz: And I just wanted to follow up on what Keith said -- you know, enforcement actions count. They matter. There was a case involving BJ Wholesalers, which involved some privacy issues, in which the commission acted through an enforcement action. The industry treats that -- you know, we notified our members when that decision came down, that enforcement action came down -- said, "Okay, this --" And it was a -- you know, there was a set of activities and a set of behaviors and said, "You need to do it." All that compliance education that I talked about this morning kicked into action, with respect to that. One advantage of the enforcement-action route is that it allows the commission to be very targeted, to be very specific, and it allows them to be very particularized when they're -- and to root out this truly abusive behavior that we've been talking about without jeopardizing the beneficial behavior that is in the same generic area.

>> Robin Thurston: Okay. Ian?

>> Ian Lyngklip: Yeah. To -- Dealing with the idea of enforcement action -- enforcement action does matter. It absolutely does. The only difficulty that we have in this circumstance with the yo-yo transactions -- it's not like in the Fair Debt Collection Practices world, where you've got debt collectors, some very large ones, making millions of calls a day or millions of calls in a week. There's not that many transactions that you're gonna funnel them down into a group that is large enough for you to pinpoint easily, and with that knowledge, people who are in the marketplace and competing in the marketplace, dealers who are out there doing bad things -- they may just think, "You know, we're gonna -- we're gonna slide under the radar here." More importantly, it leaves consumers who have been injured -- a vast majority of the consumers who are injured -- without a remedy, without a uniform remedy and something that they can look to to enforce. So, you know,

the idea that enforcement action is needed -- I agree. I think that that's got to be part of the complement of tools that's used to address it. But most importantly, the consumers have got to have a remedy all across the board to be able to enforce these transactions. And just to respond just briefly -- you know, we see transactions -- I've litigated spot-delivery cases, and I have a friend who's got one going right now, where a car dealer was sitting on approvals. They had approval notices through the callback system saying they've been approved by a finance company, but the dealer just didn't want to do the deal, and so they called it back. I understand that most dealers don't want to be in that situation, but there are plenty who are willing to do it, and I've seen those cases. What's really going on here, at base level, with the spot deliveries -- I think the idea of consumer convenience is a straw argument to mask what's going on. They're removing consumers from the marketplace. They're not allowing consumers to choose. They're locking them into a deal so they won't go someplace else and shop for a deal from a dealer who's honest, who's willing to give them the car and to honor the transaction. Instead, you've got the dealers who want to take the cars -- be able to take the car back and play both sides of the transaction -- acting, because there's no uniform rule. And that's what we need is a uniform rule, just simply saying, no conditional deals. The marketplace has to be able to function properly. And in order to allow consumers to freely choose the deal that they want, they've got to be able to get their disclosures, walk from dealer to dealer, and select what the best price is. And the spot-delivery idea -- the idea that you can lock somebody down and then pull them back later if you don't make enough money or you can't sell it on terms that you see are favorable enough -- that completely distorts the marketplace and gives the bad dealers the upper hand over the honest dealers. And that's costing the consumers money in the long run and harming honest dealers.

>> Robin Thurston: Okay. Tom, you'd had your card up before, and then I'm afraid we're gonna move on to a different issue.

>> Tom Hudson: I've been doing dealer-compliance audits now for over a decade. We do -- We've done hundreds of dealer-compliance audits. I've seen that practice -- take -- deliberately writing a deal that could not be sold to anybody -- a dealer doing that. I've seen that one time in a decade. And now, I don't have -- I'm like so many of you in this room -- I don't have good, hard numbers for stuff. All I have is my own experience. And you're hearing the experience of a person who

represents consumers, a plaintiff's lawyer representing consumers, and you're hearing the experience of an experienced dealership lawyer, who actually tries to help dealers comply. I think, before the FTC does anything by way of a rulemaking, they have an obligation to try to figure out whether or not they're dealing with any sort of practice that's anywhere near pervasive. And if it's not, then the correct approach, I think, is enforcement action and not rulemaking.

>> Ian Lyngklip: Tom, I -- That's not what I said, though. I -- Just so I can correct it, I did not say that the dealers were out there, deliberately writing contracts that couldn't be sold. That's not what I said. I said this -- the deal that I was talking about was a deal which absolutely could be sold, and they had an offer on the table from finance companies, live offers, saying, "We'll take the deal." They just didn't want -- they couldn't make enough money on it. The spread -- the yield spread wasn't big enough.

>> Robin Thurston: Okay.

>> Ian Lyngklip: So, just so we're clear on that.

>> Robin Thurston: I think that --

>> Andy Koblenz: And that dealer is just taking massive risks with that vehicle. I mean, there are so many things that are adverse, from the dealer's perspective, to do that. While I'm not saying that you didn't see that, Ian, and that there isn't that bad actor, there are just these massive economic disincentives from the dealers to do that, that it -- that it -- we -- it just is not happening that much.

>> Robin Thurston: Excuse my interruption, but we're gonna move on to a different issue. We can all take a deep breath and talk about what happens when consumers don't get good title to a car, which, I realize is -- if we can step back, get your head around a different issue, and can anyone talk about how that harms consumers? Say a dealer fails to pay off a lien or some another situation in which a consumer doesn't receive good title after purchasing a car. Bill?

>> Bill Brauch: Well, number one, it would be illegal for them to drive the car in virtually every state. They have purchased something they cannot use lawfully on the roadways, and it is a problem. And I think Greg talked this morning, and others did, about dealers going out of business. And that's a rampant problem around the country. And when it happens, almost invariably, there are situations where the dealers have not paid off the trades in prior transactions. And so they have sold a vehicle -- and it's legal to do that in Iowa -- where they haven't paid off the trade and the lien has not been released from the lender to that trade-in customer. And so that creates a huge amount of trouble. And we have motor-vehicle dealer bonds. Iowa is blessed with a \$50,000 bond, which doesn't go very far, but it's one of the higher ones in the country. But when you have just four or five vehicles like that, where you've got an unpaid loan, that's gonna eat up most of the bond proceeds, and we end up having to prorate so that consumers don't get dollar for dollar in their losses. It's a serious, serious problem.

>> Robin Thurston: Okay. Keith?

>> Keith Whann: That is probably part and parcel to the biggest problem that's out there today -- is that, when that situation happens -- I mean, I'm not saying in terms of frequency, but that's something that not only harms consumers, but harms dealers, as well. When you have a dealer who goes down and is not able to pay off liens that are on cars, you've got all sort of transactions. I mean, the car may have been retailed to a customer -- and worse than that, the car may have been retailed to the customer and the customer's trade not had the lien paid off on that. So now you've got a customer who doesn't have a car and who still owes on the other car, at least in theory, and is in trouble. But it also goes to the dealers, to the extent that there may be cars that are wholesaled. And you may have somebody who purchased a car at wholesale and has retailed that car and now can't get title to deliver title. And you know, \$50,000 doesn't go very far, but I don't know how you have a bond big enough. \$50,000 is not enough. In the state of Ohio, we have a Title Defect Rescission Fund, which is meant to cover things like this. But I don't know even how you predict that. But I will say that this is one of the areas that's probably the biggest areas of harm for consumers, dealers, and the like when somebody goes down and cannot deliver title.

>> Robin Thurston: Andy?

>> Andy Koblenz: Yeah, I'm not an expert in this area, but, back in Detroit, we had a panel on this, and Pete Kitzmiller, who is an expert on this area, participated in it. And we've got to be careful about the language we're using here when we say it's a big problem. There's no question buying a car and not getting title to it is a very large problem -- I mean, it's hard to think of one larger for that person, and I don't belittle it at all. The question is the frequency of this occurring, and I believe Bill used the word that it's rampant, but that -- that we haven't seen. We just came through the period of the greatest number of dealer closures that we've witnessed in this country in half a century, and yet the reported situations where this occurred were exceedingly small, and it's -- we're -- I'm not belittling the significance of the problem in the instance. I'm questioning the breadth of the problem in the marketplace, and I think Pete said that there was some reference that there were 319 out of 3 million transactions in California. I'd encourage you to go back -- I mean, this was discussed at length in Detroit by, as, again, Pete Kitzmiller on behalf of the dealers, who laid it out. By the way, I am also not an expert on Iowa law, but the consensus on that panel was this is criminal behavior on the part of the dealer. It would -- For anybody who is not exiting the business, it goes to their licensure. They're probably gonna be exiting the business even if they weren't intending to, because they'll lose their license. It has a massive reputational effect on the dealer. And I guess one question I would ask is -- these bonds that are in place, how many of them have been exhausted? That might give us a little indication of the magnitude of the problem. I'm questioning the breadth of it, not the seriousness of it and the individual case in which it occurs because -- and I'd encourage everybody to go back to the discussion by all the experts that we had in Detroit as to the magnitude.

>> Robin Thurston: Ian, and then I'm gonna ask a follow-up question.

>> Ian Lyngklip: Yeah. Thank you. You started the conversation with the topic of good title and not necessarily just paying liens forward, and what I want to address is Andy's statement of we don't know about the frequency of problems. Let me address that specifically. Uniformly, when I take dealer depositions and ask them about their titling procedures, I get the same kinds of explanations, which is that when they pass along certificates of title to used vehicles, what they do is they get a power of attorney from a consumer and then they bring in a clerk to sign all the backs

of the titles, and then, after that, they bring in somebody who's a notary to notarized that signature that they've signed later. This is a massive misuse of the powers of attorney and amounts to, legally, a forgery of that certificate of title. This is a massive misuse of certificates of title. And I don't want to say that every dealer is doing it. I'm sure that I have seen, you know, a number of titles that are perfectly validly executed, but I have seen many dealers where that is the standard practice -- to forge the consumer's signature using an improperly used power of attorney. And one of the problems is that this is -- to tie this back -- this is one of the principal tools that is used by dealers to recall cars in cases where there are yo-yo sales. They simply don't convey the title. They don't want to sign over the title because they know that if -- once they do that, they have to do a number of other things to try and get that car back. Even if they can get physical possession, they have to go through the process of getting a repossession title and fill out a lot of paperwork from the Secretary of State. So I would say that, you know, just given the numbers that I've seen from the dealers that I've deposed, there is a large problem on the misuse of title, and those title are not validly executed, and consumers who have not seen those titles are still on the hook, potentially, for odometer-fraud problems down the line, 'cause if somebody gets that car and has a problem with an odometer, that consumer is on the hook as somebody who is in that chain of title. And until we change the attitudes of the industry about how it is to properly use these titles, we're gonna see rampant problems with, you know, failures to pay off liens. That's a problem in our state, as well. We don't really have any effective remedies for that. So I've seen numbers of cases involving that, where consumers just simply have no remedy and no way of clearing their credit reports. They were profoundly damaged by the refusals of the dealerships to pay off those liens. And they're left without a remedy. There's no way to fix that broken credit report once a dealer walks off with the money that's been taken on the vehicle.

>> Robin Thurston: Okay. Is there a role for the FTC in addressing any of these title-related harms?

>> Bill Brauch: Well, if you are talking about just getting a title to somebody, probably not. That is probably a function of state law. If you are talking about fraud in the context of title brands, for example, where a dealer knows a vehicle had previously been titled as salvage and fails to disclose it or misrepresents it, yes, that definitely would be a violation of the FTC Act, just as it is violation

of state UDAP laws and other state laws, like Iowa's Damage Disclosure Law, and there are a number of states that have those. That is a very injurious practice. It puts people in cars that may be dangerous unknowingly. It also means that people are probably paying at least double what the car is actually worth in the marketplace. And it is a practice that has been with us for quite a while. There are steps afoot to deal with that, including the National Motor Vehicle Title Information System database, which California car buyers are now going to have the advantage of in every transaction in used cars. And there are steps, though, that can be taken. But we're also seeing to see again -- and this kind of the ebbs and flows -- but we're starting to see some new car dealers who have purchased vehicles, used vehicles, at auction or taken them in trade and have it in the records that that car was on a salvage title or has a title reading "prior salvage" or "flood" and has not disclosed that to the consumer, and that's a problem. And I think it's the down economy, but they know they're gonna get double the value of that vehicle if they don't disclose it, so they don't.

>> Robin Thurston: Andy?

>> Andy Koblenz: Yeah, I got to push back a little bit here. The issue of combating title fraud has been -- Dave Regan is sitting here from our legislative office. This has been front and center on NADA's and the dealers' agenda to combat title fraud. The comments here are suggesting that dealers are the source of it. We have been pushing for legislation and for implementation of the NMVTIS legislation for years. We are -- We share the safety concerns. We've worked hard. We salute the DOJ. We've worked with our friends in the -- in the consumer-advocacy community to help move the Department of Justice forward. The NMVTIS program is a very good one. It has some tremendous benefits, including coordination among the states -- you know, starting to deal with the issues of duplicate title, to get more reported more frequently. Here's one that was our suggestion. Let's redefine what constitutes a totaled vehicle. Let's not merely have what might be the function of state law, but let's also take from the insurance industry what their definition is because, in many, many instances, a totaled vehicle from their perspective is not one that may not yet be totaled for purposes of state law. And that is now being implemented through the NMVTIS System. When the Cash for Clunkers legislation was passed, we pushed for the recyclers to have to identify the VINs of the clunkers that were turned in and were destroyed as part -- into the NMVTIS System, which got the recyclers, as a whole, into the NMVTIS System, and more of the

vehicles that they -- that are going through their processes that are now getting in. So the notion that the dealers are seeking, as a group, to perpetuate the title fraud and the salvage fraud is furthest from the truth. We have been at the vanguard of attempting to promote that. There are still gaps in the NMVTIS System. The timeliness of reporting isn't where we want it. There's only -- It's only monthly. We'd like it more frequent. The completeness of the reporting isn't there. It's only current year -- model year and back four years. We -- The statute under which NMVTIS is being implemented was written before -- almost before the Internet. It was certainly before the prevalence of electronic titling and other electronic communications. So my request to the FTC in this regard would be -- and I'm not suggesting that there's been any failure in this yet -- but to join us in promoting -- and to get all the industries involved -- the insurance industry, the salvage industry -- everybody -- to improve and fine-tune and hone the NMVTIS System so that it can truly be what it has the potential to be, which is a single place where you can go to just get rid of these title issues. So it's something that we're proud of and that we've been working exceedingly hard on.

>> Robin Thurston: Okay. Keith?

>> Keith Whann: I can't agree more with Andy. This is probably one of the issues that I would say dealers are as adamant about as consumers would be, in terms of not wanting to have confusion in brands. In today's day and age, with the ability to run vehicle-history reports, whether it's NMVTIS or AutoCheck or CARFAX, consumers are gonna find out, anyhow. I cannot imagine a dealer's gonna sell a car and not disclose a brand, hoping somebody doesn't figure it out. I am flashing back a little bit. And we talked about the Internet and being so old. I was actually there back in '92 when the Anti Car Theft Act was passed. Rosemary, you were, too, so don't be laughing at me back there. [Laughter] We spent two years discussing this, from '92 to '94, when, in fact, the NMVTIS was born. And in '96 and '98, there was actually efforts that were put forth to try and get some sort of uniform titling bill passed so we wouldn't have this patchwork of brands and disclosures where you go from state to state. And I agree -- you know, the statute that was implemented under, Andy, is probably dated. 30 days to get a record updated -- all that does is allow somebody who is going to perpetrate a fraud to sell a car knowing full well that it won't come to light for perhaps a couple of weeks. It's much different than it was. Back then, we had states that it was as much as three or four months before that they transmitted any information or updated

the database. But this is one of those that I think the dealer community, the auction community -- everybody would support getting this simplified as much as possible and having as much disclosure of this information so that everybody knows what a brand is and we don't have issues of nondisclosure with this.

>> Robin Thurston: Jack?

>> Jack Gillis: I have just a question. CFA represents consumer organizations. And here, we have two private and a public litigator, and we have auto dealers. It seems like you guys are talking really past each other. And do you not see the problems that these litigators are surfacing? Or is -- Are you accusing them of just, "Well, there's a few bad apples, and this isn't really what's happening as more of a consumer experience"?

>> Robin Thurston: Andy, go ahead.

>> Andy Koblenz: I can respond to that. I can also ask -- Tom mentioned earlier that, you know, there's some people are from Venus and some were from Mars, and he may want to tell what the topography of those two planets are. The -- I mean, we're -- I think it may be the latter of the two, Jack, and certainly not the former. We're -- We are not here, holding out for the privilege of committing fraud. The consumers want to be profitable businesses. Consumers want to retain their customers, not just for the transaction at hand.

>> Tom Hudson: Dealers want to retain their customers.

>> Andy Koblenz: Excuse me. I misspoke. Dealers want to be profitable businesses. Dealers want to retain their customers, and not merely for the transaction at hand, but for life. We talked about this in Detroit, that the benefit to a dealer -- vehicles are the second-largest purchase that most Americans make in their life. For some who aren't able to participate in the housing market, it may be the largest purchase, and that it is not one that you make only once. It is one that you make several times over several times over the life, and the amount of money, the amount of business that an average American generates in the auto sector is very large, and dealers want to capture

that. Yes. Are they doing it because they're out as for-profit businesses? Yes. But they want to retain those customers for life. So their economic incentives are largely aligned. That doesn't mean there aren't bad apples. That doesn't mean there aren't people who cut corners. I think the place where we disagree -- And that's why I went into a little bit of the -- of the economic interest of the dealer in the -- in the abusive spot delivery -- or the non-abusive spot-delivery context -- not the abusive one, the non-abuse spot-delivery context, because their economic interests are not aligned with the -- with the rampant fraud. I assume that Bill and Ian are seeing the problem cases. I mean, the dentist sees a lot of people who have problem with their teeth. And that the -- So it doesn't surprise -- Nor am I denying that the cases that they see are there and need to be remedied. It's that they -- I think what they may be missing is the larger universe, the enormous universe of satisfied, happy consumers who are getting what they want in fair transactions that are negotiated, that goes on every day of the year, and that the dealers are delivering to them, and customer satisfaction is an enormous aspect of that. So, no, I don't think that we're -- we may be talking past each other on some of the remedy issues and things like that, but I think the perspective is that there's this large, enormously large portion of the marketplace that is not getting the recognition and the value to our society and the ability to climb up that economic ladder that the vehicle transportation allows for people -- isn't being given as much attention that might be appropriate.

>> Jack Gillis: Well, I -- just in response to that, I can say from CFA's perspective -- and every year, we work with consumer agencies all around the country and consumer groups around the country. And for some reason, there is a significant problem that consumers have with buying -- the vehicle purchase process altogether. It almost always surfaces as the number-one consumer complaint. It almost always surfaces as the experience consumers least like having in the marketplace. And there's -- And there's nothing wrong with the profit incentive. If dealers aren't profitable, there will be no cars for us to buy. That's important. But there does seem to be a disconnect here because there are growing numbers of consumers who regularly experience bad things happen to them in this purchase process, and they don't have that same experience in a lot of other purchase processes.

>> Male Speaker: And if I can...

>> Robin Thurston: I would actually like to move on a little bit and bring us back to the focus of this panel. The next panel will be another great opportunity to talk about widespread practices in industry, but I wanted to --

>> Andy Koblenz: There's a response to that, but I'll hold it.

>> Robin Thurston: I have no doubt. But I wanted to ask if any of the panelists have issues that they'd like to raise besides the two that I've suggested, being yo-yo financing and title problems -- issues, practices that cause significant harm when they occur, but that may not be industry practiced or that are not particularly widespread. Ian?

>> Ian Lyngklip: Well, I think one of the most difficult practices that I'm seeing is something that's already within the FTC's wheelhouse, which is the warranty and the misrepresentations concerning warranties. It's already governed by the Magnuson-Moss Warranty Act. And in particular, we see car dealers consistently misrepresenting, over and over again, what it is that the effect of that warranty is. It's a particularly harmful practice for them because consumers are leaving dealerships thinking that they are -- they are covered, that they've got warranties when they're buying service contracts. And the statute already has provisions for that, in that, and consumers do not have remedies and are -- those remedies are not being made available to them consistently across the board right now. It's harmful because, in my city, in Detroit, we have no mass transit. If you don't have a car -- you don't have a working car, you don't have a job. There's no way to get to and from. And when consumers are charged for products that are simply not reliable and they're misrepresented as to what they do, very harmful to the consumers.

>> Robin Thurston: Okay. Tom. And I guess I should have said, as well, as you make these comments, if you have any potential solutions, that would be terrific.

>> Tom Hudson: I just wanted to take issue with the statement that consumers don't have remedies. To the extent that these actions by dealers violate Unfair or Deceptive Acts and Practices statutes, and it sounds like almost all the ones that we hear -- that we've heard at this roundtable and the previous roundtables are those kinds of violations. They certainly have remedies. They have

remedies under a plethora of federal and state laws. They have common-law fraud remedies. They have contract remedies.

>> Ian Lyngklip: In Michigan, we don't.

>> Tom Hudson: There are remedies galore for customers. And I think to say that consumers don't have remedies is just not correct.

>> Robin Thurston: I believe Andy had his tent --

>> Andy Koblenz: This was up from before.

>> Robin Thurston: Okay. Bill, go ahead.

>> Jack Gillis: Go ahead.

>> Andy Koblenz: I was -- I want to respond. I really want to respond.

>> Bill Brauch: Yeah, well... [Laughter] There are a couple of practices that were prevalent in the past and now are beginning to rear their ugly heads again, and those are outright lies to consumers that they have to purchase optional products, like credit health, credit life insurance, in order to obtain financing, which, of course, is never the case, but we're starting to see that again. And we are starting to see -- now, remember, this is not rampant practices we're talking about here. [Laughter] She's asking about harmful, but not necessarily all across the board. The other is payment packing, where you're not gonna see it in the ad because they have to disclose a higher monthly payment, but when you're talking to the dealer's representative, the salesperson is quoting prices for the vehicle which include optional products, and not telling you that. And so consumers end up paying higher prices and not understanding the situation.

>> Robin Thurston: Okay. Andy and then Keith.

>> Andy Koblenz: Yeah, I just -- payment packing, Bill, as you know, is illegal in every state. Out-and-out lies are illegal in every state. There -- And there are --

>> Ian Lyngklip: Not in Michigan. [Laughter]

>> Andy Koblenz: You can lie in Michigan.

>> Bill Brauch: Hold on a minute. You guys keep saying that, but we're not talking about proposing new laws here. We're talking about problems in the marketplace, and they are there. We're not -- Yeah, it's illegal. Of course it is. The FTC wants to know what's going on that's harming consumers, and so we're telling them that.

>> Andy Koblenz: Okay. I mean, yes, lies -- you know, out-and-out lies are -- harm them, to the extent that they occur, and "to the extent" is the important part of that. The -- You know, it was described earlier -- the menu-selling point -- it was underscored by the dealer representatives up here that these are presented as optional products that you can, you know -- one comment I heard in the back of the room was, "How hard is it -- Isn't it easier just to say, 'No, thank you,' and leave?" When the menu is presented, you know, the menu is -- it, you know, defeats the whole concept of payment packing. And I will tell you -- and, you know, Bill might hear about it first -- I'm not gonna concede that he won't, but we have not heard this. We have not heard these concerns, but if they're there, Robin, you're asking for solutions, let's enforce the laws. We got laws against all these things. Let's enforce them.

>> Robin Thurston: Keith?

>> Keith Whann: Well, I think, as you travel the country -- and I get to do quite a bit -- and talk to dealers and even talk to consumer groups, I think what we do see is that gap. And I think the gap we see -- and probably because the people that will show up at a seminar or a meeting that I will do or Andy does or Tom will do are probably not the people who are engaging in some of the acts or practices, Ian and Bill, that you're saying.

>> Ian Lyngklip: You're probably preaching to the choir.

>> Andy Koblenz: My choir.

>> Keith Whann: I would say that that's probably the case. Now, that doesn't mean that things don't happen that you see because, quite candidly, you know, having been an assistant A.G. quite a while ago, but being in that situation as a regulator, we saw the people with the problems. So they are there. There's not a question that it is there. And you know, to Jack's earlier comment, I don't think we're talking past each other, but what I think is people are talking about their individual experiences and maybe where we see policy should go. But once again, Bill, your earlier comment about spot delivery and the disclosure -- okay, we got the same thing here. Andy, I would daresay that, within NADA, as within NIADA, we've preached the menu-selling concept. Everyone knows you can't payment-pack. In fact, after, I think, it was "Dateline" and some others did some things on that, there was a dramatic interest in this. And you saw dealers saying, "Hey, I need to pay attention and do this thing better." I think enforcement plays a role. If you have people out there who are outright lying to customers and packing payments and doing things we all know they shouldn't do, then we need an enforcement effect to be able to go after that because that's probably not the dealers that we're seeing on a day-in, day-out basis. Beyond that, if you want to have widespread compliance and not have discussion, then we need some sort of uniform disclosure we can all agree on is going to be adequate. We've got menus. We've got spot-delivery agreements -- something like a Fed box -- If we could agree on what the disclosure is that goes to the customer, there's no discussion there. And then, whoever's left that is doing that, the bad apples, and that's where enforcement comes in.

>> Robin Thurston: Okay. We're gonna go Jack, Tom, Ian, and then I'm gonna open it up to audience questions.

>> Jack Gillis: There's a number of things that we would like to bring forward as issues as we see them, and I'll just tick them off very quickly. And before I tick them off, I must say that the items that I'm gonna mention today are items that we've worked with dealers on. There are a lot of good dealers who believe in good sales practices. Some of these things that we see as a problem that

need to be corrected as one. Advertising price of a vehicle must be the selling price that deducts only those rebates that are available to all consumers, and that rebate should be very close to the price of the car in the advertisement -- not all rebate, but only those that are available to all consumers. We believe dealers should provide an offer of the complete vehicle price, the financing terms, and any add-on prices without requiring the consumer to sign a purchase agreement, to give that consumer the complete information prior. In terms of addendum labels -- you see these on cars all the time. It's important that dealers indicate to consumers that that's not part of the Monroney label, and those are not required purchases if you want to purchase that particular vehicle. We believe that dealers should, if they have add-on packages, they must also offer those items individually. I think Keith talked about menu pricing. Many dealers don't. You have to take all or none. I talked about vehicle delivery. We believe that all transactions should be completely final before delivery occurs. And then, finally, and we have the king of this over here with Ira, mandatory arbitration. Dealers should not include mandatory arbitration in any of the contracts that they offer consumers. So those are six things that we think are potentially abusive practices that could be corrected. If -- And if they're not corrected, they should be regulated by the Federal Trade Commission.

>> Robin Thurston: All right. Tom and then Ian.

>> Tom Hudson: Well, I changed what I was gonna talk about. Now I'm gonna talk about arbitration. And I fuss at my consumer-advocate friends for using anecdotes, but I'm gonna tell you an anecdote. I am a big proponent of arbitration agreements in -- for car dealers and for consumers. When I was a very, very young man, I bought a car. And I promised Andy I wouldn't identify the manufacturer or the make. I bought a car that turned out to be the single worst consumer product I have ever owned in my life. And I was a brand-new lawyer at the time, and I knew enough to know that, if I decided to turn that thing into a court case, it would be five years before I'd get any sort of final verdict out of a court if I had to sue the dealer. I would have given my eyeteeth for an arbitration agreement to bring that dealership into court and get a resolution of my problem 60 days later.

>> Jack Gillis: But it wouldn't be into court.

>> Tom Hudson: No, it would be -- I'm sorry. It would be in front of an arbitrator. I think that -- And I draft arbitration agreements, as one of the things I do for a living. And my view is that arbitration agreements need to be as consumer-friendly as they can possibly be. The dealerships, the finance companies ought to bend over backwards to make the arbitration as fair as possible. And I think a well-drafted, fair arbitration agreement is a -- is a very, very good thing for both the consumer and the dealer.

>> Robin Thurston: All right. Ian.

>> Jack Gillis: But, just to be clear, we agree -- and I notice you didn't use "mandatory."

>> Tom Hudson: I mean mandatory.

>> Jack Gillis: Oh, okay.

>> Male Speaker: Then you don't agree. [Laughter]

>> Jack Gillis: Everything else -- Everything else was good except for the mandatory.

>> Robin Thurston: Ian, go ahead.

>> Ian Lyngklip: Just to be clear -- I mean, we know that there are lots of good dealers out there doing good work, but on the flip side of that, from the consumer's viewpoint, from Venus or Mars, whichever planet you think I'm from, the reality is that consumers -- every consumer who walks into a car dealership is scared. They're scared they're gonna be taken. There's the -- There's nobody who walks into the car dealership and sits across the desk from a finance manager who does 1,800 deals a month and says, "I'm going beat this guy." Nobody says that they're take advantage of this car dealer. They're worried about's gonna happen to them. And the fact of the matter is that the car dealers who do take advantage -- it's not just that they tar the industry -- it's just -- it's that they distort the marketplace. They're eliminating the ability of the consumers to

freely choose. When dealers do things like add on an undisclosed acquisition fee after advertising a specific price and then adding on -- saying, "Oh, the finance company said you have to have this," or that price then gets added on a window-etching product for another \$250 to \$1,200, depending on what they think that the consumer can tolerate. That kind of experience is the experience that causes consumers to worry about whether or not they're gonna be taken in the dealership, and it also penalizes the dealers who do good things, who sell uniformly, who make sure they're complying with fair lending by offering products at uniform prices to everybody who comes -- to all comers who walk in the door. Those disadvantage those dealers. And there's a place for the FTC in this. There's absolutely a place because every single one of these problems that we're talking about, including the spot-delivery problems, start with the misrepresentation, and in the case of spot deliveries, it starts with the misrepresentation of, "Congratulations. You've got -- You've been approved." Nobody signs a contract thinking that they haven't been approved. Dealers mean something different than the consumer thinks they mean, and that's part and parcel of getting them into that transaction. So I think there's absolutely a place for the FTC to step in and to use its authority. Certainly, I would like to see more remedies available to the consumer and regulations that we can use to enforce, either through UDAP, where that's available -- I don't have that available in Michigan. I don't have UDAP against car dealers. I don't have fraud in the same way that many other people do. But, still, that is a massive step in the right direction and would benefit the car dealers who are trying to compete honestly.

>> Robin Thurston: All right. We have time for just a couple of audience questions. I have a hand right here.

>> Male Speaker: I want to direct this question to the car-dealer advocates. Any retail installment contract or any retail lease can be assigned with recourse. What are your thoughts? I happen to know that's the case. I want to hear what your position is.

>> Andy Koblenz: It would dramatically change the prices that are charged if the dealers' capital is tied up in a recourse transaction.

>> Male Speaker: The point I'm making is you can assign any lease or any contract as written, and they'll buy it from you, but you choose not to do it. Dealerships choose to defraud the consumer instead.

>> Andy Koblenz: [Chuckles] The dealerships do not to choose to defraud the contracts, the -- excuse me -- to defraud the consumers. The concept of retaining recourse at the dealership would dramatically alter the pricing of the vehicles, and it would -- it would -- the consumers would not appreciate the outcome of a mandate to do that. I just have to respond to one -- to Jack and Ian -- that the notion of -- you know, every consumer that goes in is scared of what's going to go on there -- it just ignores the vast amount of information that we have about the level of satisfaction that people have with the car-buying process. It is -- We're not in the 1970s or 1980s any longer, that -- the dealers have figured out the customer-for-life approach to their businesses. And the -- It's almost like -- and I hesitate saying this. It's almost like those polls about Congress, where people say, "I can't stand Congress, but I love my own Congressman." I'm not sure that's true anymore. But that's -- And there's -- Actually there was an organization called Automotive Retailing Today that actually did data research into this, and that's exactly what they found. They found that there was this general perception that, "Oh, I -- the dealers are -- dealers at large are," as being described by some of the other folks on the panel, "but my dealer -- the one I deal with? No, no, no. He's a really good guy." It was is overwhelmingly that. So I reject -- Are there some people? Sure. There are some people. But I just flat-out reject the notion that that describes the majority -- the overwhelming majority are not described by Ian's comments.

>> Robin Thurston: Okay, I'm gonna take another question over here.

>> Female Speaker: I just have two, hopefully, brief questions. The dealers have talked about conditional sales -- in other words, that, when the car leaves the lot -- leaves the lot on spot delivery, the dealer maintains the ability, if financing doesn't go through, to take it back. Would you agree to give the same right to the consumer, that, in other words, if they go home and sleep over it for a few days and realize they can't afford it on terms that are acceptable to them, or if they lose their job, that they likewise -- that that conditional sale goes both ways?

>> Andy Koblenz: The conditional sale is an external condition.

>> Ian Lyngklip: I disagree with that. The conditions that I see in the contracts that's written in them, and I have yet to see any one that doesn't boil down to, "We can't sell it for enough money and make enough money," which I think is Mr. Ingalsbe's point, that -- and it's something that I said earlier. In a spot delivery, if the dealer is willing to sell that paper with recourse, you know, they can always find a finance company to buy that, as long as the dealer's willing to do it. And once the dealer has signed on the dotted line and said, "I'm the creditor" -- that's what they say when they sign the retail installment contract -- they should be bound by that deal to the same extent that the consumer is. And if they can't make enough money, they should still carry it, or they can sell it with recourse. They can always go ahead and sell it with recourse.

>> Andy Koblenz: Yeah, we can argue the linguistic meaning of the words in the contract. The -- When these abusive transactions happen, the consumers are vindicated by the court systems. I'm not defending the abuse of dealers.

>> Female Speaker: Well, actually, that's my second question. And so, it seems to me that you're saying that the consumer does not have the equal right to back out of the deal conditionally as the dealer does. So I don't -- I didn't hear a direct answer, but it sounds like that is what you're saying, as --

>> Andy Koblenz: You're proposing a three-day cooling-off period is what you're proposing. That's your question. Your question, should be append to these contracts a three-day cooling off period? That's not what the condition says.

>> Female Speaker: Okay. So it's a condition that only applies to the dealers. My second question is, you talked about recourse in court, and the arbitration clauses were brought up. As you mentioned -- Someone on the panel mentioned that there are remedies galore to the consumer. Well, in light of the arbitration clauses, the ban on class actions, the ban on public hearing, the ban on appeals, the ban on punitive damage, the ban on attorneys' fees that are being written into these clauses as well as the problem that would solve our friend who had the bad car years ago, the fact

that you can still ask for arbitration, but that it's voluntary and not mandatory -- how -- how do you propose that there are remedies galore, in light of these arbitration clauses that are infecting every consumer transaction?

>> Robin Thurston: Okay. I think Keith wanted to make a point and someone else can answer that question. And then I'm afraid we have to wrap up.

>> Keith Whann: I just wanted to, I guess, interject a little bit of reality into the financing process. And, Andy, I'll let you speak for franchise dealers, but I think this works the same way. We don't just go into our Rolodex and start leafing through 50 or 60 finance companies when we have a contract. We have to go through the process. And quite candidly, over the last number of years, the number of members in the car business has dwindled. So I appreciate the comment. And you're right. If there's a \$10,000 note, somebody probably would pay a penny for it. But the reality for what we, sitting in a car dealership, is we have to have a lender we've already contracted with. So if, in fact, we can't get it financed with a handful of lenders that an independent dealer would have, we don't have the ability to call up Jack and say, "Jack, how about your finance company?" We'd have to go through a period. We'd have a dealer agreement that's executed. And quite candidly, by the time I got signed up with that, it would probably be too late under the spot-delivery agreement in the first place. So the whole concept of saying, "Gee, let's take something that's nonrecourse and make it recourse," that's gonna require a different agreement. We even have lenders who will require us to contract on their paper. So if, in fact, we've pulled a retail installment contract out of the drawer that's going to one lender, they may want a different piece of paper to do it. So the dealer doesn't have all this flexibility just to go start shopping around, with respect to it. And from what I'm hearing with the spot-delivery side, it's not that the dealer can change their mind if it's -- financing is not approved. And I realize there's many people that think that's one and the same thing, but there is a difference, with respect to that. So the reality, where the rubber hits the road, these dealers don't have 50 or 60 finance companies just to call up. If it's not rearranged, if they don't have a contractual relationship, they can't do business with them when that car dealer or that spot delivery goes bad.

>> Robin Thurston: Okay. I'm afraid I have to wrap this up. Otherwise, no one's gonna have a chance to get a drink of water or use the restroom before the next panel. But before you all go, Daniel Meager dropped his credit card in the lobby. We have it at the registration table. If anyone -- Daniel can make himself known. [Laughter]

>> Bill Brauch: I have a comment about that guy. [Laughter]

>> Robin Thurston: Yeah, it's very, very controversial. and we'll reconvene at 3:15 for the final panel. [Applause]

>> Keith Whann: Yep. That was a pleasure.

>> Ian Lyngklip: It was great.