UNDER ONE UMBRELLA

The Relationship Between
Antitrust and Consumer Protection
Where are we in the program?

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

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

- Provide a basic structure of doctrine
- Keep the bureaus from overlapping
- Keep them from confusing one another’s law
The basic “Consumer Choice” interpretation of the FTC Act

- The role of antitrust is to preserve a range of options in the marketplace.
- The role of consumer protection is to protect customers’ ability to choose freely and effectively among the options.
- Together the two roles allow the FTC to protect a market economy.
This does not require “maximizing” variety and choices

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

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

- **COMPETITION** -- Consumers find a reasonable range of options in the marketplace, undiminished by artificial constraints like price-fixing or anticompetitive mergers.

- **CONSUMER-PROTECTION** -- Consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints like deception or the withholding of material information.
Benefits of this interpretation

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

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

- 1980 Unfairness Policy Statement (Companion Statement)
- International Harvester (1984)
- The FTC Year in Review (Report for 2003 ABA Spring Meeting)
The choice interpretation starts the analysis on the right foot

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

- Can we do more than avoid problems?
- Can we achieve positive synergies in litigation?
- Having differentiated the missions, can we now usefully put them back together?
- Those are the questions for our panel
How can we build on cross-bureau strategies that were used successfully in the past?

Those often involved bringing both antitrust and consumer protection laws to bear on a single problem.

When might an FTC Chairman find an opportunity for similar strategies in the future? When does the Chairman want both bureau directors at a meeting?

How do you coordinate the tanks and the dive bombers?
Can we devise additional, new cross-bureau strategies for the future?

Some of those may also involve cross-bureau coordination; others more novel theories.

When can an FTC matter be usefully reconceptualized in terms of the law under the other side of the statute?

When would a bureau director want to call in a specialist from the other bureau to help on a difficult case?

How do you design a flying tank?
The previous topics have applied existing BC and BCP law in new combinations.

But does the choice model imply that antitrust law should become (somewhat) broader substantively in reaching nonprice forms of competition?

How do you build a bigger tank?
Commissioner Leary

- FTC Commissioner
- Will comment on all three papers
Mary Lou Steptoe

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