MR. AVERITT: Welcome to the last panel of the afternoon. We're on the home stretch now. The panel is called Under One Umbrella. It deals with the relationship between antitrust and consumer protection law.

That's actually an important issue for the Agency. The FTC is unusual in combining both of those functions, and obviously if we can make that combination work for the Agency rather than against it, we're going to be well ahead of the game.

Before going into the details of all of this, though, let's pause for a second and think about where we are in the overall trajectory of the program. We
heard earlier today from BC. We've also heard from BCP, and the question now is how these two bodies of law fit together, how do they relate? Another way of expressing it is this: How do the two fit together to define a single more or less coherent overall mission for the Agency?

Before getting into that, let me note for the record that any opinion I express here is solely my own and not necessarily that of the FTC.

If we're trying to define a relationship between the two bureaus, there are two general ways in which we could approach that task. One is relatively narrow and defensive and it aims, at the very least, to keep the two bureaus out of each other's way, to make sure they don't interfere with each other. Alternatively and more ambitiously, you can try to define the relationship in a way that creates synergies, greater insights or greater force for the Agency.

In my capacity as introducer and moderator of the panel, I have assigned myself the easy job. I'm going to talk just about the narrower more limited goal by way of background. Then I will leave to the panel the more challenging topics of figuring out how to derive synergies from the two bureaus.

Even the minimalist goal has a couple of somewhat challenging attributes though. Among its goals
are to create a basic structure of doctrine for the Agency as a whole, to keep the two bureaus from overlapping, and hopefully to keep either one of them from pursuing a particular doctrine in ways that create legal or doctrinal problems for the other bureau.

There are a number of ways that one might go about doing that, but the one that's been most current in recent years is a "consumer choice" interpretation of the FTC Act, and that's what I would like to outline here as a background for the panel.

The consumer choice interpretation starts with the notion that the FTC is in the business of protecting the market economy, an economy that would be driven primarily in response to consumer preferences as expressed through purchase decisions.

If you're going to be having a market economy of that sort, there are two basic things that you need. You need, first of all, an array of options in the marketplace, and that's the task of antitrust. Then the second thing you need is an ability on the part of consumers to choose among those options, and that's the task of the consumer protection. And then the two together will help you defend the American market economy.

There are a couple of grace notes to mention, a couple of points of detail here. One is to note that
this model doesn't require maximizing variety, and it doesn't automatically condemn any reduction in variety. Here, as elsewhere in trade law, the test is one of reasonable sufficiency rather than perfection. So on the antitrust side, what would be required is a sufficient range of choice, and what would be required on the consumer protection side is a reasonable access to information.

Another thing to note is that there's an efficiency defense possible here. The choice interpretation permits this because efficiencies can lead to innovation, and innovation can lead to more options in the future, and that's something that ought to be open for consideration.

When you plug all these things in, it becomes possible to come up with a slightly more detailed description of the choice model. The competition mission is to ensure that consumers find a reasonable range of options in the marketplace, undiminished by artificial constraints like price fixing or anti-competitive mergers. Then the consumer protection mission is to ensure that consumers are able to make reasonably free and rational selections from among those options, with those choices unimpeded by artificial constraints like deception or false implications or the withholding
of material information.

This all has a certain doric simplicity to it, but notwithstanding all that simplicity, there's some real benefits from this model, and those are up there on the screen now.

The model is consistent with all of the case law and lets you explain those cases. It gives each bureau a defined task. The tasks are complementary as a result, so that they support the single mission. Because of this differentiation in definition, the essential elements of the offense become relatively clear. And then finally this approach, this interpretation makes it easy to explain the mission of the FTC to the outside world.

That probably in fact is pretty important, because the FTC doesn't have the resources to police all of the economy. We can bring only a few litigations, and beyond that we have to communicate the standards to the world and rely on the world to do what's necessary. A choice model can be conveyed in a memorable way, can be conveyed in an intuitive way to lay audiences like the business community, Congress, developing countries, the EU (which might want a simple model as a point of convergence), state AGs, people administering little FTC Acts.
There are a couple of other nice features to note. A choice model is consistent with the BCP Unfairness Statement. That statement noted that it was concerned about harms that cannot reasonably be avoided. But the basic way that consumers avoid harm is by exercising choices in the marketplace, and if there's conduct that impedes the exercise of choice, then that becomes almost automatically harm that leaves consumers open to unavoidable harm.

For these reasons, the choice interpretation has been followed by the Commission. The issue doesn't come up that often, but when it comes up, this is the model that the Agency has tended to reach for. It did so in the first instance as part of the companion statement to the 1984 Policy Statement on Unfairness. It did so most elaborately in International Harvester. It did so most recently in the Year In Review report for last year's ABA Spring Meeting.

Why has it gotten this far? I think fundamentally the great virtue of the choice approach is it gets analysis started on the right foot. It gets you off asking the right question in the first place. It encourages you to do that, and that's always valuable. Let me give you a couple of examples. On the antitrust side, if you're looking at a vertical restraint and you're looking at it just with...
price in mind, you become immediately at a loss because you
probably see prices going up, but you don't know if
that's due to market power, which is bad, or to the
suppression of free riding, which might be good. But if
you approach it with a choice model in mind, you find
yourself asking, "Well, has the conduct resulted in an
increase or decrease in options," and that's the right
question to be asking.

Similarly, on the consumer protection side, the
analysis induces you to look to the question, "Has an
actual purchase decision been affected," and so that
tends to lead you away from a focus on immoral
conduct -- perhaps kid's ads -- which doesn't necessarily
affect a purchase decision. The purchase is going to
be made by the parents. So that's not really apart of
our core mission.

So in short, choice provides a good, basic
doctrine. And yet, and yet, Milton reminds us that
mankind is ever restless and never satisfied.

So the question is: Can we do better? Is it
possible to do more than just use the choice model to
avoid problems, which is what I've been talking about?
Can we instead use the model to achieve positive
synergies in litigation, or greater insights, or to make
the Agency more effective?
Put differently, having differentiated the missions for the sake of clarity, can they be put back together now so as to increase the force and the wisdom of the Agency? Those will be the questions for our panel.

To address these questions we have five very well qualified people. First up will be Cas Hobbs from Morgan Lewis. Cas will be taking on the question: Can we build on those cross-bureau strategies that we used successfully in the past? Those are, for the most part, strategies that brought both competition and consumer protection resources to bear on a single problem. Put in practical terms, the issue or the center of gravity of Cas's remarks will be: When would an FTC chairman want to have both bureau directors, BC and BCP, present in the room when formulating a strategy for dealing with a problem area? How do you coordinate the tanks and the dive bombers?

Next up will be Bob Skitol from Drinker Biddle. Bob will be asking: Is it possible to devise additional new cross-bureau strategies for the future? Some might involve reconceptualization or substitution. There might be a matter that's been traditionally handled by one bureau under its side of the FTC Act, yet could be reconceptualized and viewed as a violation of the other side of the Act instead. There may be benefits from doing
that in some cases. In other words, how do you design a flying tank?

Then the third speaker will be Bob Lande from the University of Baltimore Law School. The previous speakers have all taken BC and BCP law as a given, as it stands. Bob will be asking: Would antitrust law be construed at least a little bit differently if it were construed in the bigger context of a choice model? If we care about choices and options, does that imply that we care about non-price options and non-price competition, and does that in turn imply that this ought to be a somewhat more explicit part of antitrust analysis in the future?

Then with all these topics on the table, we have two speakers that will comment on them. The first to do that will be Commissioner Leary from our own Agency, who will be commenting on all three papers. Then next will be Mary Lou Steptoe from Skadden Arps who will be contributing to the discussion also on all three papers.

So without further ado, Cas Hobbs.

MR. HOBBS: Thank you, Neil. If you think that I'm going to fall for Neil's gambit of trying to get me to characterize one bureau or the other as a tank or a dive bomber, you're going to be disappointed.

I would like to develop four propositions in the
extraordinarily limited amount of time that Neil has
allocated to me, and given that time limitation, I'm
going to put them forward upfront. I'll get as far as I
can in developing the evidence in support of them, but
you'll have to wait for the paper because, despite all
of my triage this morning, I didn't get close to getting
this paper cut down small enough to cover all of it.

In keeping with my assigned focus on the "past as
prologue," all four of these propositions are taken from
what I consider successful initiatives of the cross-
bureau type in the past. The four propositions are the
following:

    First, I think the Commission can and should
make greater use of its unfairness authority to address
market failures which cause economic harm to consumers.

    Going back to the luncheon discussion, I probably differ
from Tim Muris and Bob Pitofsky in this regard by about
20 percent I would say. I have never sat in a Chairman's
chair though (at least when anyone was looking), so I have
the luxury of saying that.

    Second, I think the Commission should place
greater emphasis on guidelines rather than individual cases.
I think industry oriented guidelines, practice
oriented guidelines, have been great successes in
the Commission's past and ought to become part of the

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future. I have nothing against individual case adjudications; I just think you get a lot further a lot faster with the guideline approach.

Third, I would like to see the Commission resume putting emphasis on consumer information disclosure initiatives. I think providing key performance oriented product information like the R-value Rule did, like the Octane Rule did, and doing it in a standardized way -- and standardization is probably pretty important to this -- will improve the competitive functioning of markets in a significant way and improve consumer well-being in a significant way. Information can lead to consumer well-being in the form of lower prices, prices that are better correlated to the key performance characteristics of products, and innovation that is keyed to the key performance characteristics of products.

Fourth, I would like to see the Bureau of Consumer Protection do more industry-wide activity where industries are being unresponsive to consumer interests and concerns. I think though we need to do that based on the Bureau of Competition, Bureau of Economics type of analysis that asks: What is the market failure that's leading to this unsatisfactory performance, and do we have a focused remedy that will change market behavior?
Obviously these four propositions are closely interrelated in significant ways, and I think that Neil's consumer choice model is a helpful way of evaluating and highlighting those issues. Having given you those four bottom line propositions, let me see how far I can get before my time runs out.

Let me start with the guidelines proposition, which also I think supports my industry wide orientation proposition. I think that we need to pay more attention to some of the largely unsung heroes of the past. A significant number of FTC guidelines have been, in my view, significant competitive and consumer protection success stories.

I put those in three categories: Industry oriented guidelines, practice oriented guidelines, and then advertising guidelines, just because advertising has always been sort of special.

In the list of industry oriented guidelines, we have the Funeral Rule, (the price disclosures in the Funeral Rule), Used Cars (the warranty disclosures), home insulation (the development of the R-value measure and disclosure), franchising (earnings disclosures and related disclosures), care labeling, and vocational schools (with drop-out and placement disclosures).

In the practice oriented guides, I think the rules
that we take for granted but that have had enormous impact
in the market are the cooling-off, door-to-door sales,
negative option, holder in due course, mail order, and
credit practices rules. I think all of those are great
successes.

In the advertising area, I think the endorsements
and testimonial guidelines have had a remarkable effect
on that area of advertising. I think the green
environmental advertising guidelines are a great
(and under-appreciated) success. I think the green
guides provided a framework for competition and competitive
advertising that in essence prevented the anarchy
that was going to break out in the environmental
advertising area, and it provided a level playing field for
the members of the industry to advertise and provided
the opportunity for those with superior performance
characteristics to gain ground in making those claims.
It prevented a lot of confusing and contradictory advertising
claims being directed to consumers and provided consumers
with at least a starting point for a meaningful flow
of information.

There were also non successes in the information
disclosure area, and I think we need to evaluate those as
well, but I don't think they should take away from
the successes.

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Let me turn to the Commission's unfairness jurisdiction. As you know, there is an unfair methods of competition provision, and there is an unfair practices provision, and those two mandates, I think, reach in the same direction of protecting consumers' economic well-being. Many of the Commission's initiatives in the late '60s and early '70s were unfairness based consumer protection initiatives based on explicit competition considerations.

If you start with the Commission's Pfizer decision, which defined the advertiser's responsibility to possess a reasonable basis for advertising claims, it was based on the rationale that: "Fairness to the consumer as well as fairness to competitors dictates this conclusion. Absent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice and a competitor's ability to compete on the basis of price, quality, service or convenience, are materially impaired or impeded." Pfizer went on to use the FTC's unfairness jurisdiction to lay out an economic cost-benefit framework to define how much ad substantiation is required.

The Sperry & Hutchinson decision of the Supreme Court involved a fascinating interplay of antitrust and
consumer protection considerations. It was a pioneer, I suggest in legal cross-dressing. The case was litigated before the Commission on an antitrust theory, went to the Supreme Court on a consumer protection theory, and resulted in the unfairness decision that you're all familiar with.

The Commission's now infamous cereal case was also a fascinating interplay of consumer protection and antitrust issues. It was described and conceptualized as a shared monopoly case, one in which there was a sustained supra-competitive profits and prices, but a key focus of the complaint was on intensive product differentiation and brand proliferation, the result of which, the Commission alleged, was to impair and subvert the ability of consumers to make product decisions based on the nutritional benefits and prices of the competing products while simultaneously raising barriers to entry to new potential competitors. Now, as you know, the case washed out on unsound economic grounds, but that was a fascinating combined antitrust and consumer protection approach.

I think the setbacks in those early years should not lead us to disregard the enormous value of the unfairness jurisdiction on both the consumer protection
and antitrust side. I think it allows the Commission to
reach behavior on the consumer protection side that
deception doesn't reach or doesn't usually reach. I think
it also gets us into some important areas in
concentrated industries on the antitrust side that are
being unsatisfactorily treated in the federal court
of jurisprudence and in private litigation.

So I think the FTC's past forays under Section 5
with unfair methods of competition were aimed at a valuable
target. I'm not saying the Commission should bring more
cases, but I would like to see the Commission, for example,
become an intervenor in the federal court Tacit
collision/conscious parallelism cases and bring to bear
a much more structured analysis to those cases.

Let me turn to consumer information. I think
consumer information is a very important shared consumer
protection and antitrust concern. The Commission, in the
'70s explored a large number of market failure problems
involving lack of information or market failures that
could be improved by information to consumers.

The informed consumer stands at the crossroads
of consumer protection and antitrust. It's an antitrust
objective to have economically efficient markets based
on informed consumer decisions. The consumer protection
objective is to avoid consumer deception or consumer
ignorance concerning the material features of products. When the Commission promulgated the Insulation Disclosure Rule, for example, it indicated this Rule would advance both consumer protection and competition objectives: "Market imperfections impede the process of providing such information, first, discourage consumer consideration of salient product features; second, diminish comparison shopping; third, create unwarranted competitive parity or advantage for inferior products."

Skipping probably five pages right now, my last point is that I think the Commission should, in the consumer protection area, go back to focusing on entire industries and focus on them in the way that the Bureau of Competition and the Bureau of Economics does. I think that the examples of guidelines, rule-making proceedings that I mentioned previously, some of which I think have been enormously successful, support that orientation.

Those are my four propositions, and I think I'm right in under the red "time's up" card.

(Applause.)

MR. SKITOL: Well, my intent is to stand on Cas's shoulders, as broad as they are. I want to comment on how the Hobbs vision for cross-bureau information disclosure initiatives can and should inspire some fresh thinking about particularly difficult issues -- competition policy issues
that have been problematic when addressed solely from an antitrust standpoint, and consumer protection policy issues when they have been problematic or especially difficult when approached solely from a deception or unfair practices standpoint.

The intent is to suggest ways to reconceptualize, that's Neil Averitt's word which he has loaned to me, reconceptualize and thereby strengthen each bureau's existing Section 5 theories by drawing upon the other bureau's doctrines and expertise.

I have four examples to suggest. I'm going to go through them pretty quickly and invite you, if you want more detail, to read my paper.

The first example concerns professional self-regulation. We don't have to dwell a lot on it because we've heard a lot about the Commission's long history and experience in dealing with professional self-regulation in the last panel, but it is, as we also heard in the last panel, an area that suffered a serious setback in California Dental.

The setback suggests to me lost opportunities from sole reliance on the unfair methods of competition authority in this area. The Commission there applied pretty conventional Sherman Act standards in its determination that the California Dentists' advertising
code was anti-competitive. The Ninth Circuit second-guessed the Commission's analysis, came up with a different approach, different antitrust based standards, and then the Supreme Court third-guessed the Commission's judgments by essentially accepting the dentists' justifications for what the Commission had found to be overbroad regulation.

I would respectfully suggest that the outcome might have been nicely different if, at the outset, the Commission had alleged unfair practices in addition to unfair methods of competition and had employed BCP's experience in advertising regulation under its established deception standards.

The dentists' code obviously prohibited more than deceptive kinds of claims, and the resulting over-regulation caused consumer injury of a kind meeting the Commission's definition of an unfair practice, even if not also so clearly a violation of existing antitrust law.

Looking ahead, California Dental should not inhibit enforcement efforts against any association crossing the line between desirable and undesirable kinds of self-regulation activity. BC can develop stronger means of inducing associations to address consumer concerns in enlightened ways by enlisting BCP's
involvement in this effort.1

The second example is BC's initiative to address
the patent ambushes or patent hold-ups that keep popping
up in standards-setting proceedings throughout the
information technology sector. This is a problem that's
pretty well recognized these days. It comes out of the
interaction between proliferating patents and
proliferating needs for standards to enable inter-
operability amongst lots of different kinds of products
employing new technologies.

This evolves into situations where desired
specifications implicate patents undisclosed during the
standard-setting proceeding, patents that would be
widely infringed in the absence of licenses from the
owners. This has great potential for exclusionary
effects.

The Commission's efforts to date to address this
problem under its unfair methods of competition
authority have been controversial. The Agency has
struggled to find viable theories under which a patent
holder's nondisclosure of its patent claims during the
standard-setting can be found to create market power or
otherwise to be sufficiently anti-competitive in
conventional antitrust terms to amount to a recognized
antitrust violation.
A related problem is that even when a patent is disclosed, the owner withholds meaningful information on its intended license terms until after the standard is adopted and an entire industry is locked into its use in developing compliant products. Standard setting participants thus vote to buy the patent and input without knowing what it will cost compared to alternatives that might be considered.

In short, this is about hiding the ball on both patent claims and license terms in ways that subvert the open standards objectives that everybody talks about. BC might more effectively and holistically address these problems by employing BCP's consumer protection authority. This would include BCP's wide experience in defining conditions under which the failure to disclose material information can be considered deceptive or unfair.

I think the unfairness doctrine may be particularly useful in addressing a standard group's explicit prohibition on any consideration of license terms in the course of a standard setting proceeding. The unfairness authority could be invoked to extend, in a creative way, to this problem.

These principles derive from the Supreme Court's hydrolevel decision of 22 years ago. There the Supreme
Court established a standard setting group's antitrust liability when anti-competitive harm occurs as a result of the group's failure to implement procedures aimed at preventing abuse of its processes. There's no reason why the same idea should not apply to any situation where a standard setting group enables patent owners to hide facts essential to informed decision making.

I'm going to move on to a third example involving digital rights management, which really encompasses a mesh of issues surrounding content protection. In our emerging all-digital world, there are sharply conflicting interests between and among content providers, hardware vendors, original equipment manufacturers and aftermarket rivals and consumers, line drawing between piracy versus consumer fair use, unlawful circumvention of IP laws versus legitimate reverse engineering, desirable protection of innovation incentives versus undesirable or excessive limitations on competition in complementary market spaces.

The courts and Congress and the FCC have been struggling over all of these issues. The FTC has been sort of missing in action with no visible input to date. This is unfortunate because the Commission has a great deal to contribute to policy evolution in this area.
The relevance of BC's competition expertise is obvious, particularly since a lot of the problem lies right at the intersection between IP and competition law where the Commission has invested a lot of time and resources in recent years. But BCP's consumer protection expertise is also quite relevant, since core parts of the problem implicate issues of consumer expectations regarding affected devices and the absence of information at the point of purchase about use restrictions. Consumers are effectively getting locked into DRM solutions imposed by concerted industry actions unknown to them but adversely affecting product usage.

So most immediately the Commission could constructively provide its perspectives with input from both of the bureaus on these issues through amicus briefs in pending litigation, appearances in hearings on pending litigation, and particularly comments to the FCC in the course of its pending proceedings in this area as the American Antitrust Institute has cogently argued and urged the Commission to do.

BC could also begin close scrutiny of some of the new kinds of collaborative activity under which industry groups are creating standards and technology pools and licensing schemes for DRM solutions without...
safeguards for anti-competitive abuse. BCP could also take a lead role in addressing information disclosure and adequacies.

My time is up, so if you want to know about the fourth example involving the Kodak doctrine, you'll have to wait for my paper.

(Applause.)

MR. LANDE: Good afternoon. Many of this morning's speakers talked about how consumer protection law is really about consumer choice and how a consumer choice framework is the best way to analyze consumer protection issues. I'm going to try to do the same thing for antitrust, and I'm going to talk about times when antitrust should focus explicitly and directly on consumer choice.

Even though I think we would all agree that consumer welfare considerations demand that antitrust consider such consumer choice, non-price issues as quality, variety and innovation, in theory these needs could be accommodated under a price or efficiency approach. That is, in theory a price approach could analyze conduct in terms of "quality adjusted prices."

An efficiency model could take account of, quote, "the value that consumers attach to having greater variety." This can be done in theory, but in practice,
neither of these things happen very often, arguably because the translations are extremely difficult to do.

So, usually in a price analysis the theoretical caveats or adjustments are moved to the footnotes and then forgotten about, and then the analysis proceeds along the familiar lines of cost and price. As an example, consider an example that Mary Lou Steptoe gave me years ago, the Federal Trade Commission's case against firms' jointly set restrictions concerning the advertising of bulletproof vests.

In theory we could translate any non-price harms, e.g., consumers buying less safe bulletproof vests, into price terms if we did enough mental gymnastics. But as a practical matter, in the real world, we would only pay attention, in most such cases, to the price and cost savings effects at the expense of the relatively difficult-to-quantify safety issues. Price would be in the text. Safety would be in a footnote and then, as a practical matter, it would be forgotten about.

In a case like this, wouldn't it just be better to focus on safety, the item that consumers really care about, explicitly and directly?

However, there is often a problem with doing this. The problem is that normally a market that is competitive
in price terms will also be competitive in non-price terms. This is true because competitive firms usually will meet whatever price or non-price options the consumers demand, so normally there's no difference between using a price or efficiency approach on the one hand and using the consumer choice approach on the other hand.

The consumer choice approach only deserves to be a new lodestar for antitrust if there are significant, frequently encountered areas where it demands to be used, and where its use would be superior to that of a price or efficiency model, and none where it's inferior. I think that there are three important situations where the consumer choice framework meets this test.

The first category involves conduct in markets with little or no price competition as a result of regulation, of joint ventures, or third-party payers. In these situations there's no way to properly assess consumer welfare without focusing explicitly and directly on non-price issues.

Consider first the situation where markets are regulated. We can use, as an example, airlines in the 1960s. Prices were regulated, but we still wanted the airlines to compete on the basis of quality. You might ask, "Why didn't we just let every airline merge in the
The answer is we wanted them to compete with one another on the basis of quality, even though prices were regulated.

How about cases involving industry-wide joint ventures? As you recall, Aspen involved what the court decided was a relevant market for antitrust purposes, and it had an industry-wide joint venture with an industry-wide lift ticket. So there was no price competition for this product.

There was, however, choice competition between the firms involved. This gave consumers the ability to choose on the basis of quality, and it also gave the two firms an incentive to compete with one another on the basis of quality. A price analysis wouldn't work very well in such a market.

Finally, how about markets involving third-party payers? Whenever a consumer's bills are paid by somebody else, they're likely to care more about quality and variety than price. If a person knows that their health insurance or car repair bills are going to be paid by their insurance companies, a price model will simply be inadequate at fully explaining their behavior.

A second category of cases where a consumer choice approach would be superior involves conduct that increases consumers' search costs or otherwise impairs
consumers' decision-making ability. This conduct tends to harm consumers not only by raising the prices to the consumers, but also by impeding their selection of products in terms of quality and variety.

There are a large number of these cases, many which have been discussed here today. Consider all of the FTC's advertising cases, like Cal Dental, and the list goes on and on and on, and also similar cases that involve collusion to raise consumer search costs, like National Society of Professional Engineers.

Efficiencies were claimed for each of the practices, and depending on the case, the efficiencies were more or less believable. Prices of the services in question, whether it was dental services, legal services, optician, engineer, architecture, whatever, probably went up. That was the whole point of the collusion after all. The prohibitions against advertising these professional services also made it difficult for consumers to choose the professional that was best for their needs, so consumer selection of a lawyer, dentist, architect, et cetera, was suboptimal on account of the collusion.

Most of these practices are evaluated under the Rule of Reason, and if we were doing a Rule of Reason analysis of these practices, we would balance the
efficiencies on the one hand against the price effects
and the diminished consumer choice in terms of quality
and variety on the other hand.

That balance could easily come out different if
only the negative price effects were included in the
trade-off. A trade-off that includes also the negative
non-price effects would much more accurately reflect
consumer welfare.

Finally, there's an important category of cases
that involves markets in which firms compete primarily
through independent product development and creativity
rather than through price. These markets often involve
high-tech innovation or editorial independence in the
media.

Effective competition in these industries may
sometimes require more independent centers of
decision-making than are required to ensure price
competition, so market concentration principles taken
from a price context might not ensure robust competition
in the respects that are actually of most interest to
consumers. In these markets, we care about artificially
diminished consumer choice, even if prices are
competitive.

Let's take perhaps the poster child in this area:
the media. This is an area where we care about
independent judgment, decision-making and creativity.

Suppose there were only four remaining media sources of a particular type, book publishers, TV news, magazine owners, whatever, and suppose two of them wanted to merge. Suppose we believe that three companies would be enough for effective price competition.

Would you approve of this four to three merger, or would you fear diminished consumer choice, fewer independent sources of opinion and information? If so, some large media mergers might well be evaluated differently under a consumer choice standard than a price standard.

Let me contrast what I'm saying with a very conventional merger. Suppose there were only four firms that made cookies, and they wanted to merge down to three firms. Suppose that three firms would be enough to have price competition in the cookie market. If consumers want 30 or 300 variety of cookies, we could trust the remaining three firms to supply them.

For a hypothetical cookie merger, it wouldn't make any difference whether we use a price approach or a choice approach. The key difference is that the owners of the cookie companies don't care which cookies their customers eat, so they'll produce whatever kind of cookies consumers want. But this might not always be

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true for the media.

The owners of the media might have distinct preferences concerning the editorial slants of the news. Within limits they might be able to slant the content of the news coverage.

Moreover, the media owners might have unconscious biases, and even if they have the best intentions, they might not be able to supply the full range of views. While companies easily can supply all different types of cookies, it's much more difficult to hold all different types of world views.

To emphasize the point: Why don't we let every TV news network merge? That is, why not let them merge the entirety of all the network news operations into one? Would there be cost savings efficiencies? There would be tremendous cost savings efficiencies. Would there be any bad effects on prices? Well, if you're more creative than I am, you might be able to find a few minor ones. But remember that they're competing for advertising dollars and personnel with many other TV shows and many other non-TV entities.

The real harm from merging every news operation into one can best be expressed in terms of choice, in terms of perspective, quality, variety of approaches to news coverage. A choice model would account for this
much better than a price or efficiency model.

Finally, what about high technology where innovation is crucial? It's virtually meaningless to try to use a price standard to evaluate the effects of a merger or a joint venture on future technology.

For mergers in the defense, pharmaceutical, computer or other high-tech sectors, to ensure the optimal level of future consumer choice we want divergent sources of attempts to maximize innovations. In fact innovation is often more important in these industries than prices of existing products.

These mergers should be evaluated explicitly and directly in terms of whether the research might need lead to new and better products, in terms of whether consumer choice will be enhanced or diminished. Prices are also important, of course, but a consumer choice approach would, quite properly, intensify our focus on products that might never be invented but for a merger.

In conclusion, under a consumer choice standard, factors like innovation, perspectives, quality and safety would be moved up from the footnotes, where they're all too often ignored, into the text where they would play a much more prominent role in the antitrust analysis.

Thank you.
COMMISSIONER LEARY: I don't think I'll bother standing up, if you don't mind. Just a few quick comments here on the speeches and papers prepared.

This segment of this conference is I think critical to long-term development of law in both consumer protection and competition areas. They share a common framework that most people don't think of. The competition wing of our house focuses on distortions of the supply side. It focuses on price fixing schemes or exclusionary behavior that has the effect of increasing the price at which goods are offered. The consumer protection side of the house focuses on distortions on the demand side because they focus on false representations that convey the impression that goods are worth a great deal more than they are. As anybody who has studied Economics 101 understands, the prices offered and the quantities manufactured depend upon the interaction of supply side and demand side.

So if there's a distortion on either one of them, you get a false result, a distorted market result, and that's the best argument, by the way, for having both functions in the same house.

It's interesting that the traditional view of competition law is that competition law is economic...
equals statistical -- a kind of a left brain sort of a thing. The traditional view of consumer protection law is that it depends upon subjective impressions and so on -- a kind of a softer right brain kind of thing. That's no longer true either.

Since 1994 with the unfairness statute, consumer protection law is much more overtly grounded in economic criteria than it was before, and on the other hand, particularly with the developments in our merger guidelines, our general way of looking at competition issues is a great deal less statistical than it used to be. If anybody tries to tell you that there isn't an element of subjectivity involved when you're trying to predict what a merger is going to do, they don't know what they're talking about. Of course there's some subjectivity involved, and so the two areas are a lot closer than we like to think.

All of these papers make that point in one way or the other, and I generally agree with the points that are made in all of them. Please understand that my individual critique here is intended to be constructive and intended to be friendly, and because of time, it's necessarily selective.

Let me turn to the Averitt and Lande paper first. This one is the most ambitious and extensive, and when you read it, I think you will find it rich
indeed. I think they are clearly correct that consumer responses are more active and complex than many of our competition cases assume.

Consumers are not just an undifferentiated mass of people who disappear if the prices go up 5 percent, and then a larger number who will walk out of the door if they go up 10 percent and so on. They're much, much more complicated than that.

I don't think I'm an atypical consumer, but I don't mind telling you, I will not drive a car with a foreign nameplate, period, and I don't care what Consumer Reports said. I would be embarrassed to be seen in one. I will not wear dungarees unless I'm riding a horse because I don't want to look like a superannuated hippie, and I don't care what the cost/benefit is of wearing that garment. I won't do it.

A lot of people say, "Oh, well, these things are so-called fashion exceptions to the normal rules of economics," but we live in a society where the fashion exceptions are becoming the rule, and the commodity products are the exceptions.

So we have to have a richer understanding of what economics is because consumers are much, much more complicated. It's not just consumers, it's businesses as well.
Do you remember the big excitement over B2B a few years ago? We had these gigantic conferences about what the impact of B2B is going to be because the efficiencies are overwhelming and because companies are going to be able to get all these anonymous quotations, and they're going to be able to array them and make all these efficient decisions. This is going to take over, and what are the antitrust implications?

Well, what happened to them? What happened to them? We have talked to some people. We, the Federal Trade Commission, reviewed a venture in my old industry, the auto industry, before I came on to the Commission, and I recently asked some people in the auto business, "Whatever happened to this? This was supposed to take over. Why not?"

Well, it was because people wanted to deal face-to-face with their suppliers, because their choice of suppliers is not made just on price alone, not just on statistics. It's made on a much richer thing. They want to sit across the table, and they want to have a conversation about what are you going to do if X happens and if Y happens, and that's not the sort of the thing you can handle on the Internet. It's richer, and so I think here the fundamental message of your paper is
Where I fall off the sled a little bit is when you start moving from that insight to a discussion of tweaking the HHI presumptions or something of that sort, because I think the problem is much, much more fundamental than that.

Let's try a thought experiment. I read in the press just recently that the woman who created Harry Potter, a welfare mother ten years ago, is now a billionaire. My guess is that the Harry Potter Enterprise -- if you apply a standard guidelines test of whether people will flee with a 5 or 10 percent price increase -- is a monopoly.

Okay. What does it mean to say that the Harry Potter Enterprise is a monopoly? Suppose hypothetically that this woman wants to diversify her investment and wants to sell out Harry Potter to Walt Disney. Is it a horizontal merger in the first place because I suspect in many respects that the Walt Disney enterprise is a monopoly under standard guidelines testing?

If it's not a horizontal merger, do we care? If it is a horizontal merger, what is the market? What is the HHI in the first place? So, that is one of the questions that you might want to be asking in your paper, before you start talking about whether we should worry
about four to three or something. You might ask yourself: What is the market for these kinds of highly differentiated products?

If we can't even define a market in the first place, then why go down the statistical pathway at all? Is there some more direct way to determine whether or not there's consumer harm? I agree with you 100 percent that if there is consumer harm, it's a variety issue. If Walt Disney were to acquire Harry Potter, does anybody think that the big problem would be a price impact?

I suspect what people would be worried about is whether or not the unique appeal of Harry Potter -- whatever it is I have no idea, but my grandchildren seem excited about it -- the worry would be that the unique appeal of Harry Potter would somehow or another get smeared into the different views of the Disney empire, and how do you predict that? But that's a real element of consumer harm. That's what we've got to be looking at.

Cas Hobbs: Cas's paper is quite frankly a lot more interesting and a lot less scary to me than his presentation. It's got great inside history about some of the decisions in the Federal Trade Commission. I hope you keep that part in, Cas. But Cas Hobbs recently sent an e-mail to a lot of his friends saying he's about to
depart from practicing law, to focus on golf, tennis, gardening and cooking, and then he leaves behind this big ticking time bomb.

For example, the whole notion of identifying industries where there is market failure and then intensively regulating them is kind of interesting, if you take it in juxtaposition with what Messrs. Lande and Averitt are telling us, because how do you identify market failure? Traditionally we want to identify it by price that is well in excess of marginal costs, right? That's what Lou Engman's Line of Business inquiry was all about.

Well, the fact of the matter is when you're dealing with businesses like Harry Potter, marginal costs are totally irrelevant. When you're dealing with some of these high-tech-businesses, marginal costs are totally irrelevant. So how do we determine what is a good performing industry and a bad performing industry in the first place?

I'm not saying that there isn't some way to do it, but we have to find some new ways to do it before we undertake regulation in the Federal Trade Commission that identifies these industries and tries to tweak them.

I'm not smart enough to say that the cereal industry is performing poorly economically. I have no
idea. I think most of the stuff they sell is inedible, but that's just me. Obviously they appeal to somebody, and I'm not about to say -- with my own views on automobiles and dungarees -- that their tastes are any necessarily better or worse than mine.

I am particularly concerned as well about the suggestion that across the board, the Federal Trade Commission should determine which industries are providing sufficient information to consumers and which are not.

Cas, in your own paper you say that the problem isn't as hard as it used to be because you have E-Commerce now, and with E-Commerce, if you mandate the provision of information, it's a great deal less costly than it used to be. But the fact of the matter is because of E-Commerce, there's also a great deal more information out there than there used to be.

There is frankly a blizzard of information out there, and I have no idea how significant that information is to a significant number of people. I'm not even sure I know how we would find out because if you ask people what is important to them or what is not important to them, frequently the answer you will get is what they think is the socially responsible thing to say.
Boy, we knew that in the automobile business.

You ask people, "What is important to you in driving an automobile," and the answers you will get invariably are economy, utility and so on and so forth, and then they all go out and buy these massive SUVs. Don't fool yourself, it's not advertising that makes them buy the massive SUVs. Somehow or another, when they see them on the road, it means something to them. It's an image of power, or devil-may-care or I'm rich enough to be stupid.

I don't know, but it's something. I suspect there's a great deal more information out there about automobiles today than there used to be, and I don't know whether people are making intelligent choices or not, certainly not by my lights.

So what do I want to say in conclusion here? I think I can remember my conclusion. Look, this is an idea that we are working on. We are bringing cases now that are rooted in much, much more sophisticated motions.

I think what Susan Creighton said is an indication of some of the things that we are doing. I don't know whether those cases are going to prove out in fact or not, but the way the complaints are framed, you will see they are framed to take some of these consumer choice things in mind.

Secondly, we are overtly facing up to something that we haven't talked about today, and that is
potential conflict between what people think of as consumer protection objectives and competition objectives, and that is something that was identified. The Supreme Court saw it.

I'm not as critical at the Cal Dental decision as some other people may be. In part, I'm not invested in it emotionally because it was all litigated before I arrived, but what the Supreme Court was telling us there, I think, was that there may be some consumer protection objectives that you lost sight of when you declared the Cal Dental restrictions as illegal per se. There is perhaps in this industry -- at least you might want to consider -- the potential for some kind of demand side distortion because people do not readily understand information that is conveyed to them in these settings.

It's not because there's something magic about professionals. It's because their business is mysterious to ordinary people, and therefore some kind of industry self-regulation aimed at avoiding distortions which might be intolerable in a different context might be tolerable here. I think we are taking that to heart as well.

I'll give you an example. We urge industry people collectively not to advertise bogus weight loss
products, and what we are doing is we are saying something
that is an anathema to some antitrust lawyers. What
we're saying is that the demand side distortion is so
great as a result of this false advertising which
contributes nothing to efficiency, that we are willing to
run the risk perhaps of some very, very small supply side
effects.

I think, without being explicit, that's what we're
saying to the world today, and that's enough out of me.
Thank you.

(Applause.)

MR. AVERITT: We're going to move at this point
into a general discussion, and we'll start with Mary Lou
Steptoe.

MS. STEPTOE: I will start by saying I disagree. I
think actually, Commissioner, that BC people are sort of
hard wired and left brained. And in that regard I'm going to
be very hard wired and note that we're a little behind
schedule, so I will try to be very brief, but two things:

One is that when the papers come out, you have
to read both Bob and Cas's papers because of their
historical portions. If nothing else, it's fascinating
how we arrived here. I've lived with the FTC all my
life, and I didn't know some of the stuff that I lived
through. I think the history is an excellent springboard
to some very stimulating and provocative ideas, all of which deserve some consideration.

That having been said, my own reactions as a left brainer to Bob and Neil's choice approach is that I think it's very valid. I tend to agree with Commissioner that where I have the most concerns about it is trying to import it right now into merger analysis which, by definition, is one step removed as a predictive exercise, so the uncertainties associated with this choice approach I think are harder to play out.

I do, however, think it is a wonderful model and should be pushed into antitrust more on the conduct side, and I say that having brought a couple of the cases that I know Bob has considered, the Detroit Auto Dealers case and the Personal Protective Armor, the bulletproof vest case, in both of which I think as attorneys at the time we were intuiting our way into a choice approach.

We knew that something was distorting competition. It really wasn't in the first instance about price. We got over that rather shakily I think. We just knew the conduct was wrong. We were in the lucky position of being able to extract a consent so we didn't have to articulate the analysis very clearly. But I think, now speaking with a hard wired left brain, that if you tried to

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work this choice approach into conduct issues like
suppressions that raise search costs or restrict
important information and maybe articulate the theory in
a more disciplined report, that would inform all of
our analysis.

It would be good for competition, and at the end
of the day, you might improve your understanding so that
eventually you could import it into the merger area, and
that's my quick take on that.

Do I get an award for being fastest at finishing time?

(Applause.)

MR. AVERITT: Thank you, Mary Lou.

Picking up on your thought that it might make
sense to focus initially on conduct cases rather than
merger cases, would you think it would make sense to
differentiate among different kinds of situations in
which the Agency might want to consider calling for more
information.

Might we say one possibility is there's been a
market failure; another possibility is the Commission is
establishing a standard vocabulary for people that do
wish to talk about a certain thing? Still another
possibility might be as a remedy if there's been a
preexisting conspiracy to limit information in some
way, maybe a remedy might call for affirmative disclosures

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in order to speed up the restoration of the market?

Are those kind of differentiations worth thinking about, rather than saying, "Information, yes or no?" In other words, can we identify particular kinds of information short falls as raising special competition concern?

MS. STEPTOE: I think I may have misunderstood your question, but did you put it in a merger context?

MR. AVERITT: No. I meant to put it in a non-merger context.

MS. STEPTOE: Well, I think in a conduct context where you can have a before and after, you saw perhaps what the market was like before the restraints were imposed or perhaps you have an analogous market that doesn't have the restraints from which you can make comparisons, that those sort of creative remedies are appropriate.

In fact I think in Detroit Auto Dealers, for example, we did the equivalent of affirmative action remedy. The dealers had been conspiring to limit their hours, which meant that people couldn't search for cars, and we imposed a remedy that said, "You have to be open." We tried to be creative. We didn't tell them exactly what days or how long.

We gave an overall number of hours they had to be open in the week and then left it up to the dealers
to try to work it out, unilaterally, as how best to fit in with the contours of the order.

That was a creative order. It was also a flawed order. It was a flawed order because we forgot that the total number of hours might make it prohibitively dangerous for inner-city car dealers to remain open that length of time. The order was amended when this was brought to our attention. So, I think you ought to be both creative in the original order and flexible in any adjustments as the order operates in the market.

MR. AVERITT: Mary Lou, you've been a Bureau Director. Are there sociological or institutional factors that could work to encourage or to discourage collaboration on this? Are there things that you would suggest that either you ought to consider doing or ought to consider avoiding?

MS. STEPTOE: I think my experience predates the golden age that Commissioner Leary described where BCP has become more rigorous and BC has become more flexible. So while I do remember institutional barriers, I guess I would say that it sounds like they have vanished, and there is an attempt at being a more cohesive Agency than I was there, so I'm not going to walk into that particular bog.

MR. AVERITT: Bob Skitol, what would be the role
of a market power screen in the matters that you were discussing? If a firm is engaging in deception of a corporate purchaser, do you feel that we ought to be ignoring market power on the theory that deception distorts markets for reasons of its own unrelated to market power, or do you feel that market power ought to be shown nonetheless as an exercise in self-discipline?

MR. SKITOL: Well, my thought would be that market power or some proxy, some alternative test should be required before the Commission expends substantial resources on anything, but a reasonable proxy or an alternative would be the consumer injury, the substantial consumer injury element of the test for unfair practices under the unfairness protocol.

If you really have got the objective evidence to show substantial consumer injury under the protocol, then you probably, with some more effort, would also be able to show market power, but you shouldn't have to also go that additional step.

MR. AVERITT: So you're saying it ought to be shown as in the Commission's internal debates but not necessarily proven?

MR. SKITOL: Well, I think proven as well. I think if the Commission is going to bring an enforcement action in the patent hold-up kind of circumstance, for
example, I think it's appropriate for the Commission to bear the burden of proving either market power in a conventional antitrust sense or some other measure or some other indicium of substantial consumer injury, if you want to alternatively pursue the case on an unfairness theory.

MR. AVERITT: Any other thoughts, comments, responses?

COMMISSIONER LEARY: I wanted to pick up on this. I'm not sure Mary Lou and I really disagree. I always was a left brained person too, until I got into the job I have now, and it doesn't have anything to do with the difference between the private sector and the public sector. The difference is between being an advocate, which I have been all my life, and trying to decide cases. Most of the matters we see in the Federal Trade Commission on the competition side involve incipiency concerns. It's not just mergers, unless you're talking about dealing with hard core price fixing where the market impact is not really an issue, and those tend to be over in the Department of Justice anyway. In most of the things that we're dealing with, we are trying to predict the future, and predicting the future is not something that can be done just by a computer. If you're sitting where I am on the tough cases, you find
people who come in on both sides who proceed from the
same economic premise, so it's not an ideological
question either.

They both are using statistical methods. They're both eminent. Both sides are represented by eminent advocates and economists, and they're telling you diametrically opposite things, and so ultimately, in weighing these things you have to try to apply some kind of an intuitive feeling based on your own experience or something, always with the realization that you can be wrong.

So the first thing and the final reaction I have in reading all of these papers is that they appeal to our humility. It's an appeal to realization of our own fallibility. We have to make these choices because that's what we took an oath to do, but I don't feel that I can be replaced by a computer.

It's interesting, when you talk to a whole bunch of business people in an audience, you know, they keep talking about why can't the law be more predictable and certain and all this kind of stuff, and I'll say, Talk to your CEO and ask your CEO whether he can be replaced by a computer.

Of course they get hotly indignant. Yet they have all these tools to measure and predict, all of
these economic tools, and intuitively they know a lot more about their own businesses than any outside commissioner can. They still would be furious if you suggested that this law could be reduced to a mathematical calculation.

I would say, "Well, why do you think that I can make decisions the same way?" That's not a repudiation of economics. It's just that economics is not the same as physics, and I think an awful lot of people forgot that at one period of time.

MR. AVERITT: I think that gives you the last word, and it's exactly five o'clock. I am told that the reception begins at six at the hotel, the Marriott, down on Pennsylvania Avenue. I hope to see you all there. We hope to see you all tomorrow as well.

(Time noted: 5:00 p.m.)
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I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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