

UNILATERAL EFFECTS ANALYSIS AND LITIGATION WORKSHOP

February 12, 2008

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

9:00-9:15 Introductory Remarks

Deborah Platt Majoras, Chairman, Federal Trade Commission

9:15-10:15 1. Foundations of Unilateral Effects Theories: Core Features, Economic Bases, and Potential Grounds for Attack

This panel will discuss the core features and economic bases of unilateral effects theories of competitive harm in merger analysis, including the underpinnings of the Cournot, Bertrand, and Dominant Firm models, and the kinds of market environments in which these analytical constructions are applicable. The panel will also consider the factual situations that give rise to unilateral effects concerns, *e.g.*, the circumstances that signal that a merger investigation should likely focus on unilateral effects issues. In addition, the panel will discuss how the underlying predicates of unilateral effects theory might be open to attack in actual litigation practice and the bases of such attacks.

Panelists

Andrew I. Gavil, Professor of Law, Howard University School of Law

Janet L. McDavid, Hogan & Hartson

Robert Willig, Professor of Economics, Princeton University

Moderator

David P. Wales, Deputy Director, Bureau of Competition, Federal Trade Commission

10:15-10:30 Break

10:30-12:00 2. The Role of Market Definition in Unilateral Effects Analysis and in the Litigation of Unilateral Effects Cases

This panel will focus principally on issues related to the probative value, if any, of market definition and market shares in unilateral effects analysis of mergers of firms selling competing, but differentiated, products. The panel will also address such questions as (1) whether, as a matter of policy and law, it is sufficient simply to infer a relevant market (line of commerce) from direct evidence of competitive effects or whether such an inference should be buttressed by an independent investigation of likely consumer switching in response to a SSNIP;

(2) whether differences between a SSNIP selected for market definition and a projected likely post-merger percentage price increase contribute unnecessarily to confusion about the focus of unilateral effects theories; and (3) whether, as a matter of policy and law, a relevant market need be identified at all when there is direct evidence of competitive harm.

Panelists

Jonathan B. Baker, Professor of Law, American University

Kathryn M. Fenton, Jones Day

Richard G. Parker, O'Melveny & Myers

Daniel M. Wall, Latham & Watkins

Moderator

Jeffrey Schmidt, Director, Bureau of Competition, Federal Trade Commission

12:00-1:15 Lunch Break

1:15-2:15 3. Judicial Perspectives on Unilateral Effects

Only a small number of judicial decisions relate to the application unilateral effects theory in differentiated product markets, and even fewer decisions explicitly discuss unilateral effects theory. This panel, presented in the form of a mock closing argument of a merger trial with follow-up discussion, will address how judges approach unilateral effects cases, and what they see as the most outcome-determinative issues in such cases. The panel will also discuss how to increase judicial understanding of unilateral effects theory and the way different forms of evidence supports such a theory of harm.

Panelists

Hon. Douglas Ginsburg, Chief Judge, United States Court of Appeals for the District of Columbia Circuit

Hon. Diane Wood, Judge, United States Court of Appeals for the Seventh Circuit

Oral Advocates

Michael J. Bloom, Director of Litigation, Bureau of Competition, Federal Trade Commission (for the government)

Richard Liebeskind, Pillsbury Winthrop Shaw Pittman LLP (for the defendants)

Moderator

William E. Kovacic, Commissioner, Federal Trade Commission

2:15-3:30 4. Evidentiary Issues Related to Proving Unilateral Effects

The panel will examine issues related to the value of various kinds of evidence, including econometric and non-econometric economic evidence as well as non-expert evidence, such as strategic planning documents and statements of party executives. The panel will consider how best to marshal and present facts relevant to a unilateral effects case, as well as effective means to “sell” the story to courts. The panel will also address how a court should resolve conflicting predictions about competitive effects that may arise when economic evidence is developed by different means or economic models and becomes a “battle of the experts.”

Panelists

William Baer, Arnold & Porter

Susan Creighton, Wilson Sonsini Goodrich & Rosati

Richard Rapp, NERA Economic Consulting

Constance Robinson, Kilpatrick Stockton

Moderator

J. Thomas Rosch, Commissioner, Federal Trade Commission

3:30-3:45 Break

3:45-5:00 5. Virtues and Limitations of Econometric Versus Other Approaches for Developing Economic Evidence

This panel will examine the positive and negative attributes of both econometric and non-econometric economic evidence to prove liability in unilateral effects cases under varying factual conditions—such as whether marketplace conditions are “dynamic,” whether the merger involves industrial products or retailing, and whether the relevant product market is a single product or comprises a cluster of products. The reliability of both forms of economic evidence will be considered, with special emphasis on how best to demonstrate reliability to courts. The panel will also examine whether any one economic research technique or approach for

developing economic evidence (*e.g.*, formal statistical, econometric analysis; merger simulations; or “critical loss” analysis that may rely on descriptive statistics or qualitative information) is legally sufficient to prove likely anticompetitive effects.

Panelists

Orley Ashenfelter, Princeton Univ., Professor of Economics

Dennis Carlton, Professor of Economics, University of Chicago Graduate School of Business, and Senior Managing Director, Compass Lexecon

Carl Shapiro, Transamerica Professor of Business Strategy, University of California at Berkeley, and Senior Consultant, CRA International

Joseph Simons, Paul Weiss

Moderator

Michael R. Baye, Director, Bureau of Economics, Federal Trade Commission