

Hearing #14 on Competition and Consumer Protection in the 21st Century

Creighton University

School of Law

June 12, 2019



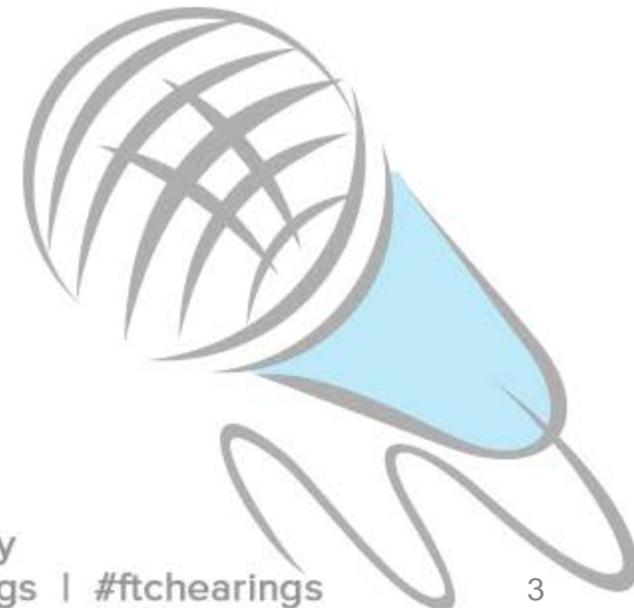
Welcome

We Will Be Starting Shortly



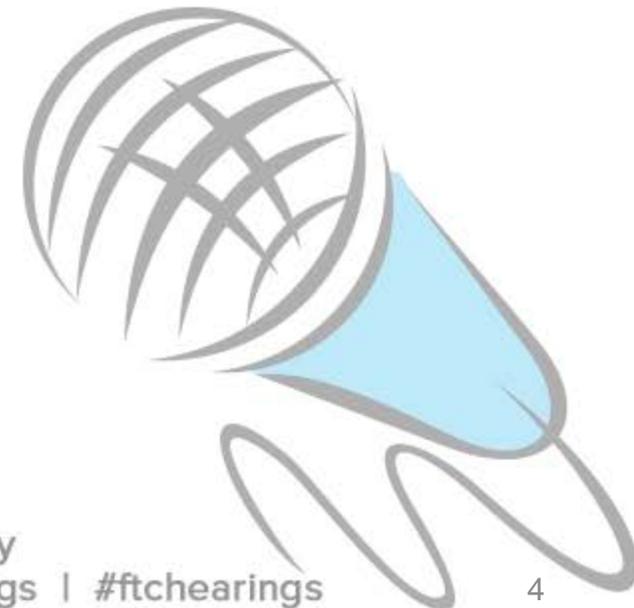
Welcome

Jacob Hamburger
Federal Trade Commission
Office of Policy Planning



Opening Remarks

Thomas Murray, Provost
Creighton University



Consumer Protection Enforcement and Policy (Panel A)

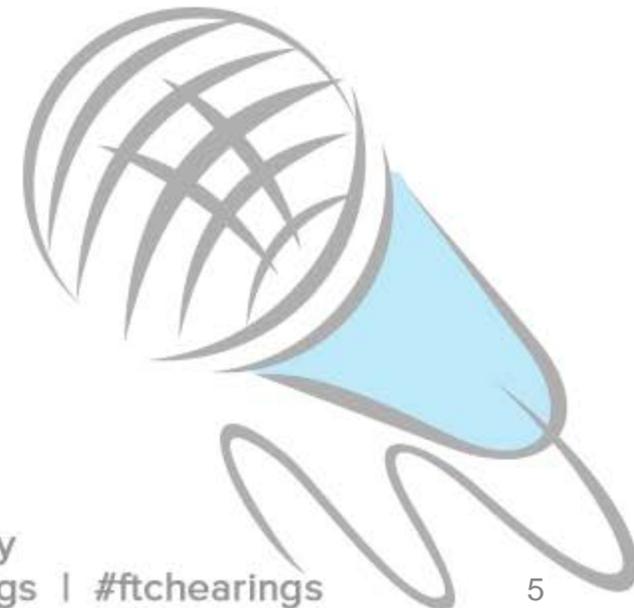
Session moderated by:

Ed Morse

Creighton University School of Law

Andrew Smith

Federal Trade Commission
Bureau of Consumer Protection



Consumer Protection:
Reactive or Proactive,
The Key is to BE Active

Jason Ravnsborg

Attorney General
South Dakota

Reactive: The Basic Model We All Know and Use



- Consumer has an issue
- Consumer calls or emails issue to us
- We take action to try to assist consumer
- Example: “I paid 2 guys in a white truck to put asphalt on my driveway and then it rained and now I realize it was just black paint.”

Proactive: We See the Issue and Start Planning

- A few calls to your Consumer Protection Division, but not widespread...yet
- Start seeing more information similar to the issue
- Time to make a plan

When NAAG is Active...

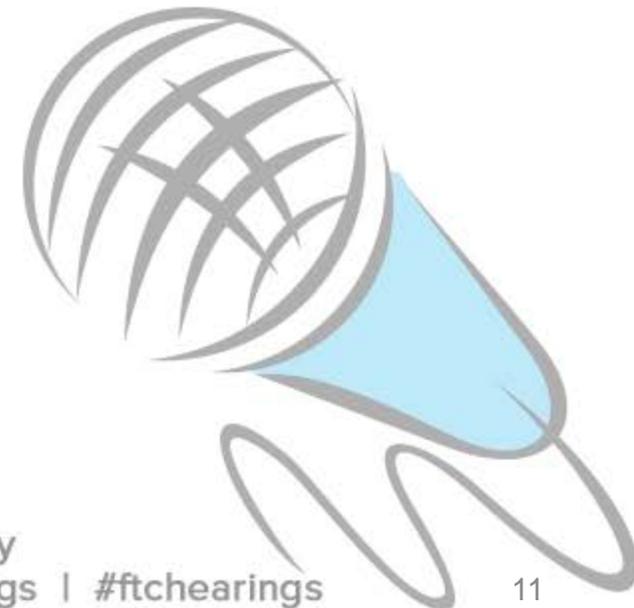
- Bringing AG's together in bi-partisan support of common causes
- Identifying issues and moving forward with solutions
- Building a consensus, not re-inventing the wheel
- Example: The TRACED ACT - **T**elephone **R**obocall **A**buse **C**riminal **E**nforcement and **D**eterrence Act
 - Supported by all 50 Attorneys General
 - In response to an issue and attempting to alleviate that problem

We Live In A Virtual Society Developing At the Speed Technology Allows

- Businesses and business models are evolving and developing more quickly than ever before
- We are tasked with protecting rights to privacy and security of the public
- Developments can happen so quickly that proactive can become reactive before you know it
- That brings us back to just being Active
- The combined power of the AG's individually, NAAG and the FTC give us the best chance to address issues, problems and changes

Consumer Protection Enforcement and Policy (Panel A)

Benjamin Wiseman
Office of Attorney General
District of Columbia

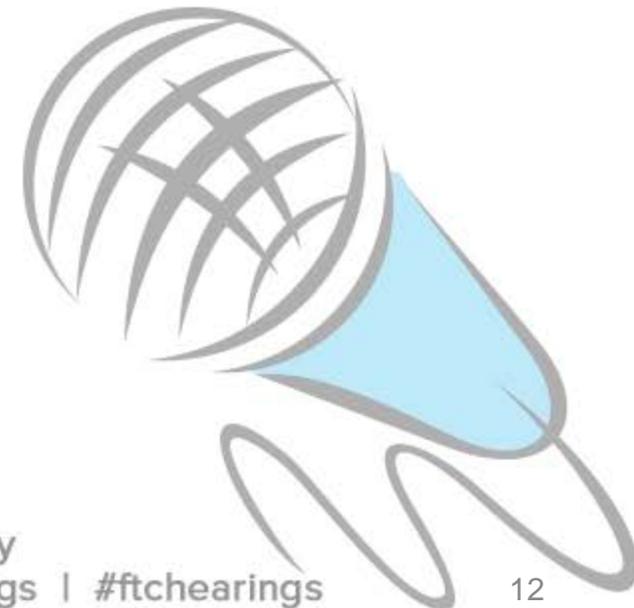


Consumer Protection Enforcement and Policy (Panel A)

Protecting Consumers in the Age of Big Tech

Jeffrey C. Mateer

Office of Attorney General
Texas



The Internet and Social Media

- The internet and social media have changed the way we communicate and do business, but they have not changed the law.
- Companies must avoid deceptive trade practices.
- Are Big Tech companies misleading users as to whether they are truly viewpoint neutral?



This free speech ideal was instilled in the DNA of the Silicon Valley startups that now control the majority of our online conversations...



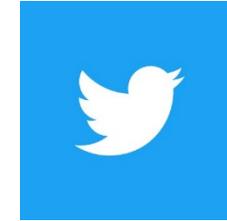
“[Google’s] atmosphere of creativity and challenge... has helped us provide unbiased, accurate and free access to information for those who rely on us around the world.”

Larry Page and Sergey Brin
2004 Founders’ IPO Letter



“[Facebook is a tool to create] a more honest and transparent dialogue around government. [The result will be] better solutions to some of the biggest problems of our time.”

Mark Zuckerberg
2012 manifesto for investors



“[Twitter is] the free speech wing of the free speech party“

CEO Dick Costolo
2017



Google CEO, Sundar Pichai



“I lead this company without political bias and work to ensure that our products continue to operate that way. To do otherwise would go against our core principles and our business interests.”

*Google CEO Sundar Pichai,
Congressional testimony (Dec. 11, 2018)*



Facebook CEO, Mark Zuckerberg



“I am very committed to making sure Facebook is a platform for all ideas.”

*Facebook CEO Mark Zuckerberg,
Congressional testimony (Apr. 10, 2018)*



Twitter CEO, Jack Dorsey



“Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our rules.”

*Twitter CEO, Jack Dorsey,
Congressional testimony (Sept. 5, 2018)*



Protection of Consumer Law

Traditional consumer protection law protects Internet users. It ensures even-handed implementation and application of **terms of service and public representations.**





“We wanted to advertise our 40th Anniversary Gala on May 11, at which we’re honoring Secretary of State Mike Pompeo, to readers of our own online publication, The American Mind. But Google refuses to allow us to do so.”

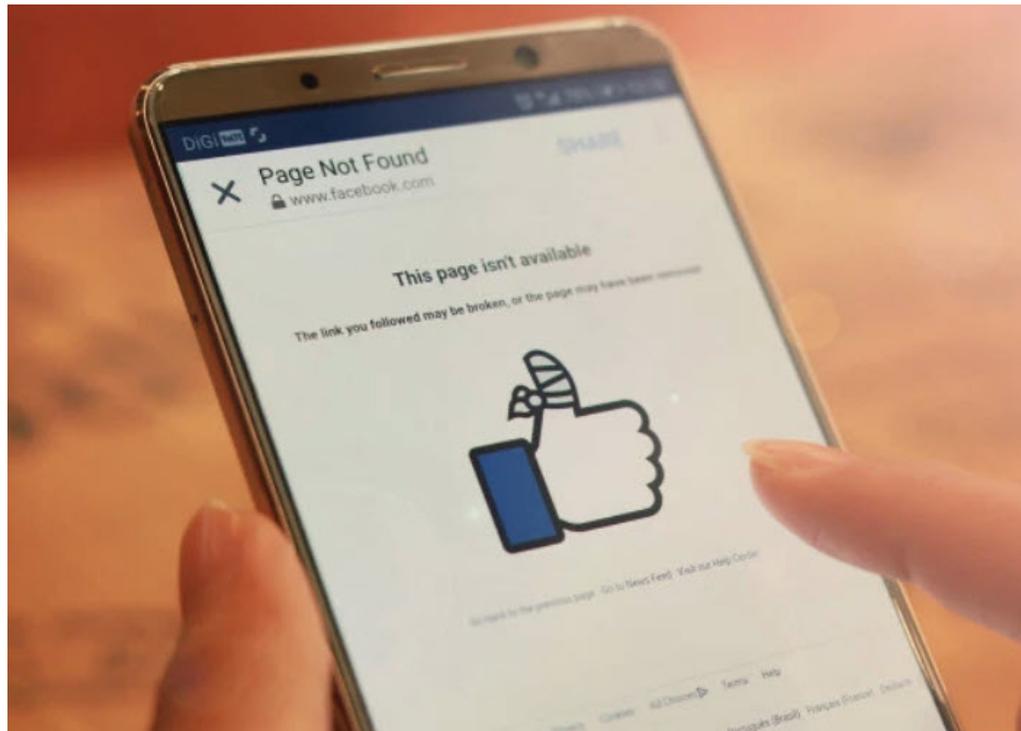
Claremont Institute President Ryan Williams



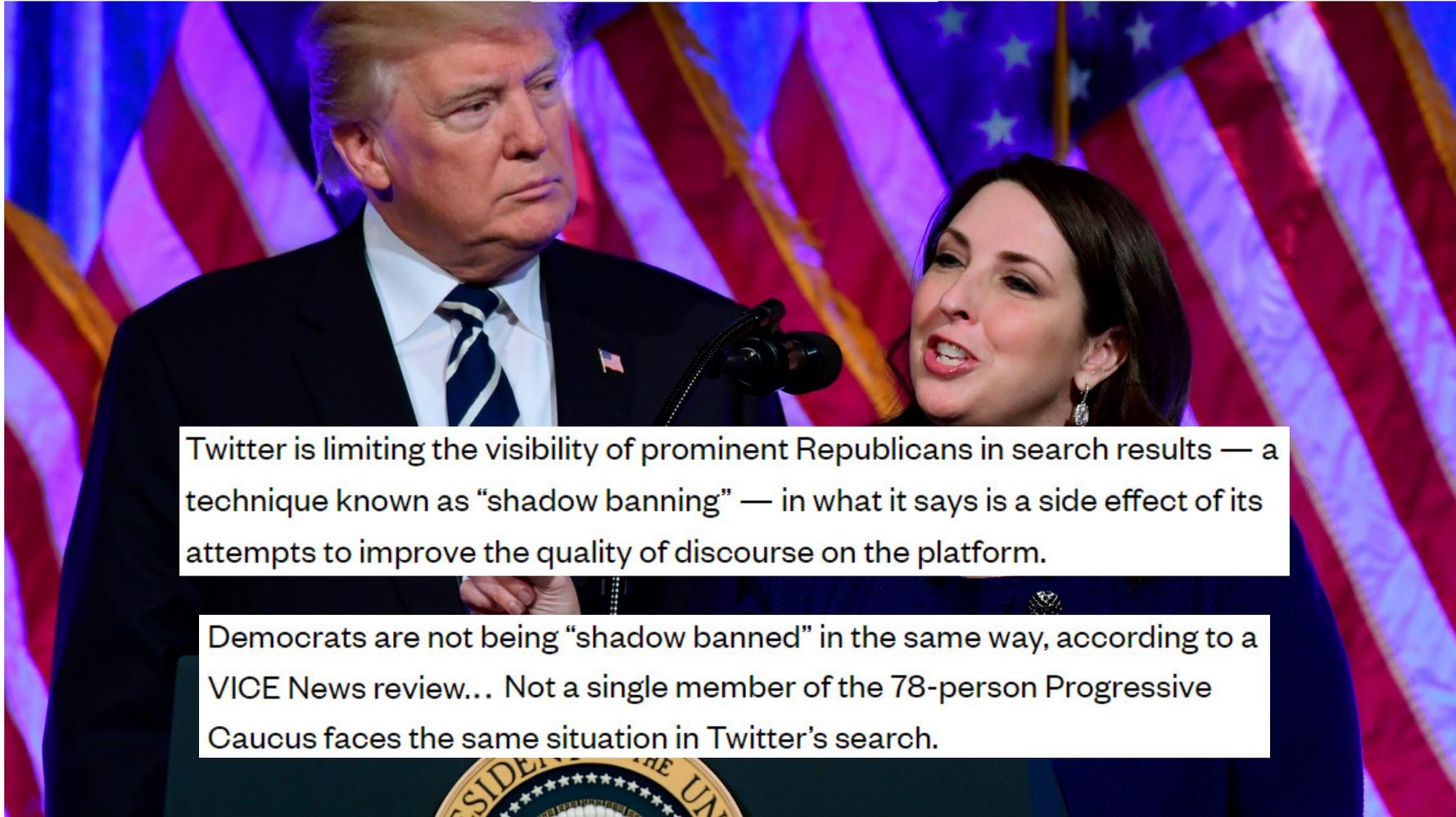
Facebook censored my column — and I still can't find out why

By [Salena Zito](#)

August 23, 2018 | 6:26pm | Updated



VICE News



Twitter is limiting the visibility of prominent Republicans in search results — a technique known as “shadow banning” — in what it says is a side effect of its attempts to improve the quality of discourse on the platform.

Democrats are not being “shadow banned” in the same way, according to a VICE News review... Not a single member of the 78-person Progressive Caucus faces the same situation in Twitter’s search.

-Alex Thompson, “Twitter appears to have fixed ‘shadow ban’ of prominent Republicans like the RNC chair and Trump Jr.’s spokesman,” Vice News (July 25, 2018)

“Brick and Mortar” or “Click and Mortar”

- The issue is not whether internet platforms are protected by the First Amendment.
- Whether you’re a “brick and mortar” or a “click and mortar” company, you have to be open and transparent with your customers about the terms of service.
- That’s what consumer protection is all about.

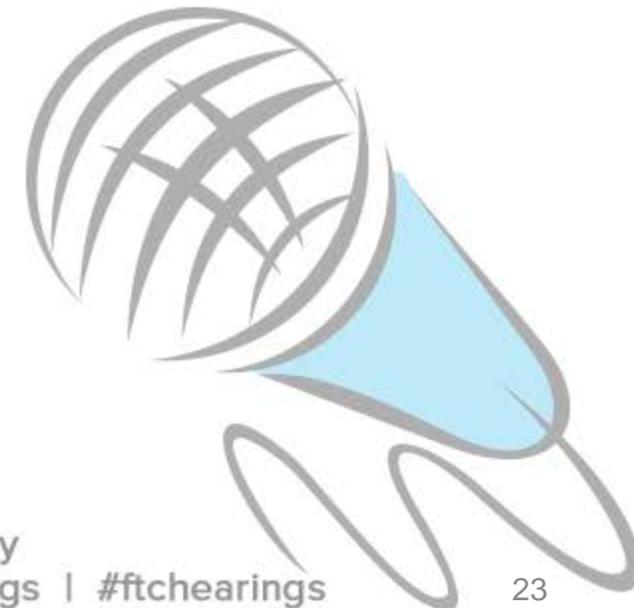


Consumer Protection Enforcement and Policy (Panel A)

Kaitlin Caruso

Office of Attorney General

New Jersey

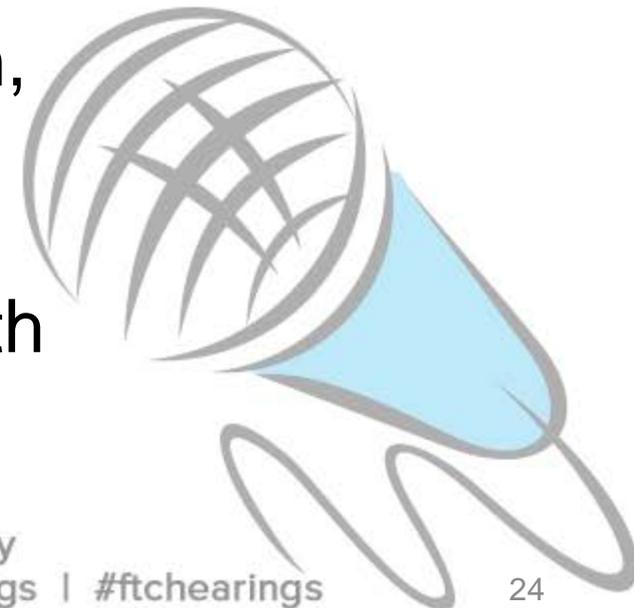


Consumer Protection Enforcement and Policy (Panel A)

Panel Discussion:

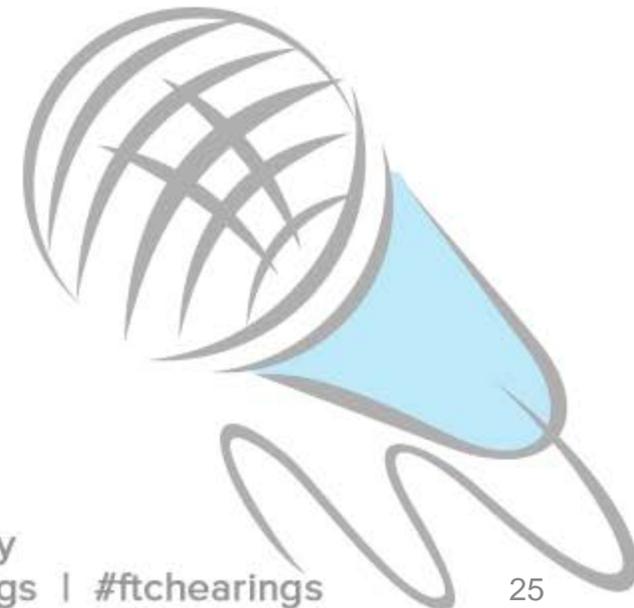
Jason Ravensborg, Benjamin Wiseman,
Jeffrey C. Mateer, Kaitlin Caruso

Moderators: Ed Morse & Andrew Smith



Break

9:30-9:35 am



Consumer Protection Enforcement and Policy (Panel B)

Session moderated by:

Ed Morse

Creighton University School of Law

Andrew Smith

Federal Trade Commission
Bureau of Consumer Protection

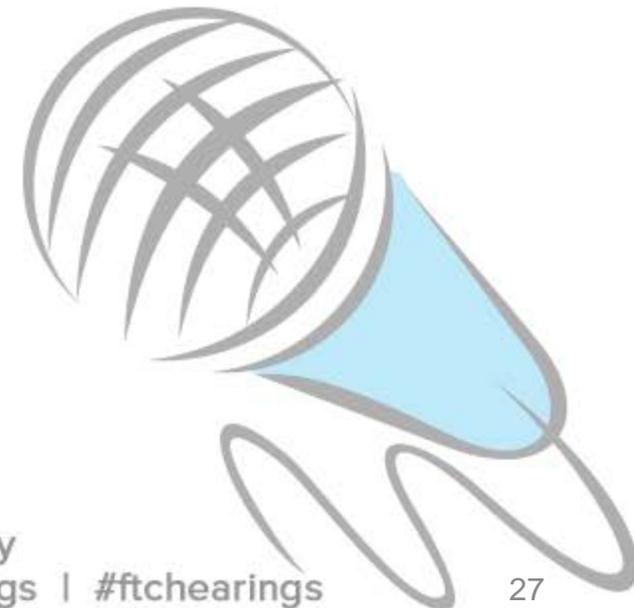


Consumer Protection Enforcement and Policy (Panel B)

Restitution, Remedies, and Recoveries

Matthew du Mee

Office of Attorney General
Arizona



Restitution Should Be A Top Priority

- Where available and able to be adequately evidenced, restitution should be the primary remedy goal
- FTC has secured over \$6 billion in refunds for consumers in the past three years
- Arizona Attorney General Mark Brnovich's Office has secured a record-breaking amount of restitution since 2015, over \$65 million
- Payments to consumers may be appropriate in data breach cases (Uber)



Remedies

- Civil penalties are a powerful tool, and appropriate in many cases, but should be used wisely
- Civil penalties can often facilitate full restitution more quickly (Theranos)



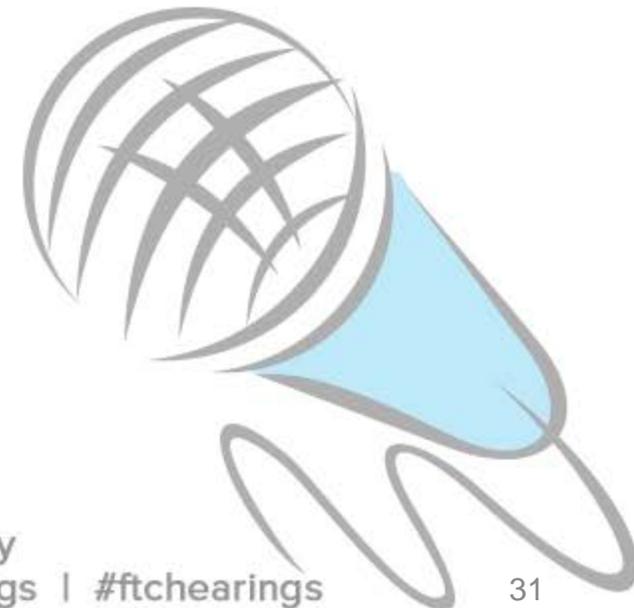
Recoveries

- FTC should reconsider its policies on suspended judgments
- Suspending judgments based on inability to pay creates perverse incentives
- Restitution should not be suspended



Consumer Protection Enforcement and Policy (Panel B)

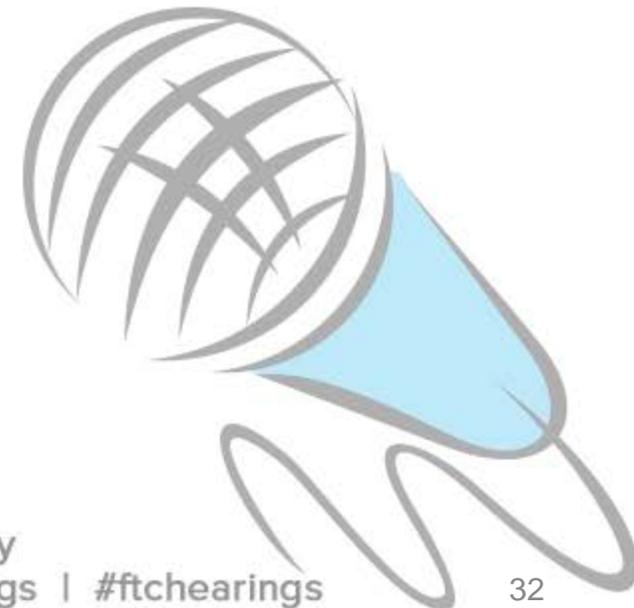
Crystal Utley Secoy
Office of Attorney General
Mississippi



Consumer Protection Enforcement and Policy (Panel B)

John Abel

Office of Attorney General
Pennsylvania



Guiding Principles

(courtesy of Justice Brandeis)

- **Privacy matters:** “Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to comprise every form of possession – intangible, as well as tangible.”

Samuel D. Warren & Louis D. Brandeis, The Right to Privacy,
4 Harv. L. Rev. 193 (1890).



Guiding Principles

(courtesy of Justice Brandeis)

- **Role of State AGs:** “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

New State Ice Co. v. Liebmann,
285 U.S. 262, 311 (1932) (Brandeis, L., dissenting).



- State AGs are on the front line, close to consumer concerns, and remain nimble to respond quickly to reports of data breaches or other privacy-related matters.
- State UDAP laws are flexible and broad enough to encompass many sorts of misconduct in failing to respect consumer privacy.



- Many States have the authority to seek the “trifecta” of
 - Civil Penalties
 - Restitution, and most importantly,
 - Injunctive Relief

The goal here is to change corporate culture/business practices to hold companies accountable for failing to live up to their own promises and failing to reasonably safeguard consumer data.



Protecting consumer data must be recognized as a priority, both from an expenditure standpoint and the viewpoint of the “C-Suite.”

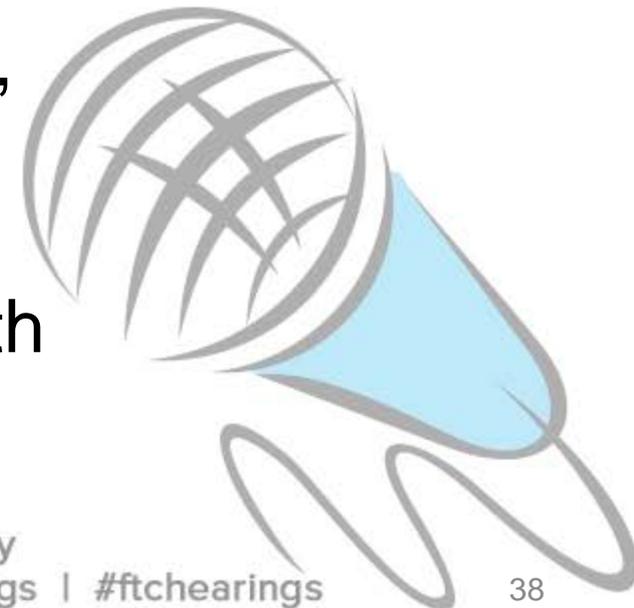


Consumer Protection Enforcement and Policy (Panel B)

Panel Discussion:

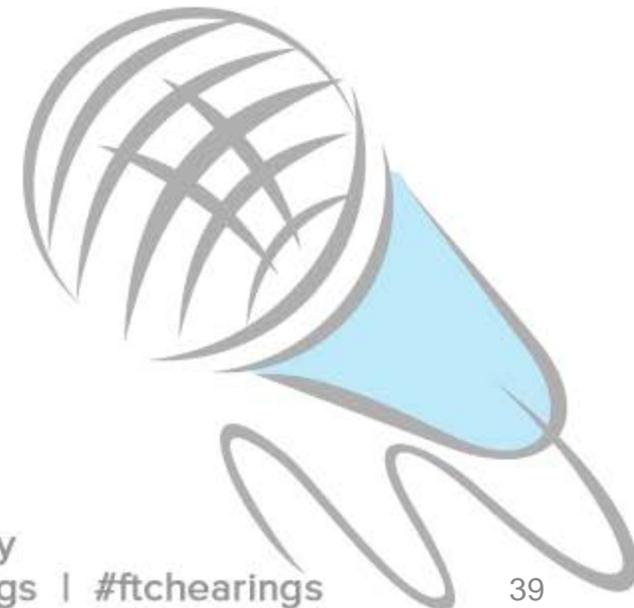
Matthew du Mee, Crystal Utley Secoy,
John Abel

Moderators: Ed Morse & Andrew Smith



Break

10:20-10:35 am



Antitrust Enforcement and Policy (Panel A)

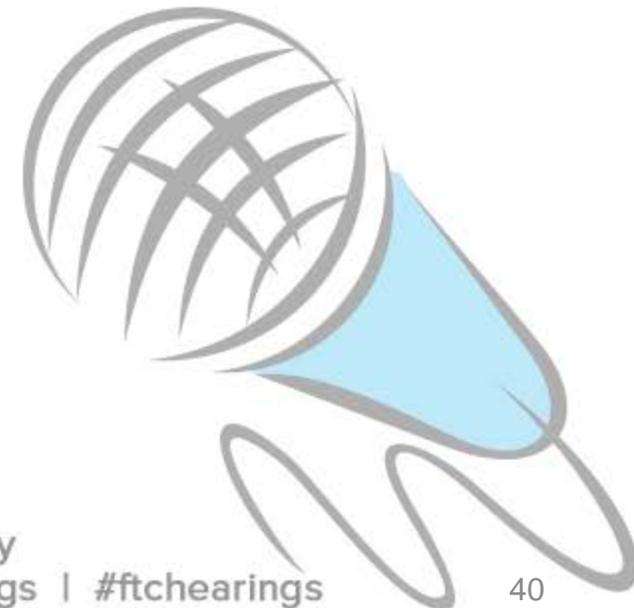
Session moderated by:

Irina Fox

Creighton University School of Law

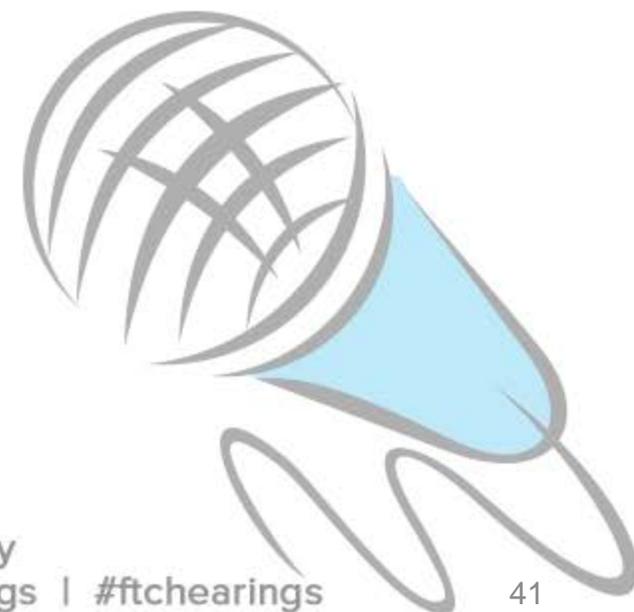
Sarah Mackey

Federal Trade Commission
Office of Policy Planning

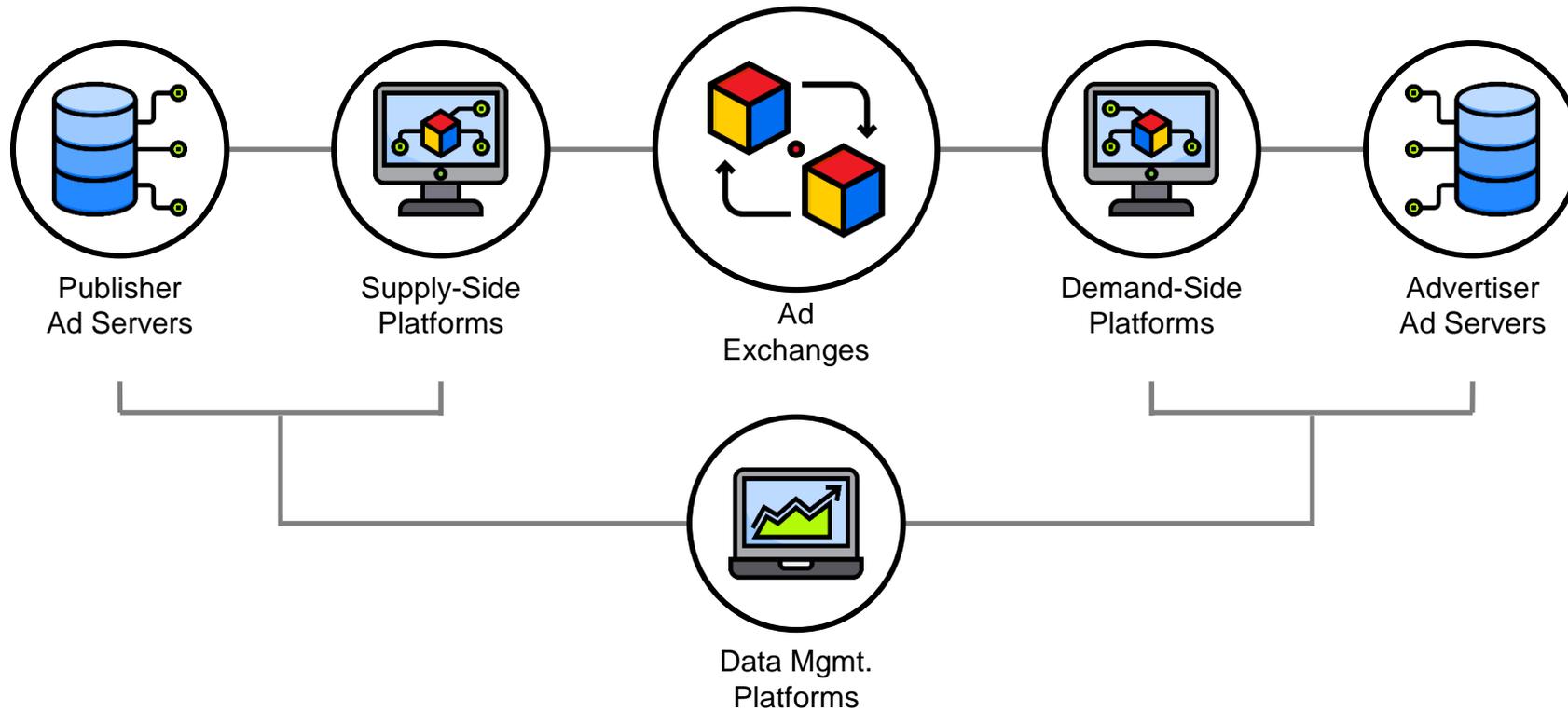


Antitrust Enforcement and Policy (Panel A)

Jeff Landry, Attorney General
Louisiana



The Ad Tech Ecosystem

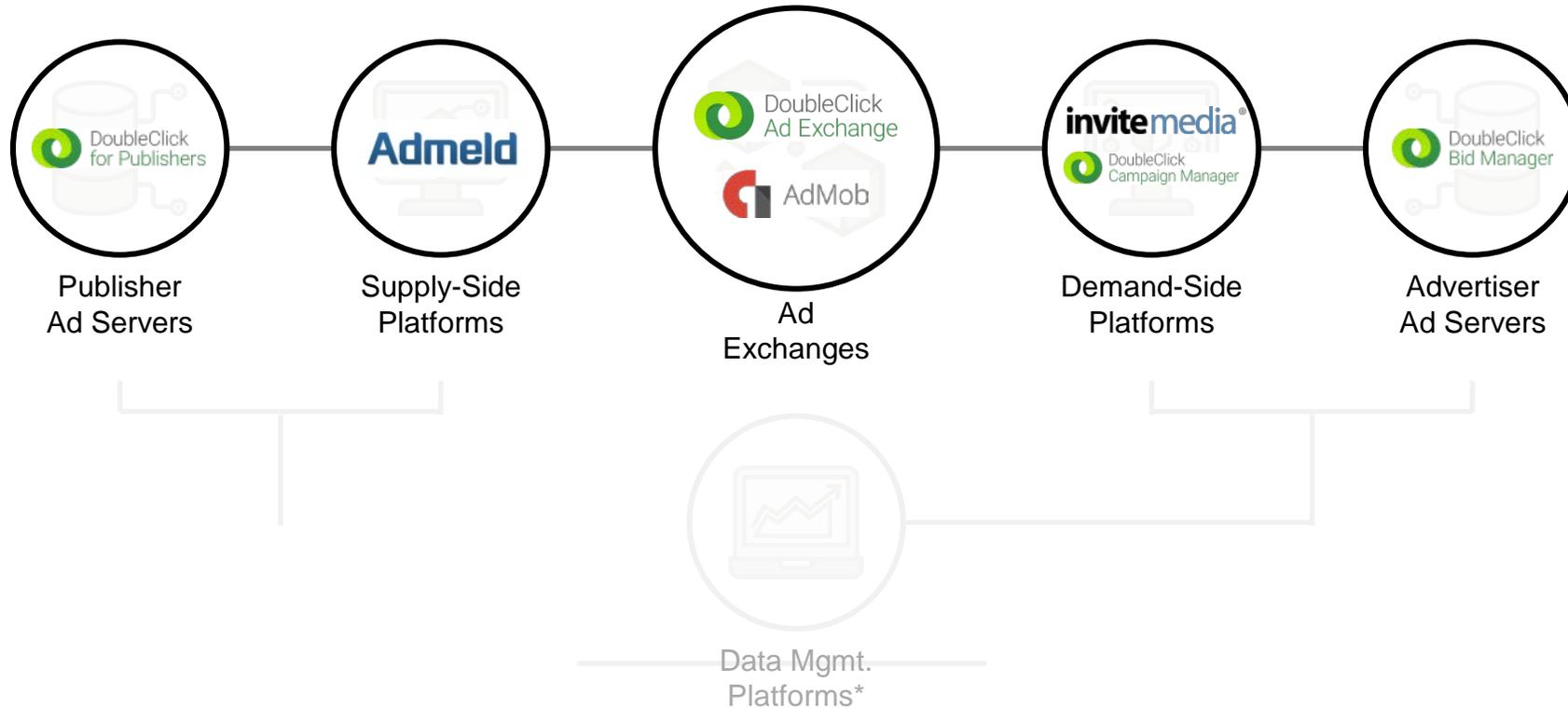


Google's Internet Domination

- Google leverages its collection of data to sell highly targeted advertising products and services.
- Google leverages its market power to stifle competition across numerous markets, particularly digital advertising which serves as the financial engine of the internet.
- Google has been free to use this intrusive business model with little oversight.



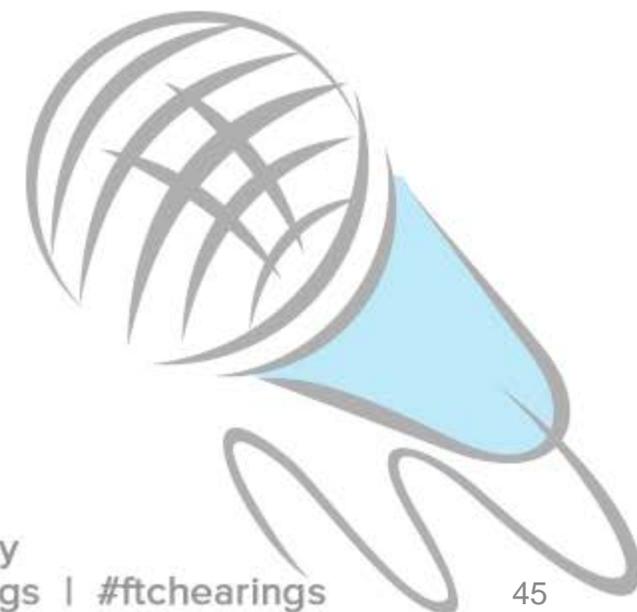
Google's Major Ad Tech Acquisitions



* Google's DMP reflects data that Google collects from various products and services

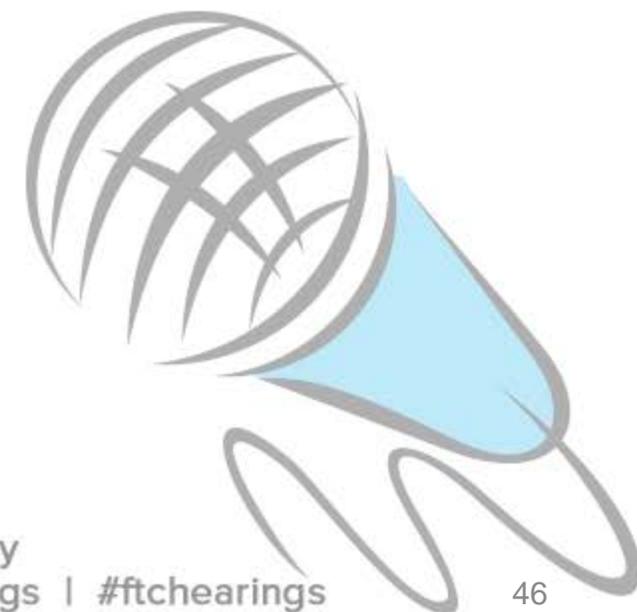
Antitrust Enforcement and Policy (Panel A)

Doug Peterson, Attorney General
Nebraska



Antitrust Enforcement and Policy (Panel A)

Herbert H. Slatery III, Attorney General
Tennessee

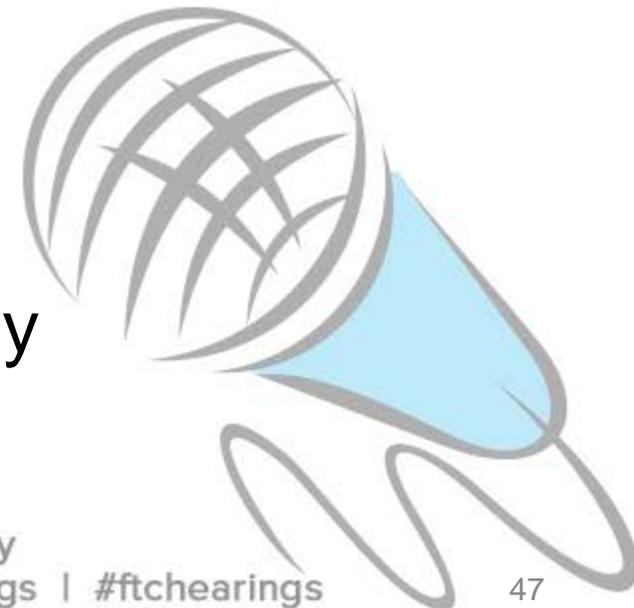


Antitrust Enforcement and Policy (Panel A)

Panel Discussion:

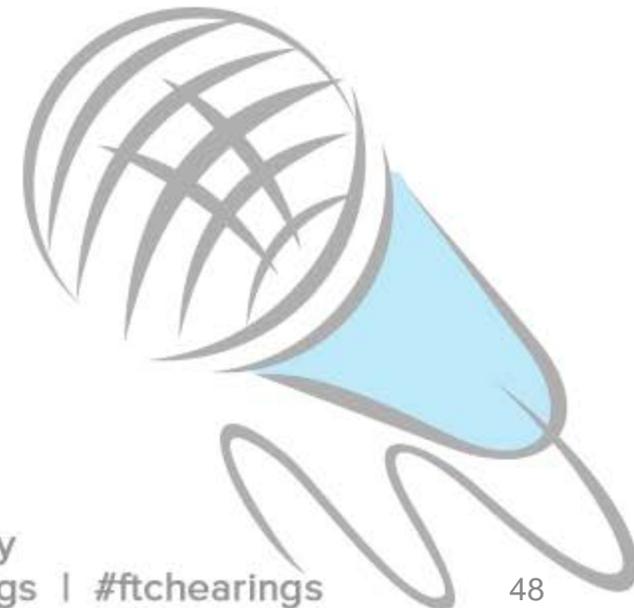
Jeff Landry, Doug Peterson,
Herbert H. Slatery III

Moderators: Irina Fox & Sarah Mackey



Break

11:20-11:25 am



Antitrust Enforcement and Policy (Panel B)

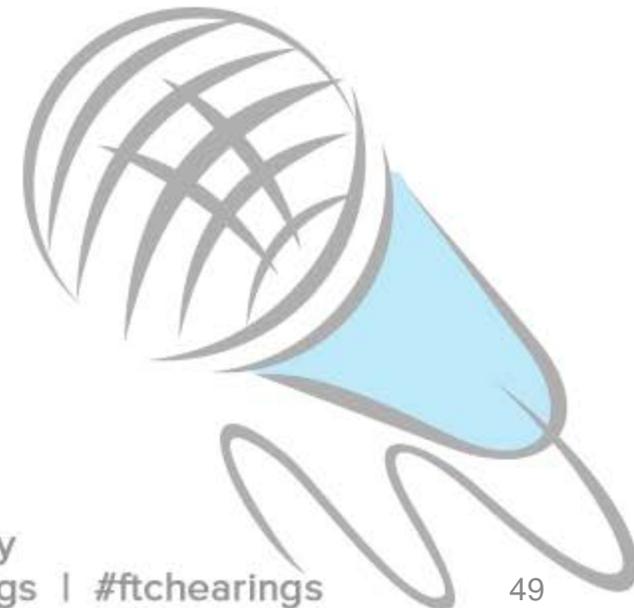
Session moderated by:

Diana Thomas

Creighton University
Heider College of Business

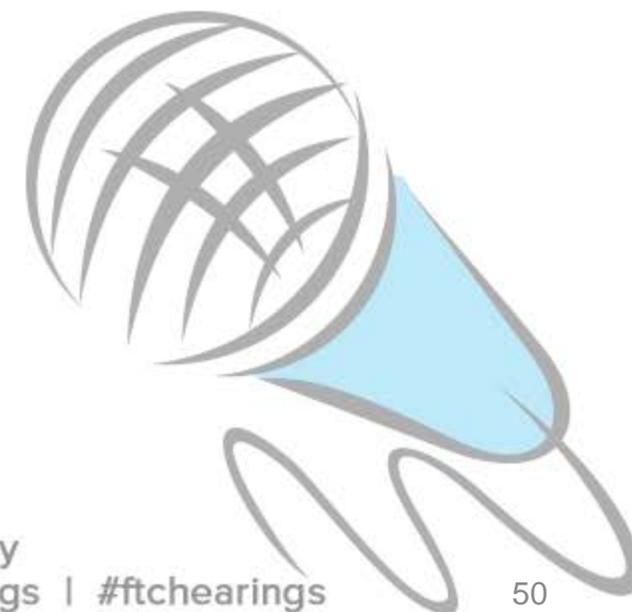
Jacob Hamburger

Federal Trade Commission
Office of Policy Planning



Antitrust Enforcement and Policy (Panel B)

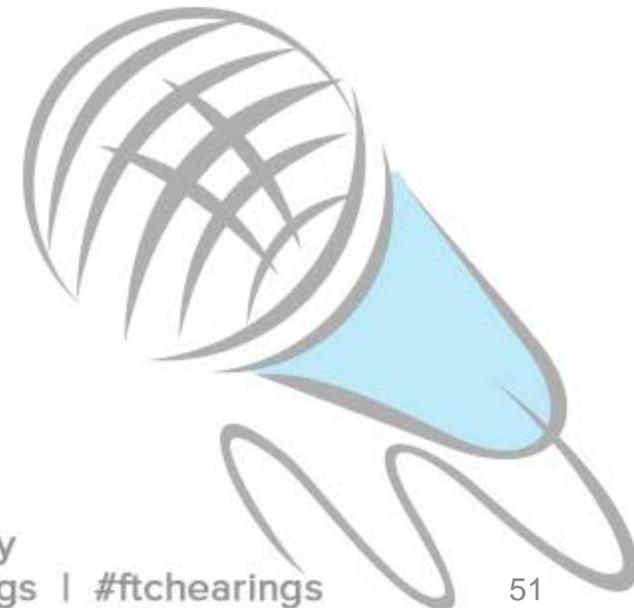
Eric Newman
Office of Attorney General
Washington



Antitrust Enforcement and Policy (Panel B)

Max M. Miller

Office of Attorney General
Iowa



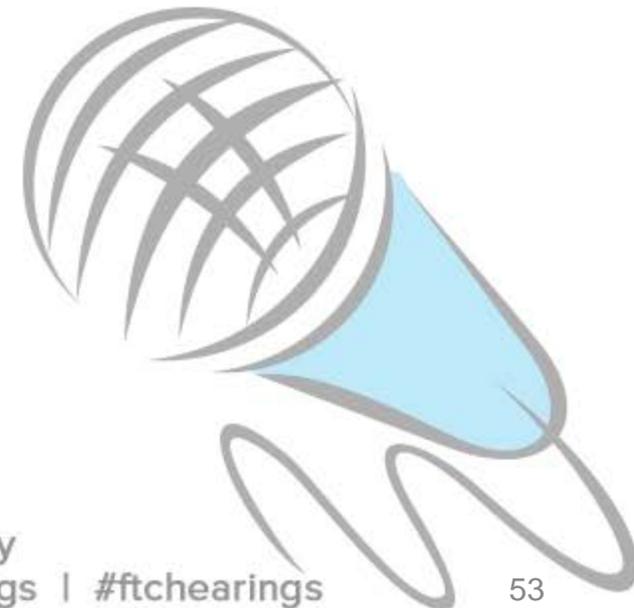
Antitrust Enforcement and Policy (Panel B)

David N. Sonnenreich
Office of Attorney General
Utah



Antitrust Enforcement and Policy (Panel B)

Sarah Oxenham Allen
Office of Attorney General
Virginia

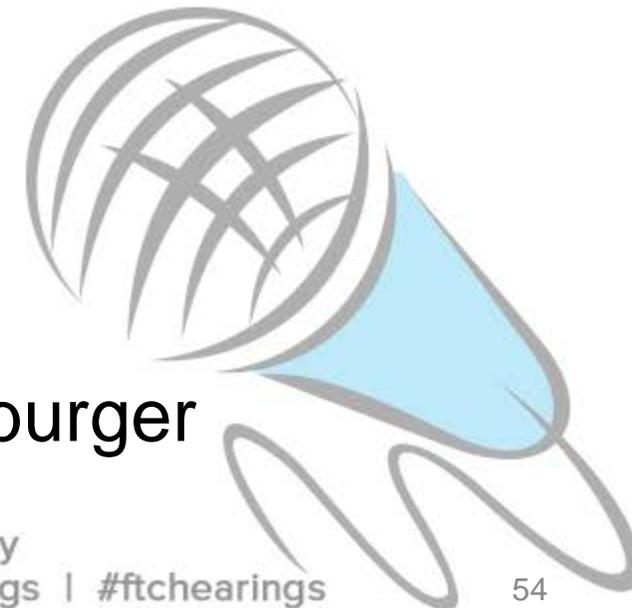


Antitrust Enforcement and Policy (Panel B)

Panel Discussion:

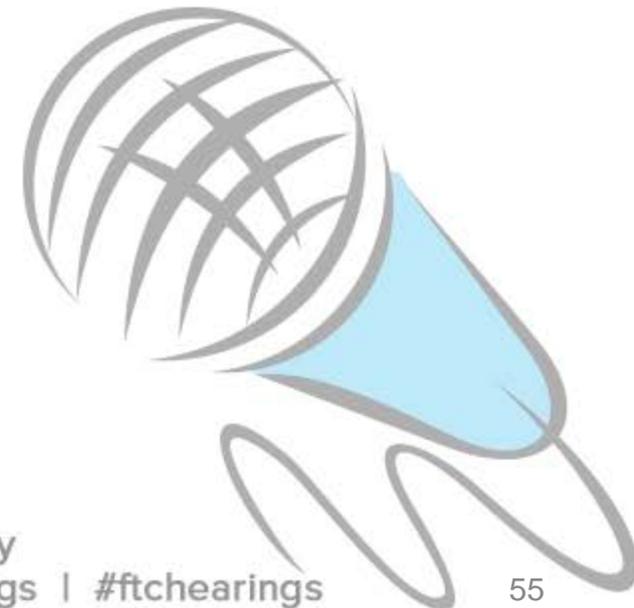
Eric Newman, Max M. Miller,
David N. Sonnenreich,
Sarah Oxenham Allen

Moderators: Diana Thomas & Jacob Hamburger



Lunch Break

12:10-1:15 pm



Consumer Protection Remedies: Economic & Legal Considerations

Session moderated by:

James Cooper

Federal Trade Commission
Bureau of Consumer Protection

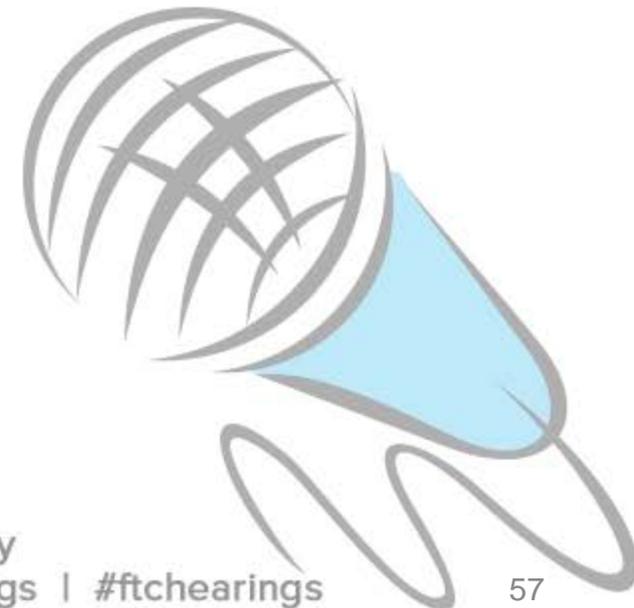


Consumer Protection Remedies: Economic & Legal Considerations

Optimal Liability

Murat C. Mungan

George Mason University,
Antonin Scalia Law School



Economic Theory of Liability

- Liability (or punishment) affects a potential offender's incentives.
- Becker (1968): Two important components
- Probability of punishment (p)
- Severity of punishment (s)
- → If the cost of compliance, b , is greater than the expected punishment (ps), do not comply.
- $b > ps$



Economic Theory of Liability

- Suppose either that different entities have different compliance costs, or that any given entity's compliance cost is probabilistically determined.
- In both cases, we can denote the proportion of entities with compliance cost b or below as $F(b)$.
- What is the proportion of entities that commit the offense given any p and s ?
- $\rightarrow 1-F(ps)$ (Assumes risk neutrality)



Economic Theory of Liability

- $1-F(p_s)$: Proportion of offenders
- $F(p_s)$: Proportion of non-offenders
- What is the optimal liability, given this observation?
- When do we want entities to comply, and when do we want them to not comply?
- Generally: Want compliance if the cost is lower than the expected social harm from non-compliance (h). (More on this (efficiency) point, later.)



Economic Theory of Liability: Exogenous p

- How can we make sure that people comply only if their cost of compliance is lower than the social harm?
- Remember: comply iff $b < ps$.
- So, if we set $h = ps$, we have comply iff $b < h = ps$.
- This is exactly what we want.
- This requires a sanction of $s = h/p$: multiply the harm with the inverse of the probability of detection to get the optimal compliance inducing liability.



Economic Theory of Liability: Endogenous p

- The result that $s^*=h/p$ relies on the probability of detection being fixed. What if it is costly to investigate, and therefore, costly to increase the probability of punishment?
- Example: Suppose $h=\$10$, and one can hire either:
 - 10 full time inspectors @ $\$1,000,000 \rightarrow p=1$
 - 1 full time inspector @ $\$100,000 \rightarrow p=0.1$
 - 1 part time inspector @ $\$1,000 \rightarrow p=0.001$
- What's the best choice, and what is the optimal liability under each case?



Economic Theory of Liability: Endogenous p

- What's the best choice, and what is the optimal liability under each case?

Number of inspectors	p	Optimal fine	Expected non-compliance cost
10 inspectors	1	\$10	\$10
Full time inspector	0.1	\$100	\$10
Part time inspector	0.001	\$10,000	\$10

- Comply if $b < \$10$.
- What probability does one choose?
- The lowest!



Economic Theory of Liability: Endogenous p , with maximum fine

- A problem with this approach is that some entities may be judgment proof.
- What if the entity does not have \$10K? In particular, what if it has only \$1,000?
- Third option is not available, and, among the two the second option is better.
- But, more importantly, we normally do not face a small number of options for enforcement. We face almost a continuum.



Economic Theory of Liability: Endogenous p , with maximum fine

- When the maximum an entity can pay is \$1K and the harm is \$10 what is the optimal p ?
- Setting $p=0.01$ gets the ideal level of deterrence, but, one can save enforcement costs by reducing p slightly.
- Example: Suppose we reduce p to 0.009 and this saves \$1K, but reduces expected sanction to \$9.
- Suppose this causes 1,000 entities with $b=\$9.5$ to switch to non-compliance
 - → Benefit from reduction in p is \$1,000 cost is \$=500. Thus, reduce p .
 - → Expected sanction of $(0.009)\times(\$1,000)=\9 better than expected sanction of \$10.
 - → It is optimal to under-deter when the probability of detection can be chosen optimally.
 - This is a general result that is not unique to this example. This is because reducing p induces only entities with b very close to h to switch their behavior, and this is almost costless.



Some Implications and Implicit Assumptions

- Recall the optimal sanction with exogenous p : $s^*=h/p$
- This is a function of h and p , where is b ?
- Optimal sanctions are harm based and not benefit based, why?
- Because the optimal sanction causes the actor to fully internalize all the costs associated with his actions (like Pigouvian taxes).
- An advantage of this is that the decision maker only needs to estimate h .



Some Implications and Implicit Assumptions

- Supposing that the decision maker could observe b , what would be the optimal sanction:
 - For $b < h$ any sanction such that $s > b/p$
 - For $b > h$ any sanction such that $s < b/p$
- Note that this sanction would be entity-dependent, instead of act-dependent, and may raise concerns.



Some Implications and Implicit Assumptions

- An implicit assumption: There are people with $b > h$.
- What if this is not true, i.e. $b < h$ for all h ?
 - Endogenous p : Choose maximum s , and p is determined by trade-off between deterrence and enforcement costs.
 - Corner solutions are possible.
 - Exogenous p : Choose maximum s , since you can never over-deter.



Some Implications and Implicit Assumptions

- Another implicit assumption: No errors.
- Possibility of punishing innocent parties may create a trade-off between type-1 and type-2 errors.
- Especially if the entity can over-invest to avoid liability, there will be additional avoidance costs from large sanctions.
 - → Maximum sanctions are not optimal, and low s to alleviate these problems.



Consumer Protection Remedies: Economic & Legal Considerations

Jonathan Klick

University of Pennsylvania
Law School



Consumer Protection Remedies: Economic & Legal Considerations

Gus Hurwitz

University of Nebraska

College of Law

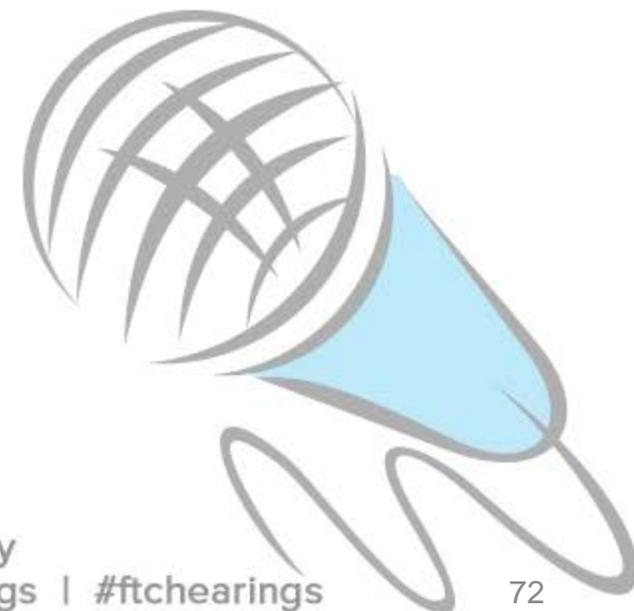


Consumer Protection Remedies: Economic & Legal Considerations

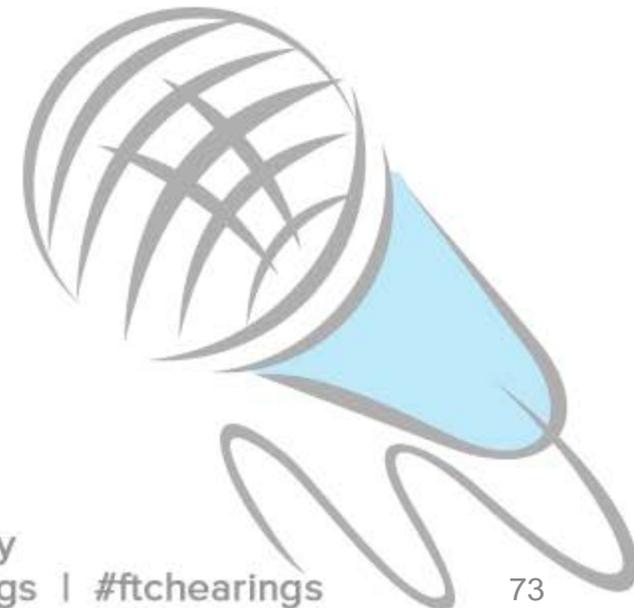
Panel Discussion:

Murat C. Mungan, Jonathan Klick,
Gus Hurwitz

Moderator: James Cooper



Break
2:45-3:00 pm



Revisiting “The Limits of Antitrust”

Session moderated by:

Bilal Sayyed

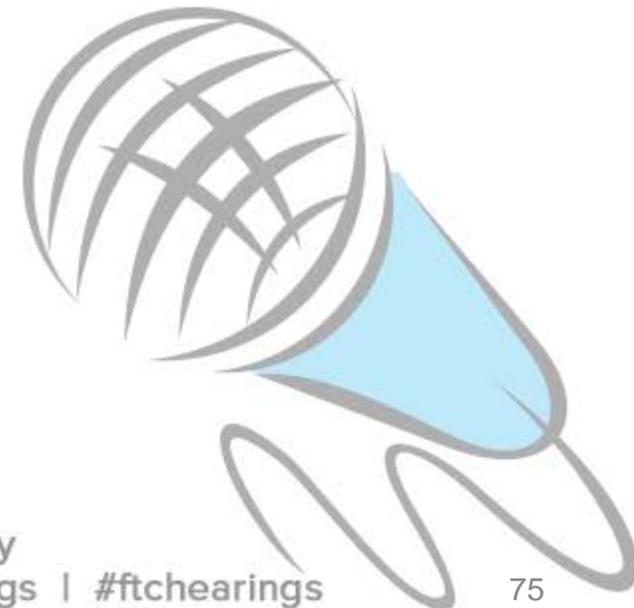
Federal Trade Commission
Office of Policy Planning



Revisiting “The Limits of Antitrust”

The Limits of Antitrust in the 21st Century

Thomas A. Lambert
University of Missouri
School of Law



Easterbrook, *The Limits of Antitrust* (1984)

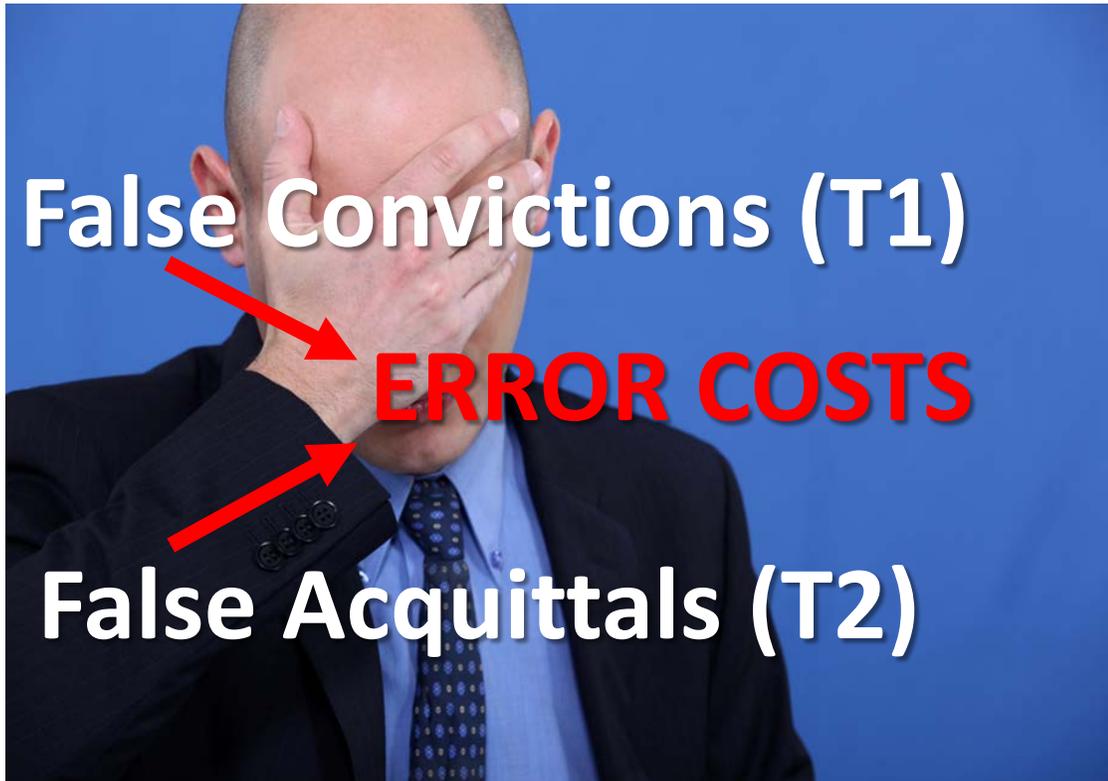
- **The Voltaire Point**
- **The Incommensurate Harms Point**
- **The Screening Mechanisms Point**



Antitrust's Domain



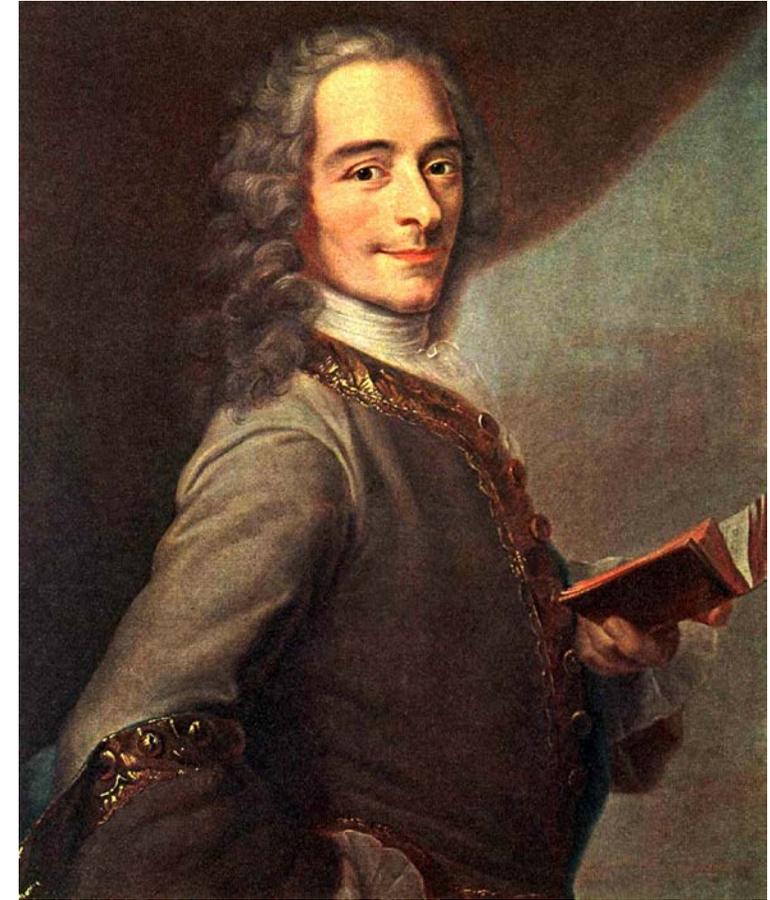
Inevitable Costs



Antitrust's Dilemma



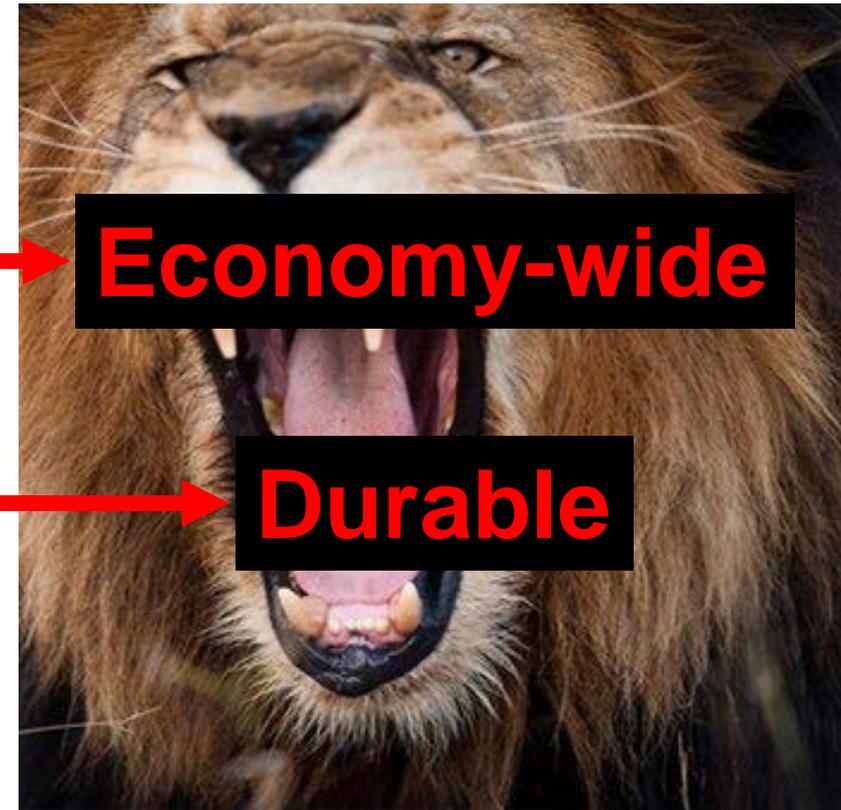
What to do?



The Incommensurate Harms Point

False Acquittal (T2)

False Conviction (T1)



The Screening Mechanisms

- 1. Does the defendant have market power?**
- 2. Would the challenged practice enhance the defendant's profits by reducing competition?**
- 3. Is the vertical practice widely adopted throughout the industry?**
- 4. Is the defendant's output and market share falling?**
- 5. Is the plaintiff a customer or competitor?**



The Screening Mechanisms

1. Does the defendant have market power?
2. Would the challenged practice enhance the defendant's profits by reducing competition?
3. Is the vertical practice widely adopted throughout the industry?
4. Is the defendant's output and market share falling?
5. Is the plaintiff a customer or competitor?



An Additional Screen?

Is another body of law capable of addressing the anticompetitive harm at issue?



Should the Agencies Be Subject to a Lower Evidentiary Burden?

On the one hand:

- **Better incentives**
- **Superior expertise**



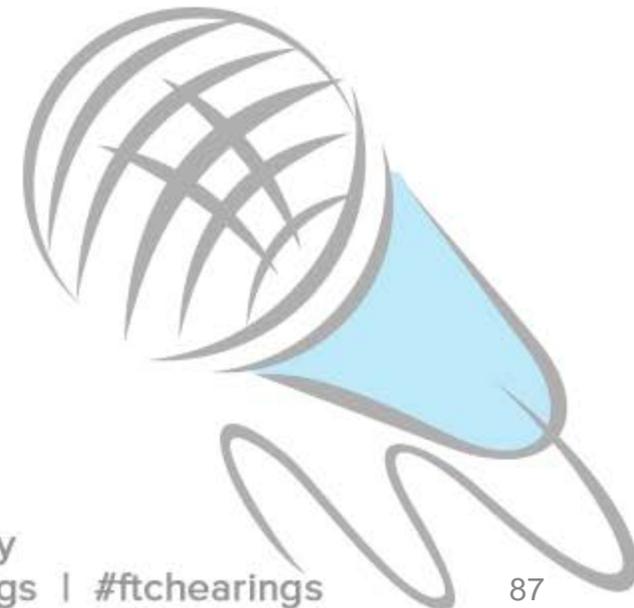
On the Other Hand...

$$\text{MHHI}\Delta = 10,000 \cdot \sum_j \sum_{k \neq j} s_j s_k \left(\frac{\sum_i \beta_{ij} \beta_{ik}}{\sum_i \beta_{ij}^2} \right)$$



Revisiting “The Limits of Antitrust”

Alan J. Devlin
Latham & Watkins LLP

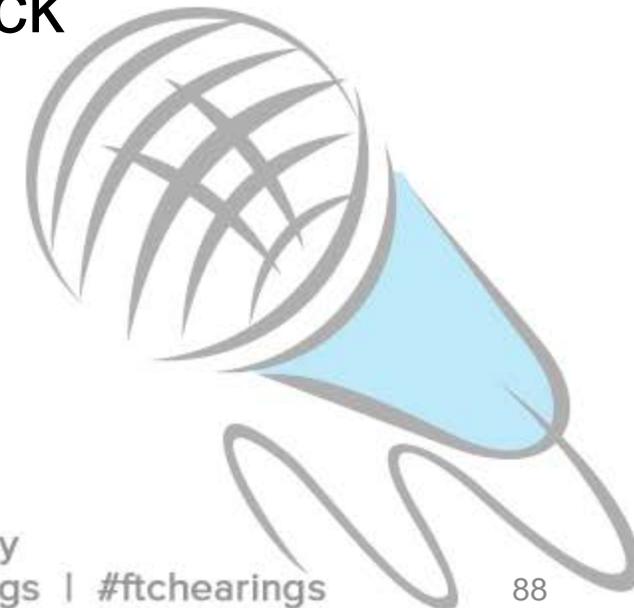


Revisiting “The Limits of Antitrust”

Limits of Antitrust and Promoting Economic Freedom

John Thorne

Kellogg, Hansen, Todd, Figel & Frederick



Easterbrook's Radical Idea: Per Se Legality

- Rule of Reason “empty.”
- Five filters:
 - Market power
 - Profits must depend on monopoly
 - Widespread adoption of identical practices
 - Practices don't decrease output
 - Identity of plaintiff
- Per se legality: “When most examples of a practice are procompetitive or neutral, the rules should have the same structure (although the opposite slant) as those that apply when almost all examples of anticompetitive.”



Implementing Easterbrook's Idea: Five Freedoms

- Freedom to cut prices
- Freedom to offer packages at a discount
- Freedom to innovate
- Freedom to increase efficiency
- Freedom to make investments without being forced to share with rivals



Economic Freedom Requires Energetic Enforcement

- Desmond Tutu: Price of freedom is eternal vigilance.
- Robert H. Jackson's test case for energetic enforcement: ASCAP and BMI decrees
- Trinko isn't an obstacle to Section 2 enforcement



Promoting Economic Freedom Produces Benefits



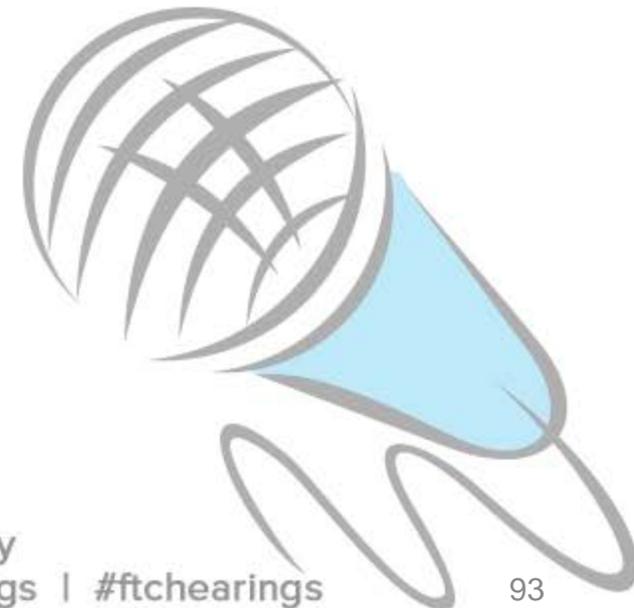
- Boys on field trip from school funded by Trinko



Revisiting “The Limits of Antitrust”

Robert E. Litan

Korein Tillery



Easterbrook's Main Theses

- Tradeoff b/w Type 1 (false positive) and Type 2 errors (false negatives) inevitable
- AT should worry more about Type 1 since markets can correct faster than courts
- Unbridled “rule of reason” (RR) runs excessive Type 1 risk
- Five “filters” before getting to RR minimize Type 1 (but “naked restraints,” i.e. most price-fixing should be *per se*)



Key Changes Since 1984

- Legal Change – Chicago School (consumer welfare standard) largely has won
- Economic Changes
 - Some worrisome, some positive, others mixed
 - Implications for Easterbrook's error framework



Key Legal Change: Chicago School Largely Won

- Rather than “filters,” courts have developed 3-stage “structured RR” in Sherman Act analysis (except naked restraints)
- *Judges/economists better at this “structured RR” than Easterbrook feared about unchecked RR in ‘84*
- Mergers – Verticals generally OK, conglomerates always OK (“potential competition” theory not accepted)



Key Economic Changes Since 1984

- Bad news: secular decline in business dynamism
- Good news: Wonders of the Internet (price, choice, productivity), Medical advances
- Mixed: Globalization (winners and losers, recent bipartisan backing away), dark sides of Internet



Has Less Competition Contributed to Any of the Changes?

- Narrative: increased industry concentration has made economy less dynamic (hence requiring a major shift in AT policy)
- National concentration is not Concentration of *Relevant antitrust markets*: many local with no increase; otherwise, with some exceptions, minor increase in unconcentrated industries
 - Productivity increases *more* in concentrated industries (Autor/colleagues, Peltzman in manufacturing)
 - Age of firm, not industry concentration, and slowing LF growth, driving startup decline (government barriers to entry, not private ones, also singled out, rest largely unexplained, CEA 2016)



Profits Tell a Different Story

- More worrisome: increase in profit share of GDP, increased profit inequality:
 - Rise of “big tech” (network effects)
 - Rising profits to IP (e.g. pharma)
 - “Collusive” profits (many more conspiracies uncovered by ‘94 amnesty policy)
- Although no link b/w rise of big tech and *overall* startup decline, the “kill zone” around tech platform is likely real
 - Traditional AT/consumer welfare standard (short-run P/Q) doesn’t account for potential LR impacts on *innovation* – the “kill zone”
 - Prospect of having to compete with platform content (Google/price comparisons, Amazon/third party sellers) can be chilling – AT (Section 2) can’t reverse what doesn’t happen



Implications for AT Enforcement

- Section 1 Sherman –Technology (chat rooms, algos) can facilitate collusion
 - **Kovavic et al idea: take prior cartel behavior into account in merger enforcement**
- Section 2 Sherman – Though probability of false negatives may not have increased, the costs of being wrong have risen:
 - AT&T breakup/fiber optics/Internet story (huge cost if no action had been taken)
 - Rise of dominant digital platforms (network effects + scale economies) present similar dangers of potential abuse
- Less actual and *potential* competition from abroad and inward FDI puts more emphasis on aggressive AT enforcement (cartels/Sec 2/mergers)
- **Hence, greater dangers of under-enforcement than before**



Current Anti-Monopolization Law is Largely, but not Completely Sufficient

- Successful Section 2 cases under current Structured RR: Microsoft, Qualcomm (both exclusive dealing)
 - FTC pay-for-delay pharma patent cases (Section 1)
- Make exclusive dealing (or functional equivalent) unlawful *per se* (if not by winning in court, then amending law)



Options for Preventing Platform Threats to Innovation (Each Would Require Legislation)

- Prohibit platforms from offering own content, products, or services -- would reduce innovation if “core activities” defined narrowly, convenience to consumers
- Stigler Center – *ex ante* regulation by new DA, treating *dominant* platforms as “essential facilities” (Kingsbury w/o universal service or price regulation)
 - How much data/“friends” must be portable? How extensive “obligation to deal”/mandatory interconnection with rivals? No need to have it involved in merger review
- Singer -- Non-discrimination for *all* (not just *dominant*) tech platforms with materiality standard via ALJ (of FTC)
 - Errs on side of encouraging “edge” innovation
 - Best of imperfect options, speedier than Section 2



Implications for Merger Enforcement

- Less foreign competition/more prevalence of price fixing/tacit collusion justifies tightening of HHI thresholds for horizontal mergers (Klobuchar change from “substantial” to “material” would help)
- Use current Sec 7 to consider impacts on labor markets (wage suppression) more often
- Conglomerate mergers -- take potential competition from target firms more seriously (under the “incipiency standard” in existing law): **Reexamine FB-Instagram**
- Change in law -- rebuttable presumption against V/C mergers where acquiring firm is *dominant* + capable of effectively entering target firm market *de novo* (airline model)



Resurrecting Brandeis Is Not the Answer

- Protect small business, democracy from excessive concentration
 - Reverses current legal standard, which is to protect competitive process, not competitors)
 - Despite elements in legislative history, always were secondary to the “competitive process” (Pitofksy), and no standards or limiting principles, sacrifices efficiency, innovation
 - Arbitrary size limits, even tied to growth of the economy, would chill innovation, especially in global market, even with some globalization backlash



Implementing Neo-Brandeis Problematic

- Breakups – Still need a Sec 2 violation; High hurdle for breakups under existing law
 - Won't solve privacy concerns, even if recognized by AT courts (opt-in legislation for data sharing and browser tracking better)
- Numerical merger thresholds for preventing mergers (\$5B valuation, or \$100B in sales – Better Capitalism) – false positive danger high, prefer a higher verbal threshold for conglomerates
- Adding additional factors (employment, privacy) means no standards at all, sacrifices efficiency
- Make predatory pricing standard less onerous ($<AVC + \text{recoupment}$) – great risk of higher prices



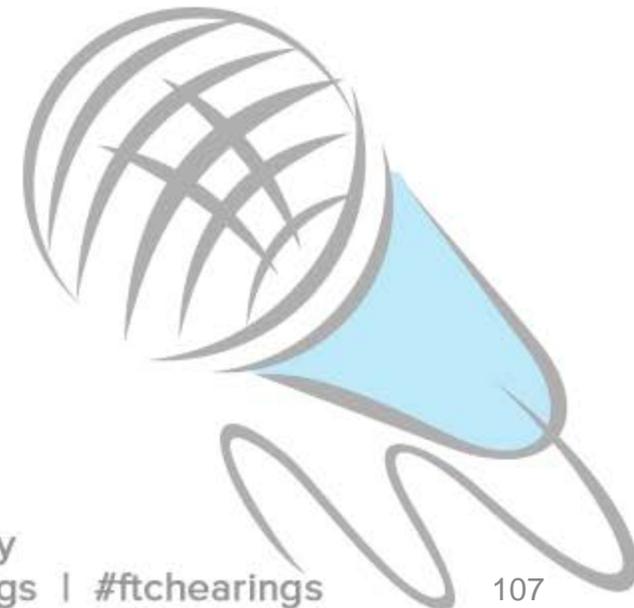
Don't Forget State AGs and Private Litigants

- AGs – uncovered generic drug price fixing, halted franchisee no poaching agreements
- Private enforcement
 - Congressionally authorized to provide an additional layer of deterrence and compensation
 - Resist further judicial/legislative cutbacks in class actions



Revisiting “The Limits of Antitrust”

Steven J. Cernak
Schiff Hardin LLP

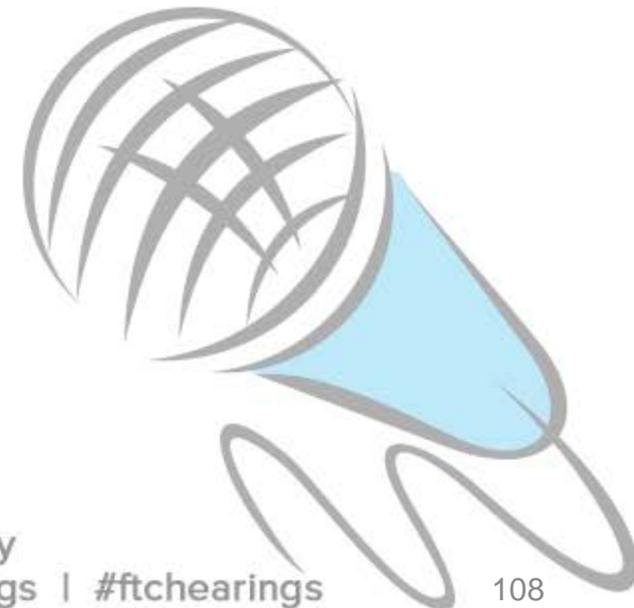


Revisiting “The Limits of Antitrust”

Panel Discussion:

Thomas A. Lambert, Alan J. Devlin,
John Thorne, Robert E. Litan,
Steven J. Cernak

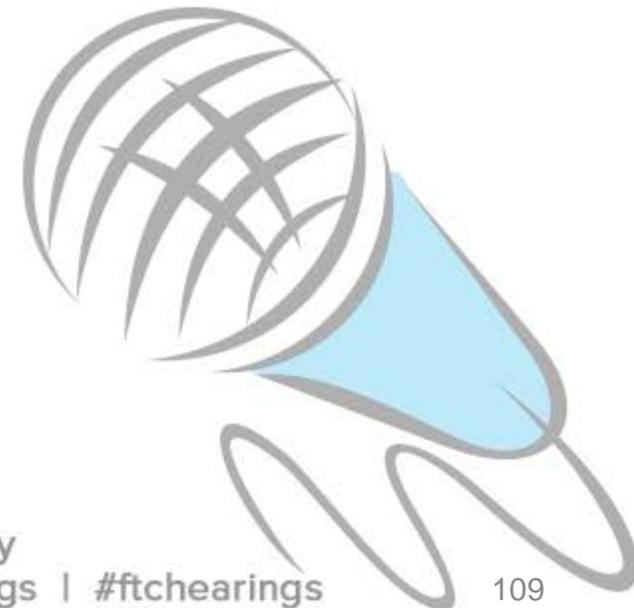
Moderator: Bilal Sayyed



Closing Remarks

Bilal Sayyed

Federal Trade Commission
Office of Policy Planning



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