

RECENT ACTIONS AT THE FEDERAL TRADE COMMISSION¹

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Antitrust and Trade Regulation Section**

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Thank you. I appreciate having the opportunity to speak to you today and to see many of my friends and colleagues in the Texas antitrust bar. The start of a new year is a good time to both look back and look ahead. 2004 was another productive year for the Commission in our dual missions – enforcing the nation's antitrust and consumer protection laws. Today, I will discuss some of our recent accomplishments for American consumers. More important than looking back, however, is ensuring that we are prepared to go forward. In that vein, I will talk about some of our new initiatives and objectives for 2005.

Our competition and consumer protection missions are not wholly separate functions that just happen to reside in one agency. Rather, they are related sets of tools designed to accomplish the same goals – promoting efficiency and preventing consumer harm. Protecting competition through enforcement of the antitrust laws stimulates efficiencies, which results in lower prices, better products and services, innovation, and choice. In the crucible of a competitive marketplace, vendors have strong incentives to supply their customers and potential customers with reliable information. But when those incentives are not enough, enforcement of the

¹ I appreciate the contributions that attorney advisors Brian Huseman and Josh Soven made to this speech.

² The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

matters (as compared to the number investigated) in which the Commission finds an antitrust violation, the parties under investigation most often agree to a consent order that requires them to take steps to discontinue or modify the conduct at issue. Those consent orders, in turn, assist you and other members of the bar in counseling your clients in an effort to avoid violations in the first instance. Indeed, I view you as the first line of defense against violations.

In addition, the FTC's competition work is not limited to conducting investigations and litigating cases. We also devote substantial resources to competition advocacy and competition

⁵ For example, last year, building on previous successful advocacies opposing attempts to limit competition between attorneys and lay providers of certain services, the FTC, in conjunction with DOJ, filed an amicus brief in the West Virginia Supreme Court to urge the rejection of a bar opinion that lay real estate settlement services are the unauthorized practice of law. Brief Amici Curiae of the Federal Trade Commission and the United States of America, *McMahon v. Advanced Title Serv. Co. of West Virginia*, Case No.: 31706 (filed May 25, 2004), available at <http://www.ftc.gov/be/V040017.pdf>. Specifically, the brief argued that there is no evidence of consumer harm from lay settlements, and that such a ban would likely increase the price of both lay and attorney settlements for West Virginia consumers. Ultimately, the West Virginia court vacated the opinion on the ground that there was an insufficient factual record to determine that these services are the practice of law because the lower court had not weighed public policy considerations, such as accountability, due care, and public safety. *McMahon v. Advanced Title Serv. Co. of West Virginia*, Case No.: 31706 (W. Va. Dec. 3, 2004).

competitive issues.

A. Healthcare/Pharmaceutical

The FTC's work in the healthcare and pharmaceutical industries in 2004 is an excellent example of the Commission's multi-pronged approach to fulfilling its antitrust enforcement mission.

1. Healthcare/Pharmaceutical Mergers

Of course, merger review continues to supply a major portion of the Commission's work in the healthcare and pharmaceutical industries (and, indeed, in all sectors of the economy).⁶

While we apply the same core principles of antitrust law in all of the mergers that we review, analyzing mergers in the pharmaceutical industry, as with other innovation-rich industries, raises issues that are not present in "older" sectors of the economy. The important assets in such deals often are intellectual property. These asset transfers present challenges in merger reviews because the products or services in the markets are often highly differentiated, there is rarely a uniform "market" price, and the markets change rapidly due to constant innovation.

Consequently, our review and any action taken must reflect these market realities.

In September, the Commission filed a final complaint and consent order in connection with Cima Labs' acquisition of Cephalon.⁷ The complaint alleged that the transaction, as

⁶ It is, of course, our statutory obligation, together with the Department of Justice's Antitrust Division, to review most significant mergers. But more fundamentally, active responsible merger review is one of the most effective components of the Commission's antitrust work. Done correctly, merger review leads to efficient markets and tremendous cost savings for consumers.

⁷ Complaint, *Cephalon, Inc./Cima Labs, Inc.*, Docket No. C-4121 (Sept. 20, 2004), available at <http://www.ftc.gov/os/caselist/0410025/040924comp0410025.pdf>; Decision and Order, *Cephalon, Inc./Cima Labs, Inc.*, Docket No. C-4121 (Sept. 20, 2004), available at

<http://www.ftc.gov/os/caselist/0410025/040924do0410025.pdf>.

8 Complaint,

structured, the transaction would likely have reduced competition in the already highly concentrated market for solid organ transplant (SOT) acute therapy drugs.⁹ Genzyme is the leading supplier; Ilex's product, Campath,¹⁰ is quickly gaining market share; and the two companies' products allegedly were each others' closest competitor. The approved consent order will remedy the original transaction's alleged anticompetitive effects by requiring Genzyme to divest to Schering all contractual rights to Ilex's Campath for use in solid organ transplants. Because Schering already distributes and markets Campath in the United States through an existing agreement with Ilex, it is well-positioned to provide effective competition in the market.

Significantly, because Campath is used in other markets that did not raise competitive concern, the Commission did not require the merged company to divest all of its rights to the product, only those involved in the use of the drug for SOT acute therapy. The parties, with the assistance of a monitor and the approval of the Commission, will implement a formula to determine the portion of Campath's earnings attributable to solid organ transplant sales. The order protects against collusion between the merged company and Schering by requiring implementation of firewalls.

Is this type of remedy the model of the future for pharmaceutical cases? Not necessarily. All else being equal, the Commission (as well as the Antitrust Division¹¹) has generally preferred

⁹ SOT acute therapy drugs suppress the recipient's immune system and are prescribed for induction therapy.

¹⁰ Interestingly, Campath is FDA-approved for the treatment of leukemia, but is used off-label as an SOT acute therapy drug.

¹¹ *Antitrust Division Policy Guide to Merger Remedies*, at III.A (Oct. 2004).

divestitures of hard assets. Divestitures of physical assets are clear and relatively easy to administer. Nonetheless, because our merger work increasingly involves the transfer of intellectual property and other information technology, we must devise new solutions to effectively remedy violations.

2. **Healthcare/Pharmaceutical Conduct**

The Commission also has been active in prosecuting unlawful conduct in the healthcare and pharmaceutical industries. First, the FTC continues its vigorous prosecution of physician conduct that amounts to the collective naked setting of prices, without risk sharing or other integrative efficiencies. This conduct raises costs to consumers in a vital part of the American economy. For example, in August, the FTC filed a complaint challenging an arrangement under which 73% of the physicians independently practicing in Roswell, New Mexico, allegedly fixed their prices at levels above rates charged elsewhere in the state and refused to deal with payers except on collectively agreed terms.¹² The physicians entered into a consent order – which was a typical order for many such matters – that requires the physicians to cease the unlawful activity and bars them from engaging in the same or similar conduct in the future.¹³

¹² Complaint, *Southeastern New Mexico Physicians, IPA, Inc.*, Docket No. C-4113 (Aug. 5, 2004), available at <http://www.ftc.gov/os/caselist/0310134/040806comp0310134.pdf>; Decision and Order, *Southeastern New Mexico Physicians, IPA, Inc.*, Docket No. C-4113 (Aug. 5, 2004), available at <http://www.ftc.gov/os/caselist/0310134/040806do0310134.pdf>.

¹³ The Commission brought similar cases involving physician groups in Alamogordo, New Mexico (80% of the area's physician positions), North Carolina (approximately 450 physicians), and San Francisco (approximately 1,500 physicians). Complaint, *White Sands Healthcare Systems, L.L.C.*, Docket No. C-4130 (Jan. 11, 2005), available at <http://www.ftc.gov/os/caselist/0310135/050114comp0310135.pdf>; Complaint, *Piedmont Health Alliance, Inc.*, Docket No. 9314 (Dec. 24, 2003), available at <http://www.ftc.gov/os/caselist/0210119/031222comp0210119.pdf>; Complaint California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, Docket No. 9306 (July 8, 2003),

3. Healthcare/Pharmaceutical Competition Advocacy

The FTC also has conducted substantial research about this vital industry. Most notably, in July, the Commission issued jointly with the Antitrust Division a report entitled *Improving Health Care: A Dose of Competition*, which was the culmination of a two-year project that began with public hearings.¹⁷ The report does not simply survey the landscape; rather, it provides significant recommendations and observations about the availability of information regarding the price and quality of health-care services; physician collective bargaining; insurance mandates; hospital merger analysis; managed care organizations' bargaining power; and hospital group purchasing organizations.

Similarly, last March, the Commission issued a report entitled *Possible Anticompetitive Barriers to E-commerce: Contact Lenses*.¹⁸ The report concluded that requiring a professional license to sell replacement contact lenses over the Internet is likely to raise prices and/or reduce convenience to consumers without substantially increasing health protections. The Commission will issue another report about the contact lens industry next month.

In an example of advocacy efforts that are becoming quite typical, in September, the FTC staff commented on a California bill that would have required pharmacy benefits managers to disclose certain financial information concerning their transactions with pharmaceutical

¹⁷ *Improving Health Care: A Dose of Competition* (July 2004), available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

¹⁸ *Possible Anticompetitive Barriers to E-commerce: Contact Lenses* (Mar. 2004), available at <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

companies and to make certain disclosures in connection with drug substitutions.¹⁹ Despite the bill's facially appealing disclosure requirements, the FTC staff concluded that the bill was likely to hurt consumers by increasing the cost of drugs and health insurance premiums and reducing the availability of insurance coverage for drugs. Governor Schwarzenegger vetoed the bill and, in so doing, released a message specifically citing to the comments of FTC staff.²⁰

B. Other Industries

I used the FTC's work in the health care industry as an illustration. But we use our trio of tools – enforcement, advocacy, and research – in many other industries. For example, as you know, the Commission is quite active in the oil and gas sectors. Last year, we filed consent orders requiring divestitures in three transactions in the petroleum industry: (1) Enterprise Products' acquisition of GulfTerra Energy; (2) Magellan's acquisition of certain assets from Shell; and (3) Buckeye's acquisition of certain assets from Shell.²¹ The Shell cases are good examples of the Commission's efforts to identify transactions that are likely to result in coordinated effects, as well as unilateral effects.²²

¹⁹ Letter from Susan Creighton *et al.* to California Assemblyman Greg Aghazarian (Sept. 7, 2004), available at <http://www.ftc.gov/be/V040027.pdf>.

²⁰ Veto Message for AB 1960, available at http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

²¹ Decision and Order, *Enterprise Partners Products, L.P.*, Docket No. C-4123 (Nov. 23, 2004), available at <http://www.ftc.gov/os/caselist/0410039/041126do0410039.pdf>; Decision and Order, *Magellan Midstream Partners, L.P.*, Docket No. C-4122 (Nov. 23, 2004), available at <http://www.ftc.gov/os/caselist/0410164/041126do0410164.pdf>; Decision and Order, *Buckeye Partners, L.P.*, Docket No. C-4127 (Dec. 17, 2004), available at <http://www.ftc.gov/os/caselist/0410162/041221do.pdf>.

²² In the Buckeye/Shell matter, Buckeye intended to acquire a refined petroleum pipeline and terminal assets, including a refined petroleum terminal in Niles, Michigan, from

To enhance our enforcement efforts in the critical petroleum sector, the Commission has devoted substantial resources to analyzing competition issues. In August, our Bureau of Economics released a report entitled *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*.²³ The report presents a detailed overview of the structural changes in the petroleum industry and describes Commission law enforcement activities related to petroleum industry mergers.²⁴ Its purpose is to inform public policy concerning competition in the petroleum industry and to add transparency to the Commission's merger analyses. And just last Friday, the Commission assembled five outside expert econometricians for a conference on econometric estimation of the effects of mergers in the industry.²⁵

In another significant market sector, high-tech, the Commission recently resolved its challenge to AspenTech's acquisition of the Hyprotech software assets several weeks before the

Shell for approximately \$530 million. The market for the terminaling of gasoline, diesel fuel, and other light petroleum products in the area in and around Niles, Michigan was highly concentrated. The transaction would have further increased this concentration, enhancing the likelihood of collusion or coordinated interaction between the few remaining competitors. In response to the Commission's concerns, the parties removed the transfer of the Niles terminal from the transaction. The consent order prohibits Buckeye from acquiring the Niles terminal for ten years, unless it complies with a procedure that tracks the requirements of the Hart-Scott-Rodino statute.

²³ *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (Aug. 2004), available at <http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf>.

²⁴ For example, the report describes how, since 1981, the Commission concluded that 15 large petroleum mergers would have resulted in significant reductions in competition if they had proceeded as proposed. In 11 of these cases, the FTC obtained significant divestitures to prevent reduced competition and harm to consumers. In the four other cases, the parties abandoned the transactions altogether after antitrust challenge.

²⁵ Press Release, *FTC to Host Conference on Oil Industry Merger Effects* (Dec. 21, 2004), available at <http://www.ftc.gov/opa/2004/12/oilmerge.htm>.

²⁶ Decision and Order, *Aspen Technology Inc.*, Docket No. 9310 (Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221do.pdf>.

²⁷ This software enables plant designers and engineers to design, simulate, and analyze production processes used in various industrial operations.

²⁸ Letter from Donald S. Clark, Secretary, Federal Trade Commission to George S. Cary (Dec. 20, 2004), available at <http://www.ftc.gov/os/adjpro/d9310/041221ltr.pdf>.

²⁹ With respect to the process engineering software assets purchased by Honeywell, the order also requires AspenTech to, among other requirements: (1) divest a related operator training business; (2) allow current customers to void their current contracts; and (3) support the assets divested to Honeywell for two years. In addition, for five years, AspenTech must provide Bentley with updates, upgrades, and new releases of AspenTech's engineering and other products on terms as favorable to those provided to other persons. The consent order also directs AspenTech to provide *both* Honeywell and Bentley with lists of relevant employees, remove

In December, the Commission held a public workshop on a significant and prominent technology issue: peer-to-peer or “P2P” file sharing, which enables individuals to share files, including music, video, and software. Participants at the workshop, which included representatives from government, private industry, interest groups, and academics, assessed the impact of the technology on consumers and businesses. It addressed both competition and consumer protection issues: risks and benefits to consumers, technological developments and efforts, models for distributing music, the impact of file-sharing on copyright holders, self-regulatory initiatives, and legislative proposals.

D. 2005: Looking Ahead for Antitrust

So what is on the competition table for 2005? We expect to be busier reviewing mergers than in the last three years, as merger filings already have increased in this fiscal year. I place great importance on providing as much transparency as feasible in merger review and on reviewing mergers through a process that is both effective and efficient. Achieving these objectives leads to better decision-making within the agency and in boardrooms. I have initiated two projects aimed at improving our capabilities in this regard.

First, the FTC, together with the Antitrust Division, intends to produce a Commentary on the 1992 Horizontal Merger Guidelines. Last February, the two agencies jointly sponsored a three-day Merger Enforcement Workshop to assess the practical efficacy of the 1992 Merger Guidelines in light of twelve years of experience. The workshop focused on whether the Guidelines meet their twin objectives of (1) helping the agencies make the right merger enforcement decisions, and (2) providing the antitrust bar and the business community with reasonably clear guidance from which to assess the antitrust risks of proposed mergers and

acquisitions. While it is clear that the Merger Guidelines are now firmly rooted in antitrust practice, I believe that additional explication on how the Guidelines are applied in practice would be useful. A Commentary should bring greater transparency to the agencies' merger analysis and greater certainty to businesses and merger practitioners. We expect that the Commentary will cover each major area of the Guidelines and explain more fully how the Guidelines are applied in practice. Fundamentally, the purpose of the Commentary is not to change the Guidelines, but rather to explain how the Guidelines are applied in practice. My hope is that we will complete the Commentary during 2005.

In 2005, the Commission also will focus on improving merger review procedures. Over the last four years, the Bureau of Competition has made some efforts to streamline merger review and make it more transparent. I believe that we can do better still. As we learned in the Merger Enforcement Workshop, the Second Request process still needs work. If we are not sufficiently disciplined and rigorous in collecting and dissecting information during the merger review process, then we are not spending the taxpayer's dollar appropriately. Similarly, if firms are not appropriately cooperative and responsive during this process, then they are wasting the shareholder's dollar. In each instance, consumers lose. Accordingly, one of my most important objectives for 2005 is to review the progress that has been made, determine what has and has not worked well, and outline specific measures for improvement. One specific focus will be the production of electronic documents.

I must emphasize that I firmly believe that merger process reform must be a two-way street. For example, for the FTC staff to limit more effectively Second Request specifications, they must have full confidence that the parties will fully cooperate in responding to those

recently created a Criminal Liaison Unit at the FTC to coordinate with the criminal enforcers and to maximize the impact of both criminal and civil prosecutions.

In October, we filed our first spyware case.³² In this case, the FTC alleged that the defendants secretly downloaded software onto consumers' computers, barraged them with pop-up ads, and installed adware and other software programs to spy on consumers' Web surfing activity. The spyware caused computers to malfunction, slow down, or even crash. Having created serious problems for consumers, the defendants then offered to sell them a solution – purported anti-spyware products – for approximately \$30. Currently, the defendants have agreed to a preliminary injunction that prohibits them from installing spyware on consumers' computers pending trial. Of course, we are not resting on our laurels. Expect to see an equally aggressive law enforcement program in 2005.

Second, in 2004, the FTC dramatically increased its efforts to address the problem of fraud aimed at Hispanic consumers. Our consumer fraud survey showed that Hispanics are roughly twice as likely as non-Hispanic whites to be victims of consumer fraud, whether they speak Spanish or not. The scam artists who prey upon Hispanic consumers mistakenly believe that their Spanish-language schemes are beyond the reach of the FTC. In one fraudulent business opportunity scheme, a young single mother who fell victim to the scam called the company to complain and demand her money back. When she advised the company that she intended to contact the FTC, the company actually taunted her, saying, “Go ahead, contact the

million judgment entered Oct. 2004), *available at* <http://www.ftc.gov/opa/2004/10/marknutritionals.htm>.

³² See FTC Press Release, *FTC Cracks Down on Spyware Operation* (Oct. 12, 2004), *available at* <http://www.ftc.gov/opa/2004/10/spyware.htm>.

FTC, they can't touch us!" They were wrong! In April 2004, we sued the company, a

³³ *FTC v. Estaban Barrios Vega*, No. H-04-1478 (S.D. Tex. filed Apr. 2004), available at <http://www.ftc.gov/opa/2004/04/hispanicsweep2.htm>.

³⁴ See FEDERAL TRADE COMMISSION – IDENTITY THEFT SURVEY REPORT (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/synovaterreport.pdf>.

³⁵ The three nationwide credit reporting agencies have established a centralized website, www.annualcreditreport.com, at which consumers can obtain their free credit reports. See www.ftc.gov/credit for more information.

³⁶ See FTC Press Release, *Compliance with Do Not Call Registry Exceptional* (Feb. 13, 2004), available at <http://www.ftc.gov/opa/2004/02/dncstats0204.htm> (citing Harris Interactive® survey).

consumers from these risks. A primary objective of these workshops is to encourage industry to develop technological fixes for the consumer protection problems posed by such technology.³⁸

Again, I appreciate having the opportunity to “get outside of the beltway” and tell you about our recent and upcoming work. Thank you for your attention.

³⁸ One notable example is the proposed development of an authentication system to stem the tide of spam that is overwhelming the global email system. The implementation of an authentication system would vastly improve the effectiveness of email filtering and potentially provide law enforcement with a critical tool to help find those responsible for sending illegal spam.