

It Only Takes Two to Tango: Reflections on Six Months at the FTC

Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum

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Good afternoon. Let me begin by thanking Global Competition Review for inviting me to participate in this year's Annual Antitrust Law Leaders Forum and offering the opportunity to speak to you today. I'm always happy to return to Florida, and on that note, I also want to thank Danny Sokol, professor of law at my alma mater, the University of Florida, for the kind introduction. I also want to thank the staff in the Bureau of Competition, and particularly Julie Goshorn, for helping me prepare these remarks.

This conference brings together a very impressive group of antitrust practitioners from around the world, and I'm pleased to be here and discuss some of my views about antitrust in the United States today. I've been the Acting Director of the FTC's Bureau of Competition for a little more than six months that have spanned a very interesting and active time in the history of the agency. My remarks today come with the usual caveat that they are my own. They do not necessarily reflect the views of the Federal Trade Commission or any Commissioner (or prospective Commissioner). And, although the U.S. antitrust laws also are enforced by the Antitrust Division of the Department of Justice, I do not speak for the Division or any of its staff.

As I've noted in several other speeches, one of the biggest surprises I've encountered in my position is the vigorous challenge to the efficacy of the last 40 years—and, in particular, the last eight years—of antitrust enforcement. This challenge has come from elected officials, the media, various lobbying organizations and advocacy groups, and some academics. It has spurred legislative and other proposals, some calling for minor changes, and others for radical alterations to antitrust laws, mainly aimed at making those laws far more stringent, thus greatly restricting mergers and acquisitions and subjecting more business conduct to potential antitrust liability. It has also included calls to include in antitrust review a wide array of additional policy goals, including labor and employment, trade and protectionism, and even speech regulation, environmental policy, and others. This challenge is largely, though not entirely, based on arguments that concentration has risen in many if not most American industries and that corporate profits are too high, as well as other arguments.

There is a vigorous debate about these issues, with a growing literature on both sides.¹ From my perspective, as a starting point, I think it's important to be clear that I do not believe that

¹ For example, Professor Carl Shapiro, who served as DAAG for economics under President Obama and is a professor at Berkeley as well as a highly respected consulting economist, provided an extensive discussion of a number of these issues. Carl Shapiro, *Antitrust in a Time of Populism*, Oct. 2017, available at <https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf>. Others no doubt continue to contribute to the debate from multiple perspectives.

antitrust enforcement is perfect—that we have reached a nirvana of legal and economic understanding that enables us to apply exactly the right analysis, and reach exactly the right result, in every case that comes before us. To the contrary, I believe that there are numerous difficult and at least partially unresolved issues in antitrust enforcement today, ranging from legal issues such as how exactly to define an “agreement” under the Sherman Act, to mixed legal and economic issues such as how to determine whether aggressive competitive conduct is competition on the merits or exclusionary conduct in potential violation of Section 2 of the Sherman Act, to deep and profound questions about whether our economic models are founded on accurate assumptions and able to make accurate predictions. Moreover, I think it’s indisputable that these ongoing questions within the body of antitrust law and economics are layered onto a socioeconomic backdrop of ongoing disruption, innovation, and sometimes radical change. So I think it is appropriate and healthy from time to time to stop, put up a hand, and ask whether what we’re doing is right, whether there are problems or issues we’ve missed, and whether our analysis could be improved. That process is actually an integral part of the common-law, evolutionary history of antitrust enforcement as we have seen it develop in the U.S. over the last 100 years.

Today, however, I want to focus on a more granular aspect of this issue. Questions have arisen about the FTC’s role in all of this, and in particular, what the FTC has been able to accomplish in the last year, particularly given that during that period we have been working with only two Commissioners, and a succession of Directors of the Bureau of Competition (I am the fourth to serve as Bureau Director or Acting Director since January 2017). I am going to attempt to answer those questions by addressing what we’ve been doing in the competition space over the last year.

Examining the FTC’s record under Acting Chairman Ohlhausen and Commissioner McSweeney shows that two Commissioners have been quite enough to tango. Over the last year, we have been pursuing an aggressive, active enforcement approach, and I have no reason to believe that’s likely to change; if anything, it may accelerate.

The FTC brings a lot of tools to the competition law table. These include advocacy, research and development, investigations, and actions (both consents and litigated matters). The scope of our investigations and actions span both mergers and conduct—unilateral and joint. Understanding the scope of the FTC’s activities over the last year requires assessing each of these areas. I will touch briefly on advocacy and R & D, and then turn to investigations and actions.

The FTC’s Active Competition Law Advocacy and R & D Agenda

In the quest for attention-grabbing litigations, it can sometimes be easy to overlook the extremely important role that advocacy and R & D play in the development of an effective competition law enforcement agenda. In fact, at the FTC we view these two arguably less-glamorous areas as part of the core mission of the agency, and as areas in which we can deliver tremendous bang for the buck. And we believe that we have done just that. For example, during the last year:

- The FTC continued its initiative to advance competition in healthcare, using its full range of policy and advocacy tools. The Commission held a workshop examining competition in prescription drug markets, particularly entry and supply chain dynamics that may prevent competition from keeping prices in check. The agency’s Now Hear This workshop addressed competition, innovation, and consumer protection issues in hearing health care. The FTC also announced a new project to study the impact of certificates of public advantage (COPAs) on prices, quality, access, and innovation for healthcare services.
- Acting Chairman Ohlhausen convened the FTC’s Economic Liberty Taskforce, expanding the FTC’s cooperation with state and federal leaders to identify and eliminate unnecessary or overbroad occupational licensing restrictions that threaten economic liberty, many of which are particularly harmful to military families who relocate frequently. During the last six months, the Task Force held two roundtables on the effects of occupational licensing restrictions, which include harm to competition, leading to higher prices, lower quality, and reduced consumer access to services and goods, and the Acting Chairman also hosted Voices for Liberty, a fireside chat featuring individuals who have been affected by undue occupational licensing restrictions. As someone who grew up in Miami, and still considers himself basically a Miamian, this hits particularly home for me. Miami is a community of business startups, of hard workers striving to climb onto what our former Chairman Tim Muris called “the first rungs of the economic ladder.” Many of the licensing restrictions we have discovered have the potential to raise that ladder, putting those crucial first rungs further and further out of reach. That is something that all Americans should be concerned about—and that competition authorities can and should address at every opportunity.
- The FTC has submitted multiple comments to state legislatures on various competition issues, as well as participating in international fora and in intragovernmental competition discussions within the federal government.
- We have filed several amicus briefs in various federal courts, and are always looking for other appropriate cases in which to do so (and welcome efforts to bring to our attention cases in which an amicus might be helpful). We have several amicus briefs in the pipeline, and hope to file them in the near future.
- Of course, also at the beginning of last year, we released the Remedies Study, which took an unflinching look at the efficacy of our remedies. While generally positive, the study showed some areas in which we could improve—a subject I’ll turn to in a few minutes.

Investigations and Actions

As antitrust enforcers, we analyze each merger or conduct matter independently and base our judgment on the facts we collect in real time. As Acting FTC Chairman Ohlhausen pointed out at this conference last year, U.S. antitrust enforcers “guard the competitive process.”²

² Remarks of Acting Chairman Maureen K. Ohlhausen, *The FTC’s Path Ahead*, Feb. 3, 2017, available at https://www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftp_path Ahead.pdf. Acting Chairman Ohlhausen also discussed claims that the U.S. lacks adequate competition. *See also id.* at 4-5.

Well, then—what are we actually doing in BC to guard the competitive process? Because FTC investigations are non-public, much of our work is hidden from public view, but you can rest assured that to the greatest of our abilities, and within the resources we have, we are closely monitoring companies across all the sectors of the economy. Here are a few things that I can discuss.

First, just in terms of sheer number of filings where we sought or obtained relief from parties involved in anticompetitive transactions, we filed 26 cases—including contested litigations and consents. My sophisticated math skills tell me that that’s a bit over two per month—not bad for a two-member Commission.

That overall number includes:

- Four contested merger litigations (two of which we filed just recently, in December);
- Two contested conduct cases;
- Seventeen merger consents; and
- Three non-merger consents.

Separately, five additional mergers were abandoned due to a threatened challenge (I can’t, of course, specify which they were).

Mergers

Let me turn in somewhat more detail to merger enforcement. I think it’s important to stress that we have been, and intend to be, thorough and aggressive on merger enforcement. To go back to Professor Shapiro’s paper, one of the points he makes is that a number of studies suggest that mergers tend to lead to increased markups—perhaps more frequently than we would expect—and tend to be less likely to produce efficiencies that benefit consumers than we might have thought. While this may not require a radical revision of our antitrust laws, it does suggest that the risk of erroneously inflicting harm by being somewhat more aggressive may be less than the risk of erroneously inflicting harm by being too willing to accept marginal mergers, or risky or incomplete remedies.

Thus, we have been conducting, and intend to continue to conduct, very careful reviews of horizontal mergers. During Acting Chairman Olhausen’s tenure, we have filed 21 litigations challenging mergers. I do not think this is a fluke or outlier. In the face of horizontal mergers that meaningfully increase concentration, we will be appropriately skeptical of arguments that likely competitive harm will not occur, such as the argument advanced in *Sanford* that a powerful buyer obviates any risk of harm. We will look at testimony, business documents—empirical evidence—and economic theory with great care, and will be appropriately skeptical of arguments that straightforward theories of harm—based on the capabilities and incentives created by a merger—will be offset by good intentions, or hypothetical future actions, as in *Tronox*. As the *OttoBock* case shows, we are very concerned about innovation harms in mergers, and as I’ve recently said, we are very interested in vertical mergers.

I want to say a bit more about some of our merger cases, subject of course to the limitation that I can't say much about cases in active litigation.

DraftKings/FanDuel

This merger combined the two largest daily fantasy sports sites, DraftKings and FanDuel. These sites arose due to the ability of internet technology to allow nearly instantaneous fantasy sports activities involving participants from across the country—a great example of technology changing a more traditional activity into something new. We rejected arguments that the relevant market included other forms of fantasy sports activities (and other entertainment options), and focused on the close competition between the firms on multiple dimensions, including price as well as innovation. About a month after we took the companies to court, they abandoned the transaction.

Sanford

This case involved a merger between the two largest health care providers in the Bismarck area of North Dakota. The merger would effectively have been a merger to monopoly in four physician services, including primary care and obstetrics.

- In December, following a four-day evidentiary hearing the previous month, the District of North Dakota issued a 69-page opinion granting the motion for a preliminary injunction sought by the FTC and the Attorney General's Office of North Dakota.
- The merging parties have filed an appeal of the district court's preliminary injunction decision.
- The basic issue in this case is quite interesting from an antitrust enforcement standpoint—does a powerful buyer effectively eliminate the threat of competitive harms from a merger to monopoly? Our view was unequivocally no, on both the facts and the economics—as well as on legal theory. Power buyers can matter, but it's very unlikely that any buyer, no matter how powerful, can offset the anticompetitive effects of a merger to monopoly. The district court, in a thorough and well-reasoned opinion, agreed.
- Relatedly, the parties also argued that the presence of a powerful buyer required changing the entire market definition calculus. Inventing something they dubbed the “actual monopolist test” to replace the Merger Guidelines' hypothetical monopolist test, the parties argued that the fact that Blue Cross Blue Shield of North Dakota used statewide pricing, including in parts of the state with highly concentrated provider markets such as Minot, meant that no SSNIP could be imposed anywhere in North Dakota regardless of how many providers merged, and thus the market must be larger than North Dakota. This was factually incorrect, and also led to the absurd conclusion that every provider in North Dakota should therefore be allowed to merge to a complete monopoly of all provider services. Moreover, it created a new legal test out of whole cloth, and fundamentally misapprehended the purpose and proper application of the hypothetical monopolist test, which asks whether enough switching to alternative products would occur *if prices actually increased* to render the price increase unprofitable.³ Again, the

³ This is the question for market definition. Whether prices would actually increase after the particular merger under review is consummated is a question of anticompetitive effects—not market definition.

district court had no difficulty rejecting this argument, and we hope to persuade the 8th Circuit that Sanford's attempt to overturn the District Court should fail.

Tronox

- In December, the Commission voted to issue an administrative complaint and to authorize staff to seek a temporary restraining order and preliminary injunction in federal court challenging Tronox's proposed acquisition of competitor Cristal.
- The companies are two of the top suppliers of chloride process titanium dioxide, a pigment used in such products as paint, plastic, and paper.
- Staff's Administrative Complaint alleges that the acquisition would allow the merged firm and the other top supplier, Chemours Company, to control the vast majority of chloride titanium dioxide sales to North American customers.
- The Complaint also alleges that the North American market is already dominated by a few large players with a history of seeking to support higher prices by restricting production, and the merger would significantly increase the risk of coordinated action and harm.

Otto Bock

- Also in December, the Commission voted to issue an administrative complaint challenging Otto Bock's consummated acquisition of Freedom Innovations, which combined two of the top sellers of prosthetic knees equipped with microprocessors.
- Staff's Complaint alleges that the merger eliminates head-to-head competition between the two companies, removing a significant and disruptive competitor, and entrenching Otto Bock's position as the dominant supplier of microprocessor prosthetic knees.
- Given the integration that had already occurred since the acquisition closed in September, Otto Bock agreed to a Hold Separate and Asset Maintenance Agreement under which the company will take steps to ensure the preservation and health of the former Freedom Innovations business.
- A particularly vital aspect of this case, as I mentioned above, is its focus on innovation. Much of the competition between Otto Bock and Freedom took the form of developing newer and better products. We are concerned that the merger will eliminate that innovation competition.

Let me turn from cases we've brought to some other important aspects of enforcement—specifically, remedies. Some of you may have noticed—I certainly did from the outside—that the FTC has been increasingly inquisitive and tough on remedies. We intend to continue strictly enforcing the requirements for remedies. And, as I mentioned earlier, we are trying to learn from experience, particularly the recent remedies study. One important example of that learning is that parties should expect that in transactions where complex pharmaceutical products such as inhalants or injectables need to be divested, we will require the divestiture of contract manufacturing capabilities rather than other assets, such as pipeline products. Based on a history of problems with divestitures in this area, our view is that divesting ongoing manufacturing rather than products that haven't yet come to market places the greater risk of failure on the merging firms, rather than the American public. Since, in the context of merger remedies, we are

considering divestitures or other remedies as a fix to an otherwise anticompetitive merger, it is entirely proper that the risk of failure be placed on the parties to the merger.

Aggressive enforcement also includes being appropriately strict on process. We have been concerned about some recent situations involving HSR filing—watch this space for possible further developments. And, as I indicated in a blog post earlier this year, we want to make sure that parties understand we expect the HSR submission include all of the terms of any transaction—whether some of those terms are in a side agreement or not.

I also want to underscore that we will treat with the utmost seriousness any attempt to impede our investigations or enforcement actions—mergers or conduct—by tampering with evidence, including threatening or retaliating against witnesses. An issue we frequently face is reluctance by non-party witnesses to speak with us—or testify—out of fear of reprisals. We have seen recent cases where parties in fact have done exactly that, and we have taken appropriate action. I'd like to briefly outline what that appropriate action might encompass.

We consider witness tampering or retaliation to be any attempt to change or prevent the testimony of third-party witnesses, or any attempt to punish those witnesses for providing information or testimony, by threatening or inflicting economic or other harm. Regardless of whether the attempt is successful, witness retaliation will trigger a Commission response, and the Commission has several avenues it can use to respond: (1) refer the matter for criminal prosecution; (2) use the witness retaliation evidence in a civil matter to secure an adverse inference or finding; and/or (3) seek appointment of a monitor to protect these witnesses in future business dealings.

As a criminal referral, witness retaliation can be prosecuted under obstruction of justice⁴ or witness tampering⁵ statutes. Successful prosecution under either of these statutes risks jail time and/or significant fines. Given the importance of protecting witnesses, we will not hesitate to call our counterparts at local U.S. Attorneys' offices under appropriate circumstances.

At the same time, we will not be shy in directing a court's attention to witness retaliation evidence in our civil matters. Some jurisdictions allow witness retaliation evidence to come in, similar to a party admission. The rationale is that a party would not attempt to alter a witnesses' testimony unless it had something to fear.⁶ If we learn of witness retaliation in our cases, expect

⁴ “Whoever . . . corruptly, or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . . [by] imprisonment for not more than 10 years, a fine under this title, or both.” 18 U.S.C. § 1503(a), (b)(3).

⁵ “Whoever knowingly uses intimidation, threats, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct towards another person with intent to (1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both.” 18 U.S.C. § 1512(b); *see also United States v. Bear*, Case No. 09-30004, 2009 U.S. Dist. LEXIS 14528, at *5 (D.S.D. Feb. 24, 2009) (noting violations of 18 U.S.C. § 1512 are punishable up to ten years of imprisonment and \$240,000 fine).

⁶ *Great Am. Ins. Co. v. Horab*, 309 F.2d 262, 264 (8th Cir. 1962) (citations omitted). Cases in other circuits and some state courts similarly hold that witness-tampering evidence is admissible against the offending party. *See, e.g.,*

us to put that evidence squarely in front of a judge, seeking an adverse inference, or at a minimum, giving the judge full information with which to weigh your clients' credibility. (And then, of course, expect to read all about it in GCR.)

Finally, the Commission will pursue other necessary means of protecting third-party witnesses, be it seeking sanctions, the appointment of a monitor to safeguard witnesses' future business dealings, or whatever the circumstances may dictate.

So, counsel your clients not to interfere with third parties that may be called for information or testimony in Commission investigations. And if your client has experienced some form of witness retaliation, let's work together to send a message. The Commission is prepared to be vigilant in these matters, but needs your help to identify retaliation when it happens.

Conduct

Let me turn to conduct cases. When I last served at the Commission, under Chairman Muris and then Chairman Majoras, and Bureau of Competition Directors Joe Simons and then Susan Creighton, we pursued a very active conduct case docket. We filed and pursued unilateral, monopolization cases, like Rambus, Unocal, and BMS. We filed and pursued coordinated cases, like Three Tenors, North Texas Specialty Physicians, South Carolina Dentists, Kentucky Movers, and of course, the pay-for-delay cases. We developed and pursued cases falling into the Cheap Exclusion rubric. We were, to put it mildly, not shy about bringing conduct cases.

Turning to the Commission as I returned to it under Acting Chairman Ohlhausen, there's an equally busy conduct case docket, with Qualcomm, 1-800 Contacts, Louisiana Real Estate Appraisers, Impax, the Androgel cases (Abbvie and others), and quite a few others. You can expect more to come. We are actively looking for good conduct cases. And, we are willing to take on cases where the law may not be clear and could usefully be clarified; or where there may be a good case, but private enforcement is unlikely due to the fact that the conduct is new and so hasn't yet inflicted large damages, or because class certification may be difficult, or for other reasons that would not present an obstacle to us.

I want to highlight one particular area of interest. I brought with me today a January 28, 2018 article from the Washington Post by Karen Weese. The article's title is "Why It's so Expensive to be Poor in America." I recommend this article to everyone in the audience. The article points out that across lower-income communities in America, from inner city to rural, costs, charges, and prices are routinely high—higher than is often the case for equivalent goods and services in more affluent communities. The article further points out that the people who bear these higher costs are, in many cases, more vulnerable to suffering severe consequences from any inability to pay them, and that the consequences of missing payments can snowball for them, driving them into intolerable circumstances.

McQueeney v. Wilmington Trust Co., 779 F.2d 916, 922-23 (3d Cir. 1985); *B.A.S. v. Midwest Division-RMC*, Case No. 1416-01845, 2016 Mo. Cir. LEXIS 17, *16-17 (Sept. 27, 2016); *State v. De Groot*, 230 Neb. 101, 107 (1988).

One of the FTC's strengths is that we have in our agency not just competition, but also consumer protection enforcement. And one thing that we have learned in our consumer protection enforcement is that vulnerable communities—low income communities, communities whose residents may have less power, or time, or resources to protect themselves—are often targeted for consumer protection violations such as fraud, false advertising, scams, and others. It seems possible that these communities could also be suffering from anticompetitive conduct—whether unilateral or coordinated—and that might be part of the reason for the high prices and lack of services they often suffer. We recognize that there could be other reasons for a lack of competitive options in low income communities; perhaps costs are higher, or returns lower, or some other factors are preventing competition from addressing some of the economic problems that harm our lower-income communities. But that possibility is not a reason to avoid investigating. And it seems worthwhile to examine these issues from the viewpoint of competition law and policy, not just consumer protection. We welcome your help in that—ideas or suggestions for areas we could explore are welcome.

Conclusion

I started this talk by recognizing the ongoing debate about antitrust enforcement, and the questions about what the FTC has been doing. Let me conclude with two thoughts.

First, as I hope I've indicated, we are not complacent about enforcement. The FTC has been very busy with enforcement actions—not to mention advocacy and our always-active research and development agenda. Two Commissioners (and four Bureau Directors) have proven to be enough to keep pressing forward with an active agenda. I expect that to continue.

Second, we are very aware that there is much that we don't know. Antitrust enforcers' understanding and approach has evolved considerably over the hundred-plus years we've had antitrust laws in the U.S. The antitrust statutes are flexible enough to accommodate current and future development. Indeed, that flexibility is one of the great strengths of our antitrust laws. I think that flexibility has enabled us to continue doing better and better over time. But what will enforcers in the 2030s or 2050s say about us? I can't possibly predict that—but I hope at least that they will say we were willing to admit that we didn't know everything, and we are willing to learn.

Thank you.