



Federal Trade Commission

Remarks of FTC Chairman Deborah Platt Majoras¹

ABA Antitrust Section Masters Program

September 28, 2006

Kiawah Island, South Carolina

Lessons from the Masters

I am honored to again speak at the Masters Program, of which I have been a strong supporter since its birth in 2002 (though I keep waiting for the ABA to hold it at Augusta – now that would be a Masters!). It is no secret to many in this room that I love to play golf (if you could call my hacking around the course “playing golf”), and it is no secret to my staff that I am an enormous fan of Tiger Woods. It is not simply because he wins and is likely on his way to becoming the greatest golfer to ever play the game; it is because he is never satisfied and thus is always trying to do better. And so it is that we have come to this Masters Course, ever aware that our discipline requires that we sharpen our analysis and our execution, wherever we are on the time line of our respective careers (or golf games, for those of you playing the Ocean Course).

I appreciate having the opportunity to talk to you about some of the things that we are doing at the FTC, which I hope reflect a competence well beyond that of my golf game. But in

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

discussing what we are doing, I also am going to reflect a bit on how we are doing it and, in that, I will take a few lessons that I have learned from my favorite new hacking hobby.

1. Look To Your Target

Now in golf, it is essential that, before you start your swing, you look out at your target to establish it firmly in your mind. So it is at the FTC that, in all of our work, we must we keep our eye on the consumer, mindful that we best enhance consumer welfare by promoting and protecting competition, as well as by battling unfair and deceptive practices. This is especially important because those who offer views on actions we might take or refrain from taking always have their own agendas – generally, appropriately so. If you work for a client, your duty is to present that client’s self-interested position, and you will always try to convince us that the position is what also is best for consumers. The interest of the FTC’s client – the consumer – is in ensuring a marketplace characterized by pervasive and relentless competition, and that may or may not correspond to your client’s interest.

2. Use All the Clubs In The Bag

The way I view it, competition is perpetually under siege. In golf parlance, we have long narrow fairways, deep rough, sand bunkers, water hazards, trees, and fast, undulating greens to combat. So, our approach is to champion competition in every arena and protect and defend competition from all attacks. This means, first, using law enforcement against anticompetitive actions by private firms; second, advocating strongly for sound competition policy and analysis in legislatures, government agencies, courts, and around the globe; third, educating our public about the benefits of competition so that it is not taken for granted; and finally, conducting

research to ensure that our analysis and policies are based on market facts and that they are working for consumers. In short, we use all of the clubs in our bag.

With that set up, let me tell you about some of our recent rounds.

3. Repetition, Repetition, Repetition

The FTC's HSR merger enforcement program continues to benefit consumers by preventing anticompetitive mergers that likely would result in higher prices, while not intervening in mergers that might produce lower prices and other market improvements. Merger work continues to consume roughly two-thirds of our competition resources, as merger filings have been climbing steadily in recent years. With just a few days remaining in fiscal year 2006, we have seen 1710 HSR filings – a 6% increase over the 1610 filings that were made in the previous fiscal year. Our merger review staff remains extremely busy: over the past 12 months, we have issued 28 second requests and taken 16 merger enforcement actions – including consent orders in nine transactions and seven transactions in which the parties abandoned the deal as a result of the FTC's concerns.

The merger relief we have obtained for consumers spans multiple, diverse industries. In Procter & Gamble/Gillette,² our Order ensured continued competition for personal care products such as at-home teeth whitening, battery-powered toothbrushes, and men's deodorants; in Teva/IVAX,³ we ensured that competition from generics for certain branded antibiotic drugs

²

In the Matter of The Procter & Gamble Company and The Gillette Company, FTC Docket No. C-4151 (Dec. 16, 2005) (consent order), available at <http://www.ftc.gov/opa/2005/09/pggillette.htm>.

³

In the Matter of Teva Pharmaceutical Industries Ltd., and IVAX Corporation, FTC Docket No. C-4155 (Mar. 7, 2006) (consent order) available at <http://www.ftc.gov/opa/2006/01/tevaivax.htm>.

could continue and thus help control escalating health costs; in Boston Scientific/Guidant,⁴ we preserved competition in the markets for life-saving medical devices such as drug-eluting stents, balloon catheters for coronary angioplasty, and coronary guidewires; in DaVita/Gambro,⁵ and Fresenius/Renal Care,⁶ our Orders protected patients who require regular outpatient dialysis services from higher prices and reduced quality and service; in Enterprise/TEPPCO,⁷ we preserved competition among vital natural gas liquids storage facilities, thereby protecting consumers of derivative products such as plastics, heating fuels, and gasoline; in Linde/BOC,⁸ we prevented a reduction in competition or higher prices for industrial gases such as oxygen, nitrogen, and helium, which play a crucial role in many segments of our economy, including healthcare, oil and gas, agriculture, and manufacturing; and in Allergan/Inamed,⁹ we protected the “beautiful people” by preserving competition for Botox® and dermal fillers.

In addition to HSR merger review, FTC staff actively monitors news and industry sources for consummated or non-HSR reportable mergers, and brings administrative merger cases where appropriate. In early July, we challenged Hologic Inc.’s purchase of the breast

⁴ *In the Matter of Boston Scientific Corporation and Guidant Corporation*, FTC File No. 061 0046 (July 25, 2006) (consent order) available at <http://www.ftc.gov/opa/2006/04/bostonscigui.htm> .

⁵ *In the Matter of DaVita, Inc.*, FTC Docket No. C-4152 (Nov. 18, 2005) (consent order), available at <http://www.ftc.gov/opa/2005/10/davita.htm>.

⁶ *In the Matter of Fresenius AG*, FTC Docket No. C-4159 (July 5, 2006) (consent order), available at <http://www.ftc.gov/opa/2006/03/fresenius.htm>.

⁷ *In the Matter of Dan L. Duncan; EPCO, Inc.; Texas Eastern Products Pipeline Company, LLC; and TEPPCO Partners, L.P.*, FTC File No. 051 0108 (Aug. 18, 2006) (consent order subject to public comment), available at <http://www.ftc.gov/opa/2006/08/teppco.htm>.

⁸ *In the Matter of Linde AG and The BOC Group PLC*, FTC Docket No. C-4163 (Sept. 5, 2006) (consent order), available at <http://www.ftc.gov/opa/2006/07/lindeBOC.htm>.

⁹ *In the Matter of Allergan, Inc., and Inamed Corporation*, FTC Docket No. C-4156 (Apr. 21, 2006) (consent order) available at <http://www.ftc.gov/opa/2006/03/allergan.htm>.

cancer screening and diagnosis business of Fischer Imaging Corporation – a non-reportable transaction that was consummated in 2005.¹⁰ We alleged in our complaint that the acquisition harmed American consumers by eliminating Hologic’s only significant U.S. competitor for the sale of prone stereotactic breast biopsy systems (“SBBS”). Our Consent Order requires Hologic to sell the Fischer prone SBBS assets to Siemens AG, a leader in the business of medical imaging, ensuring that these essential health care services will be available to women at lower prices and higher quality.

Now in golf, repetition of the golf swing is critical; the more times you repeat your swing, the better you will be. And while you may need to vary the club you use or make slight modifications to the swing to adjust to the precise situation, you still play a better round when you can continually repeat the same basic swing. This, I think, is a lot like merger review. Since the FTC and the Antitrust Division adopted the 1992 Merger Guidelines,¹¹ we have been working that same swing, which we duplicate over and over using the same basic analysis. In the Merger Guidelines Commentary¹² that we released earlier this year, we used short summaries of past investigations to explain to the bar and the business community how we at the FTC and Antitrust Division apply particular provisions of the Guidelines in practice. The Commentary shows that our approach to mergers varies according to the market facts, while the basic analysis stays the same – across two different agencies and through different administrations. The more

¹⁰ *In the Matter of Hologic Inc.*, FTC File No. 051 0263 (Aug. 9, 2006) (consent order), available at INK" <http://www.ftc.gov/opa/2006/07/hologic.htm>" <http://www.ftc.gov/opa/2006/07/hologic.htm>.

¹¹ Fed. Trade Comm’n and U.S. Dep’t of Justice, *1992 Horizontal Merger Guidelines*, (issued Apr. 2, 1992, rev’d Apr. 8, 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

¹² Fed. Trade Comm’n and U.S. Dep’t of Justice, *Commentary on the Horizontal Merger Guidelines*, (issued Mar. 2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

we swing (and, for our viewers, the more the antitrust commentators break down our swing), the more predictable the result.

Predictability in law enforcement is, of course, generally good for business. But it may not be as fun or as interesting for our viewers back home, and many antitrust commentators ask why we have not recently litigated a merger case. The answer is simple: we have had not anticompetitive mergers that parties were unwilling to fix to our satisfaction. I can think of three recent cases that we thought were approaching litigation, when two were abandoned, and a settlement was reached in the other. After talking with staff at our agency about this, I have concluded that years of merger decisions under the current Guidelines provide counsel with good information about how the agencies will view a merger, and anticompetitive mergers are scrapped in the Board room or come with a fix.

4. Keep the Swing Compact and Efficient

It also is important, when you play golf, to keep your swing as compact and as efficient as possible; the fewer the “moving parts,” the greater the likelihood of duplicating your swing and making good contact. So it is in merger process, and in February of this year, I announced significant merger process reforms.¹³ These reforms have been implemented fully and are working well. The second request search group size currently averages approximately 35 per party, which is the presumptive limit set forth in the reforms. Also, the majority of our second requests have had two-year (rather than three-year) relevant time periods for most of the non-data specifications. We also believe that merging parties are benefitting from the provisions that

¹³ Reforms to the Merger Review Process (announced Feb. 16, 2006), *available at* <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

allow them to preserve only a small number of back-up tapes and to produce slimmer privilege logs. Most important, Bureau of Competition staff, outside counsel, and the parties have worked constructively to implement the spirit of the reforms, and to negotiate modifications to second requests that ensure that the Commission obtains the information that it needs, while minimizing the burdens on the parties. I commend and encourage you – the very antitrust practitioners who often are entrusted with the important role of negotiating the scope of a second request with agency staff – to continue in this spirit of cooperation.

5. Use the Latest, Best Equipment

One thing you learn about golf nuts is that they are always trying to “buy” a better game. We think if we just have this driver or that putter, our game will magically come together and lead us to the PGA. I have even had friends tell me I should challenge the “deception” of certain golf club makers, because the golf clubs are not hitting the ball as straight and as long as promised! At the FTC, we, too, update our equipment. Our new Electronic Filing System allows parties to submit HSR Notification and Report Forms electronically via the Internet. Once the Form has been processed, it is accessible by the reviewing agencies via a shared database and can be reviewed quickly by our merger review staff located in Washington and in our regional offices. Electronic filing provides faster processing time, improved data entry, and the elimination of expensive and time-consuming duplication of documents. The Filing System is available at www.hsr.gov. The system has been online since June 20, and unfortunately no filings have been made electronically, but several firms have used the site to download the HSR form. So we are counting on you – our computer-savvy next generation antitrust lawyers – to avail yourselves of the new system.

6. Take Your Shots As You Find Them

Now, if merger work is characterized by a lot of play and, consequently, a lot of seven irons out of short rough, nonmerger work involves more 220-yard shots with a hybrid club out of U.S. Open rough over water. With some exceptions, the shots rarely look the same; they take more time to develop; and even after spending time on them, they may come to naught. We have been increasingly focusing over the past year on our nonmerger investigations, devoting substantial effort and resources to identifying the new and creative ways that market participants use to distort or eliminate competition, and we are striving for greater efficiency in our investigations. We are focusing, in particular, on the competitive issues raised by the possession and use of intellectual property (“IP”), and we are continuing to place emphasis on markets that impact consumers most – such as health care, oil and gasoline, real estate, technology, and consumer goods.

Healthcare

Despite the Supreme Court’s decision not to grant the FTC’s petition for *certiorari* in *Schering*,¹⁴ we continue to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry. You may recall that in November 2005, we filed a complaint seeking to permanently enjoin an agreement in which Warner Chilcott – manufacturer of the branded oral contraceptive Ovcon, which is off patent – and Barr Labs, the only potential generic competitor, agreed that Barr would stay out of the market and Warner would pay Barr

¹⁴ *Schering-Plough Corp. v. Fed. Trade Comm’n*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied* 126 S. Ct. 2929 (2006).

\$20 million in exchange for a five-year exclusive license to its generic Ovcon product.¹⁵ As we allege in the complaint, Warner asked Barr for this agreement when it realized that Barr would enter the market before Warner had a chance to launch its new chewable version of Ovcon, which was patent protected. For Barr's strategy of switching all Ovcon patients to the chewable to work, it could not permit Barr to enter. Very recently our staff learned that Warner launched its new chewable and was beginning to move the market away from regular Ovcon before entry of the generic version.

Concerned that such a switch strategy could essentially destroy the market for generic Ovcon before the court resolves the Commission's challenge to Warner's agreement with Barr, on Monday, September 25, the Commission filed a motion for preliminary injunctive ("P.I") relief.¹⁶ The P.I. motion seeks not to prevent Warner from launching its new product, but to limit Warner's ability to abandon regular Ovcon during the pendency of the litigation. Immediately following the filing of our P.I motion, Warner Chilcott issued a "prospectus supplement" as part of its IPO process, announcing, among other things, that it had reviewed its agreement with Barr relating to Ovcon and decided to waive the exclusivity provisions contained therein. On Tuesday, Barr announced that it plans on launching its generic Ovcon next month.¹⁷ Removal of the exclusivity provision is, of course, one of the main items of relief the FTC is seeking in this

¹⁵ *Fed. Trade Comm'n v. Warner Chilcott Holdings Co.* (Nov. 7, 2005) (complaint), available at <http://www.ftc.gov/opa/2005/11/galenbarr.htm>.

¹⁶ *Warner Chilcott Says FTC Files New Motion on Ovcon*, REUTERS, Sept. 26, 2006 (available at YPERLINK"http://today.reuters.com/news/ArticleInvesting.aspx?type=fundsNews2&storyID=2006-09-26T055435Z_01_WEN5927_RTRIDST_0_HEALTH-WARNERCHILCOTT-URGENT.XML" http://today.reuters.com/news/ArticleInvesting.aspx?type=fundsNews2&storyID=2006-09-26T055435Z_01_WEN5927_RTRIDST_0_HEALTH-WARNERCHILCOTT-URGENT.XML).

¹⁷ *Barr to Market Generic Contraceptive*, AP, Sept. 26, 2006 (available at <http://news.moneycentral.msn.com/provider/providerarticle.asp?feed=AP&Date=20060926&ID=6002411>).

matter. We are evaluating whether to continue to prosecute the P.I. motion as we think through the ramifications of the waiver and Barr's announcement.

We also continue to investigate patent settlement agreements between pharmaceutical companies that are required to be filed with us under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.¹⁸

On May 17, the Commission heard oral arguments on the appeal of the *Evanston Northwestern Healthcare Corporation* ("Evanston") matter.¹⁹ The FTC's Administrative Law Judge ("ALJ") had found in October 2005 that Evanston completed acquisition of an important competitor, Highland Park Hospital, resulting in higher prices and a substantial lessening of competition for acute care inpatient services in parts of Chicago's northern suburbs.²⁰ The Commission's decision on this appeal and on the ALJ's order requiring the divestiture of Highland Park Hospital is forthcoming.

Also in the healthcare industry, we continue to bring enforcement actions against the most basic and perhaps most pernicious anticompetitive behavior – price fixing among horizontal competitors – often physicians. Since 2002, we have brought almost 30 cases challenging illegal agreements between physicians to boycott third-party payors and fix the prices they will charge, including three in the last year. We are mindful, however, that there can be procompetitive agreements among physicians, both financial risk-sharing joint ventures and

¹⁸ See *Medicare Prescription Drug and Improvement Act Requires Drug Companies to File Certain Agreements with the Federal Trade Commission and U.S. Department of Justice* (Jan. 2004), available at <http://www.ftc.gov/os/2004/01/040106pharmrules.pdf>.

¹⁹ *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, FTC Docket No. 9315, available at <http://www.ftc.gov/opa/2005/10/evanston.htm>.

²⁰ *Id.* (Oct. 20, 2005) (initial decision by Chief ALJ McGuire), available at <http://www.ftc.gov/opa/2005/10/evanston.htm>.

clinical integration arrangements. We therefore will continue to consider seriously physicians' efficiency claims and to advise physicians about how proposed arrangements may or may not violate the antitrust laws.

Real Estate

We also have been quite focused on restrictive practices in residential real estate brokerage. In July, we charged Austin Board of Realtors ("ABOR"), a group whose members are competing real estate brokerage professionals, with violating Section 5 of the FTC Act by collectively agreeing to enforce a rule that limited the ability of consumers who use low-cost real estate brokers to market their home listings on important public Web sites.²¹ ABOR operates the Multiple Listing Service in Austin, Texas. ABOR's rule made MLS listing information available to public Web sites only if the home seller had entered into a traditional full-service real estate broker listing agreement. The FTC's Consent Order prevents ABOR from adopting rules that treat one type of real estate listing agreement more favorably than another.²² The Order contains a proviso that preserves ABOR's ability to adopt or enforce any rule that is reasonably ancillary to legitimate and beneficial objectives of the MLS. The Commission expects to bring additional real estate cases in the near future and will continue to prioritize our efforts to preserve competition in this important sector, which greatly impacts so many of us.

Rambus

²¹ *In the Matter of Austin Board of Realtors*, FTC File No. 051 0219 (July 13, 2006) (complaint), available at <http://www.ftc.gov/opa/2006/07/austinboard.htm>.

²² *Id.* (Sept. 5, 2006) (consent order), available at <http://www.ftc.gov/opa/2006/09/fyi0657.htm>.

The Commission’s opinion in the *Rambus* case was released in early August.²³ *Rambus* illustrates how a competitor may use its IP to harm its competitors and the competitive market process. In our unanimous opinion by Commissioner Harbour, the Commission determined that Rambus, a computer technology developer, unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for DRAM, or dynamic random access memory.²⁴ Through a course of deceptive conduct, Rambus was able to distort a critical standard-setting process and engage in anticompetitive “hold up” of the computer memory industry. Rambus’ acts of deception constituted exclusionary conduct under the standards of Section 2 of the Sherman Act and contributed significantly to Rambus’ acquisition of monopoly power in the four relevant markets. The Commission will determine the appropriate remedy after briefing by both sides, which began earlier this month.

Kentucky Household Goods Carriers Association

We recently received good news on the appeal of another one of our Part III matters. On August 22, the Sixth Circuit Court of Appeals denied the Kentucky Household Goods Carriers Association’s (the “Association”) petition for review.²⁵ In an opinion released in June 2005, the Commission determined that the Association’s ratemaking activities constituted unlawful horizontal price fixing and were not exempt from the antitrust laws under the state action

²³ *In the Matter of Rambus Incorporated*, FTC Docket No. 9302 (Aug. 2, 2006) (opinion of the Commission and final order), available at <http://www.ftc.gov/opa/2006/08/rambus.htm>.

²⁴ *Id.*

²⁵ *Ky. Household Goods Carrier Ass’n v. Fed. Trade Comm’n*, 2006 U.S. App. LEXIS 21864 (6th Cir. Aug. 22, 2006).

doctrine.²⁶ The Sixth Circuit agreed with the Commission that the requirements of the state action doctrine were not satisfied, and specifically that there was not enough evidence to show that the relevant state agency actively supervised the Association's ratemaking activities.

Valassis

One additional recent FTC nonmerger case that you may find interesting is the case against Valassis Communications, Inc., announced, along with a Consent Order, in March 2006.²⁷ The Consent Order settled charges that Valassis had invited its competitor, News America Marketing, to collude and eliminate price competition in the American market for free-standing newspaper inserts, the multi-page booklets found in newspapers containing discount coupons for various products. This case is somewhat unique in that previous FTC actions challenging invitations to collude generally have addressed private conversations between the competitors.²⁸ Here, the invitation was a public communication in a July 2004 public call with security analysts. The Commission's complaint alleged that, in this call, Valassis invited News America Marketing to join a scheme to allocate customers and fix prices, thereby ending an ongoing price war between the two competitors and raising prices for the inserts. News America Marketing did not accept the offer. In charging that Valassis's invitation to collude was unlawful, the Commission considered the substance and context of the communication, including the intent, likely effect, and business justification for the communication. Here the Commission

²⁶ *In the Matter of Kentucky Household Goods Carriers Association, Inc.*, FTC Docket No. 9309 (June 22, 2005) (opinion of the Commission and final order), available at <http://www.ftc.gov/opa/2005/06/kentuckymovers.htm>.

²⁷ *In the Matter of Valassis Communications, Inc.*, FTC Docket No. C-4160 (Apr. 28, 2006) (consent order), available at <http://www.ftc.gov/opa/2006/03/valassis.htm>.

²⁸ In *Stone Container Corp.*, 125 F.T.C. 853 (1998), the Commission alleged that an invitation to collude consisting of both public and private communications was illegal.

found that Valassis's communication was made with extraordinary specificity, including detailed information on future pricing plans that would not have been publicly communicated but for the effort to induce collusion, and that Valassis had no legitimate business justification to disclose this information. The Commission's Consent Order prohibits Valassis from inviting collusion and from actually entering into or implementing a collusive scheme.

7. Freely Give Advice to Others

Now, golf is a fairly social game, and if you want to make friends on the course, the best way to do it is to freely give advice to others about their golf games, particularly after someone has just pitched their 5-iron into a lake in utter disgust. O.k., o.k., you don't really want to do that! At the FTC, though, we have steadily been increasing our efforts to advocate for pro-consumer decisions and competition policy wherever they are being made. In the past year, the FTC and its staff have advised state legislatures and other agencies regarding a dizzying array of issues such as the sale of goods through online auction houses (*e.g.*, eBay),²⁹ the unauthorized practice of law,³⁰ attorney participation in online legal matching Web sites,³¹ attorney

²⁹ FTC Staff Comment to the Honorable Noble E. Ellington Concerning Louisiana S.B. 642 to Define More Clearly the Type of Seller That Must be Licensed as an Auctioneer (May 2006), *available at* <http://www.ftc.gov/os/2006/06/VO60015CommentstoLouisianaStateSenateImage.pdf>.

³⁰ FTC Staff Comment Before the Office of Court Administrator of the New York State Unified Court System Concerning Proposed Amendments to Rules Governing Attorney Advertisements (Sept. 2006), *available at* <http://www.ftc.gov/os/2006/09/V060020-image.pdf>.

³¹ FTC Staff Comment Before the Professional Ethics Committee of the State Bar of Texas Concerning Online Attorney Matching Programs (May 2006), *available at* <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>.

advertising,³² whole-grain food labeling³³ qualified health claims,³⁴ medical privacy rules,³⁵ child protection registries,³⁶ auctions for advanced wireless services licenses,³⁷ direct-to-consumer wine shipments,³⁸ wine wholesale franchises,³⁹ alcoholic beverage labeling,⁴⁰ and real estate brokerage services.⁴¹

In one recent successful advocacy effort, for example, the FTC and DOJ jointly filed comments with the New York State Assembly Committee on the Judiciary opposing proposed

³² FTC Staff Comment Before the New Jersey Supreme Court Concerning Attorney Advertising (Mar. 2006), *available at* <http://www.ftc.gov/be/V060009.pdf>.

³³ FTC Staff Comment Before the Food and Drug Administration In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grain Label Statement (Docket No. 2006-0066) (Apr. 2006), *available at* <http://www.ftc.gov/os/2006/04/v060014FTCStaffCommentstotheFDAReDocketNo2006-0066.pdf>.

³⁴ FTC Staff Comment Before the Food and Drug Administration In the Matter of Assessing Consumer Perceptions of Health Claims (Docket No. 2005N-0413) (Jan. 2006), *available at* <http://www.ftc.gov/be/V060005.pdf>.

³⁵ FTC Staff Comment to the Honorable Barbara S. Matthews Concerning California S.B. 401, to Amend the California Confidentiality of Medical Information Act (Jan. 2006), *available at* <http://www.ftc.gov/be/V050020.pdf>.

³⁶ FTC Staff Comment to the Honorable Carol Fukunaga Concerning Hawaii S.B. 2200, A Bill to Create a Child Protection Registry and Prohibit Certain Unwanted Commercial Email Messages (Mar. 2006), *available at* <http://www.ftc.gov/os/2006/04/V060012FTCStaffCommentReHawaiiSenateBill2200Image.pdf>.

³⁷ FTC Staff Comment Before the Federal Communications Commission in the Matter of Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006 (Mar. 2006), *available at* <http://www.ftc.gov/os/2006/03/ReplyoftheFTCBureauofEconomicsOnFCCAWSAuctionAUDocket06-30.pdf>.

³⁸ FTC Staff Comment to the Honorable Paula Dockery Concerning Florida S.B. 282, A Bill to Allow Direct Shipment of Wine to Florida Consumers From Manufacturers Inside or Outside Florida (Apr. 2006), *available at* <http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf>.

³⁹ FTC Staff Comment to the Honorable Bill Seitz Concerning Ohio H.B. 306 to Amend the Operation of Wine Wholesale Franchises (Dec. 2005), *available at* <http://www.ftc.gov/os/2005/12/051212cmntohiolegiswinefranchis.pdf>.

⁴⁰ FTC Staff Comment Before the Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau Concerning Alcohol Labeling (Sept. 2005), *available at* <http://www.ftc.gov/os/2005/09/050926tabaccocomment.pdf>.

⁴¹ FTC and Department of Justice Comment to the Honorable Alan Sanborn Concerning Michigan H.B. 4849 to Impose Minimum Service Requirements on Real Estate Brokers (Oct. 2005), *available at* <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf>.

legislation to expand the scope of activities constituting the unauthorized practice of law.⁴²

Presently, parties to a real estate transaction in New York routinely rely on non-attorneys to conduct title abstracting and to prepare basic transactional documents. The proposed legislation would define all such work as the practice of law and by definition exclude non-attorneys from nearly all aspects of real estate transactions. Without a clear showing that non-attorney provision of such services has caused consumer harm, the agencies concluded that the proposed legislation is not in the best interest of consumers. The legislative session ended without any action taken on the bill.

In another recent success, the FTC staff sent a letter to a Florida State Senator in response to her request for staff's views on a bill that would allow the direct shipment of wine to Florida consumers from wineries either inside or outside the state, provided certain requirements are met.⁴³ The proposed legislation was designed to bring Florida law into compliance with the recent Supreme Court decision in *Granholm v. Heald*,⁴⁴ which held that the laws of Michigan and New York that discriminated against out-of-state wineries and in favor of in-state wineries in the sale and shipping of wine within those states violated the Commerce Clause. FTC staff concluded that, if enacted, the proposed legislation would enhance consumer welfare and allow Florida to meet its other public policy goals. Although the bill was not enacted by the Florida legislature during the past legislative session, neither was a competing, potentially anti-

⁴² FTC and Department of Justice Comment to the Honorable Helene E. Weinstein Regarding New York A.B. A05596 to Establish that Certain Services Related to Real Estate Transactions May be Provided Only by Attorneys (June 2006), available at <http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf>.

⁴³ See *supra* note 38.

⁴⁴ *Granholm v. Heald*, 544 U.S. 460 (2005).

competitive bill that would prohibit direct shipping by wineries producing more than 250,000 gallons of wine annually. Thus, until relevant legislation is enacted, Florida consumers may continue to order wine directly from out-of-state wineries pursuant to a court order that invalidated Florida's ban on such interstate wine shipments.

In other efforts to advise policymakers outside the antitrust community over the past year, the Commission has prepared testimony and made witnesses available to testify before U.S. Congressional committees exploring competition issues ranging from legislative proposals to prohibit gasoline price gouging, petroleum industry concentration, real estate brokerage services,⁴⁵ auto repair industry reforms,⁴⁶ contact lens sales and distribution practices,⁴⁷ competition in group healthcare,⁴⁸ broadband and Internet competition,⁴⁹ and barriers to entry

⁴⁵ *Competition in the Real Estate Brokerage Industry: Hearing Before the H. Subcomm. on Housing and Community Opportunity* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), available at <http://www.ftc.gov/os/2006/07/CompetitionintheRealEstate%20BrokerageIndustry%20estimony%20ouse07252006.pdf>.

⁴⁶ *Right to Repair: Industry Discussion and Legislative Options: Hearing Before the H. Subcomm. on Energy and Commerce, Comm. on Commerce, Trade, and Consumer Protection* (2005) (Prepared Statement of the FTC, Presented by James A. Kohn), available at <http://www.ftc.gov/os/testimony/051110autorepairtest.pdf>.

⁴⁷ *Consumer Protection and Competition Issues Concerning the Contact Lens Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), available at http://www.ftc.gov/os/testimony/060915_v040010cpcicontactlensindustryhouse.pdf.

⁴⁸ *Competition in Group Health Care: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by David P. Wales), available at <http://www.ftc.gov/os/testimony/P859910CompetitioninGroupHealthCareTestimonySenate09062006.pdf>.

⁴⁹ *FTC Jurisdiction Over Broadband Internet Access Services: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by William E. Kovacic), available at <http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf>.

and competition by generic drugs.⁵⁰ Moreover, in recent months FTC commissioners, senior staff members, and I have testified before the Antitrust Modernization Commission to aid its examination of proposals to modify existing U.S. competition laws.⁵¹

The Commission also has achieved significant advances in antitrust law through the filing of *amicus curiae* briefs, often in cooperation with the Department of Justice. In the past year, the Supreme Court has adopted the Commission's position in three major cases, clarifying important areas of the antitrust laws, to the benefit of consumers and the American economy. In *Texaco, Inc. v. Dagher*, the FTC and the DOJ's Antitrust Division urged the Court to reverse a ruling of the Ninth Circuit that had found decisions by two companies, about the pricing of products sold by a joint venture that they had established following FTC review, could amount to *per se* antitrust violations.⁵² The Supreme Court unanimously agreed, accepting the Commission's argument that such pricing decisions did not eliminate any competition that otherwise would have existed. In *Illinois Tool Works v. Independent Ink*, the U.S. Court of Appeals for the Federal Circuit had erroneously read older Supreme Court precedent as establishing that a patent-holder presumptively has market power by virtue of the patent.⁵³ The FTC and DOJ filed an *amicus* brief urging the Supreme Court to reverse, arguing that there is no

⁵⁰ *Barriers to Generic Entry: Hearing Before Senate Special Committee on Aging* (2006) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), available at <http://www.ftc.gov/os/2006/07/P052103BarrierstoGenericEntryTestimonySenate07202006.pdf>.

⁵¹ *Antitrust Modernization Committee Hearing* (Mar. 21, 2006), (Prepared statement of Deborah Platt Majoras, Chairman, FTC), available at <http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf>; *Antitrust Modernization Committee Hearing* (Sept. 29, 2005) (Prepared Statement of Maureen K. Ohlhausen).

⁵² *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276 (2006), brief available at <http://www.ftc.gov/os/2005/09/050913texacobrief.pdf>.

⁵³ *Ill. Tool Works v. Indep. Ink*, 396 F.3d 1462 (Fed. Cir. 2005).

economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent, copyright, trademark, or other intellectual property right.⁵⁴ Again, the Court unanimously agreed. Finally, in *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, the Eighth Circuit Court of Appeals had held that a plaintiff dealer can establish price discrimination in violation of Section 2(a) of the Robinson-Patman Act even if it cannot show that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.⁵⁵ At the urging of the FTC and DOJ, the Supreme Court reversed.⁵⁶ In each of these three cases, the FTC argued against a rigid doctrinal rule that would chill efficient business conduct and thereby harm consumers, and urged the Supreme Court instead to adopt an approach that allows a more flexible economic analysis.

Our efforts to promote sound competition policy and consumer welfare do not stop at the U.S. border. The FTC continues to promote bilateral cooperation and coordination with foreign agencies investigating mergers and other matters under review by the FTC to ensure consistent analyses and compatible outcomes. We also provide input to foreign agencies on new laws and policy initiatives, including on, among others, the European Commission's Article 82 review and China's draft competition law. We conduct bilateral consultations with the heads of many of the world's major competition agencies and we promote convergence toward best practices with foreign antitrust agencies through multilateral fora. Currently, we are co-heading the ICN's new working group on unilateral conduct and its subgroup on the objectives of monopolization law

⁵⁴ *Indep. Ink v. Ill. Tool Works*, 126 S. Ct. 1462 (2006), brief available at <http://www.ftc.gov/os/caselist/illinoistools/050805briefillioistools.pdf>.

⁵⁵ *Reeder-Simco GMC, Inc. v. Volvo Trucks North America*, 374 F.3d 701 (8th Cir. 2004).

⁵⁶ *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), brief available at <http://www.ftc.gov/os/2005/05/050527volvobrief.pdf>.

and policy, and we continue to play a lead role in the ICN Steering Group and Working Groups, including heading subgroups on merger notification and procedures and on the provision of technical assistance. We also are active in the OECD Competition Committee, which will hold programs on, among other topics, competition and innovation, vertical merger analysis, the interface of competition and consumer protection, and evaluation of enforcement actions. We continue to represent the FTC in U.S. delegations negotiating competition chapters of free trade agreements with Korea and possibly other countries, and we provide technical assistance to new competition agencies around the world, such as those in India, Russia, Southeast Asia, and the Andean region, on drafting legislation and guidelines, establishing new agencies, and all aspects of law enforcement.

8. You Can Always Use Another Lesson, Read Another Book

Now, the hidden reason that so many over-achieving, neurotic lawyers like to play golf is because the search for the better game is never over; it is like the search for the holy grail. Likewise, at the FTC, our search for a better understanding of markets and for better ways to do our job for consumers is never over.

This summer, the FTC and DOJ successfully kicked off our series of public hearings to examine more closely whether and when specific types of single-firm conduct may harm consumers and violate Section 2 of the Sherman Act.⁵⁷ At the opening hearing on June 20, Professors Dennis Carlton and Herbert Hovenkamp joined Assistant Attorney General Tom Barnett and me in offering opening remarks. During a moderated panel discussion, we discussed

⁵⁷ Information on the Section 2 hearings available at <http://www.ftc.gov/os/sectiontwohearings/index.htm>.

some of the complex issues that single-firm conduct raises for competition policy, but also talked about the existence of consensus about many core underlying economic principles for analyzing unilateral behavior. We believe that we can draw upon this consensus to increase our knowledge of single-firm conduct and further develop the law. Since the opening event, we have held hearings on predatory pricing, refusals to deal, international issues, and empirical perspectives. We look forward to continuing our series of hearings, which involve a wide-range of panelists, over the coming months.

Sometimes in our research we focus on an area of the law, like Section 2, and sometimes we focus on a particular industry or market issue. Last month, I announced that I had convened the Internet Access Task Force, led by Maureen Ohlhausen, Director of our Office of Policy Planning, and made up of participants from throughout the agency.⁵⁸ The purpose is to further develop our agency's expertise in the area of Internet access, which has become an important public issue. The Task Force soon will release a working paper on competition issues relating to the provision or facilitation of wireless Internet service (or wi-fi) by municipalities to their citizens, including recommendations for policymakers. Currently, the Task Force is studying the so-called "net neutrality" issue.

Net neutrality has been variously defined and may mean different things to different people. On one level, it appears to mean that Internet users should have the freedom to access and use the Internet as they choose, without any restriction by network providers. On another but related level, it means, at a minimum, the right of content providers to unfettered access to

⁵⁸ *FTC Chairman Addresses Issue of "Net Neutrality,"* Aug. 21, 2006, available at <http://www.ftc.gov/opa/2006/08/neutrality.htm>.

the many privately owned networks that comprise the Internet and may also mean that all data transmissions are assigned equal priority as they are passed along from network to network in cyberspace. Fear of restrictions or discrimination in access has led proponents of net neutrality to seek legislation that would, for example, prohibit broadband providers from discriminating against any person's ability to use a service to access or provide lawful content, from refusing to interconnect facilities with another service provider on reasonable and non-discriminatory terms, or from charging a fee for prioritizing transmission of particular types of data. The key question is whether government regulation is necessary to protect consumers and competition on the Internet or whether the market itself under existing laws will provide the solution for the problem. The Task Force will examine these issues in depth, through research, meetings with outside parties and experts, and other means, and will continue looking for new issues to examine. Their efforts will be used to educate the Commission and the public, and to inform our enforcement and advocacy efforts.

Also well underway is our Authorized Generics Study. Brand-name drug manufacturers increasingly have begun to market authorized generic drugs at the same time that a paragraph IV generic is beginning its period of 180-day marketing exclusivity under Hatch-Waxman. The FTC is conducting a study to analyze the use and likely short- and long-run competitive effects of authorized generic drugs in the prescription drug marketplace. FTC staff currently are refining their work plan for the study in response to comments received on our first Federal Register notice.⁵⁹ We are preparing to publish the required second notice – responding to the first round of comments – and to submit a statement to OMB seeking its approval for the study.

⁵⁹ *Federal Register* Notice for the Study of Authorized Generics (March 29, 2006), available at <http://www.ftc.gov/os/2006/03/P062105AuthorizedGenericDrugStudyFRNotice.pdf>.

We expect to begin gathering study data later this fall.

In the near term, we plan to release several significant reports: the second joint FTC/DOJ report on competition policy and intellectual property; the staff working paper on competition issues in the provision of municipal wi-fi, which I mentioned earlier; a report with DOJ on the joint real estate workshop that the agencies held last October;⁶⁰ and a staff report by our Office of Policy Planning and Bureau of Competition that provides enforcement perspectives on the *Noerr-Pennington* doctrine.

⁶⁰ Information on the real estate workshop available at <http://www.ftc.gov/bc/realestate/workshop/index.htm>.

9. **Keep Your Head Down**

I consider our policy work to be a high priority. Equally important is that we “play it straight.” In golf, you must keep your head down and avoid distractions; the focus is on the ball and the target. Our approach to finding answers to market questions is quite similar – we have to keep our head down, stay focused on our target, and play it straight. In no area has this approach been tested as much as in our work in petroleum markets.

The petroleum industry continues to be a key focus of FTC investigative and enforcement resources. In light of the enormous importance of petroleum products to consumers and businesses throughout the nation, there is no other industry in which it is so important for law enforcers to “get it right” in terms of the thoroughness and airtightness of our investigations, the precision of our analysis based on solid economic theory and empirical work, and the soundness of our judgment in reaching enforcement decisions. Over the past year, we have completed important law enforcement investigations and reports, and we continue to investigate and study the industry closely.

In May, we delivered to Congress our report on whether gasoline prices have been manipulated and whether gasoline price gouging occurred after Hurricane Katrina.⁶¹ Examining multiple levels of the petroleum industry – including refining and bulk distribution – the Commission investigated various means by which oil companies might have manipulated the supply of gasoline in order to increase prices. We found no evidence that the companies were engaging in such behavior. As for post-Katrina price gouging, we identified 15 instances in

⁶¹ *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (May 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>.

which gasoline refiners, wholesalers, or retailers met the definition of “gouging” laid down by Congress in the appropriations statute that mandated this part of the investigation. In all but one such instance, however, local or regional competitive circumstances appeared to explain the price increases imposed by these firms. The Commission’s basic conclusion was that market forces, rather than illegal conduct, appear to explain the vast bulk of pricing in this industry.

At the direction of the President and the leadership of Congress, we currently are working with the Department of Justice and the Department of Energy – as well as with NAAG, on behalf of many State AG offices – to get a better understanding of last April’s dramatic gasoline price increases and to develop a more accurate and detailed picture of oil company profitability.

The Commission’s work in the petroleum sector does not stop with formal investigations and reports. Since 2002, the Commission’s economists have monitored wholesale and retail prices of gasoline to identify potential anti-competitive activities that might require greater investigation. Today, this project tracks retail prices of gasoline and diesel in some 360 cities and wholesale (terminal rack) prices in 20 major urban areas. Through this project, the Commission continues to enhance its understanding of the domestic petroleum industry, how participants in the industry compete, and how prices of gasoline and other refined petroleum products are set.

10. Always Talk About Your Golf Game

If you play golf or simply are unfortunate enough to spend time around golfers, you know that we are always talking about our last round. My husband, John, for example, remembers every shot he hits in a given round and can review it for you from start to finish. At

the FTC, we have decided to do a bit more jaw boning. In a new project, our Bureau of Competition and Office of Public Affairs, working with our “outreach experts” in the Bureau of Consumer Protection, have begun a campaign to better explain to consumers the benefits of competition, and to provide them with useful information about the marketplace and our enforcement. As part of this campaign, entitled “Competition Matters,” we soon will release a new version of our competition primer for consumers; we are working to reorganize and improve the accessibility of our Web site; and we are planning to visit consumer and business groups and schools to explain the importance of competition and the mission and accomplishments of the FTC.

We have focused so far on increased consumer outreach regarding competition issues in a few key industries. For example, in the midst of last spring’s run-up in gasoline prices, we augmented our Oil and Gas Industry Initiatives web page – where consumers can find a wealth of information concerning FTC activities in the petroleum industry – with a recurring column that speaks directly to consumers about how key developments in the industry affect what they pay for gasoline.⁶² Gasoline Columns have addressed such topics as the “risk premium” that world events can add to crude oil and gasoline prices; the impact of hurricanes on supply and prices; the ways in which consumers can face different prices because they live in different locations; and how refining capacity affects gasoline prices. Curious about the amount of interest generated by our Gasoline Columns, we looked into the number of hits we received on our oil and gas page before our web column took effect, and after. We had over 71,000 hits in

⁶² Oil and Gas Industry Initiatives, at <http://www.ftc.gov/ftc/oilgas/index.html>

April (before the column) and almost 105,000 hits in July. This 32% increase in hits suggests that our outreach efforts are working, and we hope this will continue.

Building on the success of our Oil & Gas Web site, in July we launched a new “mini-site” describing all of the FTC’s efforts to promote competition in real estate.⁶³ A mini-site for healthcare is next on our agenda.

All of you here today will be beneficiaries of one of our new outreach activities. In order to increase distribution of recent Commission reports, we have prepared mini-CDs with electronic copies of three important reports issued this past Spring: our ABA Annual Report, which describes all of the activities of the Commission over the previous year; the FTC/DOJ Horizontal Merger Guidelines Commentary; and the Gasoline Manipulation/Post-Katrina Pricing Report. You are welcome to take a CD with you, and I hope that you find this information useful as you return to your offices.

Golf is tough, but it is fun. Likewise, at the FTC, we have a tough and important job, but with teammates like Commissioners Harbour, Leibowitz, Kovacic, and Rosch, and our talented staff, we have a lot of fun doing it. Thank you.

⁶³ Competition in the Real Estate Marketplace, at <http://www.ftc.gov/bc/realestate/index.htm>.

