

REMARKS AT THE INSTITUTE OF COMPETITION LAW AWARDS DINNER APRIL 9, 2013

Thank you Nicolas. I am honored to have been asked to sit on the board for this event alongside Bill Kovacic, Fred Jenny, Alexander Italianer, and Bruno Lasserre, all of whom are thought leaders in the increasingly global antitrust bar.

What I propose to do this evening is to share with you my thoughts as an FTC Commissioner on some of the critical issues that I believe the Commission will grapple with under the second Obama Administration. And I'd like to do so through the lens of four of the outstanding academic articles submitted to these writing awards, most of them by distinguished FTC leaders – both past and present, Republican and Democrat.

Lest any of you should think that my selection of these four articles somehow has put the fix in for our award winners tonight, you should know that I only hit 50% in my other important final four selection, as I – along with the rest of the nation – thought Indiana and Ohio State would face off against Michigan and Louisville. And for those of you who hail from jurisdictions beyond the long arm reach of the NCAA, just be thankful that "March Madness" finally ended last night, allowing the rest of us to turn our attention to a different set of competition issues, including the bracket for tonight's academic writing awards.

In "*Moving Beyond the Caricature and Characterization: The Modern Rule of Reason in Practice*",¹ FTC's current Director of the Office of Policy and Planning and Howard University Professor Andy Gavil traces the intellectual history of the U.S. rule of reason from *Standard Oil*² and *Chicago Board of Trade*³ to the present day. Andy concludes that "under the modern rule of reason that emerges, the instinct to categorize conduct as fitting into seemingly distinct categories subject to either the "per se rule" or the "rule of reason" has been supplanted by the view that the rule of reason is a single standard that is subject to varying modes of application — a sliding-scale continuum that is focused on the nature and extent of the evidence of competitive effects."⁴

As the FTC, the pharmaceutical industry, and the antitrust bar await a Supreme Court decision in the *Watson* reverse payment case,⁵ we are all handicapping our bets about whether the Court lands somewhere on Andy's rule of reason continuum, or whether it will gravitate toward the 11th Circuit's scope of the patent test.⁶ The March 25th Oral Argument in the *Watson*

¹ Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL L. REV. 733 (2012).

² Standard Oil Co. v. United States, 221 U.S. 1 (1911).

³ Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

⁴ *Id.* (see SSRN Abstract at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065031).

⁵ See Press Release, FTC Seeks U.S. Supreme Court Review in AndroGel "Pay-for-Delay" Case (Oct. 4, 2012), available at <http://www.ftc.gov/opa/2012/10/androgel.shtm>.

⁶ See *FTC v. Watson Pharmaceuticals, Inc.*, 677 F.3d 1298 (11th Cir. 2012).

case, while gratifying from the FTC’s standpoint for its simple existence – considering the hard slog it took to get to the Supreme Court on this issue – shed scant light on which way the Court will go.⁷ I expect that, depending on the outcome of the case, we may see increased activity on the reverse payment issue. Time will tell.

Former FTC BC Bureau Director Susan Creighton and her co-author Jonathan Jacobson address another area of Supreme Court jurisprudence in their article called “*Twenty Five Years of Access Denials*.⁸ They focus in particular on lower courts’ interpretation of the Supreme Court’s *Trinko* decision as requiring a prior course of dealing as a liability screen, and ask the question whether this requirement is the best screen under sound antitrust policy.⁹ They argue that it is not.¹⁰ In so doing, they describe their counseling experience, and how they believe that “firms have avoided initiating new business relationships that would have been beneficial for both the firm and the prospective partner for fear that the firm will never be able to extricate itself if circumstances change or things do not otherwise go as planned.”¹¹ The authors conclude that, as a consequence, “some valuable and efficient arrangements are not being pursued as a result of this interpretation of *Trinko*.¹²

The prior course of dealing requirement is something that we Commissioners at the FTC also grapple with. Just last month, the FTC filed an amicus brief – in which we cite Creighton and Jacobson’s article – in a case involving Actelion Pharmaceuticals and allegations that it is using certain FDA mandated distribution requirements (known as REMs) to prevent generic rivals from accessing drug samples needed to perform the testing required under FDA generic drug approval rules.¹³ In that case, Actelion cited *Trinko* for the proposition that without allegations of a “prior history of dealing with the antitrust plaintiff, there can be no antitrust liability.”¹⁴ The Actelion case is in the Third Circuit, which has not yet held that a prior course of dealing is an essential element in an access denial or – as we call it in our brief – a refusal to deal case. The FTC therefore determined that an amicus brief on this important issue was appropriate. We will be watching the case closely as it moves forward through the courts.

⁷ Transcript of Oral Argument, FTC v. Actavis, Inc., et al., 133 S. Ct. 787 (2012) (No. 12-416).

⁸ Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, ANTITRUST MAG., Fall 2012, at 50.

⁹ *Id.* at 50.

¹⁰ *Id.*

¹¹ *Id.* at 53.

¹² *Id.* at 54.

¹³ Brief for FTC as Amicus Curiae, Actelion Pharm. Ltd., et al. v. Apotex Inc., et al., No. 1:12-cv-05743 (D. N.J. filed Mar. 13, 2013), available at <http://www.ftc.gov/os/2013/03/130311actelionamicusbrief.pdf>.

¹⁴ Memorandum of Law in Support of Plaintiffs’ Motion for Judgment on the Pleadings and to Dismiss Counterclaims at 13, Actelion Pharm. Ltd., et al. v. Apotex Inc., et al., No. 1:12-cv-05743 (D. N.J. filed Jan. 16, 2012), available at <http://www.hpm.com/pdf/blog/TRACLEAR%20-%20Actelion%20Mot%20for%20Jdgmt%20on%20Pldngs%20and%20MTD%20Ctrclms-%20REMS%20Complaint.pdf>.

In ‘*Merger Enforcement across Political Administrations in the United States*,’ our Director of the Bureau of Economics Howard Shelanski, and his co-authors Ronan Harty and Jesse Solomon, conduct a careful analysis of whether and how merger enforcement differs between U.S. administrations.¹⁵ Using publicly available data, their analysis tests Bill Kovacic’s hypothesis “that the political rhetoric of antitrust law has often been at odds with what the antitrust agencies have actually done and with any meaningful assessment of their performance.”¹⁶ Luckily for the authors and their future careers in antitrust, they found that the data agree with Bill Kovacic, and they therefore join his call “to focus not on case counts but on ‘progression toward a durable consensus on what constitutes good policy.’”¹⁷

The current FTC’s hospital and physician merger program serves as probably the best example of this ‘durable consensus.’ From its origins in (Republican Chairman) Tim Muris’s hospital merger retrospective, which brought forth the *Evanston* case,¹⁸ to the present day under a Democratic administration, the FTC hospital and physician merger program has met with bi-partisan support and a good measure of success ‘beyond the numbers.’ I fully expect our robust hospital and physician merger program to continue in the months and years to come.

Last, I would like to single out for recognition one other article which is not shortlisted for an award tonight. I greatly enjoyed past ABA Antitrust Section chair Richard Steuer’s piece entitled “*The Simplicity of Antitrust Law*.”¹⁹ In his article, Steuer advises us: “Antitrust law is simpler than it seems. Although it has grown increasingly complex over the years, [] when it is properly applied it focuses simply, and entirely, on combating two of the most innate proclivities in human nature – bullying and ganging up – when such conduct harms competition.”²⁰

Thank you Richard Steuer for being brave enough to state the obvious in such a lucid manner.

And thank you all for you listening.

¹⁵ Ronan P. Harty, Howard A. Shelanski & Jesse Solomon, *Merger Enforcement Across Political Administrations in the United States*, CONCURRENCES COMP. L. J., Feb. 2012, at 1, available at <http://www.davispolk.com/files/Publication/21298b64-1a24-4984-910f-c659c9763357/Presentation/PublicationAttachment/4076b8de-b7bc-41c8-8288-c6c2ef35d94a/Concurrences.Harty.Shelanski.Solomon.pdf>.

¹⁶ *Id.* at 1 (citing William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009)).

¹⁷ *Id.*

¹⁸ Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (complaint) (Feb. 10, 2004), available at <http://www.ftc.gov/os/adjpro/d9315/index.htm>.

¹⁹ Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543 (2012).

²⁰ *Id.* at 543.