Antitrust in the Digital Economy: A Snapshot of FTC Issues

Remarks at GCR Live Antitrust in the Digital Economy

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Thanks for the welcome. It's an exciting, and complicated, time to be doing the work of enforcing the antitrust laws, including—and maybe even particularly—in the digital markets that contain some of our most complex and interesting technologies, products, and services.

Today that I would discuss three main topics. First, a general update on some of the activities in which the FTC has been engaged that relate to the so-called digital economy—you could think of this as "the FTC is on the watch in the digital economy." Second, with specific regard to mergers, the FTC is very busy in several ways, including reviewing our own process as well as looking at potentially harmful acquisitions. And third, some thoughts on the FTC's active role in enforcing the law of monopolization, and some ways that might have particular significance in digital.

The FTC and the Digital Economy

As some of you know, shortly after arriving at the FTC just over a year ago, Chairman Simons launched a comprehensive set of hearings on the state of competition and consumer protection law in the 21st Century.[2] While not limited to technology and the digital economy, issues relating to those topics permeated the hearings, including hearings on: (1) the Identification and Analysis of Collusive, Exclusionary, and Predatory Conduct by Digital and Technology-Based Platform Businesses; (2) the Antitrust Framework for Evaluating Acquisitions of Potential or Nascent Competitors in Digital Marketplaces; (3) Innovation and Intellectual Property Policy; (4) Privacy, Big Data, and Competition; and (5) Algorithms, Artificial Intelligence, and Predictive Analytics. To date, we have heard from more than 350 panelists and received more than 850 public comments. The Commission is hosting one final hearing, a roundtable with state attorneys general, on June 12, 2019, where panels will discuss big data and technology issues and multi-sided platforms.[3] We continue to accept public comments at least until the end of June, and FTC staff will continue to review and analyze the information gathered during these hearings. These hearings underscore the unique role that the FTC plays in the development of sound competition policy. They also illustrate the critical point that sound policy and enforcement decisions should rest on facts and data—that we need to do the hard work necessary to be sure we understand the actual situation and issues to lay the foundation for good policy, and good enforcement decisions.

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[1] My remarks reflect only my own views, and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

[2] FTC, *Hearings on Competition and Consumer Protection in the 21st Century,* https://www.ftc.gov/policy/hearingscompetition-consumer-protection; see also FTC Press Release, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/ftcannounces-hearings-competition-consumer-protection-21st.

[3] https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-roundtable-state-attorneys-general.

As a second piece of news, we have now launched our Technology Task Force in the Bureau of Competition. We have completed the initial "set up" phase, with thirteen staff lawyers and two managers assigned—and, of course, the head of the unit, Assistant Director Patricia Galvan, is speaking later today at this conference. We are beginning investigations and also conducting extensive general fact-gathering. And we are still recruiting; we intend to add, among others, a lawyer with a relevant IP background, and a technology fellow. Of course, the Bureau of Economics has dedicated several economists to assist the Task Force, as they do with any Bureau matter.

The Technology Task Force, or TTF, will be primarily focused on investigating anticompetitive conduct and consummated mergers in the digital economy. This effort is in many respects modeled on what the Commission did with hospital mergers in the early 2000's. After losing several hospital merger challenges in federal court, the hospital merger retrospective project was launched by then-Chairman Tim Muris and then-BC Director Joe Simons, This effort was the foundation of the Merger Litigation Task Force, which was later renamed Mergers IV. The belief is that focused attention by dedicated staff to an area of the economy can produce strong enforcement results. Just by way of comparison, the hospital merger project and task force I described above turned a string of eight straight losses by the FTC, DOJ, and state AGs in the 1990s through the beginning of the 2000's, into six straight litigated wins (with fingers crossed to sustain our trial court win in Sanford on the pending appeal), plus multiple other anticompetitive transactions abandoned.

Enforcement at the FTC, Digital Economy and Otherwise

The Commission continues to pursue good cases, and litigate when necessary. During my tenure (this time around) at the FTC, I've seen a very busy agency in terms of merger and conduct challenges and litigations. Since August 2017 when Acting Chairman Ohlhausen brought me back at the FTC, the Commission has challenged 36 mergers, most of which were settled with consent orders, and issued complaints in five conduct matters. Of that group, seven matters went into litigation. While I don't mean to jinx us, I am happy to say that we're on a bit of a winning streak, with significant wins in our two merger PI trials (Tronox[4] and Wilhelmsen[5]) and two administrative trials (Tronox[6] and Otto Bock[7]) in merger cases. We also had two major deals that were abandoned after the Commission voted to challenge them (Smuckers/ConAgra[8] and CDK/Auto-Mate[9]).

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[4] *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018), (granting preliminary injunction).
[5] *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27 (D.D.C. 2018) (granting preliminary injunction).
[6] *In re Tronox Ltd.*, Dkt. 9377 (Dec. 5, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0085/tronoxcristalusa. While the appeal of the ALJ's initial decision was pending, the Commission accepted a settlement in which Tronox will divest all of Cristal's North American titanium dioxide assets, fully resolving competitive concerns found by both the federal court and the ALJ to arise from the merger as proposed.
[7] *In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378 (Dec. 20, 2017), https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.
[8] Fed. Trade Comm'n, Press Release, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco Owner, J.M. Smucker Co.* (Mar. 5, 2018), https://www.ftc.gov/news-events/pressreleases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil.
[9] *In re CDK Global & Auto/Mate*, Dkt. 9382 (Mar. 20, 2018), https://www.ftc.gov/enforcement/casesproceedings/171-0156/cdk-global-automate-matter.

On the conduct side, we've also had a full docket. Of course, we had yesterday's victory in district court in the Qualcomm case.[10] And we got a big win in our AbbVie Sham monopolization case. This is the first litigated Section 2 case involving sham litigation, and not only did the judge find that AbbVie's infringement lawsuits against the generics were objectively baseless as a matter of law, on a full record, he found that its conduct illegally maintained AbbVie's AndroGel monopoly and awarded $493 million in monetary equitable relief to be returned to those who were overcharged.[11] This case is on appeal before the Third Circuit. We also had a successful conclusion to our landmark case, FTC v. Actavis.[12] In February, on the eve of trial, we settled with the last remaining defendant in our 2009 case alleging that brand-name drug maker Solvay entered into illegal agreements with three generic drug companies to restrict generic competition for AndroGel, Solvay's branded testosterone-replacement drug. As you know, this is the case that lead us to the Supreme Court and its subsequent repudiation of scope-of-patent immunity for patent settlement agreements. Under the stipulated order entered by the court, Solvay's current owner AbbVie is prohibited from entering into certain patent infringement settlement agreements that restrict generic entry for certain drugs and contain common forms of reverse payments, such as a side deal or a no-AG commitment.

Meanwhile, we have several other matters that are ongoing; we are in the concluding phases of the *Benco* trial,[13] in which lawyers from our Western Regional Office here in San Francisco have been leading; we have trial set in the fall on *Louisiana Realty Appraisal Board*;[14] we have multiple cases on appeal; and we have the newly-filed Surescripts case,[15] which is a digital economy case that I will say a bit more about in a few minutes.

There have been setbacks as well. In 2017, the FTC filed a complaint in federal district court charging Shire ViroPharma Inc. with abusing government processes through a campaign of serial, repetitive, and unsupported filings with the FDA and courts to delay the FDA's approval of generic Vancocin capsules. The FTC alleged that Vancocin capsules are not reasonably interchangeable with any other medications used to treat CDAD, and that because of ViroPharma's actions, consumers and other purchasers paid hundreds of millions of dollars more for their medication.[16] In March 2018, the U.S. district court in Delaware ruled that the Commission had stated a valid claim that ViroPharma's repetitive and baseless petitions to the FDA amounted to sham petitioning that was not protected activity under the Noerr-Pennington doctrine.[17] Unfortunately, the court nevertheless dismissed the FTC's monopolization complaint, ruling that the agency failed to adequately plead an imminent violation of antitrust law and thus

[10] *FTC v. Qualcomm, Inc.,* No. 17-cv-00220 (N.D. Cal. Jan. 17, 2017), https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc

[11] *FTC v. AbbVie Inc.,* No. 14-cv-5151 (E.D. Pa. Sept. 8, 2014), https://www.ftc.gov/enforcement/casesproceedings/121-0028/abbvie-inc-et-al.

[12] 570 U.S. 756 (2013).

[13] *In re Benco Dental Supply et al.,* Dkt. No. 9379 (Feb. 12, 2018), https://www.ftc.gov/enforcement/cases-proceedings/151-0190/bencoscheinpatterson-matter.

[14] *In re La. Real Estate Appraisers Bd.*, Dkt. 9374 (May 31, 2017), https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board.

[15] *FTC v. Surescripts, LLC,* No. 1:19-cv-01080 (D.D.C. Apr. 17, 2019), https://www.ftc.gov/enforcement/cases-proceedings/141-0210/surescripts-llc.

[16] *FTC v. Shire ViroPharma, Inc*., No. 1:17-cv-00131 (D. Del. Feb. 7, 2017), https://www.ftc.gov/enforcement/cases-proceedings/121-0062/shire-viropharma.

[17] *FTC v. Shire ViroPharma Inc.,* 2018 WL 1401329 (D. Del. Apr. 12, 2018).

was not entitled to file suit under Section 13(b) of the FTC Act. The Third Circuit affirmed that holding, despite our arguments that no court in the 45 years since the enactment of Section 13(b) has required the FTC to meet this stringent imminence standard.[18] Given the importance of 13(b) to our ability to obtain relief in federal court, the Commission is considering its options, with some Commissioners calling for a legislative fix.

The Commission also had an opportunity to clarify the law regarding reverse payment patent settlements, after the ALJ dismissed an administrative complaint against Impax Laboratories.[19] The FTC's January 2017 complaint alleged that Impax and Endo Pharmaceuticals illegally agreed that Impax would not market a generic version of Endo's Opana ER in exchange for a payment of more than $112. After a Part 3 trial, the ALJ ruled that the procompetitive benefits of outweighed any anticompetitive effects of the agreement. The Commission, in an unanimous decision written by Commissioner Phillips, held that Impax had received a large and unjustified payment, made up of a No-AG commitment as well as an additional credit that Endo would pay to Impax in the event that the market for Opana ER declined before Impax's entry date. The Commission found that Impax had failed to show a cognizable procompetitive rationale for its reverse payment that was linked to the restraint at issue – the elimination of the risk of Impax's generic competition – rather than the patent settlement as a whole. Moreover, where there is a less restrictive alternative – here, a settlement of the patent dispute without a payment tied to a later entry date – the agreement can still be found to be an unreasonable restraint on competition in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

Merger Review Update

Turning specifically to mergers for a moment, over the last two years we have seen HSR filings rise substantially, until in 2017 they passed 2,000 filings for the first time since 2007.[20] Along with the increase in filings, we have faced increased demand for merger reviews.

Let me talk about process first. Chairman Simons and I launched a data project to better track the duration of merger review, and identify causes of any delays in the process. Currently, the best publicly available data on this issue is the either ironically or aptly-named "DAMMIT" report published by the Dechert law firm. However, that report, while useful and worth having, suffers from a critical gap: It relies entirely on publicly available information. As a result, it can only capture events such as the public announcement of a merger, the public announcement of a second request, public agency action such as accepting a consent, or the merger actually closing (if that's public or ascertainable). These public events may have little connection to the actual merger review process.

In an attempt to obtain better information, we began tracking and reporting internally on several metrics that we thought might provide more useful information on the duration of merger review and key events in that review. These include obvious milestones, such as when clearance

[18] *FTC v. Shire ViroPharma Inc.*, No. 18-1807 (3d Cir. 2018).
[19] *In re Impax Laboratories, Inc.*, Dkt. 9373 (Jan. 23, 2017).
[20] In FY 2017, the agencies received notice of 2,052 transactions, compared with 1,326 in FY 2013 and 2,201 in FY 2007. For historical information about HSR filings and U.S. merger enforcement, see the joint FTC/DOJ HartScott-Rodino annual reports, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

is requested and obtained, when second requests issue, quick look submissions completed, important dates contained in timing agreements and when they trigger, dates of divestiture proposals, the certification of substantial compliance, and others. While we will not be able to release the specific information we gather due to HSR confidentiality, we hope to aggregate the information for release, and of course we can use more precise information for internal analytics.

Unfortunately, our first year of this project was interrupted by the government shutdown, so I don't yet have the data I would need to give a detailed report. However, I thought I would share an interesting anecdote from the information that's been coming in. While this is not statistically sound, from the very incomplete information we've been able to review, it turns out that removing a small handful of transactions where the parties never substantially complied with the second request, but were delayed in closing due entirely or in large part to non-FTC issues (such as review by other authorities), drops the average length of investigations by 20%. Again, that's just an anecdote that's virtually certain to change as we get more complete numbers, but it was interesting to me.

Merger Enforcement in Digital Markets

Let me now address an aspect of merger enforcement that sits at the interface between the digital economy and anticompetitive conduct—potential competition cases, and in particular, the subset of those cases relating to nascent or developing competitors.

Much has been said about the possibility that large tech firms are squelching competition by systematically acquiring potential competitors. And commentators have at times asserted that the FTC is oblivious to this kind of anticompetitive acquisition. But let me note a couple of caveats. First, I am not aware of good economic evidence that there is a unique and widespread "nascent" or "start-up" acquisition issue in the tech industry. I have seen various commentators claim that the various tech firms make lots of acquisitions. But in itself, that provides little useful information. For example, there is no comparison to acquisition rates in other industries. No study that I'm aware of compares the rate of acquisitions in tech industries to the same rate in all industries on average, or to any other industry in particular. Nor am I aware of any careful analytical work that has actually attempted to quantify what set of the "tech" acquisitions actually eliminated nascent competitors. I have heard at least one economist say that he was sure that "some of all those deals must have been anticompetitive." Well, I'm sure of a lot of things, including that my Florida Gators will beat Alabama for the SEC championship next fall, but I've found that things I thought were "sure" don't always match up to actual facts.

None of this is to say that there were no anticompetitive acquisitions of startups by tech firms—merely that we don't yet have data that allows us to make general, industry-wide assertions.

The second initial caveat is—as I've repeatedly said—there is nothing wrong, from an antitrust perspective, with the theory that the acquisition by an incumbent firm of a nascent rival could be anticompetitive and violate the antitrust laws. There is no safe harbor for eliminating future competitors. Had Microsoft bought Netscape rather than trying to put it out of business, Microsoft would likely have—and should have—faced similar antitrust scrutiny and a similar result.

In fact, the FTC has brought a number of cases—including two recent cases, one of which involved technology platforms—in which this issue, or closely related "nascent competitor acquisition issues," have been raised. In 2017, with the states of Alaska, Maryland, New York, Texas, and Washington, the FTC charged that Questcor, a company that (at the time of the FTC complaint) had been acquired by Mallinkrodt, had extinguished a nascent competitive threat by acquiring it.[21] Questcor was a monopolist in the U.S. for a drug called Acthar that treated infantile spasms, as well as other conditions. Outside of the United States, another drug that could compete directly with Acthar was sold—Synacthen. The complaint alleged that Questcor had no legitimate business purpose for buying Synacthen, and in fact had chosen not to pursue it.[22] But when it looked like other buyers might emerge, Questcor stepped in and outbid them.[23] As the complaint further alleged, at that point, Synacthen was a nascent competitive threat, and there was significant uncertainty concerning whether it would ever actually mature into such a threat.[24]

Of particular note, while the conduct involved a consummated merger, the complaint alleged a violation of Section 2 of the Sherman Act. The case settled with Questcor's new owner, Mallinkrodt, agreeing to pay $100 million in civil monetary relief, and to license Synacthen to another pharmaceutical company.

Section 7 of the Clayton Act provides another lens for examining acquisitions that are likely anticompetitive, at least in significant part, because of their effect on future competition. Notably, in CDK/Auto-Mate, the Commission sued to block a merger of two digital technology platforms where the firms were current competitors, but one was a market giant—close to a duopolist—while the other was far smaller.[25] The complaint alleged harm to current competition, but focused even more sharply on harm to future, or nascent competition. That harm arose from the smaller competitor's substantial efforts to remake itself into a greater competitive threat going forward. This transaction was abandoned by the parties after the FTC filed suit.

A key point from both of these cases is that mergers are not necessarily completely compartmentalized from anticompetitive conduct analysis. The Mallinkrodt case was brought under monopolization theories. While those theories likely would not have worked in CDK/Automate (because CDK was—at most—an aspiring duopolist), it is certainly possible that

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[21] *FTC v. Mallinckrodt ARD, Inc. and Mallinckrodt plc*, No. 1:17-cv-120 (D.D.C. Jan. 30, 2017), https://www.ftc.gov/enforcement/cases-proceedings/1310172/mallinckrodt-ard-inc-questcor-pharmaceuticals.
[22] *See, e.g.*, Compl. ¶¶ 40, 51.
[23] "Questcor submitted a bid that included substantially more guaranteed money than the other bidders had offered, effectively ending the bidding process. By acquiring Synacthen, Questcor eliminated the possibility that another firm would develop it and compete against Acthar." Compl. ¶ 33.
[24] "Synacthen constituted a nascent competitive threat to Questcor's ACTH drug monopoly, notwithstanding the significant uncertainty that Synacthen, a preclinical drug, would be approved by the FDA." Compl. ¶ 34.
[25] *In re CDK Global & Auto/Mate*, Dkt. 9382 (complaint filed Mar. 20, 2018), (alleging market leaders CDK and Reynolds together controlled 70% of market; post-merger combined share of CDK/Auto-Mate would be 47%) https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.

other segments of the digital economy might involve firms with monopoly power. And acquisitions of competitors by those firms could potentially raise issues under Section 2 of the Sherman Act as well as under Clayton 7.

One last point on nascent competitor acquistions—detection. This is an area that we've been thinking about quite a bit. There are significant issues that we are grappling with. For example, many if not most of these acquisitions are far below the HSR reportability threshold, and so we do not get prior notice of them, and may not become aware of them at all. Some have proposed lowering the HSR thresholds to catch more of these deals. That's an interesting idea, but let me raise several cautionary flags.

First, HSR thresholds were raised in the first place, and indexed to inflation, because the antitrust agencies were inundated with filings of small transactions that rarely resulted in enforcement action. There were 4642 filings in 1999 and 4926 in 2000, prior to the threshold change. That dropped to 2376 in 2001 and 1187 in 2002. Having to review close to 5000 filings was an inefficient use of agency resources that could interfere with investigating serious competition problems. Second, more recent evidence suggests that reducing the HSR thresholds would not likely generate many good cases. Analysis of enforcement activity shows that enforcement is roughly correlated with transaction size—in other words, the bigger the deal, the more likely it is to result in a remedy, abandonment under challenge, or litigation. And, in particular, enforcement action rates are quite low at the lower end of the HSR reporting thresholds. This is not to say that we don't challenge relatively small-dollar mergers; the recent win in Ottobock is just one example. But it is important to note that the evidence suggests that the anticompetitive transactions are infrequent at lower transaction values. Third, if we were nevertheless to try to review a larger set of lower-value transactions, we simply would not have the resources. Merger review is very resource intensive for us. Every filing needs to be processed and screened. A substantial increase in filings would not only be unlikely to yield much, but would cost us a great deal.

I have heard suggestions that some new filing requirement be imposed only on digital or tech firms. Leaving aside the point I made earlier—that there's no robust evidence that below-threshold acquisitions are particularly pervasive or problematic in the digital arena—there is also a serious practical problem with this idea. That is: what is a tech, or digital, company? If Apple buys a tools company, is that a tech company merger? If so, what if Dell or Intel buys a company? If Amazon buys—hypothetically—a grocery store, is that a tech acquisition? What if Wal-Mart buys a web site? Or, what if Wal-Mart buys a grocery store and then takes it online?

The bottom line, for right now, is that to find anticompetitive nascent acquisitions, we need to do it the old-fashioned way: by looking and asking, and keeping our ear to the ground. And we need your help. Participants in these various industries might well be best-situated to spot problematic acquisitions and bring them to our attention.

<u>Anticompetitive Conduct in the Digital World—The New Monopolization</u>

Finally, a few words about anticompetitive conduct cases, and particularly about monopolization. The FTC has a long history of bringing monopolization cases under Section 5 of the FTC Act, following the standards laid down for Section 2 of the Sherman Act. While these cases are challenging, they are also important, and we do not shy away from pursuing them.

In fact, since the DOJ filed the Microsoft case in 1998, the federal government has filed 20 cases challenging single-firm conduct (I am, of course, omitting the vitally important criminal cases, and non-criminal collusion or reverse payment patent settlement cases challenged under Section 1 of the Sherman Act). Out of those cases, the FTC brought 18. They include leading cases such as the Mylan case, in which we alleged that Mylan maintained its monopoly for two widely used anti-anxiety drugs by obtaining exclusive licenses to key ingredients,[26] FTC v. McWane, in which the 11th Circuit affirmed the Commission's findings that the company's Full Support program was a de facto exclusive dealing requirement that excluded rivals, and the recent AbbVie sham case, which I discussed above.[27]

We also have two monopolization cases pending in federal court. First, of course, we have the Qualcomm case in which the court ruled in our favor yesterday, and second, we have the newly-filed Surescripts case. Both of these cases are in litigation, so I will not say much about them, but I did want to highlight one point about each.

On Qualcomm, there is something of a misperception about the case that I hope the court decision corrects. Qualcomm is not a rate regulation case; it's not a case where we are claiming that a FRAND commitment requires some specific royalty, and that failure to charge that royalty is, in and of itself, an antitrust violation. Rather, the primary theory in the Qualcomm case is a raising rivals' costs theory. The claim (in a very abbreviated version) was that Qualcomm, rather than collecting monopoly rents on the sales of its modem chips—rents to which it might have been entitled to the extent it achieved its chip monopoly by its innovation—was able to shift some of those rents into its royalties by circumventing the FRAND commitment it had made on its patents. That resulted in burdening its rivals' chips with some of those rents; in effect, a tax that raised rivals' costs.

For Surescripts, I wanted to note the fact that Surescripts involves monopolization claims in the context of multisided digital platforms. The case is thus interesting not just because the eprescribing business is very important to health care and consumers, but also because of the cutting-edge nature of the legal and economic issues in monopolization claims involving multisided digital platforms. Surescripts appears to involve a transactional two-sided platform similar to the way the Supreme Court viewed the platform at issue in the American Express case.[28] Of course, beyond that similarity there are significant differences, including that Surescripts has a monopoly where American Express lacked market power; that the conduct at issue is different; that the effects are different; and that the challenge is brought under Section 2, not Section 1. I think it is important to note that two-sided markets aren't immune from antitrust scrutiny.

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[26] *FTC v. Mylan Labs, Inc.*, No.1:98 cv-03114 (D.D.C. Feb. 9, 2001) (alleged monopolization; stipulated judgment included $100 million restitution); *see* Mem. Opinion, 62 F. Supp. 2d 25, 36-37 (D.D.C.), *revised and reaffirmed in pertinent part*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999).
[27] *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98 (E.D. Pa. 2018); *Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie* (June 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftcchairman-joe-simons-regarding-federal-court-ruling.
[28] *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018)

As I noted in discussing Mallinkrodt, there is precedent for using Section 2 of the Sherman Act, and monopolization theories, to challenge acquisitions of nascent competitors by firms with existing monopoly power. I would like to use the balance of this speech to touch on three aspects of monopolization that may have particular significance in digital industries, and particularly as compared to Section 1 of the Sherman Act. Those three things are (1) a higher bar facing monopolization claims; (2) a lower bar facing such claims; and (3) the proper role of monopolization claims, and antitrust claims generally, relative to other legal theories.

First, the higher bar. While this seems unremarkable, it is important to remember that monopolization claims require monopolies. That means that the defendant must alone possess monopoly power. Generally, that means a market share in the 70-80% range, usually coupled with some evidence of durability and entry barriers (somewhat lower for "attempt" claims, but those also require a "dangerous probability" that aspiring monopolist will in fact attain monopoly[29]).[30] While direct evidence of monopoly power can also suffice—reduced market-wide output, or increased market-wide prices[31]—such evidence is often hard to come by.

This means that in most cases, Section 2 isn't available. I mentioned CDK/Auto-Mate earlier. Section 1 and Clayton 7 have no such limitation; they permit balancing pro- and anticompetitive effects of agreements or mergers without imposing a particular market share threshold (except insofar as shares are relevant to effects evidence and to applicable legal presumptions).[32] It is also worth noting that Section 2 also requires anticompetitive conduct—often referred to as "exclusionary," "anticompetitive" or "predatory" conduct, or, as it's sometimes known, conduct that isn't "competition on the merits."[33] You'd think that after almost 130 years there would be broad agreement on what this means—and to be fair there *is* a

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[29] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

[30] *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 830 (11th Cir. 2015) (defendant's market share, which had fallen from 95% to 90%, was "plainly high enough to be considered predominant"); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005) ("Dentsply has long dominated the industry consisting of 12–13 manufacturers and enjoys a 75%–80% market share on a revenue basis, 67% on a unit basis, and is about 15 times larger than its next closest competitor."); *LePage's Inc. v. 3M*, 324 F.3d 141, 146 (3d Cir. 2003) (90% share sufficient); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998) (affirming that over 70 percent is usually "strong evidence" of monopoly power).

[31] *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.")

[32] *See, e.g.*, *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2284 (2018) (describing structure of rule of reason analysis under Section 1); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–86 (D.C. Cir. 1990) (describing structure of analysis of horizontal mergers under Section 7).

[33] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.") (emphasis in original). *See also, e.g.*, *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) ("Predatory or anticompetitive conduct, which excludes competitors from a market, is conduct, *other than competition on the merits or restraints reasonably necessary to competition on the merits*, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.") (citation and internal quotation marks omitted; emphasis added); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) ("Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of *competition on some basis other than the merits.*") (emphasis added); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1338–39 (Fed. Cir. 2006) ("To establish a section 2 violation, one must prove that the party charged had monopoly power in a relevant market and acquired or maintained that power by anti-competitive practices *instead of by competition on the merits*.") (citation omitted; emphasis added).

lot that we do agree on—but the slightly embarrassing truth is that there is plenty of confusion and controversy around what exactly "exclusionary conduct" is. As Professor Hovenkamp put it: "No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance."[34]

Now for the lower bar facing monopolization claims—causation. More specifically, Section 2 imposes a somewhat relaxed test for the causal relationship between the exclusionary conduct and the acquisition or maintenance of monopoly power. Some kind of relationship between the challenged conduct and the acquisition or maintenance of monopoly power is clearly needed. But, on the other hand, it's *also* clear that a plaintiff does not need to show that, on the balance of probabilities, in the hypothetical world that would have existed without the challenged conduct, the defendant would not have acquired or maintained the monopoly power that it in fact now enjoys.

The classic statement here is by the entire Court of Appeals for the D.C. Circuit, sitting *en banc* in *Microsoft*. The members of that court went out of their way to reject the idea that a plaintiff must strictly prove that the conduct was a but-for cause of the monopoly:

- "To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."[35]
- "Microsoft points to no case, and we can find none, standing for the proposition that, as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct."[36]

The test they articulated instead is the "rather edentulous" one (a word that oddly enough also shows up in the Third Circuit's *Dentsply* decision:[37] perhaps there is some kind of a bet involving the members of these courts and the more exotic corners of the dictionary) that requires that the conduct in question, *as a general matter*, was reasonably capable of making a significant contribution to monopoly power.[38]

There are two really important things to note about this test. First of all, it doesn't turn on the actual effects in the specific case at issue. It's a matter of general tendency: the kind of effects that can broadly be expected from conduct of this kind across the great run of cases. Second, even through this lens of generalization, a plaintiff need not show but-for causation of the monopoly. What matters is that conduct is reasonably capable (in general) of making a

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[34] Herbert Hovenkamp, *Exclusion and the Sherman Act* 72 U. Chi. L. Rev. 147, 148 (2005).
[35] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).
[36] *Id*.
[37] *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005).
[38] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) ("Given [the] rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.").

significant *contribution* to monopoly: that is, that it would tend to make the acquisition or maintenance of monopoly power more likely, or more durable, or more substantial, by some meaningful amount. That is enough.

And *Microsoft* is not an outlier in this regard: it's the orthodoxy. The reasonably-capable/significant-contribution test—which actually pre-dates *Microsoft* by a considerable margin—has been endorsed by a whole host of federal courts of appeal.[39] It's still the best and most accurate statement of the causal burden that a monopolization plaintiff has to discharge. Importantly, *this affirmative burden on a plaintiff is not the same as the one imposed by the Section 1 rule of reason*. Under Section 1 a plaintiff has to affirmatively show anticompetitive effects, *caused by the challenged agreement in that specific case*, before the burden passes to the defendant to show a procompetitive justification.[40] Under Section 2, the threshold is lower: the general tendency of the conduct must be to make a significant contribution to monopoly in the ordinary run of cases. If that can be shown, *and the conduct was "not competition on the merits,"* then it's for the defendant to show that the conduct was in fact procompetitive.

This has been settled law for decades. But it has two important implications. One is that given that Section 2 arises only in the exceptional case of actual monopoly power—an actual deadweight loss already being inflicted on society (or a "dangerous probability" coupled with market power), and exclusionary conduct—this slightly reduced causation burden should not be viewed with alarm. Second, as the D.C. Circuit explained, a different view would reward monopolists for taking more aggressive anticompetitive steps earlier, and, perversely, would result in the most effective and egregious monopolists—those with longstanding monopolies, who successfully extinguish all competitive threats in their incipiency—being least vulnerable to challenge.

That's all I want to say today about elements of Section 2 (though there's much more to talk about, including the role of procompetitive justifications). Instead, I want to conclude by briefly visiting an important question concerning how monopolization, and antitrust in general, fits into our legal system more broadly. The facts that make up antitrust cases are often rich and interesting and complicated. Businesses enter into (and break) agreements with each other, they do a variety of things that affect one another (some legal, others illegal, others arguable) and

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[39] *See, e.g.*, *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016) ("Predatory or anticompetitive conduct, which excludes competitors from a market, is conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.") (internal quotation marks, brackets, and citation omitted); *McWane, Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015) (applying *Microsoft* test for causation); *Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815, 830 (6th Cir. 2011) (applying *Microsoft* test for causation); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (applying *Microsoft* test for causation); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1553 (10th Cir. 1995) ("What matters is not so much whether the classes actually overlapped as whether the scheduling pattern was reasonably capable of contributing significantly to a monopolization attempt by discouraging BAR/BRI customers from taking PMBR's course, and, if so, whether it was nevertheless justified."); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994) ("Exclusionary conduct is defined as conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.") (internal quotation marks and citations omitted), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).
[40] *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2284 (2018).

sometimes they invade one another's expectations and rights in a whole variety of ways. The world is a complicated place, and antitrust has to live in it.

What that means is that antitrust cases are rarely *just* antitrust cases. Among the tangle of rights and obligations that connect companies with their trading partners and competitors, we will very often find rights and duties—or at least *claims* of rights and duties—grounded in contract law, patent law, tort law, securities law, property law, and whatever else. This isn't the exception: it's the norm.

Sometimes those things will matter for the purposes of an antitrust analysis in a particular case. For example, when we're trying to figure out how parties might rationally behave in light of—or in the absence of—challenged conduct, we'll look at the rights at their disposal, just as we look at their assets and practices and incentives and all the other relevant facts. But what is pretty clear is that *the antitrust rules themselves don't change just because a contract right, or a patent right, or a tort, or a violation of environmental law, happen to be implicated in some individual case*. This is pretty clearly the law. The Supreme Court and the federal courts of appeal have made it very clear that antitrust law works through rules of general application, not through microspheres of special pleading where the standards vary from one industry or setting to another.

Let's take patent law by way of example. The Supreme Court has taught us very directly that the presence of patent rights neither heightens nor lowers the sensitivity of our antitrust tools, or our willingness to infer antitrust harm. In its modern jurisprudence, the Court has refused to confer any special advantage on a plaintiff just because a patent is involved, rejecting, for example, in *Independent Ink* any presumption that patentees enjoy market power. Conversely, the Court has equally refused to confer any special advantage on defendants just because a patent is involved: rejecting, for example in *Actavis* any immunity or deference to anticompetitive agreements just because the exclusion happens to fall within the scope of a claimed patent right. The antitrust rules of the road don't change just because intellectual property is involved.

I mentioned *Microsoft* earlier, and there's a memorable passage in that decision where the court confronted Microsoft's argument that antitrust liability was inappropriate because an IP right—copyright, in that case—was in play. Not so, said the court: and in fact the argument "borders on the frivolous." The idea that an intellectual property right creates a zone of antitrust immunity, the court said, "is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability."

I'm talking here about patent law but the same is equally true of tort and contract and everything else. The *Conwood* case has to be among the clearest possible examples of an antitrust case where the conduct in question sounded simultaneously in some other body of law: in that case, tort law, as the defendant monopolist was alleged to have gone around and removed or destroyed its competitors' sales racks, deceived store clerks about what they were up to, and engaged in a whole host of similar shenanigans that we'd find throughout the pages of the business tort casebooks. But the Sixth Circuit made it perfectly clear that "merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well." Nor would an antitrust claim fail—or the reach of the Sherman Act be curtailed—just because the parties had some relevant rights and obligations in contract.

All these arguments are equally wrong, and they are wrong for the same reason: the antitrust laws don't change just because some rights or remedies are, or might be, available from some other body of doctrine. Antitrust comes into play only in exceptional cases—where agreements, on balance, reduce market-wide output, quality or innovation, or increase market-wide price; where mergers are likely to have the same effect; or where a monopoly exists, or is dangerously likely to appear, and is being acquired or maintained by conduct that is not competition on the merits. And, when it comes into play, antitrust protects market-wide, societal interests that are different from, and beyond the scope of, the narrower, personal interests of parties to contracts, tortfeasors and victims, or property holders. There is no reason to assume that those narrow interests are coterminous with the broader interests protected by antitrust, nor that the possessors of those narrower interests are properly situated, and properly incentivized, to safeguard the societal interests that are the subject of antitrust.

The point is that *antitrust law is not a rule of last resort*, any more than contract law or patent law or tort law is. Antitrust rights and remedies co-exist—sometimes neatly, sometimes messily—with everything else in the legal toolkit. And the ability of a plaintiff to recover in contract, or in patent infringement, or in tort, for the same or a similar wrong says nothing at all about whether antitrust liability is appropriate.

There are two footnotes to this general rule, both of which are of somewhat marginal practical importance. The first footnote is that when Congress has enacted a specific statutory scheme that postdates the antitrust laws, we conduct a familiar kind of analysis to see whether we have a rare case of implied repeal. That's the *Credit Suisse* kind of situation: it's rare, it's confined to federal statute, and it's heavily disfavored because of our understanding that Congress legislates in the expectation that we'll keep enforcing the antitrust laws just as we have done for the last 130 years. The second footnote is that when the Supreme Court is considering whether to *extend* some existing antitrust rule beyond its previous ambit, it is appropriate for the Court to weigh the costs and benefits of doing so as a policy matter, and the Court may include in that calculus, as appropriate, whatever impact existing rights and remedies have on that balance. That's the *Trinko* situation: when deciding whether to *extend* an antitrust rule beyond its previous bounds, the Supreme Court is entitled to take into account the strength of the need for such an extension, and that sometimes includes an appraisal of the rights and remedies that are already available in that space.

But those of us who are not the Supreme Court or Congress—including agencies and lower courts—don't get to make that kind of fresh, top-down policy determination, and we don't get to change the substantive reach of the antitrust laws. We have to deal with and apply the antitrust rules that Congress and the Supreme Court have handed to us. And, in my view at least, it's inappropriate for us to decide that—despite what those antitrust rules say—we prefer (or dislike) the policy interests that contract law or patent law or tort law seem to us, in some specific context, to promote, and for that reason we prefer to reduce (or increase) the level of antitrust scrutiny in some micro-sphere. That is as true of Section 2—as complex and controversial as it is—as it is of Section 1 and Section 7 and the rest of the antitrust enterprise.

Conclusion

That's all I have for you today. Thanks for your attention. I'll gladly take questions from anyone still awake, still in the room, and still interested enough to ask for more.