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“How the FTC Works: Lessons from the Commission’s Supreme Court Trifecta”

Administrative Law Review Annual Symposium
“Antitrust: At the Intersection of Private and Public Regulation”
American University Washington College of Law
Washington, D.C.
March 20, 2015

Good afternoon. Let me begin with the customary disclaimer and then with a note of appreciation and admiration. First, the disclaimer: I’m here today speaking only for myself and not for the Commission. Now for the appreciation. I’d like to thank the American University Washington College of Law and the Administrative Law Review for putting together this excellent symposium, and I’d like to thank Jones Day for hosting the event. And that segues into the admiration. Jones Day of course was our opposing counsel in *North Carolina Dental*,¹ and we could not have asked for a worthier adversary. I want to give a special nod to Hashim Mooppan, who argued for the state dental board in the Supreme Court, and who was on our first panel today. Hashim gave one of the best arguments I have seen in the Supreme Court, which is all the more remarkable given that this was his first time at that coveted podium.

North Carolina Dental was the third of three FTC cases the Supreme Court has decided over the past two years or so; the other two were *Phoebe Putney*² and *Actavis*.³ I’m happy to report, despite the awkwardness of today’s venue, that the Commission won substantial victories in each of those cases. I mention these victories not out of a misplaced sense of triumphalism, but because each of the three cases tells a compelling back story about what makes the FTC

¹ *North Carolina St. Bd. of Dental Exam. v. FTC*, 135 S. Ct. 1101 (2015).

² *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

³ *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

successful as a competition authority. Each of the three arose from a multi-decade FTC initiative focusing on a difficult and discrete area of competition policy. And each of those initiatives was built on a solid foundation of strong bipartisan support and close coordination among the FTC’s litigators, economists, and policy analysts.

1. The FTC Programs Underlying *North Carolina Dental*, *Phoebe*, and *Actavis*

The first of the cases I will discuss today—*North Carolina Dental* itself—dealt with the state-action exemption to antitrust liability and, more generally, with the role of state licensure requirements in the American economy. The FTC has played a central role in the development of state action doctrine over many decades, stretching back to the early taxicab litigation of the 1970s and 1980s and continuing into the 1990s with FTC-originated Supreme Court cases such as *Superior Court Trial Lawyers’ Association*⁴ and *Ticor Title*.⁵

In 2003, under the leadership of Chairman Tim Muris, the FTC voted out an exhaustive 73-page staff report analyzing the state action doctrine and encouraging continued FTC vigilance against anticompetitive practices by non-sovereign state entities.⁶ There were some interesting names on that staff report. One was then-General Counsel Bill Kovacic, who went on, as Commissioner, to author the 2010 FTC opinion that the Supreme Court ultimately affirmed in *North Carolina Dental*. Another name of interest belongs to one of the report’s main drafters, who was then an up-and-coming staffer within the Office of Policy Planning. Her name, of course, was Maureen Ohlhausen.

⁴ *FTC v. Superior Ct. Trial Lawyers’ Ass’n*, 493 U.S. 411 (1990).

⁵ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

⁶ Report of the State Action Task Force, FTC Office of Policy Planning, (Sept. 2003). All FTC materials cited here are available on the FTC’s website (www.ftc.gov).

Building on the insights of this staff report, the FTC’s scrutiny of state licensure requirements continues with deep bipartisan support, both in enforcement proceedings and in advocacy that we present to Congress and the states. That scrutiny will surely grow as licensure requirements proliferate into new lines of business that have not traditionally been thought to need them, such as cosmetology and floral-delivery services.⁷ And the Commission will continue advocating for the elimination of anticompetitive restrictions on consumer choice in markets as diverse as local car-for-hire services and retail automobile sales.⁸

The second of the three recent Supreme Court cases I’ll mention was *Phoebe Putney*. That, too, was a case about the state action exemption; it dealt with the “clear articulation” prong of the *Midcal* analysis,⁹ whereas *North Carolina Dental* dealt with the “active supervision” prong. I would like to focus today, however, on the substantive subject matter of *Phoebe*: hospital mergers.

Like state licensure requirements, hospital mergers have been the subject of longstanding FTC scrutiny, both in the specific enforcement actions we have brought and in a range of empirical research we have conducted on the consumer effects of consolidation in the healthcare industry. And those two components of the FTC’s operations—law enforcement and economic research—have worked hand-in-hand for many years to protect the consumer interest in a competitive marketplace for medical services.

⁷ See, e.g., Morris M. Kleiner, *Why License a Florist?*, N.Y. TIMES (May 28, 2014), <http://www.nytimes.com/2014/05/29/opinion/why-license-a-florist.html>; see also Eduardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. Times (Jan. 27, 2015), <http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html>.

⁸ See Prepared Statement of the Federal Trade Commission, “Competition and the Potential Costs and Benefits of Professional Licensure,” Before the Committee on Small Business, U.S. House of Representatives (July 16, 2014).

⁹ See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Let me elaborate. The FTC and the Justice Department successfully challenged a number of anticompetitive hospital mergers in the 1980s but ran into judicial resistance when, in the 1990s, some courts accepted economically questionable arguments made by the merging parties. These included the arguments that non-profit hospitals were too civic-minded to translate greater market power into higher prices¹⁰ or that geographic markets should be defined expansively to include competing hospitals located 65 or even 100 miles away.¹¹

In the early 2000s, the Commission responded by launching a wide-ranging retrospective investigation into the consumer effects of various consummated hospital mergers. The Bureau of Economics published four case studies comprehensively analyzing the voluminous available evidence, including evidence that the Commission had gathered under its unique Section 6(b) compulsory process authority.¹² Those studies collectively showed that the analyzed mergers had indeed harmed consumer welfare and that the economic assumptions used to defend the mergers had been flawed.¹³ During the same period, the FTC and the Department of Justice held public workshops on these and other healthcare competition issues and, in 2004, issued their

¹⁰ See *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146 (E.D.N.Y. 1997) (crediting the merging parties' contention that they operated their businesses with "altruistic motivations" and that "community service[,] not profit maximization, is the hospitals' mission"); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1222 (W.D. Mo. 1995) (similar).

¹¹ See *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1052-54 (8th Cir. 1999); *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 981-85 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997).

¹² 15 U.S.C. § 46(b).

¹³ See Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* (FTC Bur. of Econ., Working Paper No. 293, 2008), <http://www.ftc.gov/be/workpapers/wp293.pdf>; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 J. INDUS. ECON. 63 (2001); Christopher Garmon & Deborah Haas-Wilson, *Two Hospital Mergers on Chicago's North Shore: A Retrospective Study*, 18 INT'L J. ECON. BUS. 17 (2011); David J. Balan & Patrick S. Romano, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare* (FTC Bur. of Econ., Working Paper No. 307, 2010), <http://www.ftc.gov/be/workpapers/wp307.pdf>.

joint *Dose of Competition* report, which likewise featured a deep, data-driven analysis of hospital mergers.¹⁴

Equipped with these new empirical findings, the Commission applied a more sophisticated economic approach in its landmark *Evanston* hospital-merger case in 2007.¹⁵ Since then, the Commission has enjoyed a winning streak in healthcare merger challenges, culminating most recently in the Sixth Circuit's *Promedica* decision in 2014¹⁶ and the Ninth Circuit's *St. Luke's* decision earlier this year.¹⁷ The main lesson is this: The Commission's initiatives in the healthcare marketplace are successful precisely because its litigation and economic teams have worked inseparably to build a stronger understanding of industry consolidation, translating new economic insights into litigation wins for American consumers.

That same theme also describes the longstanding FTC initiative vindicated in *FTC v. Actavis*, the third Supreme Court case I will discuss today. As most of you know, *Actavis* concerned the legality of so-called reverse-payment agreements. A reverse-payment controversy arises when a generic pharmaceutical company settles patent litigation against a brand company and agrees to stay out of the market for a defined period in exchange for the brand company's agreement to pay substantial consideration to the generic company. In effect, the two companies in this scenario share the extra monopoly profits the brand company will earn as a result of the generic company's agreement to forestall competitive entry. The main losers are American consumers, who end up paying millions or billions of dollars more for pharmaceuticals.

¹⁴ *Improving Health Care: A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice* (July 2004), <https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice>.

¹⁵ Op. of the Comm'n, *In re Evanston Northwestern Healthcare Corp.*, Docket No. 9315, (Aug. 6, 2007).

¹⁶ *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

¹⁷ *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

Since the late 1990s, successive FTC chairs and commissioners have worked together, in an unbroken bipartisan spirit, to protect consumers against the anticompetitive consequences of these reverse-payment arrangements. As with hospital mergers, the Commission has deployed all of the tools in its administrative toolbox to achieve that goal. It has invoked its compulsory process authority under Section 6(b) to gather information about the effects of reverse-payment arrangements on generic competition. It has issued a report exhaustively analyzing the impact of such arrangements on pharmaceutical prices.¹⁸ It has advocated for, and obtained, critical legislative action from Congress, including enactment of a new provision requiring drug companies to file pharmaceutical patent agreements with the FTC.¹⁹ And in 2003, the Commission issued its first administrative adjudication in this area, finding that a reverse-payment arrangement between Schering-Plough and two generic manufacturers violated the antitrust laws.²⁰

But for many years thereafter, it seemed that the FTC would ultimately lose the legal battle. In 2005, the Eleventh Circuit invalidated the Commission's administrative ruling in *Schering-Plough* and embraced what became known as the "scope-of-the-patent test," which essentially insulated reverse-payment agreements from antitrust challenge.²¹ The Second Circuit and Federal Circuit soon adopted the same restrictive analysis.²² And the Supreme Court denied certiorari in all three cases.

¹⁸ FTC, *Generic Drug Entry Prior to Patent Expiration* (July 2002), <http://www.ftc.gov/reports/generic-drug-entry-prior-patent-expiration-ftc-study>.

¹⁹ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, § 1112, 117 Stat. at 2461-62.

²⁰ Op. of the Comm'n, *Schering Plough Corp.*, FTC Docket No. 9297 (2003).

²¹ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065-66 (11th Cir. 2005).

²² *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 213 (2d Cir. 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008).

Rather than give up, the Commission doubled down. It filed additional complaints challenging new reverse-payment arrangements and released updated empirical analyses exposing the anticompetitive effects of such arrangements.²³ Ultimately, in *Actavis*, the Supreme Court intervened, rejected the scope-of-the-patent test, and awarded a substantial victory to the Commission. It thereby vindicated nearly twenty years of Commission litigation and empirical analysis.

2. Broader Lessons from the Cases

To this point, I've used this triad of recent Supreme Court cases—*North Carolina Dental*, *Phoebe Putney*, and *Actavis*—as a basis for discussing three corresponding programmatic initiatives by the FTC: professional licensure requirements, healthcare consolidation, and reverse-payment arrangements in the pharmaceutical industry. These three FTC initiatives illustrate the Commission at its best, and for essentially the same reasons. For each initiative, the Commission identified a competition policy problem, closely analyzed it over many years with all the investigatory tools at its disposal, and brought a series of enforcement actions to protect consumers from anticompetitive practices. In each case, the Commission's economists have worked hand in hand with its lawyers, and its litigating positions have thus rested on rigorous empirical analysis. And in each case, the initiatives at issue have transcended party affiliation and individual personalities. These have been multi-decade, bipartisan initiatives exemplifying the finest traditions of this century-old institution.

²³ E.g., FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* (2010), <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

Let me now raise the discussion a level of abstraction. These three programmatic success stories help illustrate why, one hundred years after its founding, the FTC remains both distinctive and invaluable as a competition policy institution.

When people discuss which institutional arrangements are best for managing competition policy, they tend to cite two often conflicting values. The first is expertise. Competition policy in the modern economy requires a sophisticated understanding of law, economics, and often technology. Sector-specific regulatory agencies such as the FCC or FERC are repositories of deep expertise for their respective industries. But the second, often conflicting value is objectivity and freedom from regulatory capture. According to public choice theory, sector-specific regulators are constantly challenged to maintain their objectivity in the face of interest-group pressure, particularly if they focus on the quasi-legislative exercise of prescriptive rulemaking rather than case-by-case adjudication of particular disputes. In contrast, generalist federal judges, with life tenure and diverse dockets, are said to exemplify the ideal of objectivity. But they often lack the depth of subject-matter expertise possessed by sector-specific agencies.

The FTC combines some features of a generalist court with some features of a traditional regulatory agency. But it is not quite like either institution, and it arguably combines the best features of each—both in theory and often in practice.

First, the FTC is primarily a law-enforcement authority rather than a prescriptive regulator, and it focuses broadly on commercial arrangements throughout the economy rather than narrowly on arrangements in a particular industry sector. Both attributes—the law-enforcement orientation and the economy-wide focus—tend to insulate the FTC from interest-group politics and regulatory capture. At the same time, the Commission employs hundreds of lawyers and economists who have devoted their careers to understanding the complexities of

modern competition policy. That fact gives the Commission as an institution a degree of expertise that few generalist courts could be expected to match in the field of competition policy.

That expertise manifests itself in a variety of settings, but it is particularly important when the Commission sits as an administrative adjudicator—in what we call “Part 3” cases. The Commission’s seminal Part 3 decisions in the reverse-payment and hospital-merger contexts (*Schering-Plough* and *Evanston*, respectively) exemplify how the Commission puts that expertise to use in shaping national competition policy.

The virtues of this Part 3 process are also borne out in the Commission’s appellate record. Although it would make little sense to assess any agency’s expertise on the basis of appellate statistics alone, the Commission’s appellate success rate in Part 3 antitrust cases is in fact very strong, and I will close today with some brief remarks on that topic.

There are many ways to look at the numbers, but let me begin with a point of agreement. There is a broad consensus, even among skeptics of the Part 3 process, that the Commission’s appellate success rate for Part 3 antitrust decisions is approximately 80 percent. For example, there have been twelve decided appeals of Part 3 antitrust decisions over the past twenty years, and the FTC has substantially prevailed in nine or ten of them, depending on how you count the fate of the FTC’s Part 3 decision in *Schering-Plough*. That decision was ultimately vindicated in *Actavis*, a non-Part 3 case in which the Supreme Court rejected the Eleventh Circuit’s scope-of-the-patent rationale. In my view, it makes more sense to count this *Schering-Plough* reverse-payment experience as a win rather than a loss, bringing the relevant success rate to 83.3 percent.

But no matter how you slice the numbers, an appellate success rate in the neighborhood of 80 percent is exceptionally strong. Indeed, given the context, it is hard to imagine how it could be much stronger. The Commission does not typically end up litigating slam dunk cases in

Part 3. Instead, it uses its Part 3 authority to tackle the most challenging or complex issues in competition policy—as it did, for example, in *Evanston* and *Schering-Plough*. In the process, the Commission often decides new issues of law under the Sherman and Clayton Acts, and it is entitled to no *Chevron* deference when it does so. Reasonable people can have spirited disagreements about these legal issues, which is one reason why antitrust law is so interesting. The FTC did not lose *Schering-Plough* on appeal because there was anything wrong with the quality of its administrative decisionmaking. It lost because reasonable jurists can disagree about the principles that should govern the intersection of antitrust law and intellectual property rights—as the Supreme Court again showed eight years later in *Actavis*.

On top of that, respondents on the losing side of a Part 3 decision have an unusual forum-shopping advantage over ordinary litigants: They can obtain appellate review in any circuit where they do business, which typically enables them to choose whatever circuit has the most favorable law for them.²⁴ In contrast, defendants who lose in district court litigation are stuck with whatever circuit the *plaintiff* chose to sue in.

Despite all this, the Commission still wins about four out of every five appeals of Part 3 antitrust decisions, and that’s a strong testament to the persuasiveness of the Commission’s Part 3 opinions. To put this number in perspective, suppose that you are plaintiff’s counsel in a complex antitrust case that a district court just decided in your favor on the basis of important and novel issues of law. Now suppose that your opponent is represented by the best lawyers available in the antitrust and appellate bars, and that those lawyers can hand-pick, for their appeal, the circuit that they deem most hospitable to their theory of the case. In advising your

²⁴ 15 U.S.C. § 45(c).

client about whether to settle the case before appeal, would you place your odds of appellate success at greater than 80 percent or lower? If you said “lower,” as I suspect you did, you would be giving honest advice. And in fact, when district court decisions ruling for antitrust plaintiffs are actually appealed, they are no more likely—indeed, they appear less likely—to be affirmed on appeal than are FTC Part 3 antitrust decisions appealed by respondents.²⁵

Of course, we do not win all of our cases, nor should anyone expect that we will. For every ten antitrust experts, there are ten theories about exactly how the lines should be drawn in this complex and fascinating field. My narrow point is this: the FTC’s appellate record is exemplary despite the FTC’s charter to help develop competition policy in unsettled areas of antitrust law. And the reason for that success lies in the unique institutional design of the FTC as a bipartisan, empirically-oriented law enforcement institution with competition and consumer protection authority over broad sectors of the economy. Consumers today have every reason to be grateful for Congress’s decision 100 years ago to create the FTC and assign it a critical role in the development of national competition policy.

²⁵ Not all antitrust judgments are appealed; many cases are settled before an appellate decision can be rendered. And losing district court defendants are more likely than losing Part 3 respondents to settle before or during appeal. That is not because losing district court defendants are so certain they will also lose on appeal that they value the probability-adjusted benefits of a possible appellate reversal less than the costs of an appeal, which are generally negligible in comparison to the costs of an adverse antitrust judgment. Instead, losing district court defendants are more likely to settle because most district court antitrust cases concern private litigation, and private antitrust litigation often includes damages claims that are amenable to monetary settlements of varying amounts. In contrast, a litigated Part 3 antitrust judgment never includes a damages remedy that could be the subject of a compromise settlement pending appeal, yet taking an appeal from a Part 3 judgment is often the best way that a losing respondent in a conduct case can mitigate the risk of follow-on private suits for treble damages. Finally, FTC respondents (unlike district court defendants) can typically choose the appellate forum they deem most hospitable, which makes it even more likely that they will actually take an appeal rather than acquiescing in an adverse Part 3 judgment.