

**2015 ANNUAL ANTITRUST SPRING SEMINAR**  
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**Remarks of Commissioner Terrell McSweeney**  
**As Prepared for Delivery**

Thank you for inviting me to speak with you. I am delighted to be here.

This is an anniversary of sorts for me—I was sworn in as an FTC Commissioner exactly one year ago today.

It has been an exciting first year.

The FTC celebrated its centennial, won a case at the Supreme Court, secured important rulings from a number of appellate courts, and obtained the second highest monetary settlement for an antitrust case in its history. And that’s only on the competition side of the agency.

Of course, I cannot take credit for these outcomes. One thing that makes the Commission so special is the dedication and hard work of its staff and my fellow Commissioners. I want to emphasize that today I am speaking on behalf of myself—my remarks do not necessarily reflect the views of the Commission or my colleagues.

The FTC has been very active in a number of areas over the last year. This afternoon I’m going to provide you with some of the highlights—including recent significant appellate victories that are shaping antitrust law—and talk about the role competition enforcers play in protecting and promoting innovation.

Dentists, Doctors, & Ductile Iron Pipe: Recent FTC Appellate Successes

The FTC has had tremendous success in the appellate courts over the past year. In February, the U.S. Supreme Court affirmed a ruling in favor of the FTC in its case against the North Carolina State Board of Dental Examiners.<sup>1</sup>

As a reminder, this case involved a state board composed primarily of dentists which issued a number of cease-and-desist letters to non-dentist teeth whitening service providers, warning that the unlicensed practice of dentistry was a crime. As a result, non-dentist

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<sup>1</sup> *North Carolina St. Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

alternatives stopped providing their services in North Carolina. The FTC sued and alleged that the board's concerted action to exclude non-dentists was a violation of Section 5 of the FTC Act. In response, the board claimed that it was entitled to state action immunity.

The Supreme Court disagreed, holding that where active market participants—in this case, dentists—control a state board in the occupation the board regulates, active supervision is required in order to invoke the state action doctrine.<sup>2</sup> This was an important decision and builds upon other Supreme Court decisions clarifying the scope of state action immunity, including the Commission's victory in *Phoebe Putney* in 2013.<sup>3</sup>

The FTC also obtained favorable rulings in the appellate courts involving challenges to anticompetitive health care provider transactions. Last April, the Sixth Circuit affirmed the Commission's order in *ProMedica*, holding that ProMedica Health System's acquisition of its competitor, St. Luke's Hospital, was unlawful and likely would lead to higher hospital rates for patients in Lucas County, Ohio.<sup>4</sup> Likewise, the Ninth Circuit affirmed the district court's ruling that St. Luke's Health System's acquisition of Saltzer Medical Group would substantially lessen competition in the market for adult primary care physician services in Nampa, Idaho.<sup>5</sup> Just last week, the Ninth Circuit denied St. Luke's petition for panel rehearing and for rehearing *en banc*.<sup>6</sup>

These rulings are a validation of the role the FTC plays in protecting competition in health care markets—even during this period of rapid change in the delivery of health care. It is essential, in my view, that the FTC remains vigilant in protecting competition in health care markets by closely examining the competitive impact of mergers and acquisitions involving health care providers.

Some have suggested that the Ninth Circuit's opinion in *St. Luke's* raised the bar for defendants claiming efficiencies. In my view, however, the opinion reinforces—consistent with the *Horizontal Merger Guidelines*—that it is not enough to assert that the acquisition might

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<sup>2</sup> *Id.* at 1117.

<sup>3</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013) (holding state action immunity did not apply where the state did not clearly articulate and affirmatively express a policy allowing hospital authorities to make acquisitions that substantially reduce competition).

<sup>4</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

<sup>5</sup> *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

<sup>6</sup> Order, *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, No. 14-35173 (9th Cir. Apr. 21, 2015).

somehow lead to efficiencies, such as increased quality.<sup>7</sup> Although St. Luke's had a desire to improve quality, there was nothing in the record to show it had increased quality in its previous acquisitions, or that it had anything more than a "laudable goal" to do so with its acquisition of the Saltzer physicians.<sup>8</sup> Moreover, the evidence showed that St. Luke's claimed efficiencies were not merger-specific.<sup>9</sup> The record was replete with evidence, however, that competition would decrease and prices likely would go up because of the acquisition.<sup>10</sup>

Before I turn from the FTC's recent appellate successes, I would be remiss if did not mention the Eleventh Circuit affirmation of the Commission's decision that *McWane* maintained a monopoly in the ductile iron pipe fittings market through an unlawful exclusive dealing policy.<sup>11</sup> Although this case was at the Commission before my tenure, key takeaways from the court's opinion include the continued importance of qualitative evidence in assessing liability, as well as the court's denial of a heightened standard of proof for exclusive dealing cases.<sup>12</sup> The Eleventh Circuit affirmed the Commission's use of the rule of reason analysis that sought to determine the "probable effect" of the exclusive dealing policy.<sup>13</sup>

The *McWane* case and settlement with Cardinal Health, announced last week, underscore that conduct enforcement is alive and well at the FTC. The settlement with Cardinal Health requires Cardinal to disgorge \$26.8 million in ill-gotten gains and abide by certain injunctive relief.<sup>14</sup> It is the second largest monetary settlement the FTC has obtained in an antitrust case after *Mylan* almost 15 years ago. The settlement resolves the Commission's concerns that Cardinal monopolized 25 separate local markets for the sale and distribution of radiopharmaceuticals.

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<sup>7</sup> *Id.*, 778 F.3d at 791 ("It is not enough to show that the merger would allow St. Luke's to better serve patients."); see also U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES § 10 ("Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.").

<sup>8</sup> *St. Alphonsus*, 778 F.3d at 791-92.

<sup>9</sup> *Id.* at 791.

<sup>10</sup> *Id.* at 787-88.

<sup>11</sup> *McWane, Inc. v. FTC*, No. 14-11363, 2015 U.S. App. LEXIS 6111 (11th Cir. Apr. 15, 2015).

<sup>12</sup> *Id.*, 2015 U.S. App. LEXIS 6111, at \*\*47-48.

<sup>13</sup> *Id.* at \*48.

<sup>14</sup> Press Release, Fed. Trade Comm'n, *Cardinal Health Agrees to Pay \$26.8 Million to Settle Charges it Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics*, Apr. 20, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>.

Between 2003 and 2008, Bristol-Myers Squibb (BMS) and General Electric (GE) were the only U.S. manufacturers of radiopharmaceuticals known as heart perfusion agents, which are used to perform heart stress tests. During this time, a radiopharmacy could not enter a new market and compete against Cardinal without first obtaining the right to either BMS's or GE's heart perfusion agent.

The FTC's complaint alleged that Cardinal engaged in a number of anticompetitive tactics to obtain *de facto* exclusive distribution rights to the only two heart perfusion agents available at the time. Cardinal's conduct enabled it to block or delay potential entrants from gaining access to these key inputs, as well as to charge inflated prices for radiopharmaceuticals purchased by hospitals and clinics.<sup>15</sup>

I believe disgorgement was appropriate to redress the consumer harm caused by Cardinal's actions. While exclusive distribution arrangements can be procompetitive, there was significant evidence in this matter that there was no efficiency benefit or legitimate business justification for Cardinal simultaneously maintaining exclusive rights to the only two critical inputs needed for competitor entry into the relevant markets.<sup>16</sup> The FTC's settlement with Cardinal, along with the recent *McWane* decision, highlights our continued commitment to protecting consumers from monopolization that harms competition.

### Innovation & Antitrust: The Role of Competition Enforcers in Promoting Innovation

#### *Protecting Innovation Through Enforcement*

The FTC also plays an active role in protecting and promoting innovation—as both an enforcer and an advocate. Well-designed merger enforcement that is grounded in economics seeks to allow mergers that are benign or, even better, procompetitive, and to prevent mergers that substantially reduce competition and harm innovation. In 2010, the FTC and DOJ revised the *Horizontal Merger Guidelines* to include a new section that specifically addresses innovation effects, stating that the Agencies “may consider whether a merger is likely to diminish

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<sup>15</sup> Compl., *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. filed Apr. 20, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150420cardinalcmpt.pdf>.

<sup>16</sup> See Statement of the Fed. Trade Comm'n in the Matter of Cardinal Health, Inc., Apr. 17, 2015, available at [https://www.ftc.gov/system/files/documents/public\\_statements/637781/150420cardinalhealthcommstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/637781/150420cardinalhealthcommstmt.pdf).

innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.”<sup>17</sup>

In the last year, the FTC has examined the likelihood for innovation effects in transactions involving high-tech markets and in the context of pharmaceutical mergers. For example, in December the FTC challenged Verisk’s proposed acquisition of EagleView,<sup>18</sup> which the parties abandoned after the FTC sued. In that case, the Commission alleged that the transaction likely would result in a virtual monopoly for rooftop aerial measurement products, also known as roof reports, used by insurance companies to assess property claims. One of the things we examined was the likelihood of continued competition between the merging parties in offering customers more innovative products. There was strong evidence that Verisk was uniquely well positioned to compete against EagleView in providing roof reports and there were significant barriers to entry or expansion by other firms.

Certain industries lend themselves to review of possible innovation effects. The FTC regularly examines the likelihood for diminished innovation or research and development (R&D) in the context of pharmaceutical mergers. As you are no doubt aware, the number of pharmaceutical mergers has skyrocketed in the last year. The Commission is concerned not only about the elimination of actual competition in these deals, but also possible effects involving future competition.

For example, earlier this year, the FTC entered into a consent agreement to divest certain assets to a third party in order to remedy the anticompetitive effects of Novartis’s proposed acquisition of oncology assets from GlaxoSmithKline (GSK).<sup>19</sup> Novartis had certain oncology products known as BRAF and MEK inhibitors in late-stage development with the FDA. GSK was the only FDA-approved supplier of these products. The evidence strongly suggested that absent the transaction, Novartis likely would have obtained FDA approval and launched its products in the near future in direct competition with GSK. No other firms have products in development that are likely to enter at any time in the near future. Therefore, the acquisition would have eliminated the significant head-to-head competition between the merging parties for these important cancer drugs.

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<sup>17</sup> 2010 HORIZONTAL MERGER GUIDELINES § 6.4.

<sup>18</sup> Compl., In the Matter of Verisk Analytics, Inc. and EagleView Technology Corp., Dkt. No. 9363 (Dec. 16, 2014), available at <http://www.ftc.gov/system/files/documents/cases/141216veriskcmpt.pdf>.

<sup>19</sup> Decision and Order, In the Matter of Novartis AG, Dkt. C-4510 (Feb. 23, 2015), available at [https://www.ftc.gov/system/files/documents/cases/agreement\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/agreement_0.pdf)

In some instances, the FTC investigates possible adverse effects on innovation and concludes these effects are unlikely. The recently closed investigation of Zillow’s acquisition of Trulia is an example.<sup>20</sup> Zillow and Trulia operate websites and mobile apps that provide consumers with free access to residential real estate listings and information. They support this offering by selling advertising products to real estate agents looking to reach those consumers. Staff conducted a thorough investigation that yielded some important conclusions. First, the evidence suggested that real estate agents use numerous methods in addition to the platforms operated by Zillow and Trulia to attract customers. Second, there was insufficient evidence leading the Commission to conclude that real estate agents would face higher prices for advertising after the merger, or that the combined firm would have a reduced incentive to innovate—on either the consumer side or the advertiser side of its platform. The Commission therefore closed its investigation.

The FTC also protects innovation and competition by protecting consumers from anticompetitive conduct. For example, the FTC is actively working to stop reverse payment settlements (or “pay-for-delay” agreements) in the pharmaceutical sector—both through enforcement and by helping lower courts interpret the Supreme Court’s ruling in *Actavis*, which confirmed the harm to competition from reverse payment agreements.

The Commission has three ongoing reverse payment settlement litigations in district courts: *Actavis*, now on remand in Georgia, as well as *Cephalon* and *AbbVie*—both of which are pending here in the Eastern District of Pennsylvania. Last week, the private plaintiffs in the *Cephalon* matter settled with Teva (the current owner of Cephalon) for \$512 million.<sup>21</sup> The FTC’s case against Cephalon is slated for trial in June. Earlier this month, the judge in *Cephalon* ruled that the FTC is permitted to seek equitable monetary remedies as part of its prayer for relief.<sup>22</sup> Importantly, Judge Goldberg held not only that the can FTC seek disgorgement, but also that there are no equitable reasons prohibiting the agency from doing so.

Post-*Actavis*, the issue of what constitutes a payment subject to antitrust scrutiny is currently playing out in a number of actions across many different jurisdictions, including here in

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<sup>20</sup> See Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeney Concerning Zillow, Inc./Trulia, Inc., Feb. 19, 2015, available at [https://www.ftc.gov/system/files/documents/public\\_statements/625671/150219zillowmko-jdw-tmstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf).

<sup>21</sup> See, e.g., Katie Thomas, *Teva to Pay \$512 Million to Settle Suit Over Delay of Sleep Disorder Drug*, N.Y. TIMES, Apr. 20, 2015, available at <http://www.nytimes.com/2015/04/21/business/teva-to-pay-512-million-to-settle-suit-over-delay-of-sleep-disorder-drug.html>.

<sup>22</sup> Memorandum Op., *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D.P.A. Apr. 15, 2015).

Philadelphia. The *Actavis* opinion only refers to “payments” and “money” but, in my view, nothing in the opinion suggests that the Supreme Court meant to limit its ruling to strictly cash, as opposed to in-kind compensation. From a competition perspective, of course, the form that a particular payment takes is irrelevant. The competitive harm results from the delayed entry of the lower-priced competitor.

Last year, the Commission filed an *amicus* brief on this issue and participated in argument in the Lamictal direct purchaser litigation pending before the Third Circuit.<sup>23</sup> Weighing in in support of the private plaintiffs, the FTC noted that the in-kind payment at issue—a “no authorized generic” (no AG) commitment whereby a brand refrains from marketing its own authorized generic in return for delayed generic entry—is a type of reverse payment subject to scrutiny under the Supreme Court’s analysis in *Actavis*.

No AG commitments and other non-cash consideration appear to be increasingly common ways to delay generic entry. Last September, the Commission filed its first post-*Actavis* lawsuit, charging pharmaceutical companies with illegally blocking consumers’ access to less expensive versions of the testosterone replacement drug AndroGel.<sup>24</sup> AndroGel has annual U.S. sales of over \$1 billion. The FTC’s complaint alleges that branded drug manufacturer AbbVie and its partner Besins filed sham patent litigation suits against potential generic competitors in order to delay introduction of lower-priced versions of AndroGel. While the lawsuits were pending, the complaint alleges that AbbVie then entered into an anticompetitive reverse payment agreement with generic drug manufacturer Teva to further delay generic drug competition. Teva agreed to abandon its countersuit against AbbVie and refrain from launching its lower-cost AndroGel alternative. In return, AbbVie paid Teva in the form of an authorized generic deal on an unrelated cholesterol drug, TriCor. The Commission is seeking not only injunctive relief, but also disgorgement of the defendants’ ill-gotten gains.

### *Protecting Innovation Through Advocacy*

Although the FTC is primarily a law enforcement agency, it also makes use of a variety of tools to examine the competitive benefits and harms of particular practices as well as their impact on innovation.

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<sup>23</sup> Br. of FTC as *Amicus Curiae* in Supp. of Pl.-Appellants, *King Drug Co. of Florence, Inc. v. SmithKlineBeecham Corp.*, No. 14-1243 (3d Cir. filed Apr. 28, 2014), available at [http://www.ftc.gov/system/files/documents/amicus\\_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf](http://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf).

<sup>24</sup> Compl., *FTC v. AbbVie, Inc.*, No. 14-cv-5151 (E.D. Pa. filed Sept. 8, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140908abbviecmpt1.pdf>.

Competition enforcers also play an important role in promoting innovation by advocating for disruptive entrants, and the FTC has continued its work in this area. For example, in the last few years, the FTC has submitted comments to cities and taxicab authorities urging that regulations be limited to legitimate safety and consumer protection issues, and not impede competition or innovation from new ride-sharing platforms such as those offered by Uber and Lyft.<sup>25</sup>

FTC officials also expressed concern with state laws designed to protect the automotive dealership model from competition from Tesla's direct-to-consumer sales strategy, characterizing those laws as "bad policy."<sup>26</sup> I am encouraged that New Jersey recently lifted its one-year ban of Tesla's direct sales and it can once again resume sales in the state.

Virtual marketplaces can bring significant benefits to consumers, but there are a number of competition and consumer protection issues surrounding online and mobile peer-to-peer platforms. The FTC recently announced a one-day workshop to explore these issues, scheduled for June 9 at the FTC in Washington.<sup>27</sup> The so-called "sharing economy" has grown substantially over the past several years, with an estimated value of \$26 billion globally in 2013. Some estimates predict that the sharing economy will generate as much as \$110 billion per year in the near future. We are seeking public comments in connection with the sharing economy workshop as well.

I also believe that competition plays a vital role in promoting better, faster Internet service, which is why I have been urging states to be cautious about creating barriers to entry in broadband delivery at the local level.<sup>28</sup>

These examples demonstrate that—far from playing catch-up when it comes to innovative products and services—the antitrust agencies are frequently out in front, using the

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<sup>25</sup> See, e.g., Letter to Brendan Reilly, Alderman, City Council, City of Chicago from Andrew Gavil, Deborah Feinstein, and Martin Gaynor, Fed. Trade Comm'n, Apr. 15, 2014, available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf).

<sup>26</sup> Andrew Gavil, Deborah Feinstein, and Martin Gaynor, Fed. Trade Comm'n, *Who Decides How Consumers Should Shop?*, Competition Matters Blog, Apr. 24, 2014, available at <http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop>.

<sup>27</sup> Press Release, Fed. Trade Comm'n, *FTC to Examine Competition, Consumer Protection, and Economic Issues Raised by the Sharing Economy at June Workshop*, Apr. 17, 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-examine-competition-consumer-protection-economic-issues>.

<sup>28</sup> See Terrell McSweeney, *Broadband Competition Should Be Encouraged, Not Restricted*, RE/CODE, Jan. 13, 2015, available at <http://recode.net/2015/01/13/broadband-competition-should-be-encouraged-not-restricted/>.



principles of competition law to help ensure that new and exciting ideas have the opportunity to succeed on their merits.

Where there are open questions about whether conduct may be harming innovation and competition, the FTC can use its Section 6(b) authority to gain expertise. The FTC is making use of its 6(b) authority to learn how patent assertion entities (PAEs) do business and to develop a better understanding of how they affect innovation and competition. PAEs operate in a largely opaque industry. Proponents of PAEs argue that they foster a valuable secondary market for patents, enabling inventors to capitalize on their ideas and encouraging venture capital firms to fund new projects. On the other hand, critics argue that PAEs divert resources away from manufacturing firms' productive research and development efforts, take advantage of an imbalance in litigation costs between PAEs and defendants, and act as a drag on innovation.

The Commission hosted a workshop with the DOJ on patent assertion entities in 2012, and we received approval last summer to use our 6(b) authority to conduct a study. We issued information requests to approximately 25 PAEs, as well as to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector.<sup>29</sup> Currently, FTC staff is working hard to analyze the requested information. The FTC intends to publish a descriptive report that will allow industry participants, policymakers, and academics to gain a better understanding of the PAE business model.

### Conclusion

Some say that antitrust law and competition enforcers cannot keep pace with the change in dynamic or high-tech markets. I disagree. As Judge Posner noted more than a decade ago, “antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competition issues presented by the new economy.”<sup>30</sup> Modern antitrust law and the enforcement agencies protect and promote innovative, open, and competitive markets—the examples I’ve talked about today underscore the FTC’s work in this area over the last year. I look forward to continuing the FTC’s vital role as an enforcer and advocate for competition, innovation, and consumers.

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<sup>29</sup> Fed. Trade Comm’n, Patent Assertion Entities (PAE) Study, *available at* <https://www.ftc.gov/policy/studies/patent-assertion-entities-pae-study>.

<sup>30</sup> Richard A. Posner, *Antitrust in the New Economy*, John M. Olin Law & Economics Working Paper 106 (2000), *available at* [m.law.uchicago.edu/files/files/106.Posner.pdf](http://m.law.uchicago.edu/files/files/106.Posner.pdf).