

# Director's Report

## Spring 2015

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One of the most striking aspects of the Commission's competition workload this past year is the number of antitrust cases we have had pending in federal courts at all levels. Throughout the year, we had cases preparing for trial and pending on appeal, including before the Supreme Court. And the cycle continues in both merger and conduct cases. Starting in just a few weeks, the Commission will present evidence in federal court here in D.C. on its motion for a preliminary injunction in Sysco/US Foods, an action taken to preserve competition in the national market and in 32 local markets for broadline foodservice distribution services.<sup>2</sup> On June 1, more than seven years after the Commission filed its complaint against Cephalon for entering into an anticompetitive reverse patent settlement, trial will begin in district court in Philadelphia.

On the conduct front, the big news from this year was the Commission's important win before the Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*.<sup>3</sup> This is the latest in a string of FTC cases beginning with *FTC v. Ticor Insurance Co.*,<sup>4</sup> in which the Commission asked the Court to clarify the scope of the state action doctrine first articulated in *Parker v. Brown*. In *North Carolina State Board*, the Court significantly scaled back antitrust immunity for state regulatory boards that are controlled by market participants. The Commission also had a significant appellate win just this week, as the Eleventh Circuit affirmed its decision and order in a monopolization case involving *McWane, Inc.*<sup>5</sup>

The Commission also obtained important rulings from two circuit courts reviewing health care mergers. Last April, in the first favorable appellate ruling in a hospital merger enforcement action in nearly three decades, the Sixth Circuit upheld the Commission's order in *ProMedica Health System v. FTC*,<sup>6</sup> finding that ProMedica's acquisition of rival St. Luke's Hospital violated the antitrust laws and would likely lead to higher prices for patients living in the Toledo, Ohio area. Then in February 2015, the Ninth Circuit upheld a permanent injunction against the merger of St. Luke's Health System and Saltzer Medical Group, the two largest providers of adult primary care physician services in Nampa, Idaho.<sup>7</sup>

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<sup>1</sup> The views expressed are mine and do not necessary reflect the views of the Commission or any Commissioner.

<sup>2</sup> *FTC v. Sysco Corporation*, No. 1:15-cv-00256 (D.D.C. Feb. 20, 2015).

<sup>3</sup> *North Carolina St. Bd. of Dental Exam. v. FTC*, 135 S. Ct. 1101 (2015).

<sup>4</sup> *FTC v. Ticor Insurance Co.*, 504 U.S. 621 (1992).

<sup>5</sup> *McWane, Inc. v. FTC*, No. 14-11363 (11<sup>th</sup> Cir. Apr. 15, 2015).

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

<sup>7</sup> *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9<sup>th</sup> Cir. 2015).

Also this year, the Commission brought its first sham litigation case in federal court. As described further below, the complaint in *FTC v. AbbVie, Inc.*,<sup>8</sup> also challenges the method by which the sham litigation was settled, making this the Commission's first case involving a reverse payment patent settlement since the Supreme Court ruling in *FTC v. Actavis*.<sup>9</sup> And of course the Actavis case continues in district court in Georgia.<sup>10</sup> The FTC remains committed to helping develop the law on reverse payments after the *Actavis* ruling, even as tactics evolve to avoid obvious cash payments in exchange for eliminating potential competition.

Although most of the FTC's competition cases are resolved with consent orders, I believe our active litigation workload demonstrates that the Commission is ready to litigate when necessary to enforce the antitrust laws and prevent consumer harm from anticompetitive conduct or mergers.

## **MERGERS**

### *Litigated Mergers*

As noted above, the FTC is in federal court seeking a preliminary injunction to prevent the merger of Sysco and US Foods, pending an administrative trial on the merits, which is scheduled to begin later this summer.<sup>11</sup> The Commission alleges that the proposed acquisition violates Section 7 by significantly reducing competition for broadline foodservice distribution services. Broadline distributors supply a wide range of food to foodservice operators, including restaurants, hospitals, hotels and schools. Broadline foodservice distributors compete on the basis of price, extensive product lines, frequent and flexible delivery, high levels of customer service, and other value-added services such as order tracking, menu planning, and nutritional information.

Sysco and US Foods are, by far, the largest broadline foodservice distributors in the United States, with a combined 75% share of sales to national customers. Sysco and US Foods are the only broadline distributors with a truly national footprint, operating numerous distribution centers throughout the country. They compete vigorously with each other to meet the needs of customers with foodservice locations dispersed nationwide or across multiple regions of the country. As alleged in the complaint, many hotel chains, foodservice management companies, and group purchasing organizations, for example, consider Sysco and US Foods to be each other's closest competitor, and in some cases those customers' only meaningful alternatives, for national broadline distribution services. In addition, Sysco and US Foods compete for the broadline business of independent restaurants and other local customers. The Commission's complaint alleges that the proposed acquisition would likely harm competition in 32 local markets. The Commission is joined in this action by the state attorneys general from 11 states and the District of Columbia.

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<sup>8</sup> *FTC v. AbbVie, Inc.*, No. 2:14-cv-05151 (E.D. Pa. Sept. 8, 2014).

<sup>9</sup> *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

<sup>10</sup> *FTC v. Actavis, Inc.*, No. 1:09-cv-00955 (N.D. Ga. Apr. 10, 2009).

<sup>11</sup> In the Matter of Sysco Corporation, Dkt. 9364 (complaint filed Feb. 19, 2015).

During the investigation, the parties entered into an agreement to sell 11 US Foods distribution centers to Performance Food Group, a much smaller regional player. The Commission rejected that settlement, finding that the proposed fix would not allow PFG to counteract the competitive harm resulting from the merger. Even with the addition of 11 distribution centers, PFG would not replace the competition US Foods provides in the marketplace.

The Commission was prepared to litigate two other mergers this year – Verisk/EagleView<sup>12</sup> and Jostens/American Achievement<sup>13</sup> – but the parties decided to abandon their mergers in the face of a Commission challenge. In December, the Commission filed an administrative complaint and authorized staff to seek a preliminary injunction to prevent Verisk Analytics, Inc.’s proposed \$650 million acquisition of EagleView Technology Corporation, alleging that the proposed transaction would likely reduce competition and result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to estimate repair costs for property damage claims.<sup>14</sup> Until 2008 – when EagleView first offered its roof reports using proprietary software to analyze aerial images – insurance adjusters climbed roofs to measure the perimeter, slope, and other dimensions by hand. Today, insurance carriers use rooftop aerial measurement products for several reasons, including because they are safer, faster, and more accurate than traditional manual measurement.

EagleView, the self-proclaimed “industry standard” in rooftop aerial measurement products, controlled approximately 90% share of the relevant market, serving most of the top 25 insurance carriers. Verisk owns the dominant software platform through which insurers use rooftop aerial measurement products to estimate property damage claims. Verisk entered the market with two measurement products of its own, and within two years succeeded in winning significant customers away from EagleView. Verisk’s entry into the market had provided a lower-cost alternative, and Verisk was in the best position to continue competing with EagleView. The two companies were viewed by customers as the two closest substitutes, with other providers having inferior offerings. After the Commission filed its complaint, the parties decided to abandon their merger plans.

Similarly, the Commission issued an administrative complaint and authorized staff to seek a preliminary injunction in federal district court to prevent Jostens, Inc.’s proposed \$500 million acquisition of American Achievement Corp. The Commission alleged that the acquisition would have substantially reduced competition between two leading U.S. manufacturers of high school and college class rings, competition that results in lower ring prices, better warranty protection, improved services, and contributions to school programs, such as scholarship funds and educational support programs. This is not the first class rings merger reviewed by the Commission: in 1996, the Commission required divestitures in a transaction involving two

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<sup>12</sup> In the Matter of Verisk Analytics, Inc., Dkt. 9363 (complaint filed Dec. 16, 2014).

<sup>13</sup> In the Matter of Visant Corporation, Dkt. 9362 (complaint filed April 17, 2014).

<sup>14</sup> Fed. Trade Comm’n, Press Release, “FTC Challenges Verisk Analytic’s Inc.’s Proposed Acquisition of EagleView Technology Corporation” (Dec. 16, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/12/ftc-challenges-verisk-analytics-incs-proposed-acquisition>.

smaller vendors,<sup>15</sup> and in 2008, Commission staff raised competitive concerns in the proposed sale of AAC to Herff Jones before the parties decided to terminate their acquisition agreement.<sup>16</sup> Shortly after the Commission filed its administrative complaint last April, Josten's and AAC abandoned the latest proposed transaction.<sup>17</sup>

The Commission's merger litigation this year illuminates a central feature of merger enforcement: even when the Commission determines it has reason to believe a merger is likely to result in competitive harm, very few such cases end up in federal court. Most settle, with negotiated divestitures that remedy the potential harm but allow the unproblematic aspects of the merger to proceed. But when the parties determine that there is no settlement that they are willing to accept that will also satisfy the Commission's concerns, they may choose to litigate.

As I noted above, the Commission also obtained two favorable merger decisions from appellate courts this year, from the Sixth Circuit in *ProMedica v. FTC*<sup>18</sup> and from the Ninth Circuit in *St. Luke's/Saltzer Medical Group*,<sup>19</sup> the physician merger in Idaho. As I discussed in a speech last fall,<sup>20</sup> much has been written about the ongoing wave of provider consolidation in health care markets, a trend that continues to require significant resources from the Bureau to keep pace with merger reviews. There is a growing body of literature to support concerns about providers with significant market power using that position to negotiate anticompetitive reimbursement rates.<sup>21</sup> For instance, studies have shown that prices can go up as much as 40% as a result of a merger of competing hospitals.<sup>22</sup> As many others have noted, it is critical that health care markets are sufficiently competitive, and antitrust enforcement is key to preventing harmful consolidation before it occurs.<sup>23</sup>

In the first appellate decision involving a hospital merger in over 15 years, the Sixth Circuit upheld the Commission's decision to order ProMedica Health System to divest its rival,

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<sup>15</sup> Fed. Trade Comm'n, Press Release, "FTC Modifies Marriage of Class Ring Makers, Citing Risk of Higher Prices for Students" (Sept. 24, 1996), available at <https://www.ftc.gov/enforcement/cases-proceedings/9610067/class-rings-inc-castle-harlan-partners-ii-lp-town-country>.

<sup>16</sup> Fed. Trade Comm'n, Press Release, "Statement of FTC's Bureau of Competition Regarding Announcement that Herff Jones and American Achievement Group Have Terminated Their Acquisition Agreement" (Dec. 8, 2008), available at <https://www.ftc.gov/news-events/press-releases/2008/12/statement-ftcs-bureau-competition-regarding-announcement-herff>.

<sup>17</sup> Fed. Trade Comm'n, Press Release, "Statement of FTC Bureau of Competition Director Deborah Feinstein on Jostens' Decision to Drop its Proposed Acquisition of American Achievement Corp.," (April 17, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0033/visantjostensamerican-achievement-matter>.

<sup>18</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

<sup>19</sup> *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

<sup>20</sup> "Antitrust Enforcement in Health Care: Proscription, not Prescription," remarks of Deborah L. Feinstein at Fifth National Accountable Care Organization Summit (June 19, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/409481/140619\\_aco\\_speech.pdf](https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf).

<sup>21</sup> See, e.g., Paul B. Ginsburg, *Wide Variation in Hospital and Physician Payment Rates Evidence of Provider Market Power* (Center for Studying Health System Change, Research Brief No. 16, 2010), available at <http://www.hschange.com/CONTENT/1162/>.

<sup>22</sup> See, e.g., Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, 18 INT'L J.L. ECON. OF BUS., 65 (2011).

<sup>23</sup> Martin Gaynor, *Competition Policy in Health Care Markets: Navigating the Enforcement and Policy Maze*, 33 HEALTH AFF. 1088 (June 2014).

St. Luke's Hospital, because their merger would enhance ProMedica's leverage to demand higher rates.<sup>24</sup> The Commission found, and the appellate court agreed, that the merger would give ProMedica, already the largest hospital system in Lucas County, Ohio, more than half the market for inpatient general acute care hospital services and over 80% of the market for inpatient obstetrics services. The Sixth Circuit noted that in the Lucas County market, a hospital's market share correlated closely with price, reflecting market power, but that price, at least in the case of ProMedica, did not correlate with higher quality. The court concluded that the high combined market share, and St. Luke's location in the affluent southwestern Toledo suburbs, would have left payers "with no walk-away option in post-merger negotiations with ProMedica – and thus little ability to walk away from the merged firm." Party documents supported this conclusion, including many indicating that St. Luke's management saw the acquisition leading to higher prices by increasing its "negotiating clout" over insurers.

In addressing the hospitals' evidence in rebuttal, the Sixth Circuit – like the Commission – rejected the argument that St. Luke's financial condition was so weakened that its future competitive significance was limited and overstated by its current market share. The Sixth Circuit noted that it is only in rare cases that the merging parties are able to undermine the government's *prima facie* case with evidence that the acquired firm is "flailing" such that the merger would not reduce competition. In the face of evidence that St. Luke's market share was in fact increasing prior to the merger, the Court rejected the argument, commenting that the flailing firm defense is the "hail Mary pass" of "presumptively doomed mergers."

The defendants in *ProMedica* are seeking Supreme Court review of the Sixth Circuit's decision, and on April 1, the Commission filed its opposition to the petition for cert.<sup>25</sup> If granted, this would be the first merger case before the Supreme Court on substantive grounds in over 40 years.

A combination of physician practices was at issue in another appellate court ruling from this year. In the fall of 2013, the Commission and the State of Idaho challenged the acquisition of Saltzer Medical Group by St. Luke's Health System, Idaho's dominant health system. While some have characterized the transaction as a vertical one, our challenge was to the horizontal combination of primary care physicians. St. Luke's had a large number of employed primary care physicians from prior acquisitions, including eight primary care physicians in Nampa. St. Luke's acquired from Saltzer 16 primary care physicians practicing in Nampa. The Commission alleged that St. Luke's 80% post-acquisition market share gave it the ability to demand higher rates for adult primary care physician services in Nampa, Idaho's second-largest city. Although those prior acquisitions involving Nampa-area physicians gave St. Luke's greater leverage, payers had been able to resist at least some of St. Luke's demands because of the presence of an alternative provider, Saltzer. The Commission alleged, and the district court agreed, that St. Luke's acquisition of Saltzer eliminated that remaining competitive option and would have led to higher prices for physicians' services.<sup>26</sup>

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<sup>24</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6<sup>th</sup> Cir. 2014).

<sup>25</sup> *ProMedica Health Sys., Inc. v. FTC*, No. 14-792 (Brief for the Respondent in Opposition, Apr. 1, 2015).

<sup>26</sup> *FTC v. St. Luke's Health Sys., Ltd.*, 1:13-CV-00116-BLW, 2014 WL 407446 (D. Id. Jan. 24, 2014).

On appeal, the Ninth Circuit affirmed the district court's ruling in nearly all respects, finding that the FTC had met its *prima facie* burden by demonstrating the merged entity's high market share and ability to negotiate higher reimbursement rates with insurers.<sup>27</sup> The Court also dismissed the defendants' efficiency arguments, finding that the district court did not err in finding that St. Luke's failed to prove any efficiencies resulting from the merger would have a positive effect on competition.

Unfortunately, success in the appellate courts does not guarantee effective relief from the harmful consequences of a consummated merger. Two years after obtaining a unanimous decision from the Supreme Court on the inapplicability of the state action doctrine,<sup>28</sup> the Commission brought to a close its challenge to Phoebe Putney's acquisition of Palmyra Park Hospital, a merger-to-monopoly. The Commission first challenged the transaction in April 2011 by filing a motion for a preliminary injunction to preserve hospital competition in Albany, Georgia.<sup>29</sup> Although both the trial court judge and the 11<sup>th</sup> Circuit acknowledged that competitive harm was likely to result from the merger-to-monopoly, the Commission was unable to obtain preliminary relief that would have held the hospitals separate and preserved the Commission's ability to restore competition. Last month, the Commission finalized an order that does not require divestiture: "While it would have been the most appropriate and effective remedy to restore the lost competition in Albany and the surrounding six-county area from this merger to monopoly, Georgia's certificate of need (CON) laws and regulations unfortunately render a divestiture in this case virtually impossible, leading us to accept this less-than-ideal remedy."<sup>30</sup> Specifically, because the affected region is currently considered "over-bedded," it was unlikely that any divestiture buyer could obtain the necessary CON approval to operate an independent hospital. This outcome makes plain the need for preliminary relief, in the form of an injunction or a negotiated hold separate, to maintain the competitive status quo. Such a step not only prevents any potential harm to competition in the interim but also preserves remedial options for the Commission pending a determination on the merits of the antitrust case.

The FTC also concluded its litigation against Ardagh Group and Compagnie de Saint-Gobain, with a negotiated divestiture that included six of Ardagh's nine glass container manufacturing plants, along with the headquarters, mold facility, and engineering facility, as well as customer contracts, molds and intellectual property.<sup>31</sup> The final divestiture package was far superior to earlier proposals put forth by the companies to fix the competitive problem, requiring divestiture of six glass plants, along with the auxiliary mold and engineering facilities, which had been operated as an ongoing business by the former Anchor Glass Container Corporation before Ardagh purchased the company in 2012. The divested business had a diverse mix of products, customers, and plant locations. An experienced leadership team who managed the same assets while they were under Ardagh and Anchor Glass ownership will run the business. Because the parties did not offer to divest a stand-alone business, ensuring that the ultimate package created a viable business was a key issue in our consideration of their proposals. After the package of

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<sup>27</sup> *St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9<sup>th</sup> Cir. 2015).

<sup>28</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 2003 (2013).

<sup>29</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, No. 1:11-cv-00058 (M.D. Ga. Apr. 20, 2011).

<sup>30</sup> In the Matter of Phoebe Putney Health System, Inc., Dkt. 9348, Statement of the Commission (Mar. 31, 2015).

<sup>31</sup> In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., Dkt. 9356 (final order issued Jun. 18, 2014).

assets had been vetted with industry participants and potential acquirers, the Commission accepted the divestiture package, which preserved competition for beer and spirits customers.

### *Merger Settlements*

While our litigated challenges grab headlines, most agency antitrust enforcement occurs through challenges settled by a consent order. By sheer numbers, consent orders remain an important tool in the FTC's enforcement arsenal.

### *Pharmaceutical and Medical Device Markets*

This year saw a significant uptick in pharmaceutical mergers. Since April 2014, the Commission announced settlements in nine mergers involving pharmaceutical products, from oncology drugs in development to over-the-counter motion sickness medications. Two other actions in related markets required divestitures to preserve competition for balloon catheters and canine heartworm medicines. Although the surge related to tax-driven inversion deals has tapered off, merger activity in this sector remains high.

### Elimination of Actual Competition

The Commission required divestitures in two cases involving the elimination of existing competition for over-the-counter products used by consumers. In August, the Commission alleged that the merger between Prestige Brands Holdings, Inc., the maker of Dramamine, and Insight Pharmaceuticals, the maker of Bonine, would have eliminated the close competition between the only two branded motion sickness products with significant sales.<sup>32</sup> To settle the charges, Prestige agreed to divest Bonine to Wellspring Pharmaceuticals, a Commission-approved buyer, within 10 days of acquiring Insight.

We also reviewed a joint venture between consumer healthcare giants, Novartis and GlaxoSmithKline. Under the terms of the joint venture agreement, GSK would control the joint venture and contribute, among other products, its nicotine patch business. Novartis would have a 36.5 percent interest and contribute most of its consumer healthcare business, but not the part of its business that markets Habitrol, a nicotine replacement therapy transdermal patch. According to our complaint, Novartis and GSK were the only companies that market branded nicotine patches in the United States, and two of only three companies that supply private label patches to retailers.<sup>33</sup> Without the divestiture contained in the proposed settlement, Novartis's ownership of both Habitrol and a substantial interest in the joint venture that sells GSK's nicotine patches would substantially reduce competition and lead to higher prices for Habitrol and Novartis's private-label patches. To preserve competition in the market for nicotine patches, the Commission's order required Novartis to divest Habitrol, as well as its private-label patch business, to India-based Dr. Reddy's, one of the largest sellers of private-label over-the-counter health products to the U.S.

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<sup>32</sup> In the Matter of Prestige Brands Holdings, Inc., Dkt. C-4487 (final order issued Oct. 14, 2014).

<sup>33</sup> In the Matter of Novartis AG and GlaxoSmithKline, Dkt. C-4498 (final order issued Jan. 20, 2015).

In another transaction involving Novartis, Eli Lilly proposed to buy Novartis' animal health division for \$5.4 billion. The FTC alleged that the transaction would have eliminated the close competition between the two companies' canine heartworm medications. Canine heartworm parasiticides are used to prevent heartworm disease in dogs. They are available in a variety of formulations, some of which are given orally while others are applied to a dog's skin or injected. According to the complaint, Eli Lilly's Trifexis and Novartis Animal Health's Sentinel products are particularly close substitutes because they are the only two products that are given orally once a month, contain the same active ingredient, and also treat fleas and other internal parasites in dogs.<sup>34</sup> Entry barriers are high because developing new animal health pharmaceutical products – including those that treat heartworm in dogs—is difficult and time-consuming. To settle charges that the merger would likely reduce competition in the market for canine heartworm parasiticides, Eli Lilly agreed to divest the Sentinel product line to French pharmaceutical company Virbac, S.A.

In an acquisition that raised concerns about the elimination of actual competition between branded and generic versions of the same drug, the Commission challenged Valeant Pharmaceuticals International, Inc.'s \$475 million acquisition of Precision Dermatology, Inc. The complaint alleged that the merger would have eliminated current competition in the market for branded and generic single-agent topical tretinoin for the treatment of acne, and in a separate market for generic Retin-A.<sup>35</sup> Our investigation revealed that, unlike pharmaceutical markets in which the branded product no longer competes with generics once multiple generics enter, branded versions of single-agent topical tretinoin continue to compete with each other and their generic versions. According to dermatologists we interviewed, although generics contain the same molecule as the brands, prescribing a branded product allows them to know precisely which delivery vehicles their patients are using, and hence what might be the cause of any skin irritation that may arise. As a result, even years after generic entry into this market, many dermatologists still prescribe branded tretinoin, and Valeant and Precision continue to invest in promotion and marketing of their branded products. As a result, the merger likely would have substantially reduced competition between the only two significant suppliers of branded or generic single-agent topical tretinoin.

In addition, the Commission found that although generic Retin-A products are part of the single-agent topical tretinoin market, generic Retin-A products compete particularly closely with each other and thus constitute a separate relevant market. Moreover, since retail pharmacies typically carry these products in a variety of strengths and formulations in order to be able to fill the full range of requested prescriptions, each strength and formulation may constitute a distinct product market. The Commission concluded that the merger would have given Valeant a monopoly in four of five versions of generic Retin-A, and a duopoly in the remaining version. The consent order required Valeant to sell Precision's assets related to Tretin-X to Actavis and assets related to Retin-A to Matawan Pharmaceuticals LLC. Actavis and Matawan also each received partial assignments of the manufacturing contracts for both Tretin-X and generic Retin-A.

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<sup>34</sup> In the Matter of Eli Lilly and Company, Dkt. C-4500 (final order issued Mar. 4, 2015).

<sup>35</sup> In the Matter of Valeant Pharmaceuticals International, Inc., Dkt. C-4477 (final order issued Aug. 21, 2014).

## Elimination of Future Competition

An acquisition may substantially lessen competition by eliminating a future competitor whose entry, once it occurs, would have a beneficial impact on competition. For many years, the Commission has been concerned about the elimination of a future competitor in markets for generic pharmaceuticals, either where one firm has an FDA-approved generic product and the other firm is working to introduce another generic version, or where the merging firms are two of only a limited number of likely entrants. In either scenario, the competitive concern is that the acquisition would likely delay the introduction of a generic version and thereby deprive consumers of the increased competition and likely price reductions that would have occurred.

For instance, in reviewing Akorn Inc.'s \$324 million acquisition of VersaPharm Inc., the Commission determined VersaPharm and two other firms had FDA approval to sell generic injectable rifampin, a drug used to treat tuberculosis. At the time of the merger, Akorn was one of a limited number of firms that had a generic rifampin product in development, and the only firm with an Abbreviated New Drug Application under review by the FDA. We alleged that, absent the acquisition, Akorn likely would have entered the market for generic injectable rifampin in the near future, resulting in a significant price reduction for the drug.<sup>36</sup> To address concerns that the combined company would likely forego or delay the introduction of Akorn's generic injectable rifampin, the Commission required Akorn to divest its ANDA to Watson Laboratories, Inc. The Commission appointed an interim monitor to ensure Akorn provides Watson with any information the FDA requests, assists Watson with FDA approval for the pending ANDA, and provides transitional services so that Watson can develop the ability to manufacture generic injectable rifampin independently.

In another transaction involving Akorn, the Commission required Akorn and Hi-Tech Pharmacal, Inc. to sell to Watson Laboratories, Inc., the rights to and assets of three generic prescription eye medications and two generic topical anesthetics to settle charges that Akorn's proposed \$640 million acquisition of Hi-Tech would be anticompetitive. The complaint charged that the proposed transaction would eliminate existing competition between the two firms in the highly concentrated markets for two generic eye drops and two topical anesthetic prescription drugs. In addition, the proposed merger would eliminate future competition in the U.S. market for generic Ilotycin ointment, a drug used to treat bacterial eye infections. Akorn was one of three current suppliers, while Hi-Tech was poised to be the next entrant and others were far behind.

Similarly, the Commission charged that Actavis' acquisition of Forest Laboratories, Inc. would likely lessen competition in the markets for three current generic drug products and one future generic drug. According to the complaint, the three generic drug markets affected by the merger include generic diltiazem hydrochloride (AB4), which is used to treat hypertension and chronic stable angina; generic ursodiol, which is used to treat primary biliary cirrhosis of the liver; and generic propranolol hydrochloride, an extended release drug indicated for the treatment of hypertension.<sup>37</sup> In addition, the proposed merger would significantly reduce

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<sup>36</sup> In the Matter of Akorn, Inc., Dkt. C-4479 (final order issued Sep. 19, 2014).

<sup>37</sup> In the Matter of Actavis PLC, Dkt. C-4474 (final order issued Sep. 5, 2014).

competition in the future market of lamotrigine orally disintegrating tablets used for seizures, marketed as Lamictal ODT. At the time of the merger, Forest manufactured Lamictal ODT for GlaxoSmithKline, which owned the NDA, while Actavis held the only approved ANDA to market generic lamotrigine ODT. According to the Commission, the acquisition would eliminate significant future competition between the firms as Actavis likely would have been the first generic supplier in the market. Under the terms of the settlement, the parties were required to return all of Forest's rights and assets related to generic diltiazem hydrochloride (AB4) to Valeant, divest all of Actavis' rights and assets to generic ursodiol and generic lamotrigine ODT to Impax, and provide all of Forest's rights and assets to generic propranolol hydrochloride to Catalent no later than 10 days after the acquisition was consummated.

In another merger involving three dosage strengths of generic minocycline tablets, Sun Pharmaceutical Industries Ltd. and Ranbaxy Laboratories Ltd. agreed to divest Ranbaxy's interests in generic minocycline tablets in order to proceed with Sun's \$4 billion acquisition of Ranbaxy. Generic minocycline tablets are used to treat a wide array of bacterial infections, including pneumonia, acne, and urinary tract infections. According to the FTC's complaint, the proposed merger would likely harm future competition by reducing the number of suppliers in the U.S. markets for three dosage strengths (50 mg, 75 mg, and 100 mg) of generic minocycline tablets.<sup>38</sup> At the time of the merger, Ranbaxy was one of three suppliers of the products, while Sun was one of only a limited number of firms with minocycline tablets in development and an ANDA under review by the FDA.

Under the proposed settlement, Torrent Pharmaceuticals Ltd. acquired the divested assets, which included not only Ranbaxy's generic minocycline capsule tablets but also assets related to the production of generic minocycline capsules. The capsule assets were included to enable Torrent to achieve regulatory approval for a change in ingredient suppliers for its minocycline tablets as quickly as Ranbaxy would have been able to do in the absence of the deal. In addition, the order required Sun and Ranbaxy to supply generic minocycline tablets and capsules to Torrent until the company establishes its own manufacturing infrastructure.

In a second transaction involving Novartis and GlaxoSmithKline, Novartis proposed to acquire GSK's portfolio of cancer-treatment drugs for \$16 billion. At the time of the merger, Novartis and GSK were two of a small number of companies with either a BRAF or MEK inhibitor currently on the market or in development, and two of only three companies marketing or developing a BRAF/MEK combination product to treat melanoma. Physicians use BRAF and MEK inhibitors separately, and increasingly in combination, to treat melanoma. Both products are also being developed to treat a variety of other cancers. According to the complaint, if the acquisition were to go forward as proposed, Novartis would likely delay or terminate development of both its BRAF and MEK inhibitors, as well as the combination product.<sup>39</sup> For that reason, Novartis's acquisition of GSK's portfolio of cancer-treatment drugs would likely cause significant competitive harm in the U.S. markets for both the BRAF and MEK inhibitors, ultimately raising prices for consumers and depriving them of potentially superior products. Under the terms of the proposed consent agreement, Novartis agreed to divest all assets related to

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<sup>38</sup> In the Matter of Sun Pharmaceuticals Industries, Ltd., Dkt. C-4506 (final order issued Mar. 20, 2015).

<sup>39</sup> In the Matter of Novartis AG, Dkt. C-4510 (final order issued Apr. 8, 2015).

its BRAF and MEK inhibitor drugs to Array BioPharma, and to provide transitional services to ensure that development of the BRAF and MEK inhibitors continues uninterrupted.

In one of several merger settlements involving generic drugs, Impax Laboratories Inc. and CorePharma, LLC agreed to divest all of CorePharma's rights and assets to generic pilocarpine tablets and generic ursodiol tablets to settle charges that Impax's proposed \$700 million acquisition of CorePharma would reduce the number of future suppliers in the markets for those two products.<sup>40</sup> At the time of the merger, there were only two suppliers in the market for generic pilocarpine tablets, which are used to treat dry mouth. Impax and CorePharma were the only likely new entrants in the near future. In the market for generic ursodiol tablets, which are used to treat biliary cirrhosis, a chronic disease of the liver, as well as gall bladder diseases, there were four existing suppliers, including Impax. Absent the merger, CorePharma's entry as an independent competitor would likely have resulted in significantly lower prices for each of these drugs. The proposed settlement requires divestiture to an upfront buyer, Perrigo Company, and obligates Impax and CorePharma to provide transitional services and take all actions that are necessary for Perrigo to obtain FDA approval to manufacture and market generic pilocarpine and ursodiol tablets.

The Commission also addressed concerns about the elimination of future competition in a merger involving medical devices companies. In November, medical technology company Medtronic, Inc. agreed to divest the drug-coated balloon catheter business of Covidien, to complete its \$42.9 billion acquisition.<sup>41</sup> These products are used to treat peripheral artery disease. According to the complaint, C.R. Bard, Inc. was the only company currently supplying drug-coated balloon catheters indicated for the femoropopliteal artery, an artery located above the knee, and it was unlikely that other competitors could enter the U.S. market in time to counteract the effects of the merger. At the time of the merger, Medtronic and Covidien were the only companies with products in clinical trials, making them the most likely potential entrants. Medtronic agreed to divest Covidien's business to The Spectranetics Corporation, which manufactures and markets a range of devices to treat peripheral and coronary arterial disease, and has the industry and regulatory experience to obtain FDA approval for the product.

### *Hospitals and Ambulatory Surgery Centers*

The Commission required divestitures to settle charges that the proposed combination of two large chains of ambulatory surgery centers would significantly reduce competition in central Florida. H.I.G. Bayside Debt & LBO Fund II-subsidary Surgery Partners proposed to acquire Symbion Holdings, a subsidiary of Crestview Partners. Both firms operated a large number of ambulatory surgery centers located throughout the country. The proposed merger would have combined the only two multi-specialty ambulatory surgical centers in the southwestern Volusia County, Florida area, which includes the cities of Orange City and Deltona, Florida.<sup>42</sup> Without relief, the acquisition would have substantially increased concentration in the market for

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<sup>40</sup> In the Matter of Impax Laboratories, Inc., Dkt. C-4511 (complaint filed Mar. 6, 2015).

<sup>41</sup> In the Matter of Medtronic, Inc. and Covidien plc, Dkt. C-4503 (final order issued Jan. 21, 2015).

<sup>42</sup> In the Matter of H.I.G. Bayside Debt, Dkt. C-4494 (final order issued Dec. 24, 2014).

outpatient surgical services, and would have left commercial health plans and commercially insured patients there with only one meaningful alternative to Surgery Partners' outpatient surgical practice. The Commission's order required Surgery Partners to divest Symbion's ownership interest in the Blue Springs Surgery Center in Orange City, Florida, to a Commission-approved buyer. The Commission later approved the sale to Dr. Mark Hollmann, a physician at Blue Springs, who is one of its owners and actively involved in its operations.

### *Vertical Theories of Harm: Par/Mid Pac*

The Commission challenged a proposed acquisition involving two energy companies supplying gasoline in Hawaii, which presented vertical issues. Specifically, the Commission alleged that Par Petroleum's acquisition of Mid Pac Petroleum would likely substantially lessen competition in the bulk supply of Hawaii-grade gasoline blendstock – which is gasoline before it is blended with ethanol to make finished gasoline.<sup>43</sup> Par and Chevron have refineries in Hawaii that produce the product, while Mid Pac and Aloha can buy their bulk supply from Par and Chevron or import product from elsewhere. The four firms own or control access to all of the Hawaii terminals that store bulk volumes of Hawaii-grade gasoline blendstock. However, although the merger reduced from four to three the number of bulk suppliers of blendstock, the Commission determined that the increase in concentration from the loss of Mid Pac did not give rise to competitive concerns in that market. Mid Pac's ability to import made it a bulk supply market participant, but the evidence did not show that Mid Pac's participation in bulk supply or downstream markets was competitively significant.

However, the Commission alleged that Par's acquisition of Mid Pac's storage rights at Barbers Point Terminal would create the ability and incentive for Par to use Mid Pac's storage rights in a way that could impair Aloha as a competitor. Under a long-term storage and throughput agreement, Mid Pac shared access to Aloha's Barbers Point terminal – the only commercial gasoline terminal in Hawaii that is not owned by a refiner and can be used by both Mid Pac and Aloha to receive full shipments of imported gasoline blendstock.<sup>44</sup> As a result of the proposed acquisition, Par would gain Mid Pac's terminal rights, which it does not need for imports because it produces its own blendstock. However, Par could use the terminal in a manner that impairs Aloha's use of the terminal, for instance by parking blendstock in the terminal. If Par were to hamper Aloha's import capability, it would weaken Aloha's ability to negotiate lower bulk supply prices from Par and Chevron, and thus reduce Aloha's ability to compete effectively in the bulk supply market, leading to higher gasoline prices for Hawaii consumers.

Under the proposed consent agreement, Par agreed to terminate the Barbers Point terminal storage and throughput rights it acquires from Mid Pac within five days after the merger is completed. Par will retain rights to load a limited number of tanker trucks at the Barbers Point

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<sup>43</sup> In the Matter of Par Petroleum Corporation, FTC File No. 141 0171 (complaint issued Mar. 18, 2015).

<sup>44</sup> Aloha entered into the 20-year storage and throughput agreement with Mid Pac in mid-2005 after the Commission challenged Aloha's acquisition of its 50% partner in the Barbers Point Terminal. Because the agreement gave Mid Pac the ability to become a significant competitor and restored the competition threatened by that acquisition, the Commission dismissed its litigation. <https://www.ftc.gov/news-events/press-releases/2005/09/ftc-resolves-aloha-petroleum-litigation>.

terminal, and must obtain prior FTC approval to modify these rights or enter into any new agreement at the Barbers Point terminal.

### *Supermarkets*

This year, the Commission ordered the largest divestiture in any supermarket merger, requiring Albertsons and Safeway Inc. to sell 168 supermarkets in 130 local markets in Arizona, California, Montana, Nevada, Oregon, Texas, Washington, and Wyoming to settle charges that their proposed \$9.2 billion merger would likely be anticompetitive. According to the FTC’s complaint, Albertsons and Safeway compete vigorously on the bases of price, quality, product variety, and services.<sup>45</sup> Without a remedy, the acquisition would likely lessen supermarket competition to the detriment of consumers in 130 local markets by removing a direct supermarket competitor. The elimination of this competition would result in significant competitive harm by allowing the combined entity to increase prices above competitive levels or decrease quality and service below competitive levels, unilaterally or by coordinating with remaining market participants.

As in other supermarket mergers, the Commission focused on the close competition among traditional full-line retail grocery stores that sell a wide variety of food and non-food products – such as fresh meat, dairy products, frozen foods, beverages, bakery goods, dry groceries, detergents, and health and beauty products. This broad set of products and services provides a “one-stop shopping” experience for consumers by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is a critical factor differentiating supermarkets from other food retailers. As the Commission has found in other recent supermarket mergers,<sup>46</sup> the relevant product market includes supermarkets within mass merchants such as Wal-Mart Supercenters. On the other hand, other types of retailers that also sell food and grocery items – such as hard discounters, limited assortment stores, natural and organic markets, ethnic specialty stores, traditional mass merchants, and club stores – do not provide meaningful competition to supermarkets because they offer a more limited range of products and services than supermarkets and because they appeal to a distinct customer type. Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets. Further, although these other types of retailers offer some competition, supermarkets do not view them as providing as significant or close competition as traditional supermarkets.

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<sup>45</sup> In the Matter of Cerberus Institutional Partners V., L.P., Dkt. C-4504 (complaint filed Jan. 27, 2015).

<sup>46</sup> See, e.g., Bi-Lo Holdings, LLC/Delhaize America, LLC, Dkt. C-4440 (Feb. 25, 2014); AB Acquisition, LLC, Dkt. C-4424 (Dec. 23, 2013); Konkinlijke Ahold N.V./Safeway Inc., Dkt. C-4367 (Aug. 17, 2012); Shaw’s/Star Markets, Dkt. C-3934 (June 28, 1999); Kroger/Fred Meyer, Dkt. C-3917 (Jan. 10, 2000); Albertson’s/American Stores, Dkt. C-3986 (June 22, 1999); Ahold/Giant, Dkt. C-3861 (April 5, 1999); Albertson’s/Buttrey, Dkt. C-3838 (Dec. 8, 1998); Jitney-Jungle Stores of America, Inc., Dkt. C-3784 (Jan. 30, 1998). *But see* Wal-Mart/Supermercados Amigo, Dkt. C-4066 (Nov. 21, 2002) (the Commission’s complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

## NON-MERGER MATTERS

Although merger review and enforcement may grab headlines, it is often through the reasoned evaluation of potentially harmful conduct that the agency is able to shape the law to sweep away impediments to vigorous competition. Whether through litigation or consent orders, the Commission seeks to identify conduct that interferes with the fundamental give-and-take of competitive rivalry but does not offer countervailing benefits to consumers. When it identifies such conduct, the Commission will take appropriate action to stop it and prevent its recurrence.

### *Litigation*

As on the merger side, the Commission has a busy litigation docket involving allegations of anticompetitive agreements between competitors, as well as our ongoing monopolization case against McWane, Inc. After last year's opinion by the Commission held that McWane had unlawfully maintained its monopoly in domestic pipe fittings through exclusive dealing with distributors,<sup>47</sup> McWane appealed to the Eleventh Circuit. Oral argument was heard in January, and just this week, the Eleventh Circuit held, among other things, that (1) exclusive dealing is often efficient and lawful in competitive markets but poses special concerns in monopoly markets, and (2) to establish liability in a Section 2 case, the government need not "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct," and need only show that a "defendant has engaged in anticompetitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power."<sup>48</sup> In both respects, the Eleventh Circuit reaffirmed holdings of its sister circuits – most notably, the *Dentsply* decision of the Third Circuit and the *Microsoft* decision of the DC Circuit.

In the *AbbVie* case, the Commission charges that pharmaceutical company AbbVie and its partner Besins Healthcare engaged in anticompetitive tactics to delay introduction of lower-priced versions of the blockbuster drug AndroGel.<sup>49</sup> Specifically the FTC alleged that AbbVie and Besins filed sham patent infringement lawsuits against Teva and Perrigo in order to delay FDA approval of a generic version of AndroGel. The complaint alleges that the infringement claims were baseless – and that the companies knew them to be so – because during the patent application process the inventor of AndroGel had fully surrendered the particular claims that could have covered Teva's and Perrigo's products. In addition, when AbbVie's lawsuit against Teva moved quickly, AbbVie induced Teva to settle the litigation and delay introducing its product by agreeing to supply Teva with an authorized generic version of another popular drug, Tricor. The complaint alleges that while this deal was highly profitable for Teva, it made no independent business sense for AbbVie other than as a way to compensate Teva for not competing with AndroGel. The facts here illustrate the evolving tactics used by branded firms

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<sup>47</sup> Opinion of the Commission, In the Matter of McWane, Dkt. 9351 (Feb. 6, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion.pdf>. Commissioner Wright dissented from this aspect of the decision. *See* Dissenting Statement of Commissioner Wright, In the Matter of McWane, Inc., *available at* <https://www.ftc.gov/system/files/documents/cases/140206mcwanestatement.pdf>.

<sup>48</sup> *McWane, Inc. v. FTC*, No. 14-11363 (11<sup>th</sup> Cir. Apr. 15, 2015).

<sup>49</sup> *FTC v. AbbVie, Inc.*, No.14-cv-5151 (E.D. Pa. Sept. 8, 2014).

that do not involve the payment of cash in exchange for the generic's agreement to refrain from competing.

In addition to pending casework, our investigations can generate additional litigation work. We recently have had to seek court enforcement of our investigative subpoenas in two cases involving potentially anticompetitive reverse payment patent settlements. In *FTC v. Boehringer Ingelheim Pharmaceuticals*,<sup>50</sup> the DC Circuit affirmed the FTC's right to numerous financial analyses improperly withheld as work product. At issue was a 2009 FTC subpoena seeking documents from Boehringer to determine if the company had entered into anticompetitive agreements to pay generic drug manufacturer Barr Pharmaceuticals to drop its patent challenge and stay out of the market. The FTC requested – among other things – all of Boehringer's business and financial analyses of the contemporaneous copromotion agreement. Boehringer argued that these documents were protected opinion work product because they had been prepared at the request of its in-house counsel. The district court agreed with Boehringer that the financial analyses contained protected opinion work product. On appeal, however, the D.C. Circuit found that the district court had not correctly distinguished fact work product from the more highly protected opinion work product. Specifically, the court held that counsel's mere request for financial analyses during settlement discussions did not make those analyses opinion work product. The Court further found that the FTC had substantial need for the withheld analyses because they “provide unique information about Boehringer's reasons for settling in the manner than it did.”

In a separate subpoena enforcement action, *FTC v. Reckitt Benckiser Pharmaceuticals, Inc.*,<sup>51</sup> a federal court judge in the Eastern District of Virginia ordered Reckitt Benckiser Pharmaceuticals to comply with an FTC CID seeking documents in a health care investigation after the company withheld more than 22,000 documents, emails, and drafts on a claim of attorney-client privilege. The Commission argued that under Fourth Circuit law, the attorney-client privilege does not apply to communications related to a proposed public disclosure, such as the citizen petition Reckitt ultimately filed with the FDA. The court reaffirmed that if the company solicited legal advice to facilitate the production of a public document, attorney-client privilege does not extend to the published data and the details underlying it. However, client communications not directly related to the published data remain covered by the attorney-client privilege if those communications are themselves entitled to the privilege. As a result, the court ordered *in camera* review of the withheld documents by a special master for any documents still in dispute after the ruling.

With favorable rulings in both cases, we hope that parties will no longer improperly withhold documents subject to litigation in our investigations.<sup>52</sup>

The Commission also filed amicus briefs in two private suits involving allegations of anticompetitive conduct by pharmaceutical companies. The Commission urged the U.S. Court of

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<sup>50</sup> *FTC v. Boehringer Ingelheim Pharmaceuticals*, 778 F.3d 142 (D.C. Cir. 2015).

<sup>51</sup> *FTC v. Reckitt Benckiser Pharmaceuticals, Inc.*, 2014 U.S. Dist. LEXIS 134831 (E.D. Va. Sept. 24, 2014).

<sup>52</sup> See also *FTC v. Paglia*, 2:14-cv-01480 (D. Nev. Mar. 25, 2015) (district court order to show cause issued in CID enforcement proceeding).

Appeals for the Third Circuit in *In re Lamictal Direct Purchaser Antitrust Litigation* to reverse a district court determination that a brand-name drug manufacturer's commitment not to introduce an authorized generic version of its own brand-name drug in exchange for a generic drug company's promise to drop a patent challenge was not a "reverse-payment" under the U.S. Supreme Court's decision in *FTC v. Actavis, Inc.*<sup>53</sup> In June, the Commission filed an amicus brief before the district court in *Mylan Pharmaceuticals, Inc. v. Celgene Corp.*, discussing the unique regulatory framework that applies to the pharmaceutical industry, which may bear on the court's analysis of when a branded monopolist violates the antitrust laws by refusing to deal with a potential generic competitor.<sup>54</sup>

The Commission also accepted a negotiated settlement in a Part 3 administrative proceeding against AmeriGas and Blue Rhino over the companies' efforts to force Walmart to accept a reduction in the fill level in propane exchange tanks. In our administrative complaint, we alleged that in 2008, Blue Rhino and AmeriGas each decided to implement a price increase by reducing the amount of propane in their exchange tanks from 17 pounds to 15 pounds, without a corresponding reduction in the wholesale price.<sup>55</sup> Each firm understood that it could not sustain the fill reduction unless Walmart accepted it. When Walmart resisted, the two companies colluded by secretly agreeing to maintain a united front in order to push Walmart to accept the fill reduction. For three months, sales executives from the two companies communicated about their efforts to convince Walmart to accept the fill reduction. The secret agreement to 'hold the line' with Walmart, combined with efforts to persuade Walmart to accept the fill reduction, had the effect of raising the price per pound of propane to Walmart and ultimately to consumers.

The complaint is based on a Sherman Act Section One theory, relying on cases going all the way back to *United States v. Socony-Vacuum Oil, Co.*, 310 U.S. 150 (1940), in which the Court found *per se* violations of the Sherman Act for agreements among competitors to buy up surplus gasoline on the spot market to prevent prices from falling. After several months of pretrial preparation, AmeriGas and Blue Rhino agreed to settle the charges. The settlement bars each company from agreeing with competitors to modify fill levels or otherwise fix the prices of exchange tanks, and from coordinating communications to customers.<sup>56</sup>

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<sup>53</sup> FTC News Release, "FTC Amicus Brief Urges Court of Appeals to Reverse District Court Finding that 'No-Authorized Generic' Commitments Are Not Reverse Payments under Actavis Supreme Court Ruling," (May 2, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-amicus-brief-urges-court-appeals-reverse-district-court>.

<sup>54</sup> FTC News Release, "FTC Amicus Brief: Improper Use of Restricted Drug Distribution Programs May Impede Generic Competition," (Jun. 19, 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/06/ftc-amicus-brief-improper-use-restricted-drug-distribution>.

<sup>55</sup> In the Matter of Ferrellgas Partners, L.P., Dkt. 9360 (complaint filed Mar. 27, 2014).

<sup>56</sup> See Analysis to Aid Public Comment, In the Matter of Ferrellgas Partners, L.P., Dkt. 9360 (Oct. 31, 2014), available at <https://www.ftc.gov/system/files/documents/cases/141031bluerhinoanalysis2.pdf>.

## *Settlements*

Addressing the harmful effects of a non-compete agreement between two makers of ski equipment, the Commission charged that Marker Völkl (International) GmbH<sup>57</sup> and Tecnica Group<sup>58</sup> illegally agreed not to compete for each other's ski endorsers or employees. According to the FTC's complaints, the most effective and costly tool for marketing ski equipment is securing endorsement agreements from well-known skiers. The FTC alleged that starting in 2004 Marker Völkl and Tecnica agreed not to compete with each other to secure endorsements by professional skiers, in violation of Section 1 of the Sherman Act. In addition, the complaint states that in 2007, the companies expanded the scope of their non-compete agreement to cover all of their employees. The Commission alleged that the purpose of these anticompetitive agreements was to avoid bidding up the cost of securing endorsements from skiers, as well as the salaries of their employees. While limited non-compete agreements may be legitimate in some cases, the agreements between Marker Völkl and Tecnica had no efficiency benefits to justify their anticompetitive harm.

We also had a number of settlements this year involving anticompetitive trade and professional association rules, evidence that the Commission remains concerned about trade association rules that unreasonably restrict competition among members. These cases stand for the unsurprising proposition that ethical codes and other trade association rules that discourage the fundamental elements of competition, such as cutting prices or soliciting customers, will invite antitrust scrutiny.

Two of the Commission's cases are notable because they involved competitive restrictions that were highly likely to result in diminished competition among the members. For instance, the membership bylaws for the Professional Lighting and Sign Management Companies of America, a trade association of specialized electricians, had several provisions that effectively allocated territories among members and set prices for work performed in those territories.<sup>59</sup> The Commission also challenged a non-solicitation provision in the Code of Ethics of the Professional Skaters Association, an association of coaches and teachers who train both world-class skaters and beginners. According to our complaint, the PSA prohibited coaches from soliciting potential new clients and restricted the types of communications that coaches could have with skaters and parents.<sup>60</sup> The PSA actively enforced the ban through a variety of penalties, including suspension, over the objections of students of skating and their parents who wanted to switch coaches. The final order requires the PSA to eliminate most of these restrictions, although it allows for the limitation of solicitation where specifically related to student safety, such as during skating competitions.<sup>61</sup>

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<sup>57</sup> In the Matter of Marker Volkl, Dkt. C-4476 (final order issued July 9, 2014).

<sup>58</sup> In the Matter of Tecnica Group, Dkt. C-4475 (final order issued July 9, 2014).

<sup>59</sup> In the Matter of Professional Lighting and Sign Management Company of America, Inc., Dkt. C-4507 (final order issued Mar. 3, 2015).

<sup>60</sup> In the Matter of Professional Skaters Association, Inc., Dkt. C-4509 (final order issued Mar. 3, 2015).

<sup>61</sup> *See also* In the Matter of National Association of Teachers of Singing, Inc., Dkt. C-4491 (final order issued Oct. 10, 2014) (non-solicitation agreement); In the Matter of National Association of Residential Property Managers, Inc., Dkt. C-4490 (final order issued Oct. 10, 2014) (ban on comparative ads and solicitation of another member's clients).

The Commission also used its stand-alone authority under Section 5 to put a stop to a blatant attempt by two online sellers of barcodes to fix the prices of barcodes. Section 5 is an important tool for deterring and sanctioning invitations to collude. Of course, the danger of any such invitation is that if it were accepted, it would result in *per se* unlawful price fixing. In *Barcode Resellers*, two companies that sell UPC barcodes contacted a third competitor with a scheme to jointly raise the prices charged for barcodes sold online. In separate complaints, the FTC charged that InstantUPCCodes.com and its principal, Jacob J. Alifraghis,<sup>62</sup> and 680 Digital, Inc., d/b/a Nationwide Barcode and its principal, Philip B. Peretz,<sup>63</sup> violated the FTC Act by inviting competitors to collude. The FTC complaints charge that Alifraghis of Instant sent a message to Peretz of Nationwide proposing that the two companies, along with a third barcode seller, “Competitor A,” together raise their prices to meet the higher prices charged by another company, “Competitor B.” Instant’s Alifraghis allegedly then sent a similar email invitation to Competitor A, and the next day, Nationwide’s Peretz forwarded Instant’s message to Competitor A, asking for its thoughts on the proposal. Without agreement from Competitor A, Nationwide and Instant did not take action to raise prices, but allegedly continued to discuss by email a possible price-fixing scheme for barcodes, conditioned on the participation of Competitor A. Competitor A never responded to any email nor did it agree to participate in the proposed scheme. The improper discussions continued for several months, stopping only after the FTC began its investigation into the matter.

## HSR ENFORCEMENT

The FTC administers the Hart-Scott-Rodino premerger notification program and enforces the filing rules. While we strive to provide an efficient and effective premerger review process, we are keenly aware of the costs, both in time and money, that the merger review process may impose on transactions that are wholly or largely beneficial to consumers.

The Commission is also attentive to changes in business arrangements that require adjusting the HSR rules to fit the times. For example, in 2013, the Commission issued changes to the HSR rules to require companies in the pharmaceutical industry to file premerger notification reports for certain proposed acquisitions of exclusive patent rights.<sup>64</sup> After a notice and comment period, the Commission adopted revisions to Rule 801.1 and 801.2 to reflect the longstanding staff position that a transaction involving the transfer of exclusive rights to a patent in the pharmaceutical industry, which typically takes the form of an exclusive license, is potentially reportable under the Act and to clarify the treatment of retained manufacturing rights. Under the new rule, which became effective on December 16, 2013, the retention of limited manufacturing rights and co-rights does not affect whether the transfer of all commercially significant rights has occurred.<sup>65</sup> As noted at the time, the Commission limited the rule changes to transfers of

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<sup>62</sup> In the Matter of InstantUPCCodes.com, Dkt. C-4483 (final order issued Aug. 29, 2014).

<sup>63</sup> In the Matter of Nationwide Barcode, Dkt. C-4484 (final order issued Aug. 29, 2014).

<sup>64</sup> See Fed. Trade Comm’n, Press Release, “FTC Finalizes Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry,” (Nov. 6, 2013), *available at* <https://www.ftc.gov/news-events/press-releases/2013/11/ftc-finalizes-amendments-premerger-notification-rules-related>.

<sup>65</sup> 78 Fed. Reg. 68705 (Nov. 15, 2013).

exclusive patent rights in the pharmaceutical industry because that is where the FTC observed these types of transactions occurring.

A pharmaceutical trade association filed an action in federal court to set aside the new rules, challenging the FTC's authority to issue an industry-specific rule under the Administrative Procedures Act. Last May, on our motion for summary judgment, the District Court for the District of Columbia issued a memorandum opinion upholding the new rules.<sup>66</sup> The court noted that "[w]hile the FTC is not permitted to exempt a specific 'person' from the reporting requirements, [the HSR Act] authorizes the FTC to exempt general 'classes' of persons or transactions." Within that authority, the court found that the Commission was entitled to *Chevron* deference in adopting an industry-specific rule. Moreover, because the FTC provided a reasoned basis, its decision to adopt the final rule was not arbitrary and capricious. The trade association appealed, and the case was argued before the D.C. Circuit last month.

The FTC takes seriously the obligation of all investors to ensure that they comply with the HSR Rules. This year, the Commission obtained \$896,000 in civil penalties from Berkshire Hathaway Inc. for its failure to make the required HSR filing when it acquired voting securities through a conversion of notes that gave it shares with a value over the applicable filing threshold.<sup>67</sup> The company made a corrective filing after realizing the mistake – which was not its first mistake. The Commission did not take action for the first mistake after the company promised to institute an HSR compliance program, but when the same investor made a second mistake, the Commission sought civil penalties.

## **MERGER REMEDIES STUDY AND MERGER PROCESS REFORMS**

I also want to mention the Commission's ongoing effort to study the effectiveness of its merger remedies to determine how well they have met the goal of maintaining or restoring competition that would be lost due to a merger.<sup>68</sup> In seeking to prevent or counteract proposed or completed mergers that are likely to result in significant consumer harm, we want to ensure that the remedies we impose prevent that outcome. But we are not complacent about our process. As a result, the Commission has proposed to conduct a study of its merger remedies using its 6(b) authority to ensure that we are doing what we can to protect consumers and others from anticompetitive mergers.

And finally, the Bureau will soon announce guidance about its merger review process that is intended to provide more transparency to businesses and their counsel about what they can expect if they are involved in a merger under review at the Commission. Having worked for many years on the other side of the table, I know well the burdens imposed by Second Requests. However, it is also important that the agency obtain the information it needs to discharge its mission to protect consumers from the effects of anticompetitive mergers. Achieving the

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<sup>66</sup> *Pharmaceutical Research and Manufacturers of America v. FTC*, No. 1:13-cv-1974 (D.D.C. May 30, 2014).

<sup>67</sup> *United States v. Berkshire Hathaway Inc.*, No. 1:14-cv-01420 (D.D.C. Aug. 20, 2014).

<sup>68</sup> See Fed. Trade Comm'n, Press Release, "FTC Proposes to Study Merger Remedies," (Jan. 9, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

appropriate balance is an on-going struggle, particularly given advances in electronic production techniques. My hope is that this guidance – along with internal efforts to increase consistency across merger investigations to the extent possible – will yield incremental and ongoing improvements.