RECENT ACTIONS AT THE FEDERAL TRADE COMMISSION[1]

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Chairman, Federal Trade Commission[2]

Before the Dallas Bar Association's
Antitrust and Trade Regulation Section

Dallas, Texas

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Thank you. I appreciate having the opportunity to speak to you today and to see many of my friends and colleagues in the Texas antitrust bar. The start of a new year is a good time to both look back and look ahead. 2004 was another productive year for the Commission in our dual missions – enforcing the nation's antitrust and consumer protection laws. Today, I will discuss some of our recent accomplishments for American consumers. More important than looking back, however, is ensuring that we are prepared to go forward. In that vein, I will talk about some of our new initiatives and objectives for 2005.

Our competition and consumer protection missions are not wholly separate functions that just happen to reside in one agency. Rather, they are related sets of tools designed to accomplish the same goals – promoting efficiency and preventing consumer harm. Protecting competition through enforcement of the antitrust laws stimulates efficiencies, which results in lower prices, better products and services, innovation, and choice. In the crucible of a competitive marketplace, vendors have strong incentives to supply their customers and potential customers with reliable information. But when those incentives are not enough, enforcement of the

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[1] I appreciate the contributions that attorney advisors Brian Huseman and Josh Soven made to this speech.

[2] The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

consumer protection laws promotes the exchange of complete, accurate, and non-deceptive information in the marketplace, while protecting consumers' private information from unwanted and unknowing dissemination.

While I will begin, given my audience, with antitrust developments, I also will touch on our consumer protection work. What I want to illustrate is how we are using multiple tools – namely, law enforcement, advocacy, and policy research and development – to work for consumers.

ANTITRUST ENFORCEMENT

It is not surprising that much of the media's attention on competition law has focused on the so-called "big case," particularly when the case reaches the courtroom.[3] I am sure that I do not have to remind this audience of the prominence that *United States v. Microsoft* once occupied in the media. And this summer, the FTC's *Arch Coal* and the Antitrust Division's *Oracle/Peoplesoft* merger trials dominated antitrust headlines.[4] But while the blockbuster cases are important, they actually are a relatively small part of our work. Even in the relatively few

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[3] Over the last decade, antitrust probably has received more public attention than at any point in its history. The merger wave of the late 1990s, together with high-profile matters like the *United States v. Microsoft*, are likely responsible for attracting genuine consumer interest. In addition, as we have reduced regulation and unleashed market forces, we have come to rely more on the antitrust laws to establish the rules of the game for more companies and more sectors of the economy.

[4] *Arch Coal*, together with the Antitrust Division's loss in the *Oracle/PeopleSoft* trial, has raised questions about the effectiveness of customer testimony in merger trials. The courts in both cases discounted the significance of many of the agencies' largest customer witnesses. My view is that we should continue to give significant weight to the views of customers in our merger investigations, and continue to present customer testimony at trial. Customers are valuable sources of information about many mergers' competitive effects because they have the most to lose from an anticompetitive deal, and usually have little incentive to provide misleading information.

matters (as compared to the number investigated) in which the Commission finds an antitrust violation, the parties under investigation most often agree to a consent order that requires them to take steps to discontinue or modify the conduct at issue. Those consent orders, in turn, assist you and other members of the bar in counseling your clients in an effort to avoid violations in the first instance. Indeed, I view you as the first line of defense against violations.

In addition, the FTC's competition work is not limited to conducting investigations and litigating cases. We also devote substantial resources to competition advocacy and competition policy research and development. Our competition advocacy work takes the form of filing amicus briefs in private litigation, filing comments and consulting (formally and informally) with other federal and state agencies, and advising international competition authorities (informally and formally through technical assistance and training programs).[5]

Our policy research and development includes sponsoring and co-sponsoring a substantial number of conferences to bring together government officials, private attorneys, members of the business and academic communities, and interest groups to exchange information and share ideas. FTC staff also conducts research on various markets and

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[5] For example, last year, building on previous successful advocacies opposing attempts to limit competition between attorneys and lay providers of certain services, the FTC, in conjunction with DOJ, filed an amicus brief in the West Virginia Supreme Court to urge the rejection of a bar opinion that lay real estate settlement services are the unauthorized practice of law. Brief Amici Curiae of the Federal Trade Commission and the United States of America, *McMahon v. Advanced Title Serv. Co. of West Virginia*, Case No.: 31706 (filed May 25, 2004), *available at* http://www.ftc.gov/be/V040017.pdf. Specifically, the brief argued that there is no evidence of consumer harm from lay settlements, and that such a ban would likely increase the price of both lay and attorney settlements for West Virginia consumers. Ultimately, the West Virginia court vacated the opinion on the ground that there was an insufficient factual record to determine that these services are the practice of law because the lower court had not weighed public policy considerations, such as accountability, due care, and public safety. *McMahon v. Advanced Title Serv. Co. of West Virginia*, Case No.: 31706 (W. Va. Dec. 3, 2004).

competitive issues.

A. Healthcare/Pharmaceutical

The FTC's work in the healthcare and pharmaceutical industries in 2004 is an excellent example of the Commission's multi-pronged approach to fulfilling its antitrust enforcement mission.

1. Healthcare/Pharmaceutical Mergers

Of course, merger review continues to supply a major portion of the Commission's work in the healthcare and pharmaceutical industries (and, indeed, in all sectors of the economy).[6] While we apply the same core principles of antitrust law in all of the mergers that we review, analyzing mergers in the pharmaceutical industry, as with other innovation-rich industries, raises issues that are not present in "older" sectors of the economy. The important assets in such deals often are intellectual property. These asset transfers present challenges in merger reviews because the products or services in the markets are often highly differentiated, there is rarely a uniform "market" price, and the markets change rapidly due to constant innovation. Consequently, our review and any action taken must reflect these market realities.

In September, the Commission filed a final complaint and consent order in connection with Cima Labs' acquisition of Cephalon.[7] The complaint alleged that the transaction, as

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[6] It is, of course, our statutory obligation, together with the Department of Justice's Antitrust Division, to review most significant mergers. But more fundamentally, active responsible merger review is one of the most effective components of the Commission's antitrust work. Done correctly, merger review leads to efficient markets and tremendous cost savings for consumers.

[7] Complaint, *Cephalon, Inc./Cima Labs, Inc.,* Docket No. C-4121 (Sept. 20, 2004), *available at* http://www.ftc.gov/os/caselist/0410025/040924comp0410025.pdf; Decision and Order, *Cephalon, Inc./Cima Labs, Inc.,* Docket No. C-4121 (Sept. 20, 2004), *available at*

proposed, may have substantially reduced competition in the sale of breakthrough cancer pain ("BTCP") drugs. While Cephalon's BTCP drug, Actiq, allegedly had a monopoly in the market, Cima was best positioned to enter and compete because it has a BTCP drug in Phase III stages of clinical development that is expected to enter the market in 2006 or 2007. Allowing Cephalon to acquire Cima as planned likely would have reduced the number of rivals in the future from two to one, and undermined generic entry by causing Cephalon to shift its patents to Cima's product prior to generic launch. The now-approved consent order will prevent these anticompetitive effects by requiring Cephalon to grant a license and transfer all of its technological know-how and intellectual property related to Actiq to Barr Laboratories. In the event that Barr cannot manufacture an FDA-approved *generic* version of Actiq, the order requires Cephalon to supply Barr with Actiq to be marketed as a generic.

This remedy is somewhat novel because it creates a generic competitor to solve the anticompetitive problems raised by a merger of two branded pharmaceutical competitors. But, the facts showed that an important anticompetitive effect of the merger would have been the defeat of generic competition. The order, accordingly, ensures that generic competition will be present. The remedy was tailored to the specific harm alleged.

Last month, we filed a complaint and consent order in connection with Genzyme's acquisition of Ilex, which also involved a somewhat non-traditional remedy.[8] As originally

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http://www.ftc.gov/os/caselist/0410025/040924do0410025.pdf.

[8] Complaint, *Genzyme Corporation/Ilex Oncology, Inc.*, Docket No. C-4128 (Dec. 20, 2004), *available at* http://www.ftc.gov/os/caselist/0410083/041220comp0410083.pdf; Decision and Order, *Genzyme Corporation/Ilex Oncology, Inc.*, Docket No. C-4128 (Dec. 20, 2004), *available at* http://www.ftc.gov/os/caselist/0410083/041220do0410083.pdf.

structured, the transaction would likely have reduced competition in the already highly concentrated market for solid organ transplant (SOT) acute therapy drugs.[9] Genzyme is the leading supplier; Ilex's product, Campath,[10] is quickly gaining market share; and the two companies' products allegedly were each others' closest competitor. The approved consent order will remedy the original transaction's alleged anticompetitive effects by requiring Genzyme to divest to Schering all contractual rights to Ilex's Campath for use in solid organ transplants. Because Schering already distributes and markets Campath in the United States through an existing agreement with Ilex, it is well-positioned to provide effective competition in the market.

Significantly, because Campath is used in other markets that did not raise competitive concern, the Commission did not require the merged company to divest all of its rights to the product, only those involved in the use of the drug for SOT acute therapy. The parties, with the assistance of a monitor and the approval of the Commission, will implement a formula to determine the portion of Campath's earnings attributable to solid organ transplant sales. The order protects against collusion between the merged company and Schering by requiring implementation of firewalls.

Is this type of remedy the model of the future for pharmaceutical cases? Not necessarily. All else being equal, the Commission (as well as the Antitrust Division[11]) has generally preferred

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[9] SOT acute therapy drugs suppress the recipient's immune system and are prescribed for induction therapy.

[10] Interestingly, Campath is FDA-approved for the treatment of leukemia, but is used off-label as an SOT acute therapy drug.

[11] *Antitrust Division Policy Guide to Merger Remedies,* at III.A (Oct. 2004).

divestitures of hard assets. Divestitures of physical assets are clear and relatively easy to administer. Nonetheless, because our merger work increasingly involves the transfer of intellectual property and other information technology, we must devise new solutions to effectively remedy violations.

2. **Healthcare/Pharmaceutical Conduct**

The Commission also has been active in prosecuting unlawful conduct in the healthcare and pharmaceutical industries. First, the FTC continues its vigorous prosecution of physician conduct that amounts to the collective naked setting of prices, without risk sharing or other integrative efficiencies. This conduct raises costs to consumers in a vital part of the American economy. For example, in August, the FTC filed a complaint challenging an arrangement under which 73% of the physicians independently practicing in Roswell, New Mexico, allegedly fixed their prices at levels above rates charged elsewhere in the state and refused to deal with payers except on collectively agreed terms.[12] The physicians entered into a consent order – which was a typical order for many such matters – that requires the physicians to cease the unlawful activity and bars them from engaging in the same or similar conduct in the future.[13]

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[12] Complaint, *Southeastern New Mexico Physicians, IPA, Inc.*, Docket No. C-4113 (Aug. 5, 2004), *available at* http://www.ftc.gov/os/caselist/0310134/040806comp0310134.pdf; Decision and Order, *Southeastern New Mexico Physicians, IPA, Inc.*, Docket No. C-4113 (Aug. 5, 2004), *available at* http://www.ftc.gov/os/caselist/0310134/040806do0310134.pdf.

[13] The Commission brought similar cases involving physician groups in Alamagordo, New Mexico (80% of the area's physician positions), North Carolina (approximately 450 physicians), and San Francisco (approximately 1,500 physicians). Complaint, *White Sands Healthcare Systems, L.L.C.*, Docket No. C-4130 (Jan. 11, 2005), *available at* http://www.ftc.gov/os/caselist/0310135/050114comp0310135.pdf; Complaint, *Piedmont Health Alliance, Inc.*, Docket No. 9314 (Dec. 24, 2003), *available at* http://www.ftc.gov/os/caselist/0210119/031222comp0210119.pdf; Complaint California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, Docket No. 9306 (July 8, 2003),

To be clear, the Commission does not oppose all physician networks and other healthcare joint ventures. To the contrary, as the FTC/DOJ Health Care Antitrust Enforcement Policy Statements[14] recognize, many physician and other healthcare networks produce significant efficiencies arising from risk- and cost-sharing, and other forms of integration. We rarely challenge these networks. When a doctor or hospital network is simply a device for fixing prices, however, the Commission will act to end the anticompetitive conduct.

Another example of unlawful conduct that the Commission stopped this year was a conspiracy between Alpharma, Inc. and Perrigo Company to limit competition for over-the-counter store-brand children's liquid Ibuprofen.[15] Perrigo and Alpharma had signed an agreement allocating to Perrigo the sale of the product for seven years. In exchange for agreeing not to compete, Alpharma received an up-front payment and a royalty on Perrigo's sales of children's liquid ibuprofen. Perrigo then, not surprisingly, raised prices. The proposed consent order requires the companies to disgorge $6.25 million to settle charges that they earned illegal profits from the agreement, and those funds will be used to compensate customers harmed by the companies' conduct.[16]

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available at http://www.ftc.gov/os/2003/07/caadmincmp.pdf.

[14] DOJ/FTC Statements of Antitrust Enforcement Policy in Healthcare (1993), Statements 8 and 9.

[15] Complaint, *FTC v. Perrigo Co.* (D.D.C. Aug. 12, 2004), *available at* http://www.ftc.gov/os/caselist/0210197/040812comp0210197.pdf.

[16] Stipulation and Final Order, *FTC v. Perrigo Co.* (D.D.C. Aug. 12, 2004), *available at* http://www.ftc.gov/os/caselist/0210197/040812perrigo.pdf. In addition, the companies will pay $1.5 million to fifty states and territories including Texas, which filed a complaint challenging the same agreement and reached a settlement.

3. **Healthcare/Pharmaceutical Competition Advocacy**

The FTC also has conducted substantial research about this vital industry. Most notably, in July, the Commission issued jointly with the Antitrust Division a report entitled *Improving Health Care: A Dose of Competition*, which was the culmination of a two-year project that began with public hearings.[17] The report does not simply survey the landscape; rather, it provides significant recommendations and observations about the availability of information regarding the price and quality of health-care services; physician collective bargaining; insurance mandates; hospital merger analysis; managed care organizations' bargaining power; and hospital group purchasing organizations.

Similarly, last March, the Commission issued a report entitled *Possible Anticompetitive Barriers to E-commerce: Contact Lenses*.[18] The report concluded that requiring a professional license to sell replacement contact lenses over the Internet is likely to raise prices and/or reduce convenience to consumers without substantially increasing health protections. The Commission will issue another report about the contact lens industry next month.

In an example of advocacy efforts that are becoming quite typical, in September, the FTC staff commented on a California bill that would have required pharmacy benefits managers to disclose certain financial information concerning their transactions with pharmaceutical

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[17] *Improving Health Care: A Dose of Competition* (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[18] *Possible Anticompetitive Barriers to E-commerce: Contact Lenses* (Mar. 2004), *available at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

companies and to make certain disclosures in connection with drug substitutions.[19] Despite the bill's facially appealing disclosure requirements, the FTC staff concluded that the bill was likely to hurt consumers by increasing the cost of drugs and health insurance premiums and reducing the availability of insurance coverage for drugs. Governor Schwarzenegger vetoed the bill and, in so doing, released a message specifically citing to the comments of FTC staff.[20]

B. Other Industries

I used the FTC's work in the health care industry as an illustration. But we use our trio of tools – enforcement, advocacy, and research – in many other industries. For example, as you know, the Commission is quite active in the oil and gas sectors. Last year, we filed consent orders requiring divestitures in three transactions in the petroleum industry: (1) Enterprise Products' acquisition of GulfTerra Energy; (2) Magellan's acquisition of certain assets from Shell; and (3) Buckeye's acquisition of certain assets from Shell.[21] The Shell cases are good examples of the Commission's efforts to identify transactions that are likely to result in coordinated effects, as well as unilateral effects.[22]

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[19] Letter from Susan Creighton *et al*. to California Assemblyman Greg Aghazarian (Sept. 7, 2004), *available at* http://www.ftc.gov/be/V040027.pdf.

[20] Veto Message for AB 1960, *available at* http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf .

[21] Decision and Order, *Enterprise Partners Products*, *L.P.*, Docket No. C-4123 (Nov. 23, 2004), *available at* http://www.ftc.gov/os/caselist/0410039/041126do0410039.pdf; Decision and Order, *Magellan Midstream Partners, L.P.*, Docket No. C-4122 (Nov. 23, 2004), *available at* http://www.ftc.gov/os/caselist/0410164/041126do0410164.pdf; Decision and Order, *Buckeye Partners, L.P.*, Docket No. C-4127 (Dec. 17, 2004), *available at* http://www.ftc.gov/os/caselist/0410162/041221do.pdf.

[22] In the Buckeye/Shell matter, Buckeye intended to acquire a refined petroleum pipeline and terminal assets, including a refined petroleum terminal in Niles, Michigan, from

To enhance our enforcement efforts in the critical petroleum sector, the Commission has devoted substantial resources to analyzing competition issues. In August, our Bureau of Economics released a report entitled *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*.[23] The report presents a detailed overview of the structural changes in the petroleum industry and describes Commission law enforcement activities related to petroleum industry mergers.[24] Its purpose is to inform public policy concerning competition in the petroleum industry and to add transparency to the Commission's merger analyses. And just last Friday, the Commission assembled five outside expert econometricians for a conference on econometric estimation of the effects of mergers in the industry.[25]

In another significant market sector, high-tech, the Commission recently resolved its challenge to AspenTech's acquisition of the Hyprotech software assets several weeks before the

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Shell for approximately $530 million. The market for the terminaling of gasoline, diesel fuel, and other light petroleum products in the area in and around Niles, Michigan was highly concentrated. The transaction would have further increased this concentration, enhancing the likelihood of collusion or coordinated interaction between the few remaining competitors. In response to the Commission's concerns, the parties removed the transfer of the Niles terminal from the transaction. The consent order prohibits Buckeye from acquiring the Niles terminal for ten years, unless it complies with a procedure that tracks the requirements of the Hart-Scott-Rodino statute.

[23] *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (Aug. 2004), *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf.

[24] For example, the report describes how, since 1981, the Commission concluded that 15 large petroleum mergers would have resulted in significant reductions in competition if they had proceeded as proposed. In 11of these cases, the FTC obtained significant divestitures to prevent reduced competition and harm to consumers. In the four other cases, the parties abandoned the transactions altogether after antitrust challenge.

[25] Press Release, *FTC to Host Conference on Oil Industry Merger Effects* (Dec. 21, 2004), *available at* http://www.ftc.gov/opa/2004/12/oilmerge.htm.

start of an administrative trial.[26] AspenTech and Hyprotech were the primary global suppliers of process engineering simulation software,[27] and they had only one other significant competitor. The companies were also the two largest vendors of integrated engineering software, which facilitates the sharing and implementation of process design data. In the two markets, AspenTech and Hyprotech had combined market shares for the various affected product lines ranging from 67 to 82 percent.

The consent order requires AspenTech to divest the intellectual property rights to the Hyprotech products to a Commission-approved buyer and last month, the Commission approved Honeywell's acquisition of these rights.[28] The consent order also requires Aspentech to divest its integrated engineering software business to Bentley Systems. And to ensure restoration of the pre-merger competition levels, however, the order goes beyond simply requiring divestitures also to require AspenTech to take several other measures.[29]

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[26] Decision and Order, *Aspen Technology Inc.*, Docket No. 9310 (Dec. 20, 2004), *available at* http://www.ftc.gov/os/adjpro/d9310/041221do.pdf.

[27] This software enables plant designers and engineers to design, simulate, and analyze production processes used in various industrial operations.

[28] Letter from Donald S. Clark, Secretary, Federal Trade Commission to George S. Cary (Dec. 20, 2004), *available at* http://www.ftc.gov/os/adjpro/d9310/041221ltr.pdf.

[29] With respect to the process engineering software assets purchased by Honeywell, the order also requires AspenTech to, among other requirements: (1) divest a related operator training business; (2) allow current customers to void their current contracts; and (3) support the assets divested to Honeywell for two years. In addition, for five years, AspenTech must provide Bentley with updates, upgrades, and new releases of AspenTech's engineering and other products on terms as favorable to those provided to other persons. The consent order also directs AspenTech to provide *both* Honeywell and Bentley with lists of relevant employees, remove impediments deterring current AspenTech employees from switching to either buyer, and, for two years, refrain from soliciting any former AspenTech employees who choose to work for the buyers.

In December, the Commission held a public workshop on a significant and prominent technology issue: peer-to-peer or "P2P" file sharing, which enables individuals to share files, including music, video, and software. Participants at the workshop, which included representatives from government, private industry, interest groups, and academics, assessed the impact of the technology on consumers and businesses. It addressed both competition and consumer protection issues: risks and benefits to consumers, technological developments and efforts, models for distributing music, the impact of file-sharing on copyright holders, self-regulatory initiatives, and legislative proposals.

D. 2005: Looking Ahead for Antitrust

So what is on the competition table for 2005? We expect to be busier reviewing mergers than in the last three years, as merger filings already have increased in this fiscal year. I place great importance on providing as much transparency as feasible in merger review and on reviewing mergers through a process that is both effective and efficient. Achieving these objectives leads to better decision-making within the agency and in boardrooms. I have initiated two projects aimed at improving our capabilities in this regard.

First, the FTC, together with the Antitrust Division, intends to produce a Commentary on the 1992 Horizontal Merger Guidelines. Last February, the two agencies jointly sponsored a three-day Merger Enforcement Workshop to assess the practical efficacy of the 1992 Merger Guidelines in light of twelve years of experience. The workshop focused on whether the Guidelines meet their twin objectives of (1) helping the agencies make the right merger enforcement decisions, and (2) providing the antitrust bar and the business community with reasonably clear guidance from which to assess the antitrust risks of proposed mergers and

acquisitions. While it is clear that the Merger Guidelines are now firmly rooted in antitrust practice, I believe that additional explication on how the Guidelines are applied in practice would be useful. A Commentary should bring greater transparency to the agencies' merger analysis and greater certainty to businesses and merger practitioners. We expect that the Commentary will cover each major area of the Guidelines and explain more fully how the Guidelines are applied in practice. Fundamentally, the purpose of the Commentary is not to change the Guidelines, but rather to explain how the Guidelines are applied in practice. My hope is that we will complete the Commentary during 2005.

In 2005, the Commission also will focus on improving merger review procedures. Over the last four years, the Bureau of Competition has made some efforts to streamline merger review and make it more transparent. I believe that we can do better still. As we learned in the Merger Enforcement Workshop, the Second Request process still needs work. If we are not sufficiently disciplined and rigorous in collecting and dissecting information during the merger review process, then we are not spending the taxpayer's dollar appropriately. Similarly, if firms are not appropriately cooperative and responsive during this process, then they are wasting the shareholder's dollar. In each instance, consumers lose. Accordingly, one of my most important objectives for 2005 is to review the progress that has been made, determine what has and has not worked well, and outline specific measures for improvement. One specific focus will be the production of electronic documents.

I must emphasize that I firmly believe that merger process reform must be a two-way street. For example, for the FTC staff to limit more effectively Second Request specifications, they must have full confidence that the parties will fully cooperate in responding to those

narrowed requests. In short, all antitrust practitioners are in this together.

If we are hit with a merger wave, our challenge will be to continue devoting resources to investigating conduct cases, as well as to advocacy and research. We have several cases in the pipeline.

Last Thursday, Acting General Counsel John Graubert argued the *Schering* case before the Court of Appeals for the Eleventh Circuit. Last year, after extensive Part III litigation, the Commission held that Schering-Plough and Upsher-Smith Laboratories had violated Section 1 of the Sherman Act by agreeing that Upsher would delay releasing a generic drug that competed with Schering's "K-Dur-20" branded drug in exchange for a multi-million dollar payment from Schering. Both Schering and Upsher denied that there was such an agreement, and they disagreed with the Commission's analysis as to how the antitrust laws apply to such "reverse" payments. We will await the Court of Appeals' decision.

There also are a number of cases that currently are in Part III litigation, the most prominent of which is the *Rambus* case, on which the Commission heard oral argument in December. The staff's Complaint alleged that Rambus had engaged in unlawful exclusionary conduct by obtaining patents in secret, and then not disclosing to a standard-setting organization that the patents were "blocking" with respect to a computer memory standard under evaluation by the organization. After a two-month trial, the Administrative Law Judge agreed with Rambus and held that the staff had not proven the case. The matter is now before the full Commission for decision.

In policy development, the FTC will co-sponsor, together with the National Academies' Board on Science, Technology and Policy and the America Intellectual Property Law

Association, several patent reform workshops in February and March, 2005, in San Jose, Chicago, and Boston. An additional workshop will take place in Washington, D.C. The workshops will bring together government officials, business representatives, independent inventors, scholars, lawyers and other members of the patent community to discuss recommendations for patent reform. These workshops will be structured as "town meetings," with most of the time set aside for audience participation.

CONSUMER PROTECTION

I would like to spend my last few moments discussing some of the FTC's recent consumer protection initiatives. First, the FTC continues to pursue a vigorous law enforcement program that attacks a wide range of fraudulent practices. Alarmingly, results from our recent national fraud survey revealed that nearly 25 million adults in the United States – over 11 percent of the adult population – were victims of fraud during a recent 12-month period.[30]

In fiscal year 2004, the FTC filed 83 actions in federal district court, targeting a wide variety of fraudulent practices, from traditional scams like work-at-home promotions to high-tech fraud that plagues online consumers. We also obtained 110 judgments ordering defendants to pay more than $380 million in redress to consumers. In the last four months alone, the FTC obtained judgments in excess of a quarter of a billion dollars in two Texas cases that involved individuals and companies engaged in deceptive marketing of advance-fee credit cards and fraudulent weight loss products.[31] And, to increase our effectiveness in pursuing fraudsters, we

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[30] *See* CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[31] *FTC v. Assail, Inc.*, No. WA:03-CV-7 (W.D. Tex.) ($106 million judgment entered Sept. 2004); *FTC v. Mark Nutritionals, Inc.*, No. SA02CA1151 XR (W.D. Tex.) ($155

recently created a Criminal Liaison Unit at the FTC to coordinate with the criminal enforcers and to maximize the impact of both criminal and civil prosecutions.

In October, we filed our first spyware case.[32] In this case, the FTC alleged that the defendants secretly downloaded software onto consumers' computers, barraged them with pop-up ads, and installed adware and other software programs to spy on consumers' Web surfing activity. The spyware caused computers to malfunction, slow down, or even crash. Having created serious problems for consumers, the defendants then offered to sell them a solution – purported anti-spyware products – for approximately $30. Currently, the defendants have agreed to a preliminary injunction that prohibits them from installing spyware on consumers' computers pending trial. Of course, we are not resting on our laurels. Expect to see an equally aggressive law enforcement program in 2005.

Second, in 2004, the FTC dramatically increased its efforts to address the problem of fraud aimed at Hispanic consumers. Our consumer fraud survey showed that Hispanics are roughly twice as likely as non-Hispanic whites to be victims of consumer fraud, whether they speak Spanish or not. The scam artists who prey upon Hispanic consumers mistakenly believe that their Spanish-language schemes are beyond the reach of the FTC. In one fraudulent business opportunity scheme, a young single mother who fell victim to the scam called the company to complain and demand her money back. When she advised the company that she intended to contact the FTC, the company actually taunted her, saying, "Go ahead, contact the

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million judgment entered Oct. 2004), *available at* http://www.ftc.gov/opa/2004/10/marknutritionals.htm.

[32] *See* FTC Press Release, *FTC Cracks Down on Spyware Operation* (Oct. 12, 2004), *available at* http://www.ftc.gov/opa/2004/10/spyware.htm.

FTC, they can't touch us!" They were wrong! In April 2004, we sued the company, a preliminary injunction is now in place, and they now are out of business.[33]

The FTC's Hispanic Initiative aims to detect, stop, and prevent consumer fraud against Hispanics through aggressive law enforcement, media outreach, consumer education, and inter-agency cooperation. In 2004, we brought 19 cases involving Spanish-language frauds, and we are working with other federal, state, and local law enforcement authorities to do even more. Last May, the FTC brought law enforcers, educators, and community-based organizations together in Washington, D.C. to develop national strategies for effective consumer education and law enforcement to combat fraud against Hispanics. We are following up with regional workshops and will hold one here in Dallas next week, on January 27.

Third, in 2003, nearly 10 million people – that is 4.6 % of American adults – were victims of identity theft.[34] The FTC continues its fight against identity thieves on several fronts. Most notably, on December 1st, the three nationwide credit reporting agencies began to provide free credit reports to consumers pursuant to the Fair and Accurate Credit Transactions Act of 2003 and the FTC's implementing rule.[35] Armed with this important new tool, consumers will be better educated about their credit rights, better armed to prevent identity theft, and better able to respond if their identities are stolen. Implementation will be rolled out regionally, having

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[33] *FTC v. Estaban Barrios Vega*, No. H-04-1478 (S.D. Tex. filed Apr. 2004), *available at* http://www.ftc.gov/opa/2004/04/hispanicsweep2.htm.

[34] *See* FEDERAL TRADE COMMISSION – IDENTITY THEFT SURVEY REPORT (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

[35] The three nationwide credit reporting agencies have established a centralized website, www.annualcreditreport.com, at which consumers can obtain their free credit reports. *See* www.ftc.gov/credit for more information.

already begun on the West Coast. Texas residents will be able to request free reports beginning on June 1, 2005.

Fourth, the National Do Not Call Registry rapidly has become one of the FTC's most popular consumer protection initiatives. The Pulitzer-prize winning humorist, Dave Barry, called the Registry the most popular government program since the Elvis stamp. Nationwide, more than 80 million telephone numbers have been registered to date, almost 5 million of which were registered by Texas residents. Happily, telemarketers' compliance with the Registry remains high.[36] But we continue to police the system for those few telemarketers who have not complied. In 2004, the FTC brought 10 actions alleging violations of the Do Not Call registry. Our Southwest Regional Office here in Dallas brought one of those actions when it sued a company we alleged sold phony business opportunities and violated the Do Not Call Registry.[37] We continue to monitor compliance closely and more investigations are pending.

Finally, to complement our enforcement authority, the FTC continues to invest significant resources in policy research and development on the consumer protection side as well. In 2004, the FTC held workshops on email authentication, spyware, radio frequency identification, and peer-to-peer file sharing software. These workshops addressed both current applications as well as emerging applications and technologies. In each area, we explored benefits and risks to consumers, self-regulatory efforts, and technological efforts to protect

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[36] *See* FTC Press Release, *Compliance with Do Not Call Registry Exceptional* (Feb. 13, 2004), *available at* http://www.ftc.gov/opa/2004/02/dncstats0204.htm (citing Harris Interactive® survey).

[37] *See* FTC Press Release, *Companies Operating Out of Tennessee and Florida Charged with Violating Numerous Federal Laws* (July 12, 2004), *available at* http://www.ftc.gov/opa/2004/07/nationalevent.htm.

consumers from these risks. A primary objective of these workshops is to encourage industry to develop technological fixes for the consumer protection problems posed by such technology.[38]

Again, I appreciate having the opportunity to "get outside of the beltway" and tell you about our recent and upcoming work. Thank you for your attention.

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[38] One notable example is the proposed development of an authentication system to stem the tide of spam that is overwhelming the global email system. The implementation of an authentication system would vastly improve the effectiveness of email filtering and potentially provide law enforcement with a critical tool to help find those responsible for sending illegal spam.