Federal Trade Commission

Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission

Remarks of J. Thomas Rosch*
Commissioner, Federal Trade Commission

before the

George Mason Law Review's 14th Annual Symposium on Antitrust Law

Washington, DC

February 9, 2011

This symposium focuses on cartels and mergers so I will direct my comments this morning to those topics. Before I get to the practical, however, I'd like to share with you some thoughts about behavioral economics and criminal cartel law enforcement.

I.

Arguably, the punishment system for criminal antitrust offenses in the United States is mostly concerned with deterrence and is largely based on the Chicago School assumption that people act rationally. That is to say, we assume that most people tempted to engage in price fixing will be deterred from doing so by the prospect of large fines and incarceration.

---

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance preparing this paper.

Rational people may behave that way. But people also behave irrationally in a number of ways. There are studies demonstrating that people on the buy-side (consumers) act predictably irrationally in a number of respects. I would argue, moreover, that far from fighting that notion, those who are truly invested in free market economics should be indifferent about the veracity of the conclusion. Otherwise, the State, rather than producers, will dictate what is good for us. Put differently, producers in a free market will produce goods and services that consumers want, whether consumers are acting rationally or irrationally, instead of the State calling the shots based on its determination as to what would be rational. But what has this got to do with deterrence?

We actually have very limited data on the extent to which our current regime of mixed civil and criminal cartel enforcement actually deters price fixers. How do business people calculate whether they are better off if they do or don't engage in price fixing? Do they compare a short-term gain, such as a boost in salary or praise from peers, against a long-term loss, such as a fine or incarceration? What information gaps might exist in this situation that would prevent a fully-informed decision? I'm not aware of any reliable studies in that respect.

That brings me to behavioral economics. As Maurice Stucke has described, there are behavioral economics studies demonstrating that people are apt to act incrementally rather than to act in a fashion that constitutes a giant step or is irrevocable.[1] That would suggest that we should not consider all forms of price fixing to be fungible. We should instead seek to identify price fixing that lends itself to incremental involvement and focus primarily on that.

---

[1] Maurice E. Stucke, *Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels, in* CRIMINALISING CARTELS: A CRITICAL INTERDISCIPLINARY STUDY OF AN INTERNATIONAL REGULATORY MOVEMENT 263, 277 (2011).

Professor Stucke has also observed that people may justify price fixing by a higher goal.[2] That suggests that cartel activity may increase in economic downturns (as fighting a recession may be seen as a higher good) or when price fixing seems justified by safety considerations as in the *Professional Engineers* case.[3] Thus, law enforcement should be especially vigilant in those circumstances.

Professor Stucke has also noted that the duration of cartels has not decreased despite the amnesty program, which is designed to destabilize cartels by encouraging whistle-blowing and reducing trust among members.[4] Indeed, he says that "price fixers, like test subjects in other experiments, may be more trusting and co-operative than rational choice theory predicts."[5] That suggests that the amnesty program may not be working as well as it should. He observes, for example, studies showing that individuals are more likely to engage in conduct that is tolerated or encouraged by a corporate culture.[6] Perhaps that means that amnesty should be awarded based on a record free of recidivism or widespread participation in price fixing rather than on a first-come, first-served basis. At a minimum, though, it suggests that – after almost twenty years – it is time to review the amnesty program critically and that criminal sentencing for cartel activity in the United States does not focus enough on these factors.

Similarly, Professor Stucke has also described economic experiments showing that nominally criminal behavior is more likely in cultures that tolerate or reward it.[7] And, he asserts that "many cartels, according to a recent study of 81 international cartels, suffer from little

---

[2] *Id*. at 279.

[3] *National Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679 (1978).

[4] Stucke, *supra* note 1, at 268 (citing a 2009 study by Levenstein and Suslow).

[5] *Id*. at 280.

[6] *Id*. at 278-79, 282-84.

[7] *Id*.

cheating among their members."[8] That accords with my own observations representing clients from different cultures. They sometimes feared being labeled as turncoats more than they feared a big fine or incarceration. That suggests that we should be wary of trying to "export" our amnesty or leniency programs without warning that one size may not fit all or of trying to achieve convergence at any cost.

The limited number of studies of people that engaged or were tempted to engage in price fixing has convinced me that more such studies are needed. Our enforcement system could be strengthened by better understanding what motivates and what deters cartel activity in the real world, rather than relying on economic assumptions.

II.

The Department of Justice has exclusive jurisdiction over criminal cartel enforcement. But that doesn't mean that the FTC has nothing to do with cartels. Our staff sometimes uncovers evidence that a person or company may be engaging in criminal activity and refers the matter to the DOJ. In addition, the FTC investigates and challenges per se illegal conduct that falls short of a criminal violation. There are two areas where the FTC has been particularly active in challenging allegedly per se illegal conduct: unintegrated physician groups and invitations to collude.[9]

In its 1982 *Maricopa* decision, the U.S. Supreme Court held that agreements among competing physicians regarding the fees they would charge health insurers for their services

[8] *Id*. at 281 (citing a 2009 study by Levenstein and Suslow).

[9] The FTC's merger enforcement mission also addresses a form of cartel activity. Horizontal mergers are, in a sense, the ultimate cartel. That is to say, a merger results in price fixing and market allocation between horizontal competitors. We nevertheless tolerate horizontal mergers because of the potential for efficiencies and because of the ability of competitors (who are not part of the "cartel") to constrain the merged company from exercising market power.

constituted per se unlawful horizontal price fixing.[10] The Court explained that the agreements "fit squarely into the horizontal price-fixing mold" because the member physicians were "independent competing entrepreneurs."[11]

The Court distinguished the medical groups from joint ventures in which the participants had pooled their resources and agreed to "share the risks of loss as well as the opportunities for profit," thereby becoming "a single firm competing with other sellers in the market."[12] As an example, the Court suggested that a group of providers that offered "complete medical coverage for a flat fee . . . would be perfectly proper."[13] The Court also drew a contrast with the blanket license arrangement in *BMI*, which the Court described as "entirely different from the product that any one composer was able to sell by himself."[14] The combination of physician groups in *Maricopa*, by contrast, did "not permit them to sell any different product."[15]

Since the *Maricopa* decision, the Commission has challenged dozens of price fixing and boycott agreements by which unintegrated health care providers jointly seek to increase the fees that they receive from payers.[16] In these cases, health care providers agreed to charge payers the

---

[10] *Arizona v. Maricopa Cnty. Medical Soc'y*, 457 U.S. 332, 356-57 (1982); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (observing that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public service aspect of professional practice controlling in determining whether § 1 includes professions").

[11] *Maricopa*, 457 U.S. at 357.

[12] *Id*. at 356.

[13] *Id*. at 357.

[14] *Id*. at 355-56 (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc*., 441 U.S. 1 (1979)).

[15] *Id*. at 356.

[16] FTC Bureau of Competition, *Overview of FTC Antitrust Actions in Health Care Services and Products* (Sept. 2010), http://www.ftc.gov/bc/110120hcupdate.pdf. At the same time, the Commission has recognized the potential for health care providers to form collaborations with the potential to reduce costs and improve quality. The FTC has provided extensive guidance

same inflated prices, collectively negotiated with payers over fees or other terms, and/or threatened to boycott a health plan unless it met their collective fee demands. These enforcement efforts have demonstrated that "collective negotiations by health care professionals . . . have often sought fee increases of 20 percent or more."[17]

Let me give you two examples of our enforcement efforts in this area. In the Advocate Health Partners case, the Commission challenged several organizations representing more than 2,900 independent Chicago-area physicians for agreeing to fix prices and for refusing to deal with certain health plans except on collectively determined terms.[18] According to the complaint, Advocate Health Partners negotiated prices and other terms on which its members would deal with health plans but lacked any significant efficiency-enhancing integration of the provider practices. One of the effects of these practices was a 20 to 30 percent fee increase for one health plan.

Similarly, in the Minnesota Rural Health Cooperative case, the Commission's complaint alleged that competing hospitals, physicians, and pharmacies in rural southwestern Minnesota agreed to fix prices and collectively negotiate contracts with third party payers without any significant efficiency-enhancing integration.[19] The complaint charged that, through its collective negotiations and coercive tactics, the cooperative extracted higher payments and other favorable

---

describing how providers can collaborate in ways consistent with the antitrust laws. The 1996 Health Care Statements and our staff's Advisory Opinions are particularly instructive.

[17] Prepared Statement of the Federal Trade Commission Before the Antitrust Task Force of the H. Comm. On the Judiciary, Concerning H.R. 971, "The Community Pharmacy Fairness Act of 2007," 110th Cong. (Oct 18, 2007) (criticizing proposals to exempt non-publicly traded pharmacies from antitrust scrutiny).

[18] Complaint, In re Advocate Health Partners, File No. 0310021 (FTC Dec. 29, 2006), *available at* http://www.ftc.gov/os/caselist/0310021/061229cmp0310021.pdf.

[19] Complaint, In re Minnesota Rural Health Cooperative, File No. 051 0199 (FTC June 18, 2010), *available at* http://www.ftc.gov/os/caselist/0510199/index.shtm.

price-related terms from payers. As a result of these practices, one payer was coerced into paying the group's physicians 27% more, and its hospitals 10% more, than comparable physicians and hospitals in the region. Both of these cases were resolved with consent decrees prohibiting future anticompetitive conduct by these groups.

The courts have upheld the Commission's approach to physician groups. In May 2008, the U.S. Court of Appeals for the Fifth Circuit upheld a Commission opinion that North Texas Specialty Physicians, a group of independent competing physicians based in Fort Worth, violated Section 5 of the FTC Act by orchestrating a price agreement among its physicians, negotiating price terms in payer contracts on behalf of its physicians, and refusing to deal with payers except on collectively agreed-upon terms.[20] The Court agreed with the Commission that the group's conduct could be condemned under an "inherently suspect" analysis because the anticompetitive effects of its practices were "obvious."[21]

The enactment of health care reform last year highlighted the importance of the FTC's enforcement in this area. The Centers for Medicare & Medicaid Services (CMS)[22] will soon issue a Notice of Proposed Rulemaking with detailed program requirements for Accountable Care Organizations (ACOs). These are groups of health care providers that agree to be accountable for the quality, cost, and care of Medicare beneficiaries assigned to them. Formation of ACOs raises several antitrust concerns. First, ACOs run the risk of illegal price fixing if they engage in joint price negotiations with private payers and, second, ACOs may be

[20] *North Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

[21] *Id*. at 363; *see also id*. at 362 ("We, like the FTC, do not decide whether the NTSP's challenged practices constituted a per se violation, although we agree that some of NTSP's practices bear a very close resemblance to horizontal price-fixing, generally deemed a *per se* violation.").

[22] CMS is a branch of the U.S. Department of Health and Human Services. CMS administers Medicare, Medicaid, and the Children's Health Insurance Program.

able to exercise market power, particularly in rural markets, and thereby increase health care costs.[23] FTC staff, in coordination with the Department of Justice, have been providing assistance to CMS as it prepares this rulemaking. Stay tuned.

Another area where the FTC has cartel-like responsibility is with respect to invitations to collude. Specifically, the FTC takes the position that an invitation to collude violates Section 5 of the FTC Act, which is a statute that prohibits "unfair methods of competition" but does not permit follow-on private actions under the Sherman Act.[24] As two other commissioners and I pointed out in connection with our recent U-Haul consent decree, "[i]nvitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act, which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct."[25]

The DOJ, in contrast, cannot challenge invitations to collude in a straightforward manner. That is because Section 1 of the Sherman Act does not apply to attempts to fix prices due to the lack of an agreement. An invitation to collude could be challenged under Section 2 of the Sherman Act but only if one of the parties involved in the solicitation has monopoly or near monopoly power.[26] The DOJ may also use the wire fraud and mail fraud statutes to bring

---

[23] There is also a risk that ACOs could facilitate collusion by participants when operating outside the venture.

[24] *Valassis Commc'ns Inc.*, 71 Fed Reg. 13,976, at 13,978 (FTC Mar. 20, 2006) (proposed consent and aid to public comment) (describing the FTC's rationale for imposing liability for unaccepted invitations to collude).

[25] Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, In re U-Haul Int'l, Inc. and AMERCO, FTC File No. 081-0157 (June 9, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf.

[26] *United States v. Am. Airlines*, 743 F.2d 1114 (5th Cir. 1984).

criminal proceedings against attempted cartel conduct, such as bid rigging.[27] Nevertheless, I think it's clear that the FTC is better suited to challenge invitations to collude because of Section 5's ability to address this conduct directly, rather than through the indirect (or some would say, questionable) approaches that the DOJ must take.

The FTC has entered into consent agreements in several recent cases alleging an invitation to collude. In some cases, the communications occurred in private between two competitors.[28] In other cases, the communications were made publicly in, for example, an investor analyst or earnings call.[29]

The *Valassis* case is a good example. Valassis is a publicly traded company. It is one of just two suppliers of free-standing newspaper inserts, which are those multi-page coupon booklets stuck in the folds of newspapers. Like other public companies, Valassis holds quarterly conference calls with securities analysts that are open to the public and can be heard live on the Internet. The FTC alleged that during one of these calls in July 2004, Valassis invited its only direct competitor, News America, to join in a scheme to allocate customers and fix prices. Specifically, during a July 2004 call, Valassis' president and CEO indicated that Valassis would stop competing for News America's customers if News America similarly stopped competing for Valassis customers. If News America did not adhere to this plan, Valassis said that it would

---

[27] *See, e.g.*, *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990) (per curiam). *See generally* 18 U.S.C. § 1341-43.

[28] *Precision Moulding Co.*, 61 Fed. Reg. 32,824 (FTC June 25, 1996) (proposed consent and aid to public comment), 122 F.T.C. 104 (1997) (decision and order); *YKK (U.S.A.) Inc.*, 58 Fed. Reg. 19,454 (FTC Apr. 14, 1993) (proposed consent and aid to public comment), 116 F.T.C. 628 (1993) (decision and order).

[29] *Valassis Commc'ns*, 71 Fed Reg. 13,976 (FTC Mar. 20, 2006) (proposed consent and aid to public comment), 2006 FTC LEXIS 26 (2006) (decision and order). The Commission has also challenged invitations to collude involving both public and private communications. *See, e.g.*, *U-Haul Int'l, Inc.*, 75 Fed. Reg. 35,033 (FTC June 21, 2010) (proposed consent and aid to public comment), 2010 FTC LEXIS 61 (2010) (decision and order).

aggressively cut prices. Valassis entered into a consent order to resolve the FTC's concerns. The FTC did not charge News America with a violation because it did not accept Valassis' solicitation.

III.

Next, I'd like to spend some time describing some recent merger enforcement trends I've seen. Since I have already described my views on the new Merger Guidelines several times and you have an excellent panel addressing that topic next,[30] I will not delve into that area, but am happy to take questions on the new Guidelines or any other topic at the end of my remarks.

We will soon be releasing the latest iteration of our annual HSR Report to Congress, which is the sole official source of combined FTC and DOJ merger enforcement data.[31] If one goes through the report and combs through the numbers as my Attorney Advisor, Darren Tucker, has, a number of interesting things emerge. First, merger activity was up substantially in FY 2010. The number of HSR-reported transactions increased from 716 in FY 2009 to 1,166 in FY 2010.[32] That's a 63% increase. But for those of you in the private sector, it's not time to pop the champagne corks just yet. Last year's rate was still half of the rate from FY 2007 when merger activity peaked.

Not surprisingly, the increase in filings led to increased activity at the agencies. Second requests issued by the FTC and DOJ increased from 31 in FY 2009 to 46 in FY 2010, but the percentage of reported transactions receiving a second request was similar: roughly 4% in both

---

[30] *See* Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, Project No. P092900 (Aug. 19, 2010), *available at* http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf.

[31] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2010 (forthcoming 2011). Citations are to page numbers in the current draft.

[32] *Id*. at 1. The FTC's 2010 fiscal year covers the period from October 1, 2009 through September 30, 2010.

years.[33] Despite the increased workload in FY 2010, the agencies granted early termination of the waiting period more often than in the prior year.[34]

The report also provides merger enforcement statistics for each agency. On the surface, the numbers appear similar. During FY 2010, the FTC challenged 22 transactions, while the DOJ challenged 19.[35] The FTC issued 20 second requests, while DOJ issued 26.[36]

However, once you dig a little deeper, some pretty startling differences between the agencies emerge. What is easily missed from the report is that the DOJ investigated fewer than half of the number of mergers the FTC investigated. Specifically, 149 mergers were cleared to the FTC, while 73 were cleared to the DOJ.[37] Thus, the enforcement rate based on cleared transactions was quite different: 15% for the FTC versus 26% for the DOJ. Put another way, a party that submits an HSR filing and then receives an access letter during the 30-day waiting period has nearly double the chance of an ultimate challenge if the access letter comes from the DOJ. I'm guessing that few of you in the audience would have expected that.

In addition to a higher enforcement rate, the DOJ also has a much higher rate of issuing second requests when it has been granted clearance: 36% for DOJ versus 13% for FTC.[38] And even though the FTC investigated and challenged more transactions than the DOJ, the DOJ

---

[33] *Id*. Appendix A. In FY 2010, the rate was 4.1% (46/1128); in FY 2009, the rate was 4.5% (31/684).

[34] *Id.* Appendix A. In FY 2010, 74% (704 of 953) of transactions involving a request for early termination received a grant of early termination. In FY 2009, that figure was 69% (396 of 575).

[35] *Id*. at 1-2.

[36] *Id*. Appendix A.

[37] *Id*. Table I.

[38] The DOJ issued 26 second requests for the 73 transaction cleared to it; the FTC issued 20 second requests for the 149 transactions cleared to it. *Id*. Appendix A, Table I.

issued more second requests (26 versus 20). One characteristic that both agencies share is that there was a high enforcement rate for transactions that received a second request.

Do these statistics mean that the DOJ is more aggressive than the FTC in terms of issuing second requests and challenging mergers? Not necessarily. There could be other factors that explain the differences I've described. One alternative explanation could be that the DOJ puts transactions through a more aggressive screening process before seeking clearance. In other words, DOJ may be more comfortable relying on the information contained in the HSR filing to conclude that a reported transaction is not anticompetitive.

A final difference between the agencies is the nature of the relief obtained in challenged transactions. Of the FTC's 22 merger challenges, 19 resulted in consent decrees and 3 resulted in abandoned transactions. Of the DOJ's 19 merger challenges, 10 resulted in consent decrees, 4 resulted in abandoned transactions, 4 resulted in fix-it-first remedies, and 1 matter remains in litigation. While these numbers only reflect a single year of enforcement, they suggest a greater willingness to consider fix-it-first remedies at the DOJ. In that respect, the numbers appear to accord with conventional wisdom.

Let me turn next to some trends that I have seen recently in the merger enforcement area. The first is the increased frequency with which parties assert a flailing firm, or weakened firm, defense. It is hardly a surprise that with the economic downturn, many struggling companies have put themselves up for sale. While true failing firm defenses remain quite rare, we are frequently confronted with the claim that the future competitiveness of an acquired company is undermined by its distressed finances or other difficulties.

The Supreme Court in *General Dynamics* held that the defendant's "weakness as a competitor" undermined the government's prima facie case because the defendant had almost no ability to affect the price or output of the relevant product in the long run.[39] Since *General Dynamics*, the courts have taken differing approaches as to how much consideration to give a firm's weakened financial condition in a Section 7 analysis.[40]

Notwithstanding the mixed treatment of the defense in the case law, our staff gives serious consideration to such arguments when presented by merging parties. I will say, however, that we often find the arguments to be poorly developed or that outside counsel put too much emphasis on these claims. The fact that a company has had a year or two of losses or that its operating capacity has fallen below the industry average simply isn't enough to justify a problematic transaction. Parties need to explain and present evidence that their financial difficulties are serious and durable, will adversely affect their long-term competitiveness, and can only be resolved by the proposed merger. The weakened firm defense tends to be more effective when it is presented in conjunction with other credible reasons to believe that a transaction will not substantially lessen competition, rather than as the sole, or principal, defense to a transaction.

A related trend we have seen recently is greater consideration by merging parties of alternative means of combining operations. We sometimes learn that one or both parties seriously considered a joint venture or other structure short of a merger. Given the need for efficiencies to be merger specific to be cognizable under the Merger Guidelines, is that game, set, and match against consideration of the transaction's purported efficiencies? Not necessarily.

---

[39] *United States v. General Dynamics Corp*., 415 U.S. 486, 503 (1974).

[40] *Compare FTC v. Nat'l Tea Co*., 603 F.2d 694, 699-701 (8th Cir. 1979) (permitting merger to proceed where target company suffered from years of losses, had poor site locations, and had little prospects for a turnaround, with the result that absent the merger it "would probably be forced out of the relevant market"), *with FTC v. Warner Commuc'ns*., 742 F.2d 1156, 1164 (9th Cir. 1984) (per curiam) ("A 'weak company' defense would expand the failing company doctrine, a defense which has strict limits.").

Otherwise, a party's consideration of alternative transaction structures such as joint ventures would always void an efficiencies defense. Furthermore, a merger may indeed yield efficiencies that would not occur in a less fully-integrated structure; this may be the reason why an alternative structure was considered and rejected. That said, however, the fact that the parties seriously considered a joint venture casts doubt on the assertions of a party that a full-blown merger was essential in order to achieve pro-competitive efficiencies. It may also have bearing on the viability of a failing or flailing firm defense.

A third recent trend is that the FTC is giving greater consideration to the risk of coordinated effects.[41] In fact, nearly all of our recent litigated cases have involved this theory of harm. The CSL/Talecris merger is perhaps the best example.[42] There, the FTC's complaint alleged that the merger of two of the five leading plasma-derivative protein product competitors would make price coordination easier and facilitate detection of deviations from the terms of coordination.[43] The complaint described a number of industry characteristics that led to post-merger coordination concerns, such as product homogeneity, close monitoring of competitors'

[41] It should be noted that former Chairman Muris sought to bring more coordinated effects cases during his tenure (2001-2004).

[42] Of the six Part 3 administrative complaints filed in the last two years involving merger challenges, only two did not assert a coordinated effects claim: ProMedica/St. Luke's and MDR/QED, the latter of which was alleged to be a merger to monopoly. Complaint ¶¶ 23-33, In re ProMedica Health System, Inc., Docket No. 9346 (FTC Jan. 6, 2011), *available at* http://www.ftc.gov/os/adjpro/d9346/110106promedicacmpt.pdf (alleging that the transaction would result in increased bargaining leverage for ProMedica and a loss of non-price competition between the merging parties); Complaint ¶ 17, In re the Dun & Bradstreet Corp., Docket No. 9342 (FTC May 6, 2010), *available at* http://www.ftc.gov/os/adjpro/d9342/100507dunbradstreetcmpt.pdf (alleging that the transaction gave the buyer a "virtual monopoly" and the ability to "exercise unilateral market power").

[43] Complaint, In re CSL Limited, Docket No. 9337 (FTC May 27, 2009), *available at* http://www.ftc.gov/os/adjpro/d9337/090527cslcmpt.pdf.

inputs and output, widespread availability of competitive information, repeated attempts by the industry to reduce supply, and use of signaling by competitors.[44]

The CSL case involved coordinated effects concerns but not unilateral effects concerns. Other recent FTC cases have involved *both* concerns. For example, in the FTC's pending challenge to the merger between LabCorp and Westcliff, two of the three principal providers of lab services to managed care physicians in Southern California, the complaint alleged that the transaction would result in coordinated effects through the loss of a maverick and unilateral effects from the loss of direct competition between the parties.[45] In Carilion, a case involving outpatient surgical and imaging services in the Roanoke area, the Part 3 complaint alleged not only that the transaction would result in unilateral price and non-price effects, but also that the transaction would create a "stable duopoly," and that "the likelihood of coordinated interaction . . . is increased with the elimination of the only independent, non-hospital-owned competitor."[46] Likewise, in the Thoratec/Heartware case, which involved a merger between two leading developers of miniaturized blood pumps called LVADs, the complaint alleged several theories of harm, including that the transaction would "enhanc[e] the likelihood of collusion or coordinated interaction between Thoratec and other LVAD manufacturers."[47]

---

[44] *Id*. ¶¶ 4, 21-43.

[45] Complaint ¶¶ 27-28, In re Laboratory Corp. of America, Docket No. 9345 (FTC Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpcmpt.pdf.

[46] Complaint ¶¶ 27-35, In re Carilion Clinic, Docket No. 9338 (FTC July 23, 2009), *available at* http://www2.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf.

[47] Complaint ¶ 23f, In re Thoratec Corp., Docket No. 9339 (FTC July 28, 2009), *available at* http://www2.ftc.gov/os/adjpro/d9339/090730thorateadminccmpt.pdf. The complaint also alleged that the transaction would increase the likelihood that Thoratec would exercise market power unilaterally and eliminate innovation competition, and would result in Thoratec maintaining its existing monopoly position in violation of Section 2. *Id*. ¶ 23.

What is the reason for the Commission's recent emphasis on coordinated effects? Speaking for myself, the answer is simple: CCC/Mitchell. That case, which was litigated by one of the co-sponsors of this event, involved the proposed merger of two of the three leading suppliers of automobile damage estimation software used by insurance companies and body shops. The Commission had reason to believe that the transaction would result in both coordinated and unilateral effects. Even though most of the evidence presented at trial by the FTC went to the unilateral effects issue, the district court judge rejected this claim due to a lack of reliable data showing the degree of competition between the merging parties and because of the ability of the remaining principal competitor to reposition.[48] On the other hand, the court did find that the transaction increased the risk of coordinated effects, albeit modestly, and that the FTC was therefore entitled to a preliminary injunction.[49]

My takeaway from the CCC/Mitchell case is that when our staff goes into court, it makes sense to allege *both* unilateral and coordinated theories of harm, assuming we have a plausible basis for each claim. Some cases, such as CSL/Talecris, may fit so squarely into one mold that alleging both theories would not make sense. But given the uncertainties of the litigation process, my general expectation is that we should allege both theories of harm, even if one appears to be less likely to succeed.

While we are on the subject of coordinated effects, I should say that I have always felt that some economists take too cramped a view of the anticompetitive coordinated effects that may result from a merger. An argument I often hear from economists is that as long as pricing is opaque, there is little or no danger of coordinated effects from a merger. That, however, ignores other types of coordinated effects, such as tacit customer or territorial allocation agreements,

[48] *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67-72 (D.D.C. 2009).

[49] *Id*. at 60-67.

output restrictions, and non-price forms of competition. Indeed, the CCC/Mitchell case involved a concern regarding customer allocation.

Another recent trend I have seen is the "merging" – if you will forgive the pun – of multiple investigations into the same company. This can occur in different ways. It occasionally happens that our staff investigates a company simultaneously for a proposed transaction and certain business practices. Sometimes a single consent decree can resolve both sets of issues. Or, we may unearth other problematic conduct in the course of our investigation of a merger. The concerns can be related to the merger itself – such as gun jumping or covenants not to compete – or separate from the merger, such as price fixing or failure to notify a prior HSR-reportable transaction.

A recent example appears to be the DOJ's challenge to Blue Cross Blue Shield of Michigan's use of MFN clauses with Michigan hospitals.[50] Specifically, the DOJ alleged that Blue Cross-Michigan had MFN agreements with the majority of hospitals in Michigan. The DOJ alleged that the effect of these provisions was higher hospital prices, higher entry barriers, and a reduction of competition.

I don't think it's a coincidence that before this case, the DOJ had investigated a proposed merger involving Blue Cross-Michigan.[51] In a speech given shortly after Blue Cross-Michigan abandoned its proposed merger, Assistant Attorney General Christine Varney alluded to the inability of potential entrants to develop networks of hospitals, physicians, and other health care

[50] Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Against Blue Cross Blue Shield of Michigan (Oct. 18, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/263227.htm

[51] Press Release, U.S. Dep't of Justice, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans (March 8, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/256259.pdf.

providers at rates comparable to Blue Cross-Michigan.[52] This may have been a reference to the MFN provisions. In any event, it seems likely that as part of its investigation of the proposed merger, the DOJ uncovered the MFN clauses that were later subject to a separate investigation and ultimately challenged.

A final observation is that market definition remains as important as ever in Section 7 litigation. This may seem counterintuitive, given the treatment of market definition in the 2010 Merger Guidelines. However, three recent cases illustrate the continued importance of the antitrust agencies alleging and proving a relevant market when they go into court.

Last year, the Department of Justice challenged in federal court Dean Foods Company's April 2009 acquisition of a division of Foremost Farms. The Department asserted that the merger eliminated competition between the two companies in the sale of fluid milk to schools, grocery stores, convenience stores and other retailers in Illinois, Michigan, and Wisconsin.

In response, Dean Foods filed a motion to dismiss part of the complaint, arguing that the DOJ did not sufficiently plead a relevant geographic market.[53] The court denied the motion, but not before closely examining the sufficiency of the DOJ's allegations under the *Twombly-Iqbal* standard. The court criticized the "lack of specificity" in the complaint and noted that the allegations were "not well structured."[54]

---

[52] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust and Healthcare, Remarks as Prepared for the ABA/American Health Lawyers Association Antitrust in Healthcare Conference 4-5 (May 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/258898.pdf.

[53] Dean Food argued that, in the alternative, the court should require plaintiffs to submit a more definite statement as to the geographic market.

[54] Order, United States v. Dean Foods Company, Case No. 10-CV-59 (E.D. Wis. Apr. 7, 2010), *available at* http://www.justice.gov/atr/cases/f257500/257536.htm

The second case is the FTC's challenge to Ovation Pharmaceuticals' January 2006 acquisition of the drug NeoProfen. This acquisition put into one company's hands the only two pharmaceutical treatments for a serious and potentially deadly congenital heart defect affecting more than 30,000 babies born prematurely each year in the United States. The Commission was particularly concerned about the transaction because Ovation raised the price of Indocin nearly 1,300 percent, from $36 to nearly $500 a vial, shortly after the acquisition.

Notwithstanding what appeared to be a merger to monopoly with significant anticompetitive effects, the District Court for the District of Minnesota found that there was no antitrust violation because the FTC had failed to prove a relevant product market. The court reasoned that because neonatologists choose between the two drugs for reasons other than price, they could not be in the same product market. The FTC has appealed the district court's decision to the Eighth Circuit, explaining the multiple errors committed by the district court.

The third case is the FTC's pending challenge to LabCorp's acquisition of Westcliff that I've already described. The FTC's complaint alleged that the acquisition would leave only two significant laboratories in Southern California competing to provide testing services to most physician groups and that Westcliff had been a low-cost, aggressively growing rival.

I dissented from the Commission's decision to challenge the transaction because I did not believe the asserted product market was legally defensible. The complaint alleged a product market consisting of "capitated clinical laboratory testing services to physician groups operating under the delegated managed care model."[55] I issued a dissenting statement, explaining that the

[55] Complaint ¶ 9, In re Laboratory Corp. of Am., Docket No. 9345 (FTC Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpcmpt.pdf. Alternatively, the complaint alleged a broader product market included all clinical lab services purchased by physician groups operating under the delegated managed care model. *Id*.

relevant market should also include clinical laboratory services provided under fee-for-service contracts to the same physician groups.[56]

These cases together reaffirm the importance of market definition in Section 7 cases, particularly that the antitrust agencies must (1) carefully consider what the relevant market is before going into court, (2) provide adequate factual support in the complaint such that the alleged relevant market is plausible, and (3) adduce sufficient evidence at trial to demonstrate the relevant market, even when the agency appears to have a compelling story of how the merger will harm consumers. But, as I have said on other occasions, that does not mean that *upfront* market definition is necessary in most cases. Direct evidence that an acquisition may create, enhance, or facilitate the exercise of market power may enable one to "back into" the relevant market.

Thank you. I would be happy to take questions.

[56] Dissenting Statement of Commissioner J. Thomas Rosch, In the Matter of Laboratory Corp of America, Docket No. 9345, File No. 101-0152 (Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdisstatement.pdf.