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Competition Enforcement and Policy Developments at the FTC

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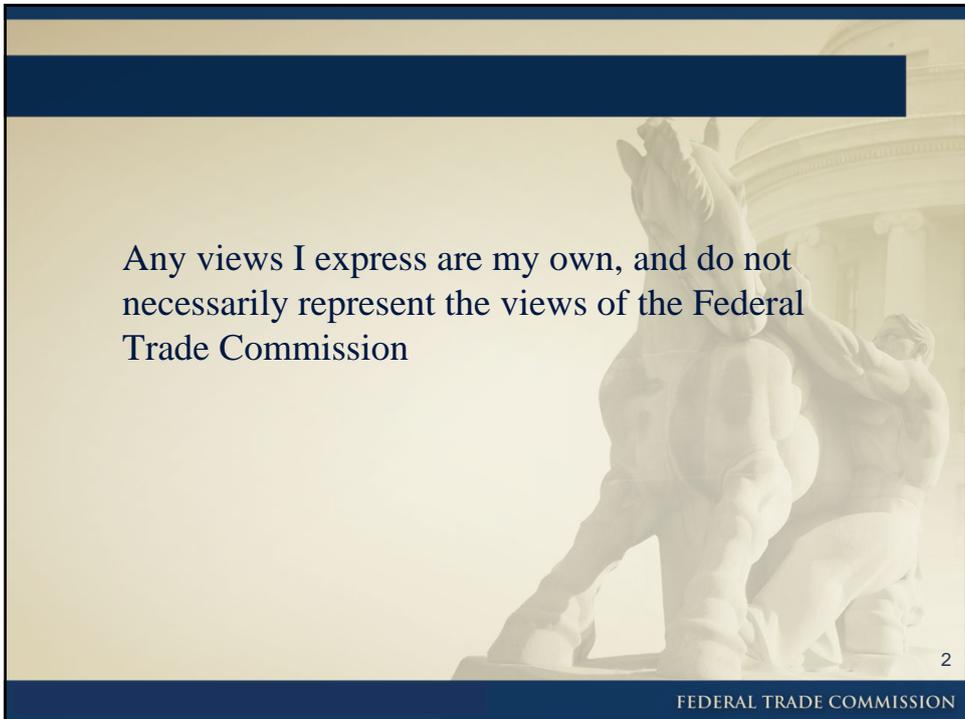


**Competition Enforcement and
Policy Developments at the FTC**

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Any views I express are my own, and do not
necessarily represent the views of the Federal
Trade Commission

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FTC Competition Enforcement Priorities

- **Promoting competition in health care and containing costs of prescription drugs.** Preventing anticompetitive conduct and mergers involving the health care sector, from hospitals to pharmaceutical companies; restricting anticompetitive “**pay-for-delay**” patent settlements

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FTC Competition Enforcement Priorities

- **Preserving competition in high tech markets**
The FTC has a unique perspective in anticipating and evaluating new technology, and using appropriate measures of enforcement, education, and public engagement to address evolving markets and business models
- The FTC devotes significant resources to monitoring **energy markets**

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Healthcare – Pay for Delay

- FTC Bureau of Economics has estimated that pay-for-delay settlements cost Americans \$3.5 billion a year in higher health care costs
- A report released in January 2013 found that Fiscal Year (FY) 2012 saw the number of potentially anticompetitive patent dispute settlements between branded and generic drug companies increased significantly compared with FY 2011, jumping from 28 to 40

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Healthcare – Pay for Delay

- After fighting for more than 12 years to restrict pay-for-delay deals, both in courts and through legislative initiatives – the U.S. Court of Appeals for the Third Circuit handed down an excellent decision in the *K-Dur* matter in July 2012
- A private antitrust litigation

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Healthcare - Pay for Delay - K-Dur

- In its decision, the Court of Appeals adopted the FTC's position that when money goes from the brand to the generic and the generic delays entry the burden shifts to the parties to show the money didn't go for delay
- FTC Chairman Statement on the decision *available at*
<http://www.ftc.gov/opa/2012/07/kdur.shtm>
- A petition for certiorari is pending

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Healthcare - FTC v. Watson Pharm.

- On January 22, 2013, the FTC filed a brief in **FTC v. Watson Pharmaceuticals et al.** (11th Cir.), a matter on which the Supreme Court granted certiorari on December 7, 2012
- In its brief, the FTC contends that patent infringement lawsuit settlements that involve a reverse payment should be treated as “presumptively anticompetitive under a ‘quick look’ rule of reason analysis”

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Healthcare - FTC v. Watson Pharm. (cont'd)

- FTC Brief: the presumption should be rebuttable only by evidence that the reverse payment was for something other than delayed entry into the market by the generic company, such as “consideration for unrelated property or services” or “litigation costs that the brand-name manufacturer would have borne” had the parties failed to settle
- Oral argument scheduled for March 25, 2013

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Healthcare Mergers – Watson/Actavis

- Watson, the world's 4th generic company proposed acquisition of Actavis
- The FTC October 2012 order required the sale of the rights and assets to 18 drugs to third party companies, to ensure competition in the markets for 21 current and future generic drugs, used to treat a wide range of conditions ranging from hypertension and diabetes to anxiety and attention deficit hyperactivity disorder (ADHD)

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Healthcare Mergers – OmniCare/PharMerica

- In January 2012, the FTC issued a complaint seeking to block OmniCare’s hostile acquisition of rival long-term care pharmacy provider, PharMerica
- The complaint alleged the combination of the two largest U.S. long-term care pharmacies would make the combined firm a “must have” for Medicare prescription drug plans, which provide subsidized prescription drug benefit coverage to Medicare

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Healthcare Mergers – OmniCare/PharMerica

- The parties abandoned the deal in February 2012

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Healthcare Mergers – OSF/Rockford

- At the last APEC meeting, I reported on the November 2011 FTC complaint seeking to block this hospital merger charging that the acquisition would substantially reduce competition among hospitals and primary care physicians in Rockford, Illinois
- In April 2012, a U.S. District Court granted the FTC request for a preliminary injunction
- A week later the parties abandoned the deal

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Phoebe Putney Health System/Palmyra Hospital

- FTC alleged the transaction is a merger to monopoly because Phoebe and Palmyra are the only two hospitals in Albany, Georgia
- The FTC also alleges the deal was structured in an attempt to improperly shield the it from federal antitrust scrutiny under the “state action” doctrine
- District Court granted Phoebe Putney's motion to dismiss the FTC's complaint on state action grounds. In December 2012, the Court of Appeals for the 11th Circuit denied the FTC's appeal

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Phoebe Putney Health System/Palmyra Hospital

- The FTC petition for a writ of certiorari by the Supreme Court was granted in June and the case was argued on November 26, 2012
- FTC's position is that, although a state can authorize state entities or private actors to engage in conduct that would otherwise violate federal antitrust law, the state's intent to take that step should not lightly be inferred

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Merger Enforcement – Hertz/Dollar Thrifty

- A \$2.3 billion acquisition, relevant markets were car rentals in local airport markets
- Staff analyzed close to 200 local airport markets, finding likely anticompetitive effects in 72 markets
- **Complaint**
 - Hertz and Dollar Thrifty are close competitors in many U.S. airport car rental markets

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Hertz/Dollar Thrifty (cont'd)

- Merger would have harmed competition by reducing the number of direct competitors from four to three, diminishing future competition, and enabling the combined firm to raise rental car prices for consumers
- Hertz's low-priced Advantage-Rent-A-Car brand is positioned similarly to Dollar Thrifty in terms of price, features, and customer service. Post-merger, Hertz's incentive to expand Advantage would be significantly reduced

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Hertz/Dollar Thrifty

- **Consent Agreement** contains divestitures to an up-front buyer
 - Hertz must divest its Advantage-Rent-A-Car business as well as 16 additional Dollar Thrifty on-airport locations to FSNA/Macquarie, operator of U-Save Car Rental
 - The divestitures effectively replicate the potential loss of current and future competition, and create a new independently-owned competitor with a national footprint

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Integrated Device Technology/PLX

- Merging parties make Peripheral Component Interconnect Express (“PCIe”) switches
 - PCIe switches are complex integrated circuits used to transmit data between processor chips and various endpoints in computer systems, such as memory or graphics cards. PCIe switches increase contact points, making data transfer faster and more efficient

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Integrated Device Technology/PLX

- PLX and IDT are the first and second largest suppliers of PCIe switches; merger would have created a virtual monopoly (80%+) for worldwide sales
- Evidence of intense head-to-head competition on both price and innovation
- A straightforward case of two aggressive competitors seeking to put an end to their rivalry by merging

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Integrated Device Technology/PLX

- The Commission issued an Administrative Complaint on December 18, 2012, and authorized staff to seek a preliminary injunction
- The parties abandoned the transaction before the injunction action was filed

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Universal/EMI (not challenged)

- Universal is the largest recorded music company in the world, followed by Sony, Warner, and EMI (together - the four “Majors”)
- In the past, the Commission has reviewed a number of mergers in the recorded music industry, and also challenged anticompetitive conduct in this area

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Universal/EMI (cont'd)

- However, the market for distributing recorded music is evolving from brick-and-mortar distribution of albums to online sales of single songs and availability through personalized music services like Pandora
- Today, the Majors compete to distribute music through a variety of ways:
 - the sale of compact discs in large mass merchandise and big box stores;

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Universal/EMI (cont'd)

- the sale of compact discs online;
 - the sale of digital downloads; and
 - increasingly, the subscription to interactive music streaming services
- After a thorough investigation, staff did not find sufficient evidence that the acquisition would substantially lessen competition in the market for commercial distribution of recorded music

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Universal/EMI (cont'd)

- Staff found that little head-to-head competition due to a different product mix
- In examining the acquisition's impact on interactive music streaming services, staff found that the transaction was unlikely to give Universal enhanced bargaining leverage since each Major was to some degree already a “must have” for streaming services.

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HSR merger filings – FY 2012

- Approximately 1430 reported transactions over fiscal year 2012



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Litigation Highlights - Conduct Matters

Idexx (Exclusive Dealing)

- Idexx provides point-of-care (POC) diagnostic products for companion animal veterinarians
- For at least the last 5 years, Idexx maintained a market share in excess of 70% for POC diagnostic testing equipment sales

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Idexx (cont'd)

- POC diagnostic equipment is predominantly (85%) sold to vets through third party distribution channels
- Idexx maintained exclusive contracts with the three major national distributors of diagnostic testing equipment, as well as the two leading regional distributors

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Idexx (cont'd)

- **Complaint:** Idexx violated Section 2 because its exclusive relationships with distributors blocked its rivals from this important sales channel, often marginalizing them or forcing them out of the market. As a result, Idexx maintained its monopoly position over several years

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Idexx (cont'd)

- **Proposed settlement:** Idexx negotiated a non-exclusive distribution agreement with one of the national distributors; the contract was incorporated into the proposed consent agreement, which also requires that Idexx not have exclusive relationships with all three national distributors for the next ten years
- The public comment period ended on January 24 (no comments were submitted)

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Google Search Bias Investigation (closed)

- An investigation into allegations that Google manipulated its search algorithms to harm vertical websites competing with its vertical websites through its new “Universal Search” product
- FTC found that the introduction of “Universal Search” and algorithm changes, even those that may have harmed competitors, were justified as innovations that improved Google product and the experience of its users

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Energy - Oil and Natural Gas

- FTC continues to monitor energy markets and devote significant resources to maintaining and protecting competition these industries
- The FTC has an ongoing Gasoline and Diesel Price Monitoring Project (http://www.ftc.gov/ftc/oilgas/gas_price.htm)
- November 2012, the Commission released its **8th Annual Report on Ethanol Market Concentration**, finding that “the low concentration levels that characterize the U.S. ethanol production industry have persisted”

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Energy – Oil and Natural Gas (cont'd)

- June and December 2012 FTC semi-annual **Reports on Activities in the Oil and Natural Gas Industries**
- 48 merger filings in these industries submitted in 2012
- January 2012 - conditions on AmeriGas's proposed acquisition of rival propane distributor Heritage Propane from its main rival Energy Transfer Partners; original deal would have reduced competition in the propane exchange cylinders market
- Remedy: Heritage Propane divested to a 3rd party

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Energy – Oil and Gas (cont'd)

- During 2012, the FTC and the Commodity Futures Trading Commission (CFTC) exchanged information under their 2011 MoU re sharing of non-public information in agency investigations, including investigations into oil and gas markets

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Intellectual Property (IP) - SEPs

- The FTC continues to provide leadership on how to approach some difficult issues involving IP rights and competition
- Standard-setting activities offer huge benefits, but replace free competition with a collaborative process
- Patents essential for implementing collaboratively-set standards (SEPs) can bestow significant market power

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Intellectual Property – SEPs (cont'd)

- Most standard-setting bodies resolve hold-up concerns by requiring SEP holders to commit to license their patents on fair, reasonable and non-discriminatory (F/RAND) terms
- FTC concerned over the tension between making a RAND commitment on a standard and making a subsequent demand for injunctive relief preventing use of SEPs

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Intellectual Property – SEPs (cont'd)

- The concern is that a patent holder may use the threat of an exclusion order, or an injunction to demand higher royalties (or other more costly licensing terms) after the standard is implemented than could have been obtained before its IP was included in the standard
- The FTC voiced these concerns in comments filed with the ITC (June 2012), Commissioner Ramirez delivered remarks in Congress (July 2012), speeches, and a December 2012 amicus brief in *Apple v. Motorola*

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Intellectual Property – Google (SEPs)

- The FTC alleged that Google reneged on its FRAND commitments and pursued injunctions against willing licensees
- The remedy – a January 3 2013 proposed consent agreement under which Google will not seek injunctions to block rivals from using its standard-essential patents
- The public comment period ends February 4

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Intellectual Property (cont'd)

- In December 2012, a joint FTC-DOJ public **workshop on patent assertion entities** (info and webcast *available at* <http://www.ftc.gov/opp/workshops/pae>)

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Summary

- **Healthcare**
 - Ending pay-for-delay remains a top priority (FTC v. Watson^{*})
 - Mergers (Watson/Actavis, Omnicare/PharMerica, OSF/Rockford System, Phoebe Putney^{*})
- **Merger Enforcement**
 - Hertz/Dollar Thrifty
 - ITD/PLX
 - Universal/EMI (not challenged)
- **Anticompetitive and Monopoly Conduct**
 - Iddex
 - Google search bias (not challenged)
- **Energy**
 - Reports on Activities in the Oil and Natural Gas industries
 - Merger (Amerigas/Energy Transfer Patents)
 - Info exchanges under MOU with Commodity Futures Trading Commission (CFTC)
- **Intellectual Property**
 - Work on Standard-Essential-Patents (SEPs)
 - Anticompetitive Conduct (Google SEP)
 - Patent Assertion Entities Workshop

^{*} Pending before the U.S. Supreme Court

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