Federal Trade Commission

The Federal Trade Commission as a Law Enforcement Agency

Lecture given by J. Thomas Rosch
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in

Antitrust Economics
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Professor Elzinga had asked me to choose my own topic for this lecture. I've been peppered with questions about what I plan to do when my term expires this September [1] (taking into account that the custom and practice at the

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The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am gratef ul to my attorney advisor, Henry Su, for his invaluable assistance in preparing this lecture.

[1] See, e.g.,Kirstin Downey, FTC Commissioners Spar Public ly in Hearing on the Hill , FTC:W ATCH , Mar. 16, 2012, at 2; Jeff Bliss & Sara Forden, FTC Commissioner Rosch Says He Will Not Seek Another Term , B LOOMBERG B USINESSWEEK

Federal Trade Commission is for a Commi ssioner to soldier on until his or her successor is appointed and confirmed). [2] So I considered pontificating about that. Fortunately for you, though, I soon rejected that notion (because I don't have the slightest idea what I'm going to do).

It's also been suggested that the best thing I could do is to list the "best practices" of a trial lawyer based on my experiences.[3] I rejected that too (because I concluded I was largely resp onsible for rejection of the Elzinga–Hogarty analysis in my last case with Professor Elzinga (United States v. Oracle).

I also know that neither topic is what Professor Elzinga had in mind.

we do at the Commission and why we do it. So that is what I am going to discuss today. And my attorney advisor has designated some reading materials for you accordingly.

I.

First, and above all, the Commission is a law enforcement agency charged with protecting competition and consumers. Our enforcement power lies principally in a federal statute commonly referred to as Section 5 of the Federal Trade Commission (FTC) Act, under which we have jurisdiction to prohibit both "unfair methods of competition" that harm competition and "unfair or deceptive acts or practices" that harm consumers.[4] To me, that mandate from Congress means that we should not put the cart before the horse. That is to say, we should not issue decrees that would make competition "better" or consumers "better off."[5]

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[4] 15 U.S.C. § 45(a)(1) (2010) (declaring "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce to be unlawful); 83 CONG. REC. 391, 391–92 (1938) (statement of Rep. Clarence F. Lea, co-sponsor of the Wheeler–Lea Amendments) (explaining that the proposed addition of "unfair or deceptive acts or practices" to the Commission's Section 5 jurisdiction will relieve the agency of the burden of having to show that an "unfair practice is injurious to a competitor" and will also allow the agency to "afford a protection to the consumers of the country that they have not heretofore enjoyed"); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (observing that the addition of the phrase "unfair or deceptive acts or practices" to Section 5's original ban on "unfair methods of competition" makes clear that Congress charged the Commission with protecting consumers as well as competition).

[5] For example, E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), and Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980)—two of a trilogy of cases that the Commission lost in the early 1980s—were arguably both instances where we as an agency tried to use Section 5 to "better" competition instead of to remedy an articulable and provable violation of antitrust law. See discussion infra note 13.

Rather, as Commissioners, we must first determine that there is "reason to believe" that an enforcement target's conduct has violated one or more of the antitrust or consumer protection laws that we enforce. Section 5 of the FTC Act makes that clear.[6] Only in the face of a putative violation of law is the Commission empowered to act in the public interest and to impose remedial measures.[7] If the Commission does otherwise, then it will be transformed from a law enforcement agency into a regulatory agency. That will not happen on my watch.

Second, Section 5 of the FTC Act is always the bedrock antitrust law that the Commission enforces. But the "ordinary" antitrust laws—the Sherman Act and the Clayton Act—are incorporated into Section 5 (or

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[6] 15 U.S.C. § 45(b) (2010) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect[.]").

[7] See FTC v. Standard Oil Co., 449 U.S. 232, 246 n. 14 (1980) ("[W]e do not encourage the issuance of complaints by the Commission without a conscientious compliance with the 'reason to believe' obligation in 15 U.S.C. § 45(b). . . . Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to [the] burdens [of the adjudicatory proceedings that ensue].").

"borrowed by" Section 5 if you will). [8] So the Commission frequently enforces those laws as well. [9]

To be sure, from time to time, as in the Intel case (or the "attempted

unsettle “settled” Sherman Act or Clayton Act case law.[14] The second is that, consistent with the business community’s insistence that there be certainty,[15] particularly in enforcement of antitrust laws governing single-firm conduct, Section 5 should be applied only to firms in highly concentrated industries, i.e., those with monopoly or near-monopoly power. The third is that, consistent with the Supreme Court’s concerns about private treble damage actions,[16]

who can apply Section 5. That is to say, there is no federal, private right of action for treble damages or other relief under Section 5. [17]

Third, as I've said, Section 5 authorizes a Commissioner to vote out a complaint, whether it is a litigation complaint or a consent decree, and whether it is an antitrust or consumer protection complaint, only if two conditions precedent exist: the first is that there is "reason to believe" a violation of the relevant law(s) enforced by the Commission has occurred or is occurring, [18] and the second is that the complaint is in the public interest. [19] Applying the statute, [20] I have therefore dissented from issuance of an

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[17] Cf. 15 U.S.C. § 15(a) (2010) (creating a private right of action to any person who has been injured in his or her business or property "by reason of anything forbidden in the antitrust laws"); 15 U.S.C. § 12(a) (2010) (defining the "antitrust laws," however, as including the Sherman and Clayton Acts but not the FTC Act). But many States have enacted "little FTC Acts" that track the language of Section 5, incorporate Section 5 case law, and also confer private rights of action.

[18] 15 U.S.C. § 45(b) (2010) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, . . .").

[19] Id. ("[A]nd if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, . . ."). See, e.g., Raladam, 283 U.S. at 649 ("Thus, the

antitrust complaint (including some complaints challenging mergers) when I have concluded that there is no reason to believe there is a violation of the

violated as alleged in the complaint. [24] I consider this language (as does the Securities and Exchange Commission) [25] to be tantamount to a denial of liability. [26] I will therefore dissent from, or not participate in voting out, any decree containing an express denial of liability. Moreover, I will shortly be circulating a proposal to my fellow Co mmissioners to amend Section 2.32 so that, at a minimum, it follows the SEC' s approach to this issue. I simply do not see how any of us can conclude there is "reason to believe" that a violation of law has occurred, or that the issuan ce of a complaint or acceptance of a decree is in the public interest, when the staff has accepted an express denial from the proposed respondent. [27]

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[24] 16 C.F.R. § 2.32 (2011) ("The agreement ma y state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.").

[25] 17 C.F.R. § 202.5(e) (2011) ("The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending

That brings me to a fourth subject. It has to do with whether we, as the Commission, are prisoners of the agency staff. Or—to put it more bluntly—whether we are just a "rubber stamp" for the staff. Thank heaven, we are not, or at least I am certainly not. I say "thank heaven" because I can truthfully tell a reporter who is asking about the status of a matter at the staff level that I don't have a clue about its status. But beyond that, it enables me to keep a pledge that I made at my Senate Committee confirmation hearing that I would not be the staff's pawn. [28]

There are at least three reasons that I can confidently say I have kept that pledge during the six-plus years that I have served as a Commissioner. To begin with, we, as a Commission, routinely cross-examine the staff about how it intends to plead and try a case before we issue a complaint. If, as in the Laboratory Corp. (LabCorp) antitrust case, I conclude that the staff may depart from the Commission's intent in pleading a case, I'll dissent from

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[28] Nominations of J. Thomas Rosch and William E. Kovacic to Be Commissioners of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp., 109th Cong. 22 (2005) (Response of J. Thomas Rosch, nominee, to question from Sen. Ted Stevens, Chairman, S. Comm.), available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg26352/pdf/CHRG-109shrg26352.pdf and referenced in 151 CONG. REC. 1198 (digest Nov. 14, 2005):

> Q: But let me ask you this, I'm hearing more, and more about a staff driven agency. Now you both were members of the staff, do you think this Commission ought to be a staff driven entity, or should the priorities be set by the Commission itself, rather than by the staff. Mr. Rosch?
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> A: I think Mr. Chairman that the priorities ought to be set by the Commission. I think we're well advised to get input from the

issuance of the complaint. [29] If, as in the recent Asset Acceptanceconsumer protection case, the staff can't state in words of one syllable a "deception" or "unfairness" theory with which I agree, I'll also vote against issuance of the complaint. [30] Or, if the staff cannot describe a trial strategy that I, as a trial lawyer, have seen work, I would also vote against issuance of the complaint.

More specifically, I am firmly convinced that the best plaintiffs' antitrust lawyers try a case the righ t way: they rely on a simple but comprehensible storyline that narrates th e competitive effects. If the lead attorney can't summarize a compelling st oryline that plays up our strengths and responds to our weaknesses in a few concise sentences, then I won't vote out the complaint. It is as simple as that. [31]

The best plaintiffs' antitrust trial lawyers also do a terrific job of figuring out how to tell that story—in other words, which witnesses and documents will be the most persuasive . They rely on adverse witnesses' documents and other statements. In fa

posture from the get-go and are unable to lead off with a canned explanation for why the conduct or transaction is procompetitive. [32] Starting with the defendant's senior executives is al

present customer testimony in a fashion that is not cumulative, on the one hand,[35] and is representative, on the other hand.[36] Finally, customer witnesses can very rarely be used to present documentary evidence. Use of competitors as primary storytellers raises similar but even more substantial concerns.

Lastly, in my view, the best crafted stories place little, if any, emphasis on complex economic formulae. When I see an econometric formula (which thankfully, Professor Elzinga did not use), my eyes start to glaze over, and I believe that's the way courts and juries view this evidence too. Granted, it may be necessary to call an economist to offer testimony on any actual anticompetitive effects from the challenged conduct or transaction. But this

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[35] FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: … undue delay, wasting time, or needlessly presenting cumulative evidence."); FED. R. EVID. 611(a)(2) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: … avoid wasting time"); M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1408 (7th Cir. 1991) ("Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.") (citing Rules 403 and 611); Vaughn R. Walker, Merger Trials: Looking for the Third Dimension, 5 COMPETITION POL'Y INT'L 35, 45 (Spring 2009) ("A special brand of judicial skepticism is reserved for a parade of witnesses beating the same drum.").

[36]

evidence will be far more persuasive if you have other testimonial and documentary evidence to back it up. [37]

A second reason why we do not merely "rubber stamp" the staff's recommended enforcement challenges, is that federal district judges, who preside over preliminary injunction proceedings that the Commission brings under Section 13(b) of the FTC Act, [38] do not hesitate to second-guess the Commission if they think that we have erred in issuing an administrative (or district court) complaint. Decisions on point include those in the LabCorp case,[39] the Western Refining case,[40] the Whole Foods case,[41] the AndroGel case,[42] and the Lundbeck case.[43] So our pretrial decisions about the pleadings and trial strategy are backstopped by the federal district courts. [44]

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[37] See, e.g.,Walker, supra note 35, at 46 (explaining his view that in United States v. Oracle Corp., "[t]here was a disconnect between the econ omic analysis the government sought to relate and the storytellers it brought to court.").

[38] 15 U.S.C. § 53(b) (2010).

[39] FTC v. Lab. Corp. of Am., No. SACV 10-18 73 AG (MLGx), 2011 U.S. Dist. LEXIS 20354, 2011-1 Trade Cas. (CCH) ¶ 77,348 (C.D. Cal. Feb. 22, 2011).

[40] FTC v. Foster, No. Civ. 07-352 JB/ACT, 2007 U.S. Dist. LEXIS 47606; 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. May 29, 2007).

[41] FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), rev'd, 548 F.3d 1028 (D.C. Cir. 2008).

[42] In re AndroGel Antitrust Litig., 687 F. Supp. 2d 1371 (N.D. Ga.), clarified , No. 1:09-cv-00955-TWT, 2010 U.S. Dist. LEXIS 113593 (N.D. Ga. Sept. 16, 2010), appeal pending , No. 10-12729-DD (11th Cir. argued May 13, 2011).

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Our administrative decisions are also subject to judicial review by a federal appellate court, often of th e enforcement target's own choosing. [45] Those appellate courts likewise don't he sitate to reverse us when they think we got it wrong. [46] Cases on point include the D.C. Circuit's decision in Rambus;[47] the Eleventh Circuit's decisions in the Schering and recent Phoebe Putney cases;[48] and the Eighth's Circuit's affirmance of the district court's decision against us in Lundbeck.[49] So the Commission is not cloistered with its staff. To the contrary, our decision s can be (and are) second-guessed every

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administrative proceedings would be in the public interest. 15 U.S.C. § 53(b) (2010). But that reason-to-believe determination alone does not guarantee success in court; a trial judge must still make an independent determination that the Commission has made a "proper showing" that an injunction would be in the public interest, taking into consideration the Commission's "likelihood of ultimate success" and weighing the equities involved. Id. See FTC v. Freeman Hosp., 69 F.2d 260, 267 (8th Cir . 1995) (observing that "Congress expected courts to use independent judgment in review ing preliminary injunction applications under Section 13(b)"). This requires an inquiry into whether the Commission "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberati on and determination by the FTC in the first instance and ultimately by the Court of Appe als(TD .0 0 TD -.000 Hosp.,Bea(d .0 0 T -22.604t(on al7-n-2.1(sti)4.5(g

step of the way. Judicial review includes—importantly—the Commission's interpretation and application of Section 5 to "unfair methods of competition" and "unfair or deceptive acts or practices."[50]

Just in the last two years, I not only dissented from, or voted "no" for, the LabCorp case,[51] but also the McWane and Pool Corp "exclusive dealing" cases,[52] and the Omnicare merger case.[53] In many instances, moreover, I issued separate statements explaining why I differed from my colleagues. As I say, I have also dissented from a host of consumer protection decrees that I have considered "cheap" and therefore contrary to the public interest.[54] So I have not been a "shrinking violet" or otherwise in thrall of the staff (or my colleagues, for that matter). This does not count the instances in which the federal trial or appellate courts have disagreed as well.

Let me turn to a fifth subject concerning the work that we do at the Commission. Although I have said the Commission should be a law enforcement agency instead of a regulatory agency, I would be remiss if I did

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[50] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (recognizing that while, to be sure, the Commission has "an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations[,] . . . the words "deceptive practices" set forth a legal standard and they must get their final meaning from judicial construction."); FTC v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 314 (1934) (reaffirming that "it is for the courts to determine what practices or methods of competition are to be deemed unfair," but at the same time recognizing that that exercise requires giving weight to the Commission's expert determination on the issue (citing FTC v. Gratz, 253 U.S. 421, 427 (1920))).

[51] See Rosch, LabCorp, supra note 21.

[52] See Rosch, McWane, supra note 22; Rosch, Pool Corp., supra note 21.

[53] Press Release, Fed. Trade Comm'n, FTC Sues to Block Omnicare's Bid to Buy Rival Pharmacy Provider PharMerica, (Jan. 27, 2012) (noting my voting no for the administrative complaint), http://www.ftc.gov/opa/2012/01/omnicare.shtm.

[54] See Press Release, supra note 30.

not mention its advocacy work in both its antitrust and its consumer protection missions.

The Commission maintains an active Policy Planning organization and a Bureau of Economics that work in tandem with both the Bureau of Competition and the Bureau of Consumer Protection.[55] Those offices regularly submit comments on pending legislation.[56] Their work in warning the States not to shelter anticompetitive activities is especially valuable, and I don't recall dissenting from any of those submissions.

Another aspect of our advocacy wo rk is the Commission's filing of amicus curiae briefs, sometimes on our own and sometimes in conjunction with the Department of Justice or an other agency. Our Office of General Counsel usually takes the lead on these briefs. Recent examples include—on the competition side—amicus briefs a ddressed to the Third Circuit in the K-Dur Antitrust Litigation ,[57] to the Federal Circuit in Tivo Inc. v. EchoStar Corp.,[58] and to the Supreme Court in Caraco Pharmaceutical Laboratories,

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[55] See About the Office of Policy Planning , FED. TRADE COMM'N, http://www.ftc.gov/opp/about.shtm (last visited Apr. 3, 2012); About the Bureau of Economics , FED. TRADE COMM'N, http://www.ftc.gov/be/about.shtm (last visited Apr. 3, 2012).

[56] See Advocacy Filings by Date , FED. TRADE COMM'N, http://www.ftc.gov/opp/

Ltd. v. Novo Nordisk A/S ;[59] and on the consumer protection side—an amicus brief addressed to the Fifth Circuit in St. Joseph Abbey v. Castille .[60] I will have more to say about our brief in K-Dur a little bit later.

II.

In addition to our law enforcement an d advocacy work, the Commission also gets involved from time to time in policymaking, for example, through the issuance of "policy" reports. It is easy to overlook those because they are so often intertwined with politics. To be sure, the President and the Senate are prohibited by statute from appointing and confirming more than three of the five Commissioners from the same political party. [61] For that reason, we are often referred to as an "independent" or "nonpartisan" agency. [62] As I testified before a House Appropriations subco mmittee several weeks ago, however, that just means that none of us is i mportuned by the majority to vote or not vote as we wish. It does not mean that our political views are necessarily aligned. As I put it in my testimony, it just means that each of us gets a "fair hearing." As far as I'm concerned, that 's all we as Commissioners can ask for

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and it means that we act collegially. [63] Let me give you some instances when we have disagreed politically and, therefore, on specific policies.

First, in December 2010 the Commission's Bureau of Consumer Protection issued a staff report on consumer privacy. [64] In that report, the Bureau purported to recommend, among other things, that the Commission rely on the "unfairness" prong of Section 5 instead of the "deception" prong in protecting consumers from "unwarranted" invasions of their privacy, [65] and that the Commission support new and as-yet-unspecified "Do Not Track" mechanisms. [66] Several of my colleagues jumped on the bandwagon supporting those proposals. Although I concurred in the decision to issue the report for pub2.3r

revolutionary, but it conflicted with what we had told Congress in the 1980s about the breadth of our consumer-protection "unfairness" jurisdiction.[68] Moreover, the then-available Do Not Track proposals were plainly not ready for prime time.[69]

Several weeks ago the Commission (not just the staff) issued a "final" Report on Privacy that embraced these proposals plus a few others.[70] This time I dissented, pointing out again (1) that "unfairness" was an elastic and elusive concept, (2) that consumers themselves might favor privacy in polls but reject it in practice, and (3) that the proposed new privacy framework based on "unfairness" instead of deception went beyond our representations to Congress about how we would apply the consumer-protection "unfairness" prong.[71] I also pointed out that there were many unanswered questions about Do Not Track, including what it meant—whether it simply meant Do Not Target Advertising or whether it meant Do Not Collect consumer data.[72] I

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[68] Id. at E-4–E-5 & n.9.

[69] Id. at E-6. See also J. Thomas, Comm'r, Fed. Trade Comm'n, Do Not Track: Privacy in an Internet Age, Remarks Before the Loyola Chicago Antitrust Institute Forum 18–21 (Oct. 14, 2011), http://www.ftc.gov/speeches/rosch/111014-dnt-loyola.pdf; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Information and Privacy: In Search of a Data-Driven Policy, Remarks Before the Technology Policy Institute Aspen Forum 9–10 (Aug. 22, 2011), http://www.ftc.gov/speeches/rosch/110822aspeninfospeech.pdf.

[70] Press Release, Fed. Trade Comm'n, FTC Issues Final Commission Report on Protecting Consumer Privacy (Mar. 26, 2012), http://www.ftc.gov/opa/2012/03/privacyframework.shtm; FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), available at http://www.ftc.gov/os/2012/03/120326privacyreport.pdf [hereinafter FINAL

also noted that insofar as the report called for legislation (or FTC rulemaking), those calls were at odds with the report's assertion that all it proposed was a list of "best practices" for self-regulation. [73] Additionally, given that the report talked extensively about additional workshops involving stakeholders to occur later this year, [74] I wondered how the Commission could issue a "final" report before those workshops had occurred.

Second, for several years the Commission has been waging a judicial and legislative "crusade" against so-called "pay-for-delay" settlements of lawsuits triggered by generic pharmaceutical firms challenging brand-name pharmaceutical companies' patents. These are settlements in which the brand-name company pays the generic firm to delay its entry into the market (usually to a date on or after the brand-name company's patent has expired).

At the Commission's behest and in connection with a provision in H.R. 3962, known as the Affordable Health Care of America Act, [75] the Congressional Budget Office (CBO) "scored" (or estimated) that an outright ban on such settlements would save the federal government $1.8 billion dollars in direct spending on prescription drugs over a ten-year period from 2010 to 2019.[76] The CBO also estimated the same amount of savings in direct

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[73] Id. at C-8; see FINAL PRIVACY REPORT, supra note 70, at iii, vii & 1.

[74] FINAL PRIVACY REPORT, supra note 70, at 13, 14, 56–57, 64, 73.

[75] Affordable Health Care for America Act, H. R. 3962, 111th Cong. § 2573 (2009) (as passed by the House and placed on the Senate calendar), available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962pcs/pdf/BILLS-111hr3962pcs.pdf.

[76] Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Rep. John D. Dingell (Nov. 20, 2009) (attaching a revised estimate of the budgetary impact of H.R. 3962, the

federal spending, however, in connection with different legislation, S. 369,[77] which, instead of banning such settlements outright, would have imposed a rebuttable presumption of anticompetitive effects and given the settling parties an opportunity to show that the procompetitive benefits outweigh the anticompetitive effects.[78]

As I have explained elsewhere, I am in favor of legislation that would not ban the settlements outright but would instead simply shift the burden of proof to the settling parties to justify their settlement.[79] I have been able to persuade my colleagues that this is an acceptable course instead of an outright ban, as seen in the amicus brief we filed in K-Dur.[80] However, my colleagues have continued to claim that shifting the burden of proof in this

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Affordable Health Care for America Act, including the impact of section 2573 of the bill (protecting consumer access to generic drugs); see Table 4 at 11, line item 2573), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10741/hr3962revised.pdf.

[77] Preserve Access to Affordable Generics Act, S. 369, 111th Cong. § 3(a) (2009) (as reported by the Senate Committee on the Judiciary), available at http://www.gpo.gov/fdsys/pkg/BILLS-111s369rs/pdf/BILLS-111s369rs.pdf.

[78] CONG. BUDGET OFFICE, COST ESTIMATE: S. 369, PRESERVE ACCESS TO AFFORDABLE GENERICS ACT 1, 2, 3 & 4 (2010) (as amended), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/110xx/doc11040/s369.pdf and at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/115xx/doc11582/s369_updated_table.pdf. The CBO also estimated that the legislation would reduce overall expenditures for prescription drugs by consumers by about $6 billion over the same ten-year period. Id. at 6. The CBO has since increased its estimate of the savings in direct federal spending to $4.0 billion over the ten-year period from 2012 to 2021. CONG. BUDGET OFFICE, COST ESTIMATE: S. 27, PRESERVE ACCESS TO AFFORDABLE GENERICS ACT 1 (2011), available at http://aging.senate.gov/publications/s27.pdf.

[79] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Pay-for-Delay Settlements, Authorized Generics, and Follow-on Biologics: Thoughts on the How Competition Law Can Best Protect Consumer Welfare in the Pharmaceutical Context, Remarks Before the World Generic Medicine Congress 7–9 (Nov. 19, 2009), http://www.ftc.gov/speeches/rosch/091119worldgenerics.pdf.

[80] Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellants and Urging Reversal at 22–28, In re K-Dur Antitrust Litig., Nos. 10-2077, -2078 & -2079 (3d Cir. May 18, 2011), available at http://www.ftc.gov/os/2011/05/110518amicusbrief.pdf.

fashion would save consumers "billions" of dollars, citing the CBO estimate and a January 2010 Commission staff study. [81]

Based on this claim, it was suggested that the burden-shifting legislation be hooked to the Defense Authorization Bill, a time-honored method on the Hill for getting less popular legislation enacted into law. I dissented from that suggestion too. I observed that pay-for-delay legislation ought to be considered on its own merits. [82] Moreover, I pointed out that the CBO estimate was based (at least originally) on the premise that there would be a complete ban on the settlements, not simply a burden-shifting, and that consumer or taxpayer savings from the latter legislative approach were entirely speculative since they would depend on how frequently the parties could justify their settlement. [83]

Third, several years ago, my colleagues voted to issue an interim report that questioned the competitive implications of "authorized" generics, which are generic versions of a branded drug offered by or through the manufacturer of the brand. [84] That scrutiny was supposedly warranted by two concerns. The first was that authorized generics might rob generic firms of

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[81] Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions (2010), available at http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[82] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Letter to the Editor, POLITICO (Nov. 9, 2011, 1:35 PM), http://www.politico.com/news/stories/1111/67963.html. The text is also available at http://www.ftc.gov/speeches/rosch/111109lteonleibowitz.pdf.

[83] Id.

[84] FED. TRADE COMM'N, AUTHORIZED GENERICS: AN INTERIM REPORT (2009), available at http://www.ftc.gov/os/2009/06/P0621_05authorizedgenericsreport.pdf.

their incentives to develop their own generic versions and to challenge the brand-name companies' patents. [85] The second was that brand-name companies might use a promise not to offe r authorized generics as a form of "payment" for delay in illegal pay-for-delay settlements with generic firms. [86]

I questioned the underlying premise of both concerns. I said that the existence of authorized generics meant that there would be more competition than there would otherwise be in the generic drug marketplace. [87] I noted that as matter of economic theory, more co mpetition would lead to lower, not higher, prices in that market. Addition ally, I said that if the abandonment of that additional competition were indeed being used by the brand-name firms to "pay" for delay, the way to attack th at use of authorized generics was to challenge the settlements themselves. [88] In its recent final report on authorized generics, the Commission acknowledged that the increased competition resulting from authorized generics did cause prices in the generic drug marketplace to be lower, rather than higher. [89] Moreover, the agency dropped any suggestion of banning the existence of authorized generics on the basis that abandonment of that th reat was being used by brand-name

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[85] Id. at 2.

[86] Id.

[87] Concurring Statement of J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, on the Release of the Commission's Interim Report on Au thorized Generics 1 (June 24, 2009), http://www.ftc.gov/os/2009/06/P_062105authgenconcurringrosch.pdf .

[88] Id. at 3.

[89] FED. TRADE COMM'N, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT ii–iii (2011), available at http://www.ftc.gov/os/2011/08/ 2011genericdrugreport.pdf .

companies to “pay” a generic firm for abandoning its challenge to the brand-name company’s patents. [90]

Let me give you one more example of political differences leading to different policy positions within the Commission. It relates to the Patient Protection and Affordable Care

Obamacare (which most of my colleag ues on the Commission were) moved to relax the Guidelines as to ACOs. [94]

I opposed any special treatment of ACO

sometimes politics leads to differences in policy judgments among the Commissioners.

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Thank you for inviting me to talk to you today and for listening to me, and I'll take any questions you may have.