UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

On

Antitrust Enforcement in the Health Care Industry

December 1, 2010

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any Commissioner.
[2] *See* U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND H

as efficiently as possible, so that the best health care can be provided to the most consumers at the least cost. Congress has charged the FTC with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[5] The FTC has played, and will continue to play, an important role in protecting and promoting competition to lower costs and improve quality, and believes that continued effective antitrust enforcement is a necessary component of any plan to improve health care.

Antitrust enforcement can improve health care in two ways. First, by preventing or stopping anticompetitive agreements to raise prices, antitrust enforcement saves money that consumers, employers, and governments otherwise would spend on health care. Second, competition spurs innovation that improves care and expands access.

The Commission tries to leverage its limited resources to yield the greatest benefit for American consumers. For example, the Commission has made stopping pay-for-delay agreements a top priority because of the substantial harm to consumers from these deals: a recent FTC Staff study found that they cost consumers about $3.5 billion a year.[6] On the merger front, the Commission has challenged numerous pharmaceutical acquisitions to prevent price increases and promote innovation. Last year the Commission successfully blocked CSL's attempt to acquire its competitor Talecris, preventing anticipated price increases in the multi-billion dollar blood plasma market.[7] Although pharmaceutical matters demand substantial resources and raise complex issues, the Commission pursues them because of the importance of pharmaceutical competition.

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[5] Federal Trade Commission Act, 15 U.S.C. ▪ 45.

[6] FEDERAL TRADE COMMISSION, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (Jan. 2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[7] Fed. Trade Comm'n v. CSL Ltd. and Cerberus-Plasma Holdings LLC, 09-cv-1000-CKK (D. D.C. 2009) (Complaint).

The Commission has also stopped the accumulation of market power among hospitals and other clinics that threatened to increase prices or reduce quality, such as in the proposed merger of Inova Health System and Prince William Hospital in northern Virginia. After the Commission sued to enjoin the merger in federal district court, the parties decided to drop the deal.[8]

The Commission's enforcement efforts in the healthcare arena are also focused on protecting incentives to innovate. For example, Thoratec, the only producer of blood pumps used to support and sustain patients suffering from end-stage heart failure, sought to acquire Heartware, a potential entrant which was seeking approval for a new and innovative product. In 2009, the Commission successfully challenged this transaction to protect the vibrant competition between these two companies to innovate and develop new products that will improve health care.[9]

The FTC has also continued to challenge anticompetitive agreements among health care providers to fix the prices they charge to health insurance plans, conduct likely to raise prices without improving quality of care or expanding access to care.[10] The Commission's enforcement efforts also have helped assure that new and potentially more efficient ways of delivering and financing health care services can develop and compete in the marketplace.[11]

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[8] *See infra* note 18 and accompanying text.
[9] *In the Matter of Thoratec Corp. and HeartWare Int'l, Inc.,* FTC Dkt. No. 9339 (July 30, 2009) (Complaint), *available at* http://www ftc.gov/os/adjpro/d9339/090730thoratecadminccmpt.pdf.
[10] *See* Fed. Trade Comm'n, FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS, *available at* http://www.ftc.gov/bc/healthcare/antitrust.pdf.
[11] *See id.*

[12] *See, e.g.,* FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf; FED. TRADE COMM'N, THE STRENGTH OF COMPETITION IN THE SALE OF CONTACT LENSES: AN FTC STUDY (2005), *available at* http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf; FED. TRADE COMM'N AND DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[13] *See e.g.,*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), *available at* http://www ftc.gov/os/testimony/P859910pharm.pdf (criticizing proposal to exempt non-publicly traded pharmacies from antitrust scrutiny).

[14] On multiple occasions, the Commission has provided Congress testimony on the dangers of pay-for-delay patent settlements between brand and generic companies and the costs they impose on consumers, employers, and the government. Today, the Commission is providing testimony on other important areas of health care competition.

services in each of three markets – Delaware, Puerto Rico, and metropolitan Las Vegas.[19] The settlement preserves competition in the relevant areas by requiring the sale of 15 facilities to FTC-approved buyers. In all of these instances, the Commission acted to protect consumers and competition.

III. Physician Services: Price Fixing vs. Clinical Integration

Some have suggested that the antitrust laws act as barriers to health care provider collaborations that could lower costs and improve quality.[20] That is simply wrong. Antitrust standards distinguish between price fixing by health care providers, which is likely to increase health care costs, and effective clinical integration among health care providers that has the potential to achieve cost savings and improve health outcomes. In order to assist in making that distinction clear, the Commission has provided extensive guidance on how health care providers can collaborate in ways consistent with the antitrust laws, precisely because such collaborations have the potential to reduce costs and improve quality.

A. Price Fixing and Group Boycotts Are Likely to Raise Prices and Harm Consumers.

For more than 25 years, the Commission has challenged price fixing and boycott agreements through which health care providers jointly seek to increase the fees that they

[19] *In the Matter of Universal Health Services, Inc.,* FTC Dkt. No. C-4308 (consent order) (Nov. 15, 2010), *available at* http://www.ftc.gov/os/caselist/1010142/101115uhspsido.pdf.

[20] *See, e.g.*, Letter from Michael D. Maves, MD, Exec. Vice President, CEO, American Medical Ass'n, to the Hon. William E. Kovacic, Chairman, Federal Trade Commission, regarding Physician Network Integration and Joint Contracting (June 20, 2008), *available at* http://www.ftc.gov/bc/healthcare/checkup/pdf/AMAComments.pdf ("We are extremely concerned with what we see as the significant regulatory barriers that restrict physicians' ability to collaborate in ways crucial to improving quality and containing costs"); *cf.* Timothy Stolzfus Jost and Ezekiel J. Emmanuel, *Commentary: Legal Reforms Necessary to Promote Delivery System Innovation*, 299 JAMA 2561, 2562 (2008) (suggesting that uncertainty about forms of clinical integration permitted under the antitrust laws "could deter attempts to create accountable health systems.")

receive from health care plans.[21] Such arrangements typically involve competing health care providers agreeing to charge the same high prices and collectively refusing to serve a health plan's patients unless the health plan meets their fee demands. Since its 1982 *Maricopa* decision,[22] the U.S. Supreme Court has held that such conduct is considered to be *per se* unlawful because it is so likely to harm competition and consumers by raising prices for health care services and health care insurance coverage. This remains good law, and is also good competition policy. As part of its mission, the Commission continues to investigate such conduct.

The Commission's cases have challenged groups of providers that simply seek to jointly negotiate the fees they receive without improving quality, coordinating the care they provide, or reducing health care costs. The U.S. Court of Appeals for the Fifth Circuit recently affirmed a Commission opinion finding that an association of independent physicians in the Fort Worth area engaged in horizontal price fixing that was not related to any procompetitive efficiencies.[23] This type of conduct is likely to increase health care costs.

B. The Antitrust Laws Promote Health Care Collaborations that Can Reduce Costs and Improve Quality.

The antitrust laws treat collaborations among health care providers that are *bona fide* efforts to create legitimate, efficiency-enhancing joint ventures differently from the way they treat price fixing schemes. The Commission asks two basic questions with respect to such collaborations. First, does the proposed collaboration offer the potential

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[21] *See* FTC Bureau of Competition, Overview of FTC Antitrust Actions in Health Care Services and Products, *available at* http://www.ftc.gov/bc/0608hcupdate.pdf.

[22] *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982) (agreements among competing physicians regarding fees they would charge health insurers for their services constituted *per se* unlawful horizontal price fixing).

[23] *North Texas Specialty Physicians v. Fed. Trade Comm'n,*528 F.3d 352 (5th Cir. 2008).

[24] *See Maricopa County Medical Soc.*, *supra* note 14, at 343 ("since Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), we have analyzed most restraints under the so-called 'rule of reason.' As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.")

[25] U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy In Health Care* (1996), *available at* http://www ftc.gov/bc/healthcare/industryguide/policy/index.htm [hereinafter

[29] Elliot S. Fisher et al., *Achieving Health Care Reform – How Physicians Can Help*, 360 NEW ENG. J. MED. 2495, 2496 (2009); *see also, e.g.*, TriState Letter, *supra* note 18 (discussing web-based HIT system, software, and clinical guidelines and review proposal); GRIPA Letter *supra* note 18 (regarding GRIPA's

[32] *See*

[33] Jon Leibowitz, Chairman, Federal Trade Commission, Remarks Before the Workshop Regarding Accountable Care Organizations, and Implications Regarding Antitrust, Physician Self-Referral, Anti-Kickback, and Civil Monetary Penalty Laws at 1 (Oct. 5, 2010) *available at* www ftc.gov/opp/workshops/aco/docs/leibowitz-remarks.pdf (hereinafter, "Leibowitz Remarks").

[34] *E.g.*,

> to improve quality and decrease costs – but not to fix prices or create market concentration?[35]

The Commission will continue to work with DOJ, CMS and OIG, and will continue to solicit ideas from those who have a stake in the establishment of an optimum enforcement regime. Of course, that includes all of us – providers, enforcers, and most of all, consumers.

V. Conclusion

Thank you for this opportunity to share the Commission's views on these vitally important issues. The Commission looks forward to working with the Committee to ensure that competitive health care markets deliver on the promise of competitively priced health care goods and services and increased innovation and quality.

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[35] Leibowitz Remarks at 3.