

discussing what we are doing, I also am going to reflect a bit on how we are doing it and, in that, I will take a few lessons that I have learned from my favorite new hacking hobby.

1. Look To Your Target

Now in golf, it is essential that, before you start your swing, you look out at your target to establish it firmly in your mind. So it is at the FTC that, in all of our work, we must we keep our eye on the consumer, mindful that we best enhance consumer welfare by promoting and protecting competition, as well as by battling unfair and deceptive practices. This is especially important because those who offer views on actions we might take or refrain from taking always have their own agendas – generally, appropriately so. If you work for a client, your duty is to present that client’s self-interested position, and you will always try to convince us that the position is what also is best for consumers. The interest of the FTC’s client – the consumer – is in ensuring a marketplace characterized by pervasive and relentless competition, and that may or may not correspond to your client’s interest.

2. Use All the Clubs In The Bag

The way I view it, competition is perpetually under siege. In golf parlance, we have long narrow fairways, deep rough, sand bunkers, water hazards, trees, and fast, undulating greens to combat. So, our approach is to champion competition in every arena and protect and defend competition from all attacks. This means, first, using law enforcement against anticompetitive actions by private firms; second, advocating strongly for sound competition policy and analysis in legislatures, government agencies, courts, and around the globe; third, educating our public about the benefits of competition so that it is not taken for granted; and finally, conducting

research to ensure that our analysis and policies are based on market facts and that they are working for consumers. In short, we use all of the clubs in our bag.

With that set up, let me tell you about some of our recent rounds.

3. Repetition, Repetition, Repetition

The FTC's HSR merger enforcement program continues to benefit consumers by preventing anticom

cancer screening and diagnosis business of Fischer Imaging Corporation – a non-reportable transaction that was consummated in 2005.¹⁰ We alleged in our complaint that the acquisition harmed American consumers by eliminating Hologic’s only significant U.S. competitor for the sale of prone stereotactic breast biopsy systems (“SBBS”). Our Consent Order requires Hologic to sell the Fischer prone SBBS assets to Siemens AG, a leader in the business of medical imaging, ensuring that these essential health care services will be available to women at lower prices and higher quality.

Now in golf, repetition of the golf swing is critical; the more times you repeat your swing, the better you will be. And while you may need to vary the club you use or make slight modifications to the swing to adjust to the precise situation, you still play a better round when you can continually repeat the same basic swing. This, I think, is a lot like merger review. Since the FTC and the Antitrust Division adopted the 1992 Merger Guidelines,¹¹ we have been working that same swing, which we duplicate over and over using the same basic analysis. In the Merger Guidelines Commentary¹²

we swing (and, for our viewers, the more the antitrust commentators break down our swing), the more predictable the result.

Predictability in law enforcement is, of course, generally good for business. But it may not be as fun or as interesting for our viewers back home, and many antitrust commentators ask why we have not recently litigated a merger case. The answer is simple: we have had not anticompetitive mergers that parties were unwilling to fix to our satisfaction. I can think of three recent cases that we thought were approaching litigation, when two were abandoned, and a settlement was reached in the other. After talking with staff at our agency about this, I have concluded that years of merger decisions under the current Guidelines provide counsel with good information about how the agencies will view a merger, and anticompetitive mergers are scrapped in the Board room or come with a fix.

4. Keep the Swing Compact and Efficient

It also is important, when you play golf, to keep your swing as compact and as efficient as possible; the fewer the “moving parts,” the greater the likelihood of duplicating your swing and m

allow them to preserve only a small number of back-up tapes and to produce slimmer privilege logs. Most important, Bureau of Competition staff, outside counsel, and the parties have worked constructively to implement the spirit of the reforms, and to negotiate modifications to second requests that ensure that the Commission obtains the information that it needs, while minimizing the burdens on the parties. I commend and encourage you – the very antitrust practitioners who often are entrusted with the important role of negotiating the scope of a second

\$20 million in exchange for a five-year exclusive license to its generic Ovcon product.¹⁵ As we allege in the complaint, Warner asked Barr for this agreement when it realized that Barr would enter the market before Warner had a chance to launch its new chewable version of Ovcon, which was patent protected. For Barr's strategy of switching all Ovcon patients to the chewable to work, it could not permit Barr to enter. Very recently our staff learned that Warner launched its new chewable and was beginning to move the market away from regular Ovcon before entry of the generic version.

Concerned that such a switch strategy could essentially destroy the market for generic Ovcon before the court resolves the Commission's challenge to Warner's agreement with Barr, on Monday, September 25, the Commission filed a motion for preliminary injunctive ("P.I") relief.¹⁶ The P.I. motion seeks not to prevent Warner from launching its new product, but to limit Warner's ability to abandon regular Ovcon during the pendency of the litigation. Immediately following the filing of our P.I motion, Warner Chilcott issued a "prospectus supplement" as part of its IPO process, announcing, among other things, that it had reviewed its agreement with Barr relating to Ovcon and decided to waive the exclusivity provisions contained therein. On Tuesday, Barr announced that it plans on launching its generic Ovcon next month.¹⁷ Removal of the exclusivity provision is, of course, one of the main items of relief the FTC is seeking in this

¹⁵ *Fed. Trade Comm'n v. Warner Chilcott Holdings Co.* (Nov. 7, 2005) (complaint), available at <http://www.ftc.gov/opa/2005/11/galenbarr.htm>.

¹⁶ *Warner Chilcott Says FTC Files New Motion on Ovcon*, REUTERS, Sept. 26, 2006 (available at YPERLINK"http://today.reuters.com/news/ArticleInvesting.aspx?type=fundsNews2&storyID=2006-09-26T055435Z_01_WEN5927_RTRIDST_0_HEALTH-WARNERCHILCOTT-URGENT.XML" http://today.reuters.com/news/ArticleInvesting.aspx?type=fundsNews2&storyID=2006-09-26T055435Z_01_WEN5927_RTRIDST_0_HEALTH-WARNERCHILCOTT-URGENT.XML).

¹⁷ *Barr to Market Generic Contraceptive*, AP, Sept. 26, 2006 (available at <http://news.moneycentral.msn.com/provider/providerarticle.asp?feed=AP&Date=20060926&ID=6002411>).

matter. We are evaluating whether to continue to prosecute the P.I. motion as we think through the ramifications of the waiver and Barr's announcement.

We also continue to investigate patent settlement agreements between pharmaceutical companies that are required to be filed with us under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.¹⁸

On May 17, the Commission heard oral arguments on the appeal of the *Evanston Northwestern Healthcare Corporation* ("Evanston") matter.¹⁹ The FTC's Administrative Law Judge ("ALJ") had found in October 2005 that Evanston completed acquisition of an important competitor, Highland Park Hospital, resulting in higher prices and a substantial lessening of competition for acute care inpatient services in parts of Chicago's northern suburbs.²⁰ The Commission's decision on this appeal and on the ALJ's order requiring the divestiture of Highland Park Hospital is forthcoming.

Also in the healthcare industry, we continue to bring enforcement actions against the most basic and perhaps most anticompetitive behavior – price fixing among horizontal competitors – often physicians. Since 2002, we have brought almost 30 cases challenging illegal agreements between physicians to boycott third-party payors and fix the prices they will charge, including three in the last year. We are mindful, however, that there can be procompetitive agreements among physicians, both financial risk-sharing joint ventures and

¹⁸ See *Medicare Prescription Drug and Improvement Act Requires Drug Companies to File Certain Agreements with the Federal Trade Commission and U.S. Department of Justice* (Jan. 2004), available at <http://www.ftc.gov/os/2004/01/040106pharmrules.pdf>.

¹⁹ *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, FTC Docket No. 9315, available at <http://www.ftc.gov/opa/2005/10/evanston.htm>.

²⁰ *Id.* (Oct. 20, 2005) (initial decision by Chief ALJ McGuire), available at <http://www.ftc.gov/opa/2005/10/evanston.htm>.

clinical integration arrangements. We therefore will continue to consider seriously physicians' efficiency claims and to advise physicians about how proposed arrangements may or may not violate the antitrust laws.

Real Estate

We

The Commission's opinion in the *Rambus* case was released in early August.

doctrine.²⁶ The Sixth Circuit agreed with the Commission that the requirements of the state action doctrine were not satisfied, and specifically that there was not enough evidence to show that the relevant state agency actively supervised the Association's ratemaking activities.

Valassis

One additional recent FTC nonmerger case that you may find interesting is the case against Valassis Communications, Inc., announced, along with a Consent Order, in March 2006.²⁷ The Consent Order settled charges that Valassis had invited its competitor, News America Marketing, to collude and eliminate price competition in the American market for free-standing newspaper inserts, the multi-page

found that Valassis's communication was made with extraordinary specificity, including detailed inform

legislation to expand the scope of activities constituting the unauthorized practice of law.⁴²

Presently, parties to a real estate transaction in New York routinely rely on non-attorneys to conduct title abstracting and to prepare basic transactional documents. The proposed legislation would define all such work as the practice of law and by definition exclude non-attorneys from nearly all aspects of real estate transactions. Without a clear showing that non-attorney

competitive bill that would prohibit direct shipping by wineries producing more than 250,000 gallons of wine annually. Thus, until relevant legislation is enacted, Florida consumers may continue to order wine directly from out-of-state wineries pursuant to a court order that invalidated Florida's ban on such interstate wine shipments.

In other efforts to advise policymakers outside the antitrust community over the past year, the Commission has prepared testimony and made witnesses available to testify before U.S. Congressional committees exploring competition issues ranging from legislative proposals to prohibit gasoline price gouging, petroleum industry concentration, real estate brokerage services,⁴⁵ auto repair industry reforms,⁴⁶ contact lens sales and distribution practices,⁴⁷ competition in group healthcare,⁴⁸ broadband and Internet competition,⁴⁹ and barriers to entry

⁴⁵ *Competition in the Real Estate Brokerage Industry: Hearing Before the H. Subcomm. on Housing and Community Opportunity* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), available at <http://www.ftc.gov/os/2006/07/CompetitionintheRealEstate%20BrokerageIndustry%20estimony%20ouse07252006.pdf>.

⁴⁶ *Right to Repair: Industry Discussion and Legislative Options: Hearing Before the H. Subcomm. on Energy and Commerce, Comm. on Commerce, Trade, and Consumer Protection* (2005) (Prepared Statement of the FTC, Presented by James A. Kohn), available at <http://www.ftc.gov/os/testimony/051110autorepairtest.pdf>.

⁴⁷ *Consumer Protection and Competition Issues Concerning the Contact Lens Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), available at http://www.ftc.gov/os/testimony/060915_v040010cpcicontactlensindustryhouse.pdf.

⁴⁸ *Competition in Group Health Care: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by David P. Wales), available at <http://www.ftc.gov/os/testimony/P859910CompetitioninGroupHealthCareTestimonySenate09062006.pdf>.

⁴⁹ *FTC Jurisdiction Over Broadband Internet Access Services: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by William E. Kovacic), available at <http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf>.

and competition by generic drugs.⁵⁰ Moreover, in recent months FTC commissioners, senior staff members, and I have testified before the Antitrust Modernization Commission to aid its examination of proposals to modify existing U.S. competition laws.⁵¹

The Commi

economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent, copyright, trademark, or other intellectual property right.⁵⁴ Again, the Court unanimously agreed. Finally, in *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, the Eighth Circuit Court of Appeals had held that a plaintiff dealer can establish price discrimination in violation of Section 2(a) of the Robinson-Patman Act even if it cannot show that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.⁵⁵ At the urging of the FTC and DOJ, the Supreme Court reversed.⁵⁶ In each of these three cases, the FTC argued against a rigid doctrinal rule that would chill efficient business conduct and thereby harm consumers, and urged the Supreme Court instead to adopt an approach that allows a more flexible economic analysis.

Our efforts to promote sound competition policy and consumer welfare do not stop at the U.S. border. The FTC continues to promote bilateral cooperation and coordination with foreign agencies investigating mergers and other matters under review by the FTC to ensure consistent analyses and compatible outcomes. We also provide input to foreign agencies on new laws and policy initiatives, including on, among others, the European Commission's Article 82 review and China's draft competition law. We conduct bilateral consultations with the heads of many of the world's major competition agencies and we promote convergence toward best practices with foreign antitrust agencies through multilateral fora. Currently, we are co-heading the ICN's new working group on unilateral conduct and its subgroup on the objectives of monopolization law

⁵⁴ *Indep. Ink v. Ill. Tool Works*, 126 S. Ct. 1462 (2006), brief available at <http://www.ftc.gov/os/caselist/illinoistools/050805briefillioistools.pdf>.

⁵⁵ *Reeder-Simco GMC, Inc. v. Volvo Trucks North America*, 374 F.3d 701 (8th Cir. 2004).

⁵⁶ *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), brief available at <http://www.ftc.gov/os/2005/05/050527volvobrief.pdf>.

and policy, and we continue to play a lead role in the ICN Steering Group and Working Groups, including heading subgroups on merger notification and procedures and on the provision of technical assistance. We also are active in the OECD Competition Committee, which will hold programs on, among other topics, competition and innovation, vertical merger analysis, the interface of competition and consumer protection, and evaluation of enforcement actions. We continue to represent the FTC in U.S. delegations negotiating competition chapters of free trade agreements with Korea and possibly other countries, and we provide technical assistance to new competition agencies around the world, such as those in India, Russia, Southeast Asia, and the Andean region, on drafting legislation and guidelines, establishing new agencies, and all aspects of law enforcement.

8. You Can Always Use Another Lesson, Read Another Book

Now, the hidden reason that so many over-achieving, neurotic lawyers like to play golf is because the search for the better game is never over; it is like the search for the holy grail. Likewise, at the FTC, our search for a better understanding of markets and for better ways to do our job for consumers is never over.

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some of the complex issues that single-firm

9. **Keep Your Head Down**

I consider our policy work to be a high priority. Equally important is that we “play it straight.” In golf, you must keep your head down and avoid distractions; the focus is on the ball and the target. Our approach to finding answers to market questions is quite similar – we have to keep our head down, stay focused on our target, and play it straight. In no area has this approach been tested as much as in our work in petroleum markets.

The petroleum industry continues to be a key focus of FTC investigative and enforcement resources. In light of the enormous importance of petroleum products to consumers and businesses throughout the nation, there is no other industry in which it is so important for law enforcers to “get it right” in terms of the thoroughness and airtightness of our investigations, the precision of our analysis based on solid economic theory and empirical work, and the soundness of our judgment in reaching enforcement decisions. Over the past year, we have completed important law enforcement investigations and reports, and we continue to investigate and study the industry closely.

In May, we delivered to Congress our report on whether gasoline prices have been manipulated and whether gasoline price gouging occurred after Hurricane Katrina.⁶¹ Examining multiple levels of the petroleum industry – including refining and bulk distribution – the Commission investigated various means by which oil companies might have manipulated the supply of gasoline in order to increase prices. We found no evidence that the companies were engaging in such behavior. As for post-Katrina price gouging, we identified 15 instances in

⁶¹ *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (May 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>.

which gasoline refiners, wholesalers, or retailers met the definition of “gouging” laid down by Congress in the appropriations statute that mandated this part of the investigation. In all but one such instance, however, local or regional competitive circumstances appeared to explain the price increases imposed by these firms. The Commission’s basic conclusion was that market forces, rather than illegal conduct, appear to explain the vast bulk of pricing in this industry.

At the direction of the President and the leadership of Congress, we currently are working with the Department of Justice and the Department of Energy – as well as with NAAG, on behalf of many State AG offices – to get a better understanding of last April’s dramatic gasoline price increases and to develop a more accurate and detailed picture of oil company

The Commission’s work in the petroleum sector does not stop with form and reports. Since 2002, the Commission’s economists have monitored wholesale and retail prices of gasoline to identify potential anti-competitive activities that might require greater investigation. Today, this project tracks retail prices of gasoline and diesel in some 360 cities and wholesale (terminal rack) prices in 20 major urban areas. Through this project, the Commission continues to enhance its understanding of the domestic petroleum industry, how participants in the industry compete, and how prices of gasoline and other refined petroleum

If you play golf or simply are unfortunate enough to spend time around golfers, you

the FTC, we have decided to do a bit more jaw boning. In a new project, our Bureau of Competition and Office of Public Affairs, working with our “outreach experts” in the Bureau of Consumer Protection, have begun a campaign to better explain to consumers the benefits of competition, and to provide them with useful information about the marketplace and our enforcement. As part of this campaign, entitled “Competition Matters,” we soon will release a new version of our competition primer for consumers; we are working to reorganize and improve the accessibility of our Web site; and we are planning to visit consumer and business groups and schools to explain the importance of competition and the mission and accomplishments of the FTC.

We have focused so far on increased consumer outreach regarding competition issues in a few key industries. For example, in the midst of last spring’s run-up in gasoline prices, we augmented our Oil and Gas Industry Initiatives web page – where consumers can find a wealth of information concerning FTC activities in the petroleum industry – with a recurring column that speaks directly to consumers about how key developments in the industry affect what they pay for gasoline.⁶² Gasoline Columns have addressed such topics as the “risk premium” that world events can add to crude oil and gasoline prices; the impact of hurricanes on supply and prices; the ways in which consumers can face different prices because they live in different locations; and how refining capacity affects gasoline prices. Curious about the amount of interest generated by our Gasoline Columns, we looked into the number of hits we received on our oil and gas page before our web column took effect, and after. We had over 71,000 hits in

⁶² Oil and Gas Industry Initiatives, at <http://www.ftc.gov/ftc/oilgas/index.html>

April (before the colum
