United States of America

Federal Trade Commission

protecting consumers from fraudulent and deceptive practices. These victories are notable both in their own right and for their broader precedential value; in the long run, litigation allows the Commission to translate its unique competition expertise into binding legal rules.

With that background in mind, and with this panel's focus upon the role of the judiciary in antitrust, I will address three topics. First, I will examine the Commission's continuing use of litigation in federal court to develop the law regarding so-called cluster markets. Second, I will review efforts under my watch to solidify judicial acceptance of bargaining models in merger analysis. Third, I will address briefly the district court decision in *Viropharma*, which raises important questions about the scope of the Commission's authority under Section 13(b) to seek equitable remedies in federal court.

II. Cluster Markets

In a run-of-the-mill case, the decision-maker considers each good or service individually. That analysis often accurately reflects the underlying dynamics of the marketplace. Occasionally, however, we find markets that do not fit neatly within the traditional framework. "Cluster markets" are one such example.

At its most basic level, a cluster market includes several different goods or services. Although the law is still developing, in *Promedica* the Sixth Circuit identified two strands of the cluster market analysis.[1] First, an agency may cluster markets exhibiting similar competitive conditions for "administrative[] convenience."[2] Second, an agency may cluster products consumers wish to purchase as a package, which the Seventh Circuit described in the *Advocate* case as products that are clustered together because "the cluster is itself an object of consumer

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[1] *Promedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014); *see also* Krisha A. Cerilli, *Stapl.2l>case,i(msee Tm[]MC /P(rd)-7D 1>MPed two st.8Tm(Promed)3IDdP 8 P(the underlyie Tm[]MC 3em)7D 1>Led two st.8Tm(Prome*

During my tenure the Commission brought several cases alleging cluster markets outside the healthcare industry. For example, in 2015 we successfully challenged Sysco's proposed acquisition of US Foods on the grounds that the transaction would reduce competition for "broadline foodservice distribution" to national and local customers. According to the district court, broadline service entails offering "a vast array of product offerings," "private label offerings, next-day delivery, and value-added services."[8] In 2016 we successfully challenged Staples' proposed acquisition of Office Depot because it was likely to reduce competition in the market for "consumable office products" sold to certain targeted customers.[9] And during my time as Acting Chairman we alleged – and the district court subsequently found – that Wilhelmsen's proposed acquisition of Drew Marine likely would reduce competition in the market for "the supply of marine water treatment chemicals and services to Global Fleet customers."[10]

With that history in mind, I offer two observations.

Second, the cases involving cluster markets emphasize how important facts are in merger analysis. In each of the cases I have described today, the facts indicated that several individual products or services should be considered together. That is not to say we find a cluster market under every rock. Rather, consistent with the *Brown Shoe* requirement that we undertake a "pragmatic, factual approach to the definition of the relevant market,"[11] we must grapple with the facts each and every time. Sometimes the facts lead us to cluster markets, sometimes they do not.

III. Bargaining Models

I am also proud of our litigation record in cases involving a second tool we use in merger analysis, bargaining models. Bargaining models estimate the likely outcome of negotiations between a large supplier and a large customer. They are often used in merger analysis to determine whether a transaction would materially change a party's bargaining power, and therefore the terms of the bargains it strikes. Bargaining models are frequently used to assess healthcare mergers.

In 2016 the Commission used bargaining models to define the relevant market in two hospital cases, Advocate-NorthShore and Penn State Hershey-Pinnacle. The cases are remarkably similar. Before the district court, we alleged each transaction would grant the merged entities significantly greater power when they bargain with insurers.[12] In each case the

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[11] *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962). Although the Court there was specifically addressing the definition of geographic markets, it explained that "[t]he criteria to be used in determining the appropriate geographic mat t irisTw 7.98 0 0 L.p6 (ing9)]Tteistoe Tc 0.00phi, 336 Althonaly.8 e-4.55c68a9 (tly use00)8.3d994ss

The imminence standard applied by the district court could seriously undermine the Commission's ability to challenge anticompetitive conduct in federal court. Section 13(b) is, at least today, the primary remedial tool the Commission uses when it litigates conduct matters in federal court. By significantly narrowing its scope, the district court decision risks giving serial offenders a free pass; like a schoolyard bully, they

In Viropharma's case, we have just such a pattern. It made more than forty meritless filings over many years to forestall generic competition. So if *Viropharma* repeatedly acted that way in the past, the Commission has reason to believe it will do so again. Or, to return to my analogy, if you've just watched forty ducks pass from right to left, it's reasonable to believe another one will soon enter stage right.

V. Conclusion

In conclusion, I am proud of the Commission's litigation record during my tenure and heartened by its many victories. In a series of litigated challenges to mergers, we broadened the use of cluster markets in merger analysis. Whereas it was traditionally a tool used in health care mergers, we successfully applied it to mergers of firms selling broadline foodservice distribution, consumable office products, and marine chemicals. We also successfully litigated the applicability of bargaining models in health care mergers. Although we did not receive the relief we requested from the district court in the Viropharma litigation, I am confident that the Third Circuit will rule that Section 13(b) does not give repeat offenders a free pass so long as they've already gotten what they wanted and promise not to do it again.