

The Capitol Forum: Interview with FTC Commissioner Maureen Ohlhausen

Please note this interview was conducted on 9/30/14. The transcript has been modified slightly for clarity.

Maureen Ohlhausen. Commissioner Ohlhausen, thank you very much for sitting down to talk with me today.

COMMISSIONER OHLHAUSEN: Great. The views I express here are my own.

JOE TIPOGRAPH: Understood. The FTC is turning 100 this year, and you lead the preparation of the FTC Annual Report during your tenure.

giving the complete history of the FTC. In both the competition area and the consumer protection area, there have been significant shifts in policy in the late 1970s and early 1980s that have directed our work subsequently.

So, with that in mind, starting with competition first, one area that I think is important to focus on is health care. We have seen a lot of consolidation in that industry. I think that's a really important area to focus on.

recall, we had had a series of losses in challenges to hospital mergers.

So the Chairman at the time, Tim Muris, decided to do a merger retrospective, to ask: did the effects that we were forecasting actually take place in the marketplace? And we used that learning to shape our hospital merger enforcement efforts going forward. And I think that's been very effective.

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Court unanimously on the clearly articulated prong with the Putney and now we have the active supervision prong before the Supreme Court in the North Carolina Dental case.

I think that a very important area that we focused on is narrowing the scope of exemptions and immunities to ensure that private antitrust authority put on it.

Another area I would highlight is our efforts in improving the enforcement of antitrust laws and clarifying antitrust doctrine. So, for example, in the rule of reason area, we helped develop quick look analysis in the PolyGram case with the inherently suspect framework, which has now been endorsed by the D.C. Circuit and the Fifth Circuit. That really was the culmination of a long effort, going back to the Indiana Federation of Dentists case, and the Massachusetts Board case before that.

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in well with the state action doctrine. We engage with other parts of the federal government and the states to encourage them to consider the impact on consumer competition as they consider other regulations.
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agency. What role has administrative litigation recently played in the FTC's competition
protection objectives?

COMMISSIONER OHLHAUSEN: Our part three authority, that is, our administrative litigation capability, is
really a unique feature of the FTC and an important part of how we carry out our mission, both on the competition
side and on the consumer protection side.

On the competition side, I think the administrative litigation is very, very significant, and much more important
substantive development of the antitrust law.

For example, I already mentioned the development of the inherently suspect framework. In the
Unocal case, we used it to develop the case law on the representation exception to Noerr.

COMMISSIONER OHLHAUSEN: We already touched on state action. That was a project, started under Chair
Muris, where we first did a report where we looked at the state action doctrine, the underlying principles, what
exists, what it protects, why it might be overly broadly interpreted, and sensible ways to pare it back. Then
looked for cases that might serve as a vehicle to move the law in the appropriate direction.

Right now we have the North Carolina Dental case. We've been working on that for
two weeks. I think the administrative litigation function has allowed us to invest time in developing and
clarifying the antitrust law.

JOE TIPOGRAPH: Just really quickly on the state action. These are fact patterns, like the North Carolina Dental
where you have a licensing or a regulating board of people who actually practice in the field that they are regulating.
And the concern is to not allow them to use that power to exclude competitors in an anticompetitive way. Is that

JOE TIPOGRAPH: So the North Carolina dental context is about teeth whitening.

COMMISSIONER OHLHAUSEN: Yes.

JOE TIPOGRAPH: And it would be okay for the state to actively take the position that dentists can do teeth whitening without a state determination.

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we try to maximize those benefits and minimize those risks with a very targeted approach. Do I wish it worked 100 percent all the time? Yes, I do. But just going back to my original point, I think the Delaz Thrifty matter

They settled by agreeing to divest six of the nine plants that were owned by Ardagh at the time of ~~the sale~~, as the corporate headquarters of the Anchor Glass Corporation, which had been acquired by Ardagh in ~~the sale~~. Essentially, Ardagh agreed to divest the bulk of the Anchor business.

That is actually a pretty good barometer of what the parties ~~thought~~ were going to be able to prove in litigating this matter. I think it was a very good outcome for consumers. I feel confident that we took the right approach this case.

even though previously when we ~~was~~ F H V V I X O O \ E O R F N H G W K H 6 W D S O H V P H U J H

Consumers were sitting there reading their cereal boxes.

You had this consumer benefit. And then other companies got in on the act and they said, oh, that's a benefit. They got this beneficial cycle, with more information to consumers about a dietary benefit and more products available to them in the market.

I think it's important to keep in mind that if you're suppressing useful information to consumers, you might be stopping them from making good decisions based on that information. Advertising is a wonderful vehicle to convey

foods and vitamins. I think it's appropriate to have a lower substantiation standard than what the majority required for some of these health claims.

JOE TIPOGRAPH: How expensive can the randomized controlled test be for a company?

COMMISSIONER OHLHAUSEN: Well, sometimes it can be very expensive. It depends on the product. If something has a long-term effect, an RCT would be extremely expensive. A lot of the dietary guidance in the U.S. is based on observational studies. The Framingham Heart Study, for example, which asked: how healthy are you? And what do you generally eat?

One RCT or two RCTs is not appropriate for all products. It is not even what the FDA requires for a lot of food claims. Our dietary advice is not based on RCTs.

JOE TIPOGRAPH: Privacy has been a major issue at the FTC over the past decade. And this year, the FTC released the data from the FTC's 2013-2014 survey, which asked consumers about their privacy expectations. For a particular purpose, what role should the FTC play in managing and protecting their expectations about who might gain access to that information and how it might be used?

