Picasso, Cubism, and Antitrust:
Welcome to the Modern Federal Trade Commission
New York State Bar Association, January 29, 2015

Thank you for that kind introduction and for inviting me this evening. I had a chance to speak with many of you during the ABA's Fall Forum last November.[1] The contrast between that event and this reminds me of something Pablo Picasso once said: "When art critics get together, they talk about Form and Structure and Meaning. When artists get together, they talk about where you can buy cheap turpentine." Now, maybe it is because in November, I addressed a luncheon where the strongest thing served was ice tea and tonight we are making a serious dent in the nation's supply of artisanal whiskey, but I've found that when DC antitrust lawyers get together, they talk about mergers, acquisitions, and the latest FTC health care competition workshop, and when New York antitrust lawyers get together, they talk about how lousy the Knicks are.

I've been thinking about Picasso as I've been researching what our world looked like in

providers that would result in higher prices.[12] But the FTC Act and the Affordable Care Act share the common goal of promoting high quality and cost-effective health care. While the vast majority of health care provider mergers do not attract antitrust scrutiny, the FTC will challenge mergers that would likely result in higher rates and reduced incentives to compete on clinical quality or patient satisfaction.

Despite what many have said, a federal district court made clear in FTC v. St. Luke's that the ACA and antitrust are not at cross-purposes. In that case, the court granted a permanent injunction blocking the hospital and physician network St. Luke's Health System from combining with Saltzer Medical Group, Idaho's largest independent, multi-specialty physician practice group. Focusing on the horizontal overlaps between the merging parties, the FTC argued that the acquisition would combine the two largest providers of adult primary care physician services in the relevant market.[13] The federal court agreed, finding it "highly likely" that health care costs would rise as the merged organization "obtains a dominant market position," which would allow it to negotiate higher rates from managed care organizations, which in turn would be passed on to consumers.[14] The court also noted that improving healthcare quality and lowering costs is not dependent on a merger, or on any specific organizational structure.[15]

The FTC's competition efforts made headlines again in April 2014 when the U.S. Court of Appeals for the Sixth Circuit upheld the Commission's 2012 decision finding that ProMedica Health System violated the U.S. antitrust laws when it acquired its rival in the Toledo, Ohio area, St. Luke's Hospital.[16] The court stated: "[T]he Commission had every reason to conclude that, as Promedica's dominance in the relevant market increases, so does the need for [Managed Care Organizations] to include ProMedica in their networks—and thus so too does Promedica's leverage in demanding higher rates."[17] On the key issue of how to resolve the antitrust injury, the Sixth Circuit also found that the Commission did not abuse its discretion in selecting divestiture as an appropriate remedy.[18] ProMedica has appealed the case to the U.S. Supreme Court, and we all await its response.

About 12% of total health care spending, or, 2% of total GDP, in the US is devoted to pharmaceuticals,[19] and it is one of the FTC's top priorities is to make sure that these markets are working for U.S. consumers. The states are also active on this front: a group of state Attorneys General have announced they are investigating recent spikes in certain generic drug prices.[20]

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[12] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).
[13] Complaint at ¶ 33, FTC v. St. Luke's Health Sys., Ltd., 1:13-cv-00116-BLW (D. Idaho filed Mar. 26, 2013), available at http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf
[14] FTC v. St. Luke's Health Sys., Ltd., 1:13-cv-00116-BLW, 2014 U.S. Dist. LEXIS 9264, at *6 (D. Idaho Jan. 24, 2014). This decision is on appeal in the Ninth Circuit.
[15] FTC v. St. Luke's Health Sys., Ltd., Findings of Fact and Conclusions of Law, 1:13-CV-00116-BLW, at ¶¶ 46-47 (D. Idaho Jan. 24, 2014), available at http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf
[16] ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. Apr. 22, 2014).
[17] Id. at *569.
[18] Id. at *573.
[19] OECD Briefing Note, supra note 11; OCED, Compare Your Country – Health Profile, available at http://www.compareyourcountry.org/health?cr=oecd&cr1=oecd&lg=en&page=2
[20] Leah Nylen, Vermont, Other States, Examining Rising Generic Drug Prices, MLEX, Jan. 5, 2015.

into pharmaceutical company mergers, resulting in eight announced consent orders in calendar year 2014 alone.[26] One of these enforcement actions is particularly noteworthy because the merging parties were two of only a few likely future competitors, and the Commission required divestitures in two generic markets that did not yet exist.[27] Endo Health Solutions and Boca Life Science Holdings were among a limited number of companies that were in the process of developing generic Bromfed-DM—a drug used to treat respiratory illnesses[28]—and a generic version of Zamicet, which is used to relieve pain.[29] As originally proposed, the Endo/Boca merger would have substantially increased concentration in these two generic drug markets—neither of which existed yet—by reducing the number of likely future suppliers.

Though our founders would have perhaps been surprised at how health care competition concerns crowd our agenda, they would not have looked at the multipronged approach we have taken to address those concerns. The same, however, could be said of our work on patent assertion entities. As most of you know, these are firms that attempt to generate profits by purchasing patents, then either licensing them to companies already using the patented technology or litigating against those businesses.

The FTC first started examining PAE activity in workshops leading up to our 2011 Report on the IP marketplace,[30] and we followed that up with a joint workshop with the Department of Justice Antitrust Division in 2012.[31] Currently, we are in the midst of an extensive review of PAE activity, a so-called 6(b) study named after the statutory provision that gives us authority to undertake the project.[32]

All reports indicate that PAE-initiated lawsuits are on the increase,[33] with one study claiming PAEs accounted for 62 percent of all infringement suits in 2012.[34] Some find this trend

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forward, I am very hopeful that Congress will be able to pass a bill implementing these important reforms. At the same time, I, like many others, are very much looking forward to the findings of the FTC's PAE study, which will surely shed light