

**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. 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."<sup>1</sup> Now, maybe it is because, in November, I addressed a luncheon where the strongest thing served was sweet 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 1914. As most of you know, the FTC celebrated its centennial last September, and it has been fascinating to study the changing times into which our agency was born. In 1914, the world's first electric red and green traffic lights were installed in Cleveland, Ohio, and the Panama Canal opened in, of all places, Panama.<sup>2</sup> Robert Goddard started building rockets.<sup>3</sup> The first regularly scheduled airline passenger service began between St. Petersburg and Tampa; Charlie Chaplin made his film debut; Babe Ruth began his professional baseball career; green beer was invented in the Bronx; and Europe toppled into the First World War.<sup>4</sup>

1914 was also the apex of the Cubist art movement, and Pablo Picasso was at its center. Cubism revolutionized Western art and set it on a winding and many-branched course that it still travels today.<sup>5</sup> Jean Metzinger, a painter himself and Cubism's first and leading scholar, described the Cubist artist as approaching his subject from many different viewpoints and placing it in the context of space and time.<sup>6</sup> That retreat from the singular perspective gave the Cubists' work a modern and game-changing complexity and depth. As Picasso said, "I begin

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<sup>1</sup> This quote has been attributed to Pablo Picasso, *see, e.g.*, <http://www.ribbonfarm.com/2010/03/18/the-turpentine-effect/>.

<sup>2</sup> *See* History Channel, *available at* <http://www.history.com/this-day-in-history/first-electric-traffic-signal-installed> and <http://www.history.com/this-day-in-history/panama-canal-open-to-traffic>.

<sup>3</sup> *See* Nat'l Museum of the US Air Force, *available at* <http://www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=12374>.

<sup>4</sup> *See* Space.com, *available at* <http://www.space.com/16657-worlds-first-commercial-airline-the-greatest-moments-in-flight.html>; NPR, *available at* <http://www.npr.org/2014/02/02/269458123/a-century-ago-today-chaplin-made-his-film-debut-in-a-dud>; History Channel, *available at* <http://www.history.com/this-day-in-history/babe-ruth-makes-mlb-debut>; Daily Meal, *available at* <http://www.thedailymeal.com/tracing-origin-green-beer>, PBS, *available at* <http://www.pbs.org/greatwar/maps/>.

<sup>5</sup> *See, e.g.*, The Metropolitan Museum of Art, Heilbrunn Timeline of Art History – Cubism, *available at* [http://www.metmuseum.org/toah/hd/cube/hd\\_cube.htm](http://www.metmuseum.org/toah/hd/cube/hd_cube.htm).

<sup>6</sup> *See, e.g.*, Guggenheim, Collection Online – Jean Metzinger, *available at* <http://www.guggenheim.org/new-york/collections/collection-online/artists/bios/1000/Jean%20Metzinger>.

with an idea and then it becomes something else.”<sup>7</sup> Cubism was born and art was forever changed.

I like to think that the Progressive Era leaders who gave birth to the FTC shared some of the Cubist spirit, for it is certain they too believed the most complete understanding of a subject comes from viewing it through many different lenses. Our founders, men like President Woodrow Wilson and Justice Louis Brandeis, gave us a variety of tools to approach our mission:<sup>8</sup> the authority to suggest and make policy, to research, to educate, to enforce laws related to consumers and competition. They also defined our role as advocate for not just one set of participants in the marketplace, but for all. By ensuring fair and efficient competition, we ensure markets works for businesses, the consumers they serve, and the greater economy.

The Progressives constructed the FTC to work by consensus, not on the prevailing partisan winds, but on dispassionate facts and reasoned analysis. The 1914 Senate report on the FTC Act described an agency “competent to deal with [complex antitrust matters] by reason of information, experience, and careful study of the business and economic conditions of the industry affected.”<sup>9</sup>

This duality lies at the core of the FTC’s very foundation. Yes, devotees of the then-new social sciences that the Progressives were, they wanted us to think and analyze and study—and we do, with our workshops and our reports and our 6(b) research authority. But they also wanted us to act, which is why they gave us law enforcement powers, policy advocacy responsibilities, and an education mission. Twenty-four years after its founding, the FTC was also empowered to investigate and prohibit unfair and deceptive acts and practices in commerce.<sup>10</sup>

I believe our founders wanted the FTC to come at competition issues by both thinking and doing, a concept that, in 1914, was as forward looking as Picasso’s cardboard and sheet metal guitar sculptures. Wilson and Brandeis would be pleased that today’s FTC is still committed to analysis followed by action and action based on analysis. It is in that light I would like to look at a few of the issues in competition that occupied the FTC in 2014 and are likely to remain at the top of our agenda in 2015.

In terms of its impact on consumer quality of life and ascendancy in our economy, the healthcare market is to today’s FTC what steel and oil were to the original Commission. According to the OECD, health care spending makes up approximately 17% of the Gross Domestic Product of the United States.<sup>11</sup> So, it is no surprise that we devote considerable resources to investigating and, where appropriate, challenging mergers among health care

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<sup>7</sup> ANN LIVERMORE, *ARTISTS AND AESTHETICS IN SPAIN* 154 (Tamesis Books 1988).

<sup>8</sup> See, e.g., Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *ANTITRUST L. J.* 1, 5-6 (2002) (“[T]here emerged in 1914 a Commission with a broad and flexible mandate, wide-ranging powers, and the ability, at its best, to respond to the needs of the changing times.”).

<sup>9</sup> S. Rep. No. 597, 63d Cong., 2d Sess. 9 (1914).

<sup>10</sup> Wheeler-Lea Act of 1938, ch. 49, Pub. L. No. 75-447, 52 Stat. 111 (1938).

<sup>11</sup> OECD, “Briefing Note, OECD Health Statistics 2014: How Does the United States Compare?” available at <http://www.oecd.org/unitedstates/Briefing-Note-UNITED-STATES-2014.pdf> [hereinafter “OECD Briefing Note”].

providers that would result in higher prices. Both the FTC Act and the Affordable Care Act<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> The court also noted that improving healthcare quality and lowering costs is not dependent on a merger, or on any specific organizational structure.<sup>15</sup>

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.<sup>16</sup> The court stated: "[T]he Commission had every reason to conclude that, as Promedica's dominance in the relevant markets 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."<sup>17</sup> 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.<sup>18</sup> 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,<sup>19</sup> 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.<sup>20</sup> For

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<sup>12</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

<sup>13</sup> 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>.

<sup>14</sup> *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.

<sup>15</sup> *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>.

<sup>16</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. Apr. 22, 2014).

<sup>17</sup> *Id.* at \*569.

<sup>18</sup> *Id.* at \*573.

<sup>19</sup> OECD Briefing Note, *supra* note 11; OECD, Compare Your Country – Health Profile, available at <http://www.compareyourcountry.org/health?cr=oeed&cr1=oeed&lg=en&page=2>.

<sup>20</sup> Leah Nylen, *Vermont, Other States, Examining Rising Generic Drug Prices*, MLEX, Jan. 5, 2015.

our part, the FTC has and will continue to focus on anticompetitive pay-for-delay deals and pharmaceutical mergers.

In June of 2013, in *FTC v. Actavis, Inc.*, the U.S. Supreme Court held these pay-for-delay deals are subject to antitrust scrutiny,<sup>21</sup> vindication for our longstanding, bipartisan campaign against them. Since the *Actavis* decision, in September 2014, the FTC filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania charging that several major pharmaceutical companies illegally blocked consumers' access to lower-cost versions of the blockbuster testosterone drug, AndroGel. As this action reflects, payments do not have to be in the form of cash to qualify for scrutiny as unlawful pay-for-delay deals under *Actavis*.<sup>22</sup>

Not only will we identify agreements raising potential antitrust concerns for our enforcement efforts, we also look for opportunities to advance the principles upheld by the Supreme Court in *Actavis* through amicus briefs or other advocacy. Last month, the FTC released our annual report summarizing the potential pay-for-delay deals received between October 1, 2012 and September 30, 2013.<sup>23</sup>

These annual reports underscore what various industry observers have noted: that arrangements for compensation to delay generic entry have been more creative in recent years, including the use of "no authorized generic" arrangements.<sup>24</sup> Amicus briefs, such as the one we recently filed in Third Circuit in the *Lamictal* litigation, provide us with a good opportunity to explain the economics of such commitments to the federal courts and why they can function like the reverse payments the Supreme Court addressed in *Actavis*.<sup>25</sup>

Pharmaceutical mergers are another area in which the FTC combines research, analysis, and enforcement actions to support competition. We conducted several significant investigations

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<sup>21</sup> 133 S. Ct. 2223 (2013).

<sup>22</sup> Specifically, the FTC alleged that pharmaceutical company AbbVie and its partner filed sham patent infringement lawsuits against potential competitors to delay the introduction of lower-priced versions of that drug. The FTC also charged that, while these lawsuits were pending, AbbVie enticed one of its competitors to agree to forego competing against AndroGel for three years by authorizing it the right to sell an authorized generic version of the highly-profitable cholesterol drug TriCor. Complaint at ¶¶ 5-10, 117, *FTC v. Abbvie Inc.*, 2:14-cv-05151-HB (E.D. Pa. Sept. 26, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140908abbviecmpt1.pdf>.

<sup>23</sup> Fed. Trade Comm'n, Bureau of Competition, Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2013 (Dec. 22, 2014), available at <http://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/141222mmafy13rpt-1.pdf>.

<sup>24</sup> Compensation in 4 of the 29 potential pay-for-delay agreements took the form of a no authorized generic commitment and compensation in 11 of 29 of such agreements were in the form of a side business deal between the branded and generic manufacturer. In the remaining agreements, the compensation was solely in the form of a cash payment to the generic supplier that purported to be for litigation fees. *Id.*

<sup>25</sup> See, e.g., Fed. Trade Comm'n Brief as Amicus Curiae in Support of Plaintiffs-Appellants, In re Lamictal Direct Purchaser Antitrust Litig., No. 14-1243 (3rd Cir. Apr. 28, 2014), available at [http://www.ftc.gov/system/files/documents/amicus\\_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf](http://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf); see also Fed. Trade Comm'n Motion for Leave to File Amicus Curiae Brief and Brief as Amicus Curiae, In re: Wellbutrin XL Antitrust Litig., 2:08-cv-2431, 2:08-cv-2433 (E.D. Pa. Sept. 26, 2013), available at [http://www.ftc.gov/system/files/documents/amicus\\_briefs/wellbutrin-xl-antitrust-litigation-re/130926wellbutrinbrief.pdf](http://www.ftc.gov/system/files/documents/amicus_briefs/wellbutrin-xl-antitrust-litigation-re/130926wellbutrinbrief.pdf).

into pharmaceutical company mergers, resulting in eight announced consent orders in calendar year 2014 alone.<sup>26</sup> 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.<sup>27</sup> 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<sup>28</sup>—and a generic version of Zamicet, which is used to relieve pain.<sup>29</sup> 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 blinked at the multipronged approach we have taken to address those concerns. The same, I believe, 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,<sup>30</sup> and we followed that up with a joint workshop with the Department of Justice Antitrust Division in 2012.<sup>31</sup> 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.<sup>32</sup>

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

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<sup>26</sup> In the Matter of Eli Lilly & Co. and Novartis AG, Dkt. C-4500 (Dec. 22, 2014); In the Matter of GlaxosmithKline, PLC and Novartis AG, Dkt. C-4498 (Nov. 26, 2014); In the Matter of Prestige Brands Holdings, Inc. and Insight Pharmaceuticals Corporation, Dkt. C-4487 (Aug. 28, 2014); In the Matter of Akorn, Inc., Dkt. C-4479 (Aug. 24, 2014); In the Matter of Valeant Pharmaceuticals Int'l, Inc. and Precision Dermatology, Inc., Dkt. C-4477 (July 3, 2014); In the Matter of Actavis PLC and Forest Laboratories, Inc., Dkt. C-4474 (June 30, 2014); In the Matter of Akorn, Inc. and Hi-Tech Pharmacal Co., Inc., Dkt. C-4452 (Apr. 14, 2014); In the Matter of Endo Health Solutions Inc., Boca Life Science Holdings, LCC, and Boca Pharmacal, LCC, Dkt. C-4430 (Jan. 31, 2014).

<sup>27</sup> Press Release, FTC Puts Conditions on Endo Health Solutions' Acquisition of Boca Life Science Holdings (Jan. 31, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-endo-health-solutions-acquisition-boca-life>.

<sup>28</sup> Complaint at ¶ 11, In the Matter of Endo Health Solutions, Inc., Dkt. C-4403 (Jan. 29, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140131endobocacmpt.pdf>.

<sup>29</sup> *Id.* at ¶ 12.

<sup>30</sup> FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf> [hereinafter 2011 Patent Report].

<sup>31</sup> The workshop materials are available at the following link: <http://www.ftc.gov/opp/workshops/pae/>.

<sup>32</sup> Federal Trade Commission Act, 15 U.S.C. § 46(b).

<sup>33</sup> U.S. Gov't Accountability Office, GAO-13-465, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality (2013) at 17, available at <http://www.gao.gov/products/GAO-13-465> (finding that the share of patent litigation filed by “patent monetization entities” increased 7% between 2007 and 2011).

<sup>34</sup> Executive Office of the President, Patent Assertion and U.S. Innovation, June 2013, prepared by the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy,

a positive one. They argue PAEs make the market for intellectual property more robust by compensating small inventors who might not otherwise have the resources to enforce their patents; by acting as a ready buyer for the patents of failed start-ups thus reducing the investment risks associated with early stage technologies;<sup>35</sup> and by allowing operating companies to monetize intellectual property.

Others disagree. They contend that PAEs impose unnecessary costs without promoting the dissemination of technological know-how. Also, because PAEs do not manufacture products, they are not subject to countersuit, and therefore have little or no incentive to cross-license patents.<sup>36</sup> This behavior contrasts with the more traditional scenario of rival producers, each with its own patents, settling competing infringement cases by cross-licensing rather than engaging in expensive legal battles.<sup>37</sup> Moreover, the FTC has found that PAEs also have few of the reputational concerns that might deter a manufacturing company.<sup>38</sup>

While panelists and commenters at our 2012 PAE workshop provided anecdotal evidence of these and other potential costs and benefits of PAE activity, many stressed the lack of more comprehensive empirical evidence needed to better understand what's at stake. But, up until that point, most data describing the types of patents acquired by PAEs and their assertion strategies as compared to other patent holders has been inaccessible because it is confidential.<sup>39</sup>

Fortunately, the FTC's 6(b) study will allow us to shed light on some of these questions. We've sent information requests to approximately 25 PAEs across a variety of market sectors, and to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector. Our goal is a broad descriptive examination of the PAE business model, including their organization and structure, their economic relationships, and their actions in terms of patent acquisition, assertion, litigation, and licensing.<sup>40</sup> The data is coming in as we speak. We hope to be able to complete a report relatively quickly—by the end of 2015—which we are sure policy makers at all levels and branches of government will put to good use.

Some have suggested that enacting legislation that addresses some of the patent issues should wait until our 6(b) study is done, but I disagree. Various provisions in bills proposed in Congress will most certainly help to further discourage frivolous lawsuits and improve patent quality, actions the FTC has long encouraged. Given the bipartisan efforts to move this issue

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available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force> [hereinafter President's PAE Report]; Fiona Scott Morton, Carl Shapiro, Strategic Patent Acquisitions, Haas School of Business, University of California at Berkeley, working paper, 2 July 2013, available at <http://faculty.haas.berkeley.edu>.

<sup>35</sup> 2011 Patent Report, *supra* note 30, at 52-53.

<sup>36</sup> They also have lower discovery costs. The President's PAE Report indicates that the success of the PAE business model is due in part to the combination of these various attributes. President's PAE Report, *supra* note 34.

<sup>37</sup> See Henry C. Su, Invention Is Not Innovation and Intellectual Property Is Not Just Like Any Other Form of Property: Competition Themes from the FTC's March 2011 Patent Report, the Antitrust Source, August 2011, available at <http://www.antitrustsource.com>.

<sup>38</sup> Evidence suggests that the majority of litigated patent infringement claims are against inadvertent infringers. 2011 Patent Report, *supra* note 30, at 131 n.337.

<sup>39</sup> The workshop materials are available at the following link: <http://www.ftc.gov/opp/workshops/pae/>.

<sup>40</sup> Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 26, 2013), available at <http://www.ftc.gov/opa/2013/09/paestudy.shtm>.

forward, I am very hopeful that Congress will act 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 on the more complex issues at stake here.

Similarly, the fact that we are still in the middle of our study does not present a barrier to appropriate law enforcement action, as we took in a recent case involving MPHJ Technology Investments.<sup>41</sup> If the law enforcement agencies—the FTC and DOJ, as well as the states—uncover other PAE activity that is in violation of current law, they should act expeditiously to take whatever enforcement actions are warranted to stop inappropriate PAE abuse.

The FTC is shaping and enforcing policy in many 21<sup>st</sup> century hotspots—health care competition, pharmaceutical prices, patent assertion entities—not to mention advertising, mobile payment systems, data security, data brokers, and the Internet of Things. And, perhaps somewhat remarkably, we are doing so with a playbook penned by 20<sup>th</sup> century leaders like Wilson and Brandeis. We study activities and business structures that impact innovation and markets, but we do not just study. We act when we see consumers threatened, when we see competition faltering. Our founders expected us to use all the tools they gave us to pursue our mission of protecting competition as it shapes the economy and consumers as they navigate the markets. They expected us to think and act, and when it comes to any of the myriad of competition issues under our jurisdiction, that is exactly what you can count on us to do.

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<sup>41</sup> Press Release, FTC Settlement Bars Patent Assertion Entity From Using Deceptive Tactics (Nov. 6, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.