Interview with Joshua D. Wright, Commissioner, Federal Trade Commission

Editor's Note: *Joshua D. Wright was sworn in as a Commissioner of the Federal Trade Commission on January 11, 2013, to a term that expires in September 2019. Prior to joining the Commission, Wright was a Professor at George Mason University School of Law and held a courtesy appointment in the Department of Economics.*

In this interview with The Antitrust Source*, Commissioner Wright discusses the scope of Section 5 of the FTC Act, patent holdup, patent assertion entities, the role of efficiencies in FTC investigations, reverse payment settlements, the Roberts Court's antitrust decisions, the FTC's recent data broker study, and data security standards.*

Editorial Chair Darren Tucker conducted this interview for The Antitrust Source *on May 30, 2014.*

THE ANTITRUST SOURCE: Before joining the Commission, you wrote about the importance of evidence-based antitrust analysis.[1] What does this mean and how does viewing enforcement through this lens affect how you look at cases as a Commissioner?

JOSHUA WRIGHT: Evidence-based antitrust is a particular methodological commitment to thinking about decision-making by antitrust agencies and courts. Evidence-based antitrust is, at its core, about harnessing the best available economic theory and evidence to improve decision-making about specific enforcement matters, policy decisions, resource allocation, agency design, and other critical decisions. The central idea is to wherever possible shift away from casual empiricism and intuitions as the basis for decision-making and instead commit seriously to the decision-theoretic framework applied to minimize the costs of erroneous enforcement and policy decisions and powered by the best available theory and evidence.

There is not much disagreement that economic evidence is quite valuable in the context of resolving a particular dispute about, for example, whether a proposed merger will substantially lessen competition. Evidence-based antitrust encompasses a commitment to using the best available economic theory and empirical evidence to make that decision; but it also stands for a much broader commitment to structuring antitrust enforcement and policy decision-making. For example, evidence-based antitrust is a commitment that would require an enforcement agency seeking to design its policy with respect to a particular set of business arrangements—loyalty discounts, for example—to rely upon the existing theory and empirical evidence in calibrating that policy. I've written some about my views of what an evidence-based perspective on loyalty discounts would look like[2]—but the critical point is that the existing economic literature makes avail-

[1] *See, e.g.*, Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 Antitrust L.J. 241 (2012).

[2] *See, e.g.*, Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* Antitrust Law and Economics 183 (Keith N. Hylton ed., 2010); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts, Remarks at the Bates White 10th Annual Antitrust Conference (June 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf.

able important information concerning the probability that loyalty discount arrangements are procompetitive or anticompetitive and that information is fundamental to designing an enforcement strategy that makes consumers better off.

An evidence-based antitrust policy informs the way that an antitrust agency ought to think about its activities: what types of cases to bring, how many of those to bring, what mix of cases to bring, and what areas of conduct need more study.

So, the bulk of the evidence on exclusive dealing, to give one example, shows the practice is generally procompetitive. We may not be able to estimate with precision how likely any one instance of exclusive dealing is procompetitive. But the best available theory and evidence tells us that it's much more likely than not to be procompetitive than anticompetitive. That is a simple piece of information—but a powerful one for structuring enforcement decisions and policy.

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Understanding even roughly or intuitively and, in some cases more precisely, both the probability of anticompetitive harm for a given practice and the magnitude of the potential harm can be incredibly helpful in allowing an agency to allocate resources, make better enforcement decisions, improve our advocacy and research efforts, and help us get cases right more often than we would otherwise do.

ANTITRUST SOURCE: You've spoken more on the need for the Commission to put out a policy statement on the scope of its authority to challenge unfair methods of competition under Section 5 than on any other topic. Why is this subject so important to you and why do you think the FTC has not put out a policy statement similar to the one it did for unfair acts or practices?

JOSHUA WRIGHT: Let's begin with the reasons why setting forth a formal policy statement defining the Commission's authority to prosecute unfair methods of competition under Section 5 is such an important topic.

The first reason is that, from an economic perspective, this is an area that is incredibly important to our competition mission. It is sometimes pointed out that standalone Section 5 cases are a small part of what we do. That is certainly true by volume. We obviously do more merger investigations than we do standalone Section 5 investigations. But activity levels alone are not a fruitful way of thinking about a competition agency's output and performance. Instead, if you look at the consumer savings that the agency reported arising from our competition mission over the past five years, a significant portion of those consumer savings—roughly one-third—come from standalone Section 5 cases. Even more dramatically, if you look at consumer savings from unfair methods of competition cases as a percentage of our non-merger enforcement, nearly 75 percent of those savings are attributable to standalone Section 5 cases. I think most people would consider those to be significant figures, and they certainly are large enough to render it inappropriate to dismiss the Section 5 debate as a small-stakes affair.

Standalone Section 5 cases clearly are an important part of our portfolio. I think that alone is an important enough reason for the Commission to think long and hard about steps to improve both process and substance as they relate to unfair methods of competition enforcement.

Another very important reason why the Commission's Section 5 unfair methods of competition enforcement requires agency guidance is that a vague and undefined Section 5 authority, when combined with the administrative process advantages the Commission enjoys, gives the Commission such significant advantages in conduct investigations that questions of procedural fairness and substance are implicated. The historical data show that the Commission will nearly invariably conclude its Section 5 process by issuing a judgment against the prospective defendant. As a result, the vast majority of our Section 5 enforcement results in agency settlements. This shift to a more regulatory regime raises the real concern that we might be preventing conduct that might not be found anticompetitive, and indeed might be procompetitive, if push came to shove in a true adversarial proceeding.

These procedural advantages would be less of a problem if Section 5 unfair methods had a clear definition. But it does not. The unbounded nature of Section 5 invites more questions than it provides answers as to its scope, and as many definitions as there are Commissioners, and often more. Within the past 40 years, Section 5 has been understood by commissioners to cover anything from harms to the environment or employee-employer relationships to simply harm to a competitor. There has long been a consensus that these types of harms lay far outside the scope of the traditional antitrust laws.

The combination of process and substance problems gives rise to serious concern that the agency has in its power a tool that is unavailable to the DOJ or private parties, that is boundless in its reach and scope, that the agency has used to evade proving consumer harm, and that can reach conduct that is arguably procompetitive.

People do not debate too vigorously that the extension of Section 5 beyond the traditional antitrust laws might be useful in areas like invitations to collude. But the FTC has also used Section 5 in areas that are far more controversial, including loyalty discounts and seeking injunctions to remedy the infringement of standard essential patents. These are much more complex topics and, more importantly, conduct that can be both procompetitive and a fundamental part of a well-functioning competitive economy.

There has been a one hundred year natural experiment to evaluate the results of the Commission's Section 5 unfair methods of competition jurisprudence and the results are in. We do not have much to show in terms of enforcement success, influence upon antitrust law, or any of the goals Congress set forth when it originally contemplated the unfair methods authority. The best that proponents of the status quo or an even more expansive use of the Commission's Section 5 authority can do is to argue that we will do better. Perhaps we will. But one hundred years is long enough to carry on without a statement that sets forth the bounds of the agency's approach to Section 5 unfair methods of competition enforcement and if we do not set forth such a statement on our own, I suspect that Congress or the courts will do it for us.

ANTITRUST SOURCE: In June 2013, you released a proposed policy statement outlining your views as to how the Commission should use its unfair methods of competition authority.[3] Some have asserted that your Section 5 policy statement covers no more than what's already condemned under the Sherman and Clayton Act, plus invitations to collude. Do you think that's a fair characterization? And if not, can you provide examples of conduct that would violate Section 5 under your policy statement but not the Sherman or Clayton Act?

JOSHUA WRIGHT: My statement articulates and proposes two necessary conditions that must be satisfied in order for an act or practice to constitute a standalone violation of Section 5. The first is that the conduct must cause harm to competition as that concept is understood by the

[3] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

traditional antitrust laws, namely the Sherman Act and the Clayton Act. That requirement simply requires parity between the definition of economic harm that lies at the heart of Section 5 and the traditional antitrust laws.

The second necessary element is that the conduct alleged to violate Section 5 must lack cognizable efficiencies. To be clear, those requirements would only apply to standalone Section 5 unfair methods of competition cases. The FTC could continue to prosecute, as it and the DOJ have done successfully, conduct with both anticompetitive effects and cognizable efficiencies as violations of the traditional antitrust laws.

This definition would have some bite. For example, the *Intel* case alleging that vertical restraints and loyalty discounts violate Section 5 standalone violations would not survive the second requirement—the efficiencies screen—because discounts have obvious intuitive procompetitive benefits. The definition would leave intact the FTC's ability to prosecute nearly all private invitations to collude. However, at least some public invitations to collude would be ruled out by my proposed definition because it is well understood that they can involve cognizable efficiencies.

The ability to enforce one's property right is too important an issue to be determined by the luck of agency draw.

But in terms of what the agency has done over the past 20 years in Section 5 standalone cases, by my count, about 70 percent of what we have done in those cases would satisfy the elements in my proposed policy statement. What we are really talking about then is the other 30 percent. And the question is not whether the FTC can bring those cases at all, but rather whether the FTC should do so under Section 5 as a standalone violation or under the Sherman Act. Shrinking the scope of what is understood to be a standalone Section 5 violation would force the FTC into federal court (or administrative litigation) on a Sherman Act-based theory of anticompetitive harm requiring proof of anticompetitive effect. That is perfectly appropriate. We do that and win in appropriate cases. The DOJ does that and wins too.

I do not think Section 5 was designed as an avenue for an enforcement agency to evade the burden of proof articulated by the Supreme Court that a plaintiff must show an anticompetitive effect in order to prevail on a traditional antitrust claim. My personal belief is that Section 5 standalone violations have been used by the FTC historically to evade the requirement to show competitive harm in cases like Intel. However, whether I am correct about that or not, there is certainly a perception—and it is a perception I think is accurate—that Section 5 has been employed in cases where the ability of the agency to demonstrate competitive harm by the preponderance of the evidence is dubious.

There is also the perception—again accurate in my view—that Section 5 creates a real wedge in enforcement reach between the FTC and DOJ. Take the simple example of asserting an injunction over a FRAND-encumbered SEP. No federal court has ruled that such conduct violates the antitrust laws without proof of deception. But the FTC has settled cases alleging that the same conduct violates Section 5. The ability to enforce one's property right is too important an issue to be determined by the luck of agency draw. I think that that perception, combined with those process advantages that give the agency an unfair advantage in extracting consents, is the cause of the Section 5 problem and precisely why previous Commissions, commissioners, Congress, and academics remain interested in the agency setting forth some boundaries and providing some guidance with respect to its authority.

You asked for examples of conduct other than invitations to collude that might fit the definition of a standalone Section 5 violation as defined in my proposed policy statement. Let me give you two examples that are in the statement. I think the first is well understood. The second may not be.

The first is that the no-efficiency screen would not rule out any cases based upon a theory of deception in the standard-setting process. Under my proposed policy statement, deceptive conduct that results in the acquisition or maintenance of monopoly power would still be viable Section 5 cases.

A second example would be—and I think this is an area that has been underappreciated and that would actually expand the definition of economic harm in a way that I think most economists would agree with—in the first prong of economic harm, the plaintiff can prevail by showing the acquisition of market power without a demonstration of preexisting monopoly power as would be required under a Section 2 monopolization theory.

Steve Salop recognized this point in his article responding to my proposed Section 5 statement and applauded the expansion as consistent with modern economics.[4] I do not think it is a point many of the other critics who mistakenly believe my proposal would kill Section 5 enforcement entirely have picked up on quite yet. Now, to be clear, one would still need real proof of anticompetitive effect under any theory of harm. The point is that there is a general movement in antitrust law toward favoring proof of actual effects over using unreliable proxies like market shares to predict effects wherever possible. We have seen that in the merger area most prominently. But there is no reason why that approach—which is economically sound—should not be used with respect to the traditional antitrust laws and Section 5 where appropriate. That addition to the Section 5 statement had in mind tying together Section 5 unfair methods of competition analysis with the analytical framework we rely upon when we employ the rule of reason. In this case, where there is proof that the conduct alleged to constitute a standalone violation of Section 5 harmed competition and caused anticompetitive effects as traditionally understood under the antitrust laws, my statement would do away with the unnecessary step of demonstrating the defendant had a market share large enough to establish monopoly power as we might see required in traditional monopolization cases

ANTITRUST SOURCE: Would you be willing to accept a Section 5 policy statement with a broader reach than your proposed statement, if that resulted in unanimity on the Commission?

JOSHUA WRIGHT: Absolutely. When I first launched the idea of issuing my own policy statement, one of the things that I said is that my articulation of a proposed policy statement defining the contours of what constitutes an unfair method of competition under Section 5 is meant to be an invitation to a discussion. It was meant as an entry into the marketplace of ideas. I stand ready and willing to discuss alternative options and ideas concerning policy statements that would precisely define our Section 5 authority.

I have been particularly pleased that, as we sit here today, four of the sitting Commissioners have discussed publicly their views on Section 5 and its scope. Commissioner Ohlhausen endorsed a Section 5 unfair methods definition similar to mine in its treatment of economic harms and offering some variation on the appropriate treatment of efficiencies.[5] Both Chairwoman Ramirez and Commissioner Brill have acknowledged that the standard they favor for Section 5 is

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4 Steven C. Salop, *Guiding Section 5: Comments on the Commissioners*, 9 CPI Antitrust Chron. 1 (Sept. 2013).

5 Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Section 5 Principles of Navigation, Remarks Before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

similar to the traditional rule of reason.[6] The gap between the substance of these positions is much narrower than generally appreciated. Chairwoman Ramirez and Commissioner Brill have also argued that relying upon consents to inform the public about the scope of Section 5 is an adequate substitute for agency guidelines. I disagree with that point. And I believe everyone sees the potential value of guidelines. Guidelines have been an integral part of our enforcement approach in both our consumer protection and competition missions. There is no reason guidelines should not play a role in Section 5 enforcement. Another underappreciated benefit of guidelines is that a precise definition of the Commission's unfair methods authority might well give the agency greater confidence—confidence that has for good reason been quite absent historically—to litigate appropriate Section 5 cases.

There is now a consensus that, as under the rule of reason, Section 5 unfair methods should require economic harm that is of the type traditionally understood by the antitrust laws and that Section 5 is an antitrust statute not meant to get at noneconomic concerns.

I want to underscore the degree of consensus that has emerged on substantive standards for standalone Section 5 claims because I think that point has also been underappreciated by some commentators. From a historical perspective, it is actually quite remarkable how much consensus there is today. There is now a consensus that, as under the rule of reason, Section 5 unfair methods should require economic harm that is of the type traditionally understood by the antitrust laws and that Section 5 is an antitrust statute not meant to get at noneconomic concerns.

There was not agreement on even that point 20 years ago. Each commissioner who has spoken on the issue of Section 5 has also articulated a framework consistent with the notion that efficiencies must be included in that framework and that guidelines could have some value. I think those are, to me, the building blocks for what could be a unanimous statement.

Let me turn to the substance of my proposed policy statement and the efficiencies screen that would constitute the second element of an unfair methods offense. Some critics have made the rather colorful point that even a dollar in efficiencies would be sufficient to defend a standalone Section 5 claim. A subset of these critics has followed that argument to the erroneous conclusion that the Commission could not pursue cases where the conduct resulted in net competitive harm so long as there was a single dollar of cognizable efficiencies. It is true that the Commission, under my statement, could not pursue such cases as standalone violations of Section 5. Indeed, that is what the no cognizable efficiencies test means. But the implication that the Commission could not bring these cases under alternative theories is mistaken and quite clearly rejected in the policy statement itself. In cases where the Commission has reason to believe that conduct generates more competitive harm than efficiencies it can and should pursue those cases under its theory of choice under the traditional antitrust laws in federal court or in administrative litigation. If we have a case with economic evidence consistent with that theory, we will prevail. We are perfectly capable of doing so. The DOJ does the same thing. I do not think that this agency needs any extra help when it goes into federal court in these cases to win. I think we have all the tools required to do it and to win cases on the same footing as the DOJ.

ANTITRUST SOURCE: In a recent speech, you observed that the FTC has departed from what you

[6] *See* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission's Next Century, Keynote Address at the George Mason Law Review Annual Antitrust Symposium (Feb 13, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf; Julie Brill, Comm'r, Fed. Trade Comm'n, Remarks at Technology Policy Institute Aspen Forum (Aug. 20, 2013), *available at* https://www.youtube.com/watch?v=9V_YEu1FIAE&feature=youtu.be.

call the "symmetry principle."[7] What did you mean by that, and what problems might this cause?

JOSHUA WRIGHT: The recent speech I gave in New York was based in large part upon a paper I co-authored with Judge Ginsburg that discusses what we describe as the symmetry principle.[8] The speech explored the possibility that some recent FTC actions in particular have deviated from it.

The symmetry principle is an idea embraced by the 1995 IP Licensing Guidelines that antitrust agencies will treat intellectual property rights and real property rights within the same analytical framework. It does not mean—and the '95 Guidelines make this quite clear—that the agencies must ignore important differences and facts between contexts or investigations involving the use of real property rights that might result in antitrust violations and the use of intellectual property rights that might result in antitrust violations.

There will always be different and important factual considerations in investigations involving IP on the one hand and real property rights on the other. The symmetry principle implies the same framework ought to be applied to analyze problems involving intellectual property rights and problems involving real property rights.

The '95 Guidelines embrace that principle. I think that principle is an important one. The primary reason the symmetry principle is an important one is that antitrust economics has developed a sound analytical approach to the context of largely real property cases that respects and understands the rule of property rights in a competitive economic system. We have developed a set of tools, both in theory and empirics, of evaluating potential antitrust claims.

I think those efforts have been highly successful. One needs only to compare the body of antitrust law from the 1940s and '50s to the present to have some sense of the magnitude of improvement that has occurred. Asymmetries in analyzing real property and intellectual property invite what I think of as intellectual shortcuts to handling disputes involving IP. I worry about the use of intellectual shortcuts to handle and think about these problems because there is an abundance of intuitions and hunches about the competitive effects of IP out there.

There is a body of literature on the potential for patent holdup. There are excellent theory papers that describe when and how and under what conditions too many patents might result in a problem, too few patents might result in a problem, and low- or high-quality patents might result in competitive problems. These are important contributions to our economic knowledge, but the state of empirical literature now is not at which we can have any confidence in these intuitions as a matter of policy. That is to be expected in some ways. The literature is young. But as of now, there is a lot of theory and not a lot of empirical evidence.

Those debates, to me, are much like the antitrust debates in '70s and '80s. There are lots of theories and not much empirical evidence from which to make decisions. That is precisely the sort of area where you worry about intuitions substituting for full analysis. And that is the primary concern with deviations from symmetry. I don't think one needs to go very far in the legal scholarship or economic scholarship or even agency documents to find examples of strong intuitions about the virtues of intellectual property substituting for what I would think is the analysis we might do in the real property context.

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7 Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Does the FTC Have a New IP Agenda?, Remarks at the 2014 Milton Handler Lecture (Mar. 11, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/288861/140311ipagenda.pdf.

8 Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 Competition Pol'y Int'l, Autumn 2013, at 2.

I worry that we develop these shortcuts by way of an asymmetrical approach. Now, I would also worry if the shortcuts ran in the other direction, that is, if we were to say real property rights never generate problems because real property is different and less likely to generate problems. That would also be a mistake. Right now, that is not the policy concern.

The policy concern right now is that there is no shortage of calls for skepticism about licensing, assertion of patent rights, acquisitions involving IP rights, activities where there is an invitation to deviate from what is a well-developed analytical framework that we've applied for real property rights now over a century. I worry that those short cuts are going to lead us down the wrong path by inviting a weaker form of analysis.

The second problem with deviating from symmetry is a simple one. It is that any such deviation is inconsistent with the 1995 Guidelines. If we would like to deviate from what is in the 1995 Guidelines as an agency or as a pair of agencies, it falls upon the agencies to articulate the reasons why and subject those reasons to scrutiny from the outside bar, the business community, and the public at large. Instead, deviations from the 1995 Guidelines occur through Section 5 settlements, and they are particularly dangerous when they occur in this manner.

The breach of a FRAND commitment or a licensing commitment, without more, does not violate the traditional antitrust laws.

ANTITRUST SOURCE: You have stated on several occasions that you think the FTC may have gone too far in some recent cases involving alleged breaches of licensing commitments to a standards development organization, including *N-Data*, *Bosch*, and *Motorola*. When, if ever, do you think that an alleged breach of a licensing commitment should raise concerns under the antitrust laws or Section 5?

JOSHUA WRIGHT: The breach of a FRAND commitment or a licensing commitment, without more, does not violate the traditional antitrust laws.

Further, breach of a FRAND commitment or an agreement with a standard-setting body should also not violate Section 5 of the FTC Act as an unfair method of competition. The Commission certainly found that such conduct did violate Section 5 in *N-Data*.[9] I believe that settlement is misguided and that the logic behind it is mistaken.[10]

However, let's begin with the federal antitrust claims. Consider first a hypothetical "pure breach" of contract case—that is, there is no deception alleged—wherein a patent holder is alleged to breach a FRAND commitment and that the conduct violates Section 2 of the Sherman Act. As with any monopolization claim, the plaintiff bears the burden of demonstrating that the patent holder has acquired or maintained monopoly by virtue of its actions. It cannot merely be the case that a lawful monopolist raises its prices by virtue of some conduct, not even by virtue of bad conduct.

In the Supreme Court's unanimous decision in *NYNEX*, we had a defendant that was able to successfully raise price, and allegedly, there was anticompetitive effect. It was a lawful monopolist that had monopoly power that enabled it to raise its prices prior to its allegedly bad act. There was no disagreement that price has gone up. And it did so through evading regulatory requirements—certainly not good conduct. And the Supreme Court unanimously held that conduct to be outside the scope of Section 2. The D.C. Circuit apparently agrees with this interpretation, as it held that *NYNEX* applies with equal force to deception-based claims, and concluded that: "an oth-

[9] Negotiated Data Solutions LLC (N-Data), No. 051-0094 (Jan. 23, 2008).

[10] Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. Competition L. & Econ. 469 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1143602.

erwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."[11]

The logic is relatively straightforward. The antitrust laws do not apply to all increases of price. The Sherman Act is not a price regulation statute. The antitrust laws govern the competitive process. The Supreme Court said in *Trinko* that a lawful monopolist is allowed to charge the monopoly price. In *NYNEX*, the Supreme Court held that even if that monopolist raises its price through bad conduct, so long as that bad conduct does not harm the competitive process, it does not violate the antitrust laws. The bad conduct may violate other laws. It may be a fraud problem, it might violate regulatory rules, it may violate all sorts of other areas of law. In the patent context, it might give rise to doctrines like equitable estoppel. But it is not an antitrust problem; antitrust cannot be the hammer for each and every one of the nails that implicate price changes.

We do not need special antitrust rules for patent holdup; much less for patent assertion entities.

The Supreme Court's teachings on that point, including *Trinko* and *NYNEX*, apply with equal force to claims that a breach of contract allowing a patent holder to raise its price violates the Sherman Act. The burden of proof a plaintiff must satisfy in such a case is to demonstrate that the breach resulted in the acquisition of market power that did not exist but for the breach.

That was certainly not the approach the Commission took in *N-Data*. In *N-Data*, the patent holder had agreed to a nominal $1000 royalty rate, and seven years later asked to increase it to FRAND. This was not a FRAND holdup that resulted in a claim for a supra-competitive rate. This was a movement from a $1000 nominal rate that essentially no one paid to a FRAND rate. There was no evidence in the record that it harmed competition and certainly not any evidence that would support a traditional antitrust claim.

In my view, the appropriate way to deal with patent holdup cases is to require what we require for all Section 2 cases. We do not need special antitrust rules for patent holdup; much less for patent assertion entities.[12] The rule is simply that the plaintiff must demonstrate that the conduct results in the acquisition of market power, not merely the ability to extract existing monopoly rents. This is precisely the distinction the D.C. Circuit focused upon in *Rambus*; and I think it was correct to do so. That distinction between extracting lawfully acquired and existing monopoly rents and acquiring by unlawful conduct additional monopoly power is one that has run through Section 2 jurisprudence for quite some time.

To be clear, I have no analytical problem with cases alleging that deception that results in the acquisition of market power violates Section 2. The D.C. Circuit in *Rambus* has laid out a standard that I think is a reasonable one for how a plaintiff would need to prevail on such a claim.

But in the absence of allegations of deception, the attempt to extend the antitrust laws to breach of contract disputes involving patent royalty rate negotiations threatens to convert antitrust law—a body of law designed to govern the competitive process—into one forced into micro-managing negotiations and regulating prices. It is important to note that no federal court since *Rambus* has taken the view that breach alone is an antitrust violation. No single federal court has endorsed that claim, and I think that is consistent with decades of antitrust jurisprudence, holding wishful thinking from those who would like antitrust law to play a greater role in governing patent holdup aside.

ANTITRUST SOURCE: There have been calls from some in the antitrust community, including current and former government officials, for standards development organizations to provide greater

[11] Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008).

[12] Joshua D. Wright & Douglas H. Ginsburg, *Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease?* 79 ANTITRUST L.J. 501 (2014).

clarity to their intellectual property policies to reduce the likelihood of holdup or other concerns. What are your thoughts on these efforts?

JOSHUA WRIGHT: I have written elsewhere that I am a little disappointed in those efforts. Let me explain why. It is certainly the case that a number of agency officials and chief economists in particular have called for standard-setting bodies to "correct" the problem of patent holdup by making SSO contract terms more precise, defining FRAND more clearly, spelling out when patent holders will be able to pursue injunctions and when they will not more clearly, and delineating patent disclosure rules more clearly. The call has been for more complete, more precise contracts, and that this would limit the problem of patent holdup.

The patent holdup literature obviously has its roots in the more general holdup literature beginning with Armen Alchian, Ben Klein, and Oliver Williamson. And it is well understood in that literature that there was a trade-off between additional contractual specificity, which might reduce the probability of holdup in some cases, with the cost of writing those terms, and also that additional terms can sometimes create the potential for holdup. The notion that there are trade-offs that transacting parties face when they consider how complete to make the contract is one that is at the heart of this patent holdup literature but seems to have been ignored when we moved from real property to intellectual property rights in thinking about patent holdup.

Now, that is not to say that patent holdup is not a problem. Holdup can be a problem. The economic forces underlying opportunism and holdup are real. But what the holdup literature from Alchian, Klein, and Williamson taught primarily was how transacting parties respond to the threat of holdup by designing a contract to minimize its incidence. Transacting parties have the incentives to avoid holdup, and they design contracts to minimize that probability. Now, sometimes it happens, and there is an important question about what body of law is most appropriate to deal with that. The answer traditionally has been contract law. In patent holdup cases, contract law or patent law are two bodies of the law available to deal with holdup. However, in a similar vein to the real property context, the standard-setting bodies and their members have every incentive to design contracts to minimize the probability of holdup.

Again, minimizing the probability of holdup does not mean that it is zero. Holdup can happen. It will happen. It will be observed in the wild from time to time, and there is again an important question about whether antitrust has any role to play there. My answer to that question is yes in the case of deception that results in market power. Otherwise, we ought to leave the governance of what amount to contracts between SSO and their members to contract law and in some cases to patent doctrines like equitable estoppel that can be helpful in governing holdup.

Therefore, I think the question of whether patent holdup is a serious problem, and whether antitrust agencies ought to go out to standard-setting bodies and give them free advice on how to write their contracts in order to minimize the probability of holdup is not something that we generally do.

There are many contracts out there, important ones that govern important relationships. But to me it is quite an odd thing for an agency to be going out and giving advice to sophisticated parties on how to design their contracts. Perhaps I would be more comfortable if there were convincing and systematic evidence that the contracts were the result of market failure. But there is not such evidence. This is a question that I took up recently in a paper that I am working on now with my economic advisor, Joanna Tsai.[13]

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[13] Joanna Tsai & Joshua D. Wright, Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts (Working paper, July 18, 2014), *available at* http://ssrn.com/abstract=2467939.

We collected and analyzed actual SSO contracts and how they evolved over time to go out and try to test what happens with these contracts in the wild and asked a number of what we hope are interesting and policy-relevant questions. Is it true per patent holdup theory—or at least the theory that it is a dominating concern in the design of these contracts—that the contracts are unresponsive to market changes? Are they dominated by patent-holders as opposed to implementers? Do the changes all work in favor of the patent-holders over time? What we found thus far is that, as one expects in a competitive ecosystem of diverse players, these contracts change all the time and they change in lots of different directions. Some of the changes are what we might think about as in favor of giving more room to run for patent-holders, some are not. Some are more restrictive and go in the direction of more specificity.

There is still a lot of empirical work to be done in this area to better understand these contracts and how they change over time, but I am befuddled by claims that there has been an empirical demonstration of these contracts as somehow evidence of a market failure. By traditional measures that industrial organization economists would use to think about market failure, I don't think we have any evidence of that of that so it is a little bit puzzling that we have had as many both scholars and antitrust agency officials as active as they have been in asserting that there is a problem here.

I do not think it has been demonstrated. To the contrary, the evidence seems to show that while holdup can occur, like breach of contract occurs in the real world, its incidence is consistent with what we expect to see in a normal competitive marketplace and does not suggest systematic market failure.

ANTITRUST SOURCE: Despite calls by some for greater antitrust scrutiny of patent assertion entities, you have urged restraint and said that so far "there is precious little reliable empirical data on the costs PAEs impose upon practicing entities."[14] What are the key things you would like to learn from the FTC's 6(b) study of patent assertion entities and how might these affect your views on the merits of antitrust enforcement in this area?[15]

JOSHUA WRIGHT: First, let me say, I think that the use of 6(b) in the patent assertion entity area is precisely the type of activity that the FTC is well suited to do, to contribute an evidence-based antitrust policy. We have the expertise in the building in terms of both analyzing the data and understanding the competition problems to understand patent assertion activity. As I have mentioned a couple of times, the empirical literature involving competition and IP rights is thin. I think it is an important and valuable activity for the agency to understand and describe what's going on in some of these spaces, including patent assertion, and one that I certainly support and think is worthy of the agency's time and resources.

What I hope to learn, I think at this stage, is what the relevant research questions are. I also want to be realistic about what can be demonstrated and what cannot be given existing data. I think that there is some temptation in the empirical patent literature to go after only the $64,000

[14] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities? (Apr. 17, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/what-role-should-antitrust-play-regulating-activities-patent-assertion-entities/130417paespeech.pdf.

[15] Press Release, Fed. Trade Comm'n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact.

questions. Can I come up with a testable hypothesis that will tell me once and for all whether PAEs are good or bad? Are we for them or against them?

That is not a productive approach to economic research. At a minimum, it leaves the policy debate in a state of play with an unacceptably high ratio of theory to data. PAEs are diverse. In some circles, even the definition of a PAE cannot be agreed upon. But even if we agree upon one, what we are talking about and we really should be talking about is not a business model or the merits of a business model. That is not what antitrust agencies do. We think about conduct and we think about whether the conduct results in or has implications for market power. And here I think there is some attraction to the idea of research questions that either declare PAEs meritorious and worthy of our applause or condemn them, in large part because of the growing IP skepticism in the ranks of the legal academy. I do not think we have enough evidence to shed light upon the question of whether PAEs increase or decrease welfare.

And for that reason, some of the literature that is out there attempts to address whether the win rate in litigation for PAEs is too high or too low without identifying a useful benchmark. Other stock market event studies show not much more than that litigation is really expensive, but they offer sweeping policy conclusions about the inefficiency of enforcing property rights without considering the benefits of the same. Some also have other methodological issues. But the main point is that much of this literature, in my view, is not focused on the right questions.

I think the right approach—and the approach that the FTC is taking—with the 6(b) study is a more incremental and modest one. That is, there is not much understanding at the descriptive level of what is going on with patent assertion behavior. The study will focus upon questions such as: Are PAEs different from other NPEs in terms of assertion activity? How are they different and when are they different? What types of patents generate those differences? I think there are important descriptive questions, including how they are organized, and it is helpful to have questions like these answered to get a descriptive feel for these entities and their activities.

Our job is to put real and useful information to inform the policy debate into the world, and I think that is an approach that we are taking, and I think it is the right approach.

What I would like to see is a reliable understanding of the universe in which PAEs operate and the sorts of activities they engage in. Once that is described and analyzed, there might be further research that can take next steps and discuss welfare implications and the like. But, I think the first step is to do something modest, but do it really well. And I expect that that is what we will have.

ANTITRUST SOURCE: For many years, there have been concerns about diverging standards and procedures for the FTC and DOJ to obtain an injunction against an unconsummated merger. Do you agree with the calls for applying the traditional equities test to the FTC and barring the FTC from pursuing administrative litigation in HSR merger cases?

JOSHUA WRIGHT: I do agree and support the general attempt to equalize the standards for PIs between the FTC and DOJ. Let me say, I recognize there are some potential benefits to Part III merger litigation. Specifically, that approach offers the Commission the opportunity to employ its expertise to write an opinion to influence the court of appeals and inform antitrust jurisprudence more generally. I certainly believe that there is some merit in that approach and I readily recognize that limiting the agency's ability to proceed in Part III merger cases comes at the cost of restricting its ability to influence the development of law in that particular manner.

I support efforts to equalize the PI standards nonetheless. One reason is that there are many other ways than writing the opinion in Part III merger cases for the agency to influence the law. The competition agencies, for example, have been very successful with guidelines. The FTC and DOJ have also been very successful in taking advantage of amicus opportunities in federal district court, circuit courts of appeal, and at the Supreme Court. We would have to rely more heavily upon those methods of influencing the law rather than having the Commission write its own opinion under many of the proposals to equalize PI standards, including the SMARTER Act.[16] Those alternatives mitigate the losses from restricting the Commission's ability to write opinions in Part III.

On the other hand, I think there are real and substantial gains from eliminating even the perception that exists that the standard that might be applied to one's merger is different depending on whether one draws the FTC or DOJ. It is simply a perception that should not be allowed to continue to exist, much less to influence merger enforcement and even the decision to merge. These recent efforts in particular are an approach to both recognizing that problem, as did the Antitrust Modernization Commission, and to doing something about it.

ANTITRUST SOURCE: In the recent *Ardagh* case, you issued a dissenting statement lamenting that receiving credit for efficiencies in merger review is often difficult at the FTC and asserting that the burden of proof for establishing efficiencies should be in parity with the burden for establishing anticompetitive effects.[17] In your view, what standard is the FTC applying today when evaluating merger efficiency claims and how does that differ from the optimal standard?

JOSHUA WRIGHT: I want to focus upon what I viewed to be a disparity in the standards applied by the Commission in evaluating competitive effects evidence. The crux of the dissent is the concern that it appears the Commission applies different standards evaluating anticompetitive effects evidence than it does when evaluating evidence of efficiencies. In other words, the Commission appeared to tolerate much greater uncertainty in crediting economic evidence supporting the plaintiff's prima facie demonstration that a merger substantially lessens competition while holding evidence tending to show efficiencies to a greater standard of precision.

The central problem is that in an effects-based antitrust regime, economic sense requires parity between the standard being applied by the Commission to credit economic evidence establishing likely anticompetitive effects on the one hand and efficiencies on the other.

In *Ardagh*, the Commission alleged in our complaint in federal court that the cognizable efficiencies associated with the proposed merger were approximately zero. Based upon my own review of the evidence at the time we voted out that complaint, I found that allegation totally implausible. While I concluded that there was some plausible evidence of unilateral anticompetitive effects that should be credited given the economic evidence, the evidence also demonstrated that the cognizable efficiencies passed on to consumers significantly outweighed any evidence of anticompetitive effects by a ratio of six-to-one. To be clear, it is not unreasonable to disagree about the magnitudes of harm or efficiencies estimates. I have no quarrel with that sort of disagreement, which is standard fare in antitrust analysis and economics generally. Estimates and analyses are rough and come with standard errors and methodological caveats for a reason. However, in this particular instance, given my own review of the evidence, I found it fairly implausible that one could agree that there was reason to believe the proposed transaction would gen-

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16 Standard Merger and Acquisition Reviews through Equal Rules (SMARTER) Act of 2014.

17 Dissenting Statement of Commissioner Joshua D. Wright, *In re* Ardagh Group S.A., FTC File No. 131-0087 (Apr. 11, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/298101/140411ardaghstmt.pdf.

erate approximately zero dollars in efficiencies unless one were applying a different standard to efficiencies evidence than one applied to evidence establishing likely anticompetitive effects. In my view, the application of asymmetrical standards was the only way to reconcile such stark differences in analyses and I remain of that view.

Ardagh aside, that analysis raises an important general issue worthy of serious discussion: the lack of clear guidance on how the agency thinks about and should think about efficiencies analysis in practice. I cite in the dissent evidence from an excellent paper by Malcolm Coate and Andrew Heimert, which highlights the substantial disagreement and differences within the agency on when to credit efficiencies.[18] For example, there are considerable differences between when the Bureau of Economics and the Bureau of Competition are willing to credit efficiencies as cognizable and verifiable.

[T]he agencies ought to give equal weight to out-of-market efficiencies that are cognizable and otherwise satisfy all of the requirements of the Merger Guidelines.

Let me repeat that it has been my experience that agency staff, both lawyers and economists, do think about efficiencies seriously. However, when one observes such significant disagreement on the magnitudes of efficiencies—disagreement among Commissioners or disagreement between BC and BE staff—or when one observes fundamental disagreements concerning the evidence required to conclude a proposed efficiency is cognizable under the Guidelines, it suggests to me that we can do better in terms of providing some contours and some guidance on what efficiencies mean in practice.

I hope the notion that there should be symmetrical burdens in analyzing all types of competitive effects evidence is an uncontroversial one for those who support economically rigorous effects-based antitrust regimes.

ANTITRUST SOURCE: To stay on the topic of efficiencies a bit longer, you have also argued in favor of giving more consideration to out-of-market efficiencies and fixed cost reductions in merger review. In your view, when should the agencies give consideration to these and how much weight should they be given compared to incremental cost reductions in the relevant market?

JOSHUA WRIGHT: I have written that the agencies ought to give equal weight to out-of-market efficiencies that are cognizable and otherwise satisfy all of the requirements of the Merger Guidelines. There are jurisdictions around the world—such as Germany and Canada—that take this approach.

One of the useful and positive contributions of the 2010 Merger Guidelines is a clear movement away from arbitrary non-economic distinctions and towards competitive effects. Downplaying market definition and the role of inferring competitive effects from market structure and instead placing greater emphasis upon effects is a move toward a more sophisticated, evidence-based approach. Getting away from predicting competitive effects by counting the number of firms with our fingers and instead relying on more modern economic tools is a marked improvement. I think the overall contribution of the 2010 Guidelines is to move incrementally toward a true effects-based regime.

However, most if not all of the incremental changes in the 2010 Merger Guidelines were focused upon sharpening theories of competitive harm and better understanding how to identify

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[18] Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission: 1997–2007* (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf.

the potential anticompetitive consequences of mergers. For example, the 2010 Merger Guidelines updated the guidance provided by the agency on how it approaches unilateral effects. The new Guidelines don't really touch, much less update or refresh in any significant way, agency thinking with respect to efficiencies or entry. The supply side was left alone, or maybe left behind, and I think there remains significant work to be done there.

The case for crediting out-of-market efficiencies is considerably stronger under the new Guidelines. The 2010 Merger Guidelines embrace narrower markets with circles drawn around where we are able to identify unilateral price effects. There is nothing wrong with this approach from an economic perspective. But, on the other hand, there is no reason to think that the efficiencies generated by a merger must be, or are even likely to be, passed on to consumers in the same narrowly drawn market where the Commission alleges anticompetitive effects. Indeed, as markets are drawn more narrowly, the likelihood that efficiencies become "out-of-market" increases, and an agency concerned with the overall consumer welfare implications of a proposed transaction needs to respond to that possibility. When combined with the arbitrary rule in *Philadelphia National Bank* prohibiting counting benefits outside of the relevant market, the modern approach inadvertently puts a thumb on the scale against mergers. The approach also makes arbitrary choices about which consumers' welfare to protect and which to ignore.

The problem can be remedied by rejecting the *Philadelphia National Bank* rule. Now, the Supreme Court has to do that. But the agency can do more than a footnote considering the possibility of out-of-market efficiencies that are "inextricably linked." There is no economic reason to exclude benefits the agency considers cognizable and otherwise satisfy the requirements of the 2010 Merger Guidelines simply because the consumers reaping those benefits fall outside arbitrarily drawn markets. We have no reason to favor one set of consumers over another as an agency and no basis in economics to do so. We as an agency should not be in the business of saying, this consumer counts and that one does not because one falls inside a SSNIP test and the other does not. Our mission is to protect all of the consumers, not those that fall within an arbitrary SSNIP.

Many jurisdictions around the world recognize that in a variety of ways. I think one intermediate step that could be taken and one that I write about in a paper with my adviser, Jan Rybnicek, is loosening the "inextricably linked" language in the Guidelines on the treatment of out-of-market efficiencies.[19] There are a number of ways to do this that we discuss in that article, but I think that would be a reasonable first step.

To change subjects a bit, another area in efficiencies analysis that should be modified is the treatment of fixed cost efficiencies. There is considerable economic evidence that fixed costs do in fact influence pricing, at least under some conditions, and should be taken more seriously and certainly not reflexively rejected. We could easily remedy this problem with an analytical update to the 2010 Merger Guidelines that covers the supply-side.

ANTITRUST SOURCE: In the FTC's review of the Google/DoubleClick transaction, there were calls for incorporating privacy considerations into merger analysis. The FTC declined to do so,[20] yet

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[19] Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 William E. Kovacic: An Antitrust Tribute—Liber Amicorum (2014) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270.

[20] Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (2007), *available at* http://www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick.

there have been renewed calls on the FTC to take privacy and data security into consideration in merger analysis, for example in the Facebook/WhatsApp merger. Are there circumstances where non-competition concerns, such as privacy, should play a role in merger analysis?

JOSHUA WRIGHT: No. I think that there is a great danger when we allow competition law to be unmoored from its relatively narrow focus upon consumer welfare. It is the connection between the law and consumer welfare that allows antitrust to harness the power of economic theory and empirical methodologies. All of the gains that antitrust law and policy as a body have earned over the past fifty or sixty years have been from becoming more closely tethered to industrial organization economics, more closely integrating economic thought in the law, and in agency discretion and decision-making. I think that the tight link between the consumer welfare standard and antitrust law is what has allowed such remarkable improvements in what effectively amounts to a body of common law.

I think that there is a great danger when we allow competition law to be unmoored from its relatively narrow focus upon consumer welfare.

Calls to incorporate non-economic concerns into antitrust analysis, I think, threaten to undo some, if not all, of that progress. Antitrust law and enforcement in the United States has some experience with trying to incorporate various non-economic concerns, including the welfare of small dealers and worthy men and so forth.[21] The results of the experiment were not good for consumers and did not generate sound antitrust policy. It is widely understood and recognized why that is the case.[22]

Now, to be clear, I do not mean to say that privacy has no place in antitrust at all. In some cases, we can think about privacy as a form of non-price competition. Some of the calls for incorporating privacy and related concerns into merger review, I think, fall into that category. If there is a coherent theory on how or why a merger changes incentives to compete on that particular non-price margin, there is no reason that standard economic tools cannot incorporate that issue. On the other hand, when advocates use antitrust law to achieve policy goals without a coherent antitrust-relevant theory about why a particular merger will impact privacy, those arguments should be rejected out of hand.

In any event, the most important consideration in evaluating any argument about a merger's impact on a non-economic concern—whether the concern is privacy, protecting small business, a company being "too-big-to-fail," or any other type of non-consumer welfare based concern—is to keep that analytical framework focused upon economics, competition, and consumer welfare. We have developed analytical tools to assess a merger's likely impact upon consumer welfare, and our success rate—blocking mergers that threaten to harm consumers and allowing those that do not—is much better than it was in the '60s. Those gains have provided substantial benefits for consumers and the antitrust community, and the agencies in particular ought to be very careful not to give up an inch of that hard-fought territory.

ANTITRUST SOURCE: Under the FTC Act, the Commission can issue a complaint when it has "reason to believe" that a violation has occurred and that a proceeding would be in the public interest.[23] What does this standard mean to you and what role does prosecutorial discretion play?

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[21] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men").

[22] Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2416 (2013) (observing widespread agreement that antitrust analysis considering non-economic factors practiced prior to the 1970s is considered a failure).

[23] 15 U.S.C. § 45(b).

JOSHUA WRIGHT: The "public interest" prong of the standard does a lot of work when I am thinking about individual cases and enforcement decisions. I perceive the "reason to believe" prong of the standard in terms of a probabilistic assessment to require something less than more-likely-than-not that the conduct or merger will violate the law. However, when I am thinking about whether to vote for a complaint in a specific case, the public interest prong—the other part of the 45(b) standard that I equate with consumer welfare—is something to which I, as an economist, give great weight.

My own view is that I need to be fairly confident to have reason to believe that an agency action is in the public interest. I do have to have some real confidence that the proposed course of action is going to improve consumer welfare relative to the status quo and certainly that it will not make consumers worse off. A faithful application of that approach means that monopolization cases should face a higher bar than cartel cases because the latter involve a lesser risk that the enforcement action will generate false positives that will harm consumers.

ANTITRUST SOURCE: Before you became a commissioner, you claimed that "the culture of consent," i.e., reliance on the consent decree as the principal means of enforcement, has led to a number of adverse consequences for settling parties, consumers, and the antitrust agencies themselves.[24] You alluded to this concern in your *Nielsen* dissent,[25] as well as in one of your prior responses. Could you expand on your concerns and explain how you would address this problem without diminishing the agency's ability to obtain relief in as many cases as it now can through the use of consent decrees?

JOSHUA WRIGHT: It is certainly the case that both antitrust agencies—but I will just talk about the FTC—increasingly rely upon the consent process. Obviously, what the agency is able to achieve in a consent decree is the product of a bilateral negotiation between the firm and the agency. This occurs in the absence of litigated cases but yet can nevertheless result in the creation of a de facto standard. That is one potential issue with excessive reliance on consents.

To give some examples, we have consent decrees at the FTC that suggest that the assertion of an injunction by a standard essential patent holder alone violates Section 5 of the FTC Act as an unfair method of competition. There is no federal court that has endorsed this theory as a violation of the traditional antitrust laws or as an unfair method of competition. The settlement with Intel adopts a discount-attribution pricing rule. The settlement certainly raises questions about what the agency thinks is the appropriate standard for evaluating loyalty or bundled discounts.

We have consent decrees that occasionally incorporate additional relief even when there is no evidence demonstrating harm of the type the relief concerns. I believe the Commission's recent consent in *Graco* is a good example of this phenomenon.[26] There, we obtained a consent decree in a consummated merger case. I voted for the action because of convincing evidence of a Clayton Act violation. Graco employed exclusive dealing contracts, but we did not allege that the exclusive dealing contracts violated the antitrust laws or Section 5. However, as fencing-in relief

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[24] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—LIBER AMICORUM 177, 179–80 (2012).

[25] Dissenting Statement of Commissioner Joshua D. Wright at 6, In the Matter of Nielsen Holdings N.V. and Arbitron Inc., FTC File No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitron-jdwstmt.pdf.

[26] Decision and Order, Graco Inc., FTC File No. 101-0215 (Apr. 18, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracodo.pdf.

for the consummated merger, the consent included prohibitions on exclusive dealing and loyalty discounts despite there being no evidence that the firm had employed either of those tactics to anticompetitive ends. When an FTC settlement bans a form of discounting as standard injunctive relief in a merger case without convincing evidence that the discounts themselves were a competitive problem, it raises significant concerns.

In this case and others, policy is made through consent decrees that are individually negotiated with firms. I think two ways to minimize the cost of the culture of consent influencing agency decisions in a negative way is, first, for commissioners themselves to be more active in their review of consents, and second, for the Bureau of Economics, which is trained to think long and hard about the incentive effects of orders, to be involved in the consent process earlier.

Economists can play a significant role in evaluating proposed consents but are often included too late in the process and sometimes even after the consent is signed, sealed, delivered, and ready for Commission vote. Economists are trained to evaluate whether the consent order is in the public interest, how it will impact incentives, and how the marketplace might react to consents.

There are, of course, as you alluded to in the question, tradeoffs and costs associated with such an approach, such as potentially decreasing the speed at which the agency works. That is important, too. But these things need to be balanced. A third approach would be judicial review or some sort of judicial approval mechanism for agency consents.

A lodestar principle of antitrust law is that when presented with novel conduct we do not fully understand, we decline to use truncated rules or truncated analysis. Instead we use the rule of reason and develop economic learning based upon experience.

ANTITRUST SOURCE: In the aftermath of the *Actavis* decision,[27] how should the FTC proceed in addressing "reverse payment" settlements and, in particular, what features of a settlement strike you as particularly problematic?

JOSHUA WRIGHT: I think *Actavis* is an important decision and I think very much correct in evaluating reverse payment settlement agreements under the rule of reason. I think one of the important benefits of evaluating conduct under the rule of reason—especially conduct the competitive effects of which are not exhaustively understood—is that the rule of reason becomes a place where we learn about those competitive effects over time. A lodestar principle of antitrust law is that when presented with novel conduct we do not fully understand, we decline to use truncated rules or truncated analysis. Instead we use the rule of reason and develop economic learning based upon experience. I think that is what is warranted here. I certainly support efforts of the agency to challenge anticompetitive reverse settlements within the rule of reason framework.

You asked what sorts of considerations ought to be a part of that rule of reason analysis. In *Actavis*, the Supreme Court certainly focuses intensely upon the size of the reverse payment. Indeed, some commentators have suggested that evidence of a payment larger than anticipated litigation expenditures should entitle the plaintiff to a presumption of illegality, shifting the burden to the defendant to otherwise justify the settlement.[28] This approach contemplates the post-*Actavis* rule of reason taking the form of a quick look analysis.

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[27] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[28] Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating* Actavis, ANTITRUST, Fall 2013, at 16. *But see* Barry C. Harris, Kevin M. Murphy, Robert D. Willig & Matthew B. Wright, *Activating* Actavis*: A More Complete Story*, ANTITRUST, Spring 2014, at 83 (advocating more traditional approach under the rule of reason that considers various factors in addition to anticipated litigation costs).

I have written elsewhere[29] that I am skeptical the Court's analysis leaves room for the quick look approach. The Court was invited to and rejected the opportunity to endorse a quick look for reverse payment cases. The Supreme Court chose the rule of reason. I think the idea that the Supreme Court was saying rule of reason while winking and meaning "quick look if it is a really big payment" is hard to square with the language in the opinion.[30]

That said, what lower courts do with *Actavis* remains to be seen. The Court certainly talks a great deal about the size of the payment. That to me begs the question: the size of the payment relative to what? Is the appropriate benchmark litigation costs? If the payment is greater than litigation costs, then the size of the payment would be a factor that militates in favor of liability. Others have suggested other types of competitive benchmarks. I think there is now brewing an important economic debate over what inferences one can draw from the size of the payment. The inferences drawn about likely competitive effects in various models of reverse payments depend upon a number of assumptions about risk preferences, behavior, and the number of entrants. There are some very smart economists working on the problem and I think there is substantial work to be done in this area over the theoretical implications both with respect to what inferences can be confidently drawn from the size of any reverse payment and with respect to analyzing the welfare effects of reverse payment settlements more generally, including potential efficiency justifications.

ANTITRUST SOURCE: The Roberts Court has taken a number of antitrust cases. What do you think accounts for the number of antitrust cases the Court has heard and what are your key takeaways from the Roberts Court's decisions?

JOSHUA WRIGHT: I think more than anything the frequency with which the Roberts Court has taken antitrust cases has more to do with the sheer number of Supreme Court Justices who are interested in antitrust. All of the former D.C. Circuit judges who are now Supreme Court Justices have written significant antitrust opinions.

Justice Thomas wrote an important merger decision when he was on the D.C. Circuit. Justice Roberts had some antitrust experience. Justice Alito has antitrust opinions. Justice Sotomayor has also written some important antitrust decisions on the Second Circuit. And Justice Breyer, of course, has written on antitrust both as a scholar and as a circuit judge. I think the activity level reflects the sheer breadth of interest across the political spectrum.

I think the cases have also been what one might describe as picking off relatively low hanging fruit. You have mostly super-majority or unanimous decisions with the exception of *Leegin*. And I think *Leegin*, which many commentators have pointed out, was a five-to-four decision not because of a robust debate about the competitive effects of resale price maintenance, but rather a debate about the power of precedent as it relates to Supreme Court decisions.

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[29] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, FTC v. Actavis and the Future of Reverse Payment Cases, Remarks at the Concurrences Journal Annual Dinner (Sept. 26, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc-v.actavis-future-reverse-payment-cases/130926actavis.pdf.

[30] *Actavis*, 133 S. Ct. at 2337 (rejecting quick look approach "because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.").

In terms of work that remains for the Supreme Court, I do believe the Supreme Court will eventually overturn the quasi-per se rule against tying that the Court lukewarmly affirmed in *Jefferson Parish*. That is one of the easy outdated rules that remains in the law. And I think the Supreme Court will eventually get to a merger case. There are a lot of things to clean up at the Supreme Court regarding merger doctrine. I think overturning the structural presumption in *Philadelphia National Bank* should be first on the Supreme Court's list if its appetite for picking low-hanging fruit persists.

ANTITRUST SOURCE: In May, the FTC released a study of the data broker industry that called on Congress to enact legislation to enable consumers to learn more about the activities of data brokers and to obtain access to information about them held by these entities.[31] Given the Commission's finding that consumers benefit from many data broker activities and that many of the concerns identified in the Commission's report do not appear to have ever occurred, why is legislation needed?

I think overturning the structural presumption in Philadelphia National Bank *should be first on the Supreme Court's list if its appetite for picking low-hanging fruit persists.*

JOSHUA WRIGHT: It's a good question. To start, the data report itself—much like our discussion of the 6(b) study of patent assertion entities—is a valuable exercise in getting descriptive data about the industry out into the world. That is certainly the reason I voted for issuing their report and I think the most important contribution that it makes. I understand there is a lot of interest in the recommendations that appeared at the back of the report.

My own view is that the report is certainly correct to point out that there are many benefits from the activity of data brokers. There is no real attempt to estimate either the incidence or the value of those activities or the incidence or value of the potential concerns. Again, many of which you correctly point out are raised as hypotheticals in the report.

I do not think the report should be read as offering an authoritative view on how frequently data broker activity generates costs or benefits or the relative magnitudes of the costs and benefits associated with data brokers. The staff did not ask the questions or do the work to be able to opine confidently about those issues. That is not a criticism. It was simply not the goal of the study. That said, staff were able to obtain some important information about what sorts of activities are going on in the industry and that is a positive contribution.

In terms of the legislative recommendations, a careful reader of the report will see that in the footnotes I have divorced myself from a number of recommendations, almost all of the recommendations that are outside of the disclosure context.[32] I think one thing this report does successfully demonstrate is that consumers are generally and oftentimes unaware of how their data is being used, or sold, or to what uses it is being put when they agree to engage in commercial relationships. I think it is a relatively innocuous recommendation to suggest that Congress consider legislation that would result in disclosure and allow consumers to vote with their feet. The recommendations that I support all fall into that category.

The majority of the Commission supported a number of other recommendations, ranging from requiring a centralized Web portal that would provide for consumer access to data collected as

[31] Fed. Trade Comm'n, Data Brokers: A Call for Transparency and Accountability (May 2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[32] *See id.* at nn. 85, 88, 96, 105.

well as an opt-out mechanism to requiring consumer-facing entities to provide notice that they share consumer data with data brokers and provide consumers with the ability to opt out.[33] For the majority of these other recommendations, I simply do not think that we have any evidence that the benefits from Congress adopting those recommendations would exceed the costs. It is not that I think we did the work and I take a different view than the majority of the Commission. I just do not think that we collected the data that would make me comfortable with those sorts of recommendations.

I would need to have some confidence based on evidence, especially about an area where evidence is scarce. I'm not comfortable relying on my priors about these activities, especially when confronted by something new that could be beneficial. Before we make recommendations to Congress, I would like to have evidence sufficient to show, or at least to believe, that the benefit to consumers we represent as an agency from these recommendations exceed their costs. I do not see anything in the report that would allow me to support those. The danger would be that we recommend actions that either chill some of the beneficial activity the data brokers engage in or just impose compliance costs that we all recognize get passed on to consumers.

So, before we impose that sort of tax we ought to know what we are getting in return for it. That would be my approach, not just with the data broker report but with any recommendations made without that sort of evidence.

ANTITRUST SOURCE: The FTC has been very active in the area of data security using its Section 5 authority. In light of concerns that have been raised by some in the business community about the lack of standards, would you support more specific data security regulations or a statement regarding the Commission's use of Section 5 in data security matters?

JOSHUA WRIGHT: I am a fan of offering guidance in areas where it can be useful in spelling out for businesses what they can and cannot do, what activities will or will not run afoul of Section 5. Where there is demand for that, I think that the agency seriously ought to consider offering precisely that sort of guidance. There is a body of agency-negotiated data security settlements as well as the Commission's Policy Statement on Unfairness,[34] which articulate cost-benefit and negligence-style frameworks that I think are certainly sufficient to provide information to businesses about how the agency views their data security obligations. That said, I think it may well be a useful and valuable exercise, not just for the business community but also for the agency, to synthesize and offer high-level principles that would provide additional guidance. That is something that I would certainly be in favor of the agency considering and taking on.

ANTITRUST SOURCE: On January 7, 2014, the Commission announced five settlements with companies involving allegations of deceptive marketing of nutritional and dietary supplements. The agreements require the respondents to conduct two well-controlled human clinical trials before making similar claims in the future. You issued a separate statement calling for "the Commission to explore more fully whether the articulation and scope of injunctive relief in these and similar settlements strikes the right balance between deterring deceptive advertising and preserving for con-

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[33] *Id.* at viii, 50–53.

[34] FTC Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984).

sumers the benefits of truthful claims."[35] Could you expand upon why you feel additional consideration by the Commission is needed in this area?

JOSHUA WRIGHT: When I joined the Commission this was an issue that was somewhat new to me, but coming from an economics background has sensitized me to the idea that a reflexive approach in requiring two RCTs as fencing-in relief might not always be in the best interest of consumers.[36] The reasons are two-fold. One reason is that we normally think of fencing-in relief as remedial relief that not only will stop a defendant who violated the law from again engaging in precisely the same activity, but also will prevent that defendant from engaging in similar activity related to those law violations. Fencing-in relief prevents them from slightly modifying their conduct and easily evading the provisions of the order.

However, remedial relief that requires that the defendant be in possession of a second RCT before that defendant can make a truthful claim in the future does more than just prevent the defendant from engaging in illegal behavior—it may actually harm consumers. For example, if the defendant wants to make a claim but cannot until he has the second RCT done, the delay between the first and second RCT also harms the consumer who is not getting the truthful information as soon as it is available. In some instances, whether in the first instance or after an order is imposed, competent and reliable scientific evidence will necessarily require more than one RCT. However, that is not always the case. So, we have to be really careful about imposing that requirement in orders.

My view on this has evolved over time and while I am now generally comfortable with some form of fencing-in relief for a defendant that has engaged in deceptive advertising, I would disagree that the appropriate way to accomplish this is by "counting" the number of RCTs.

This brings me to my second point. Counting the number of RCTs is not the best way to look at the body of evidence. Not all RCTs are created equal. There are very good ones, but there are ones that are not so good. Counting them is a pretty noisy signal of the quality of substantiation. Rather than thinking about it in terms of just numbers, I think that—informed by expert opinion as to the amount and quality of evidence necessary—we ought to instead articulate remedial relief language flexible enough to consider the quality of all the evidence, how that evidence fits together and whether it is adequate to substantiate the claim going forward.

Finally, we should also take into account the facts of each particular case. If, for example, we are concerned, as we sometimes are, that the defendants have engaged in completely fraudulent activities, we should require fencing-in relief that is more directly tailored to solving that problem. In particularly egregious cases, the Commission should consider remedial relief such as bans. In other cases, for example where defendants have fabricated study data, the remedial relief should be crafted to prevent the defendants from engaging in that type of particular activity. These are ways to more directly get at the conduct that is at the root of the illegal activity. ●

[35] Statement of Commissioner Joshua D. Wright, In the Matter of GeneLink, Inc. (Jan. 7, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140107loccitanestatementwright.pdf.

[36] *See, e.g.*, Opinion of the Commission at 50–52, POM Wonderful LLC, No. 9344 (Jan. 10, 2013), *available at* http://www.ftc.gov/system/files/documents/public_statements/568951/130116pomopinion.pdf.