FTC:WATCH

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In this issue

Drip, drip, drip....Those charges really add up....

We've all been there: You make reservations for a rental car but when you arrive at the airport to pick it up, the bill is not what you expected. Various charges are added, including a fee for the airport shuttle to pick up the car, an airport "concession fee," and a fee for allowing your child, who is not yet 25, to drive. You already had gotten a dose of such "add-ons" from the airline that had hit you up for an extra $25 for each checked bag and a charge for even a crummy snack during the flight.

All of these added prices that are not apparent when you first purchase a product or service have come to be known as "drip pricing." Federal Trade Commission chairman Jon Leibowitz recently vowed that his agency has the tools to rein in this behavior and to protect consumers from a practice that is so ubiquitous that, he said, almost all of us have dealt with it.

Leibowitz kicked off a recent all-day conference devoted to the economics of drip pricing by noting that it is not confined to airlines, but also is used by Internet vendors, telecommunications companies, banks and other financial institutions and plenty of other businesses. The chairman's determination to corral this practice is understandable since, on its face, it looks like a scheme to lure potential customers into making purchases only to nail them with more charges once they have decided they really have to have the product.

Despite Leibowitz's comments, by the end of the conference on May 21, the need for the FTC to issue regulations to curb this behavior was anything but clear. The only consensus of several panels of economists was that more empirical study and data must be assembled before the agency acts. Much depends on the context in which drip pricing is used, whether there is competition for the particular product at issue and whether the purchasers are sophisticated consumers or not.

In some cases, for example, a firm that engages in drip pricing—say that airline that charges baggage fees—might prompt a competitor to offer services without such add-on charges, thereby giving consumers a choice. In other cases, the line between legitimate come-ons by a firm and clear deception is simply not clear-cut. And, some economists worried that FTC action actually might induce some firms to exit a business altogether and leave consumers with fewer choices.

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By contrast with those cautionary notes, Leibowitz seemed ready to act against behavior that he sees as not-so-thinly-disguised moves to rip people off. He noted that the FTC already had entered into consent decrees with several rental car companies for failing to disclose fees. One case was prompted when Leibowitz, himself, was a victim of drip pricing when he discovered unexpected charges on his rental car bill.

About five years ago, Budget Rent A Car System Inc. settled charges that it had failed to disclose a surcharge on consumers who drove fewer than 75 miles. "If consumers had known about these charges in advance, they could have chosen, and they might have chosen, a different rental car company and paid less," Leibowitz said.

Notwithstanding the chairman's bad experience, the economists were full of reasons to be cautious, even as they acknowledged how odious the behavior can be. Michael Baye, a business professor at Indiana University and former director of the FTC's Bureau of Economics, said, "When you first start thinking about drip pricing, the knee jerk reaction that I had initially was, 'Gee, drip pricing presumably hides information, raises search costs for consumers and that can never be a good thing."

But after examining the issue further, he is not so sure. "I don't think economic theory provides a clear view of whether drip pricing is good, bad or indifferent for consumers. I think it really depends upon the environment you are looking at," he concluded.

Baye noted that different firms have different costs and therefore different optimal prices. There is a check in the market by those that try to rip off customers. Competing firms charge less because they have lower marginal costs—and consumers benefit from choice.

In an interview with *FTC:WATCH*, Baye cautioned that a one-size fits all regulatory response is not best. "Am I willing to concede that there are environments where drip pricing might reduce competition and adversely affect consumers," he asked rhetorically. "You bet. But are there [other] environments where it is benign or where the [regulatory] policy itself might do more harm than good? You bet."

Michael Salinger, professor of management and economics at the Boston University School of Management and also a former director of the FTC's Bureau of Economics, added, "A lot of the practices we are talking about are pretty standard marketing practices. One of the challenges in formulating policy is that all marketing is going to be a little bit deceptive."

Salinger recalled an old joke from his earlier stint at the FTC in the 1980s. "We joked back then that if you saw prices going up, it was monopolization; if you saw prices being stable, it was price fixing; and if prices were going down, it was predation," he said. "So that there wasn't anything you could do without getting into trouble. And I think the drip pricing problem, there is a similar issue with it."

While no economist disputed that there is offensive behavior that is designed to deceive consumers and should be addressed, the conundrum is, as Baye put it in the interview, "separating the wheat from the chaff."

Or as Salinger added, policymakers "are just dying for the economists to say, `Look economic theory says this is where you intervene and this is where you don't intervene.'" But he noted that the economists at the conference could not provide "absolute clear guidance as to when it is a problem and when it is not."

However, a number of speakers did note a possible distinction between the add-on charges that would apply to all or virtually all purchasers of a product, and those that were more customized to individual preferences, and therefore more discretionary.

David Laibson, a Harvard University economics professor, spoke of the need for far more empirical work before the FTC acts. "I don't think we are going to come up with rules in general…for drip pricing in the next nine years, certainly not in the next nine months," added. "In the short run, we need a lot of measurement, market by market, [to] begin to learn at a very micro level, what's happening and what kinds of interventions do and don't work."

Laibson, in an interview with *FTC:WATCH*, emphasized the need for such study. "Is there evidence that some kind of shrouding [of prices] exists and is distorting consumer decisions? Absolutely," he said. "Is it clear what the regulatory response should be? No. Is this a good time to start engaging in various research projects that explore both the nature of the shrouding and the scope for policy that responds? Absolutely."

"I'm generally cautious," Laibson added. "My personal experience is that every time I confront a problem and I think I know how to solve it, I explore the solution in some pilot study and I am always surprised at how inefficacious my solution was. So I am pretty hesitant to jump into anything headfirst."

—Kirk Victor

REFERENCE: http://www.ftc.gov/be/workshops/drippricing/index.shtml

Roll Corp. spitting fruit juice in the eye of the FTC

The ink was barely dry on the 443-page ruling issued on May 17 by D. Michael Chappell, chief administrative law judge, when the makers of the pomegranate drink that was the subject of the complaint took to the internet to crow that they had won.

Roll Global, parent company of POM Wonderful LLC, went on the offense in support of their product, a chilled purple-colored beverage sold in a suggestive hour-glass-shaped bottle.

The company blasted out press releases to the newswires, pulling out quotes from pages 282, 103 and 188 they said substantiated their claims that Judge Chappell had ruled in their favor and had many favorable things to say about pomegranate juice. In an accompanying press release, they repeated some of the same claims they had been making about how pomegranate juice—and in particular, their product, POM Wonderful, supports prostate health and has a beneficial effect upon erectile tissue.

"We wholeheartedly believe in the power of the pomegranate, and believe our customers do, too," the company said in a statement.

Then, over the Memorial Day weekend, people who googled the words "Federal Trade Commission," or "FTC" for one reason or another found pop-up advertisements quickly appearing on their screens, directing them to a new website entitled pomtruth.: "Pom vs FTC! You be the judge!"

The website included a link to the 335-page ruling, although not the 108-page appendix, which included images of dozens of POM ads touting the health benefits of the product.

And those who took the time to read the main ruling might have noticed that in fact, Judge Chappell's conclusions were different than Pom's representations. He found that Pom had distributed advertisements that might have been misleading to some consumers, and he found for the FTC by saying the agency had met all three criteria used in determining if an advertiser was distributing false advertisements in violation of the FTC Act. The three-part inquiry requires the agency to prove that the respondents circulated ads containing the information specified in the complaint, that the claims were false or misleading and that the claims were material to prospective consumers.

"The evidence demonstrates that Respondents disseminated advertisements that a significant minority of reasonable consumers would interpret to contained an implied claim that drinking eight ounces of POM juice daily, taking one POMx Pill daily, and/or taking one teaspoon of POMx Liquid daily, treats, prevents or reduces the risk of heart disease, prostate cancer and/or erectile dysfunction, and/or is clinically proven to do so, as alleged in the complaint," Judge Chappell wrote, adding that the FTC had proved the first element of the false advertising claim.

On the second claim, "the weight of persuasive expert testimony demonstrates that there was insufficient competent and reliable scientific evidence to support the implied claims," the judge wrote, adding that the FTC had satisfied that element, too.

Then he found the claims were "material" as well, because they are health-related and resulted in increased product sales."

The Pom Wonderful defense is being funded by a pair of lively Beverly Hills millionaires, Stewart and Lynda Resnick. Fit and active senior citizens, the Resnicks have a particular affinity for the beverage and have spent millions of dollars fighting the FTC on this case. Lynda Resnick, who handles the marketing of the drink, has long had a bit of an anti-authoritarian streak. Vietnam War protestor Daniel Ellsberg used the copier in Mrs. Resnick's advertising agency to reproduce documents that became the focus of the political tug of war known as the Pentagon Papers.

And there's no doubt that the Resnicks believe in their product. Stewart Resnick testified, according to Judge Chappell, that he believed that pomegranate juice is beneficial in treating some kinds of impotence.

But evidence presented at the administrative hearings, which included 2,000 exhibits, 14 expert reports, 24 witnesses and 3,273 pages of trial transcript made clear that while pomegranate juice might be healthy to drink, its health claims for seriously ill people were likely overstated. That made the company's strategy of placing advertisements and marketing materials inside urologists' waiting rooms somewhat questionable. They seemed to be targeting people not from the general population, but men who are under a doctor's care and who might be feeling vulnerable or at least unusually suggestible.

One advertisement, for example, told men that drinking 8 ounces of POM pomegranate drink for two years had slowed the onset of fatal complications for 46 men suffering from prostate cancer. The ad contained these

words: "One important note: All the patients drank the same POM Wonderful 100 percent Pomegranate Juice which is available in your supermarket produce section."

Certainly this latest press campaign seems disingenuous, at best.

Take the quote referenced for page 282 of the ruling:

"Competent and reliable scientific evidence supports the conclusion that the consumption of pomegranate juice and pomegranate juice extracts supports prostate health, including by prolonging PSA doubling time in men with rising PSA after primary treatment for prostate cancer."

Yes, that's what it says on page 282.

And this is what is says in the next three sentences:

"However, the greater weight of the persuasive expert testimony shows that the evidence relied upon by Respondents in not adequate to substantiate claims that the POM products treat, prevent or reduce the risk of prostate cancer or that they are clinically proven to do so. Indeed, the authors of the Pantuck Study and the Carducci study each testified that their study did not conclude that POM juice treats, prevents or reduces the risk of prostrate cancer. And, as Respondents' expert conceded, no clinical studies, research and/or trials show definitely that the POM products treat, prevent, or reduce the risk of prostate cancer," Judge Chappell wrote.

Judge Chappell wrapped up his ruling with a cease-and-desist order. "It is ordered that Respondents…shall not make any representation in any manner, expressly or by implication…that such product is effective in the diagnosis, cure, mitigation, treatment or prevention of any disease…or to treat, prevent or reduce the risk of erectile dysfunction," he wrote.

Apple's tart response to DOJ lawsuit

Apple's tart response to the Justice Department's lawsuit alleging an eBooks conspiracy is simple and forceful: It actually reads like an Apple product looks—clean, innovative, a bit brash, intellectually self-confident.

The Justice Department's lawsuit, according to Apple, is based on a false premise—that is, that the eBooks market had been a locus of "robust price competition" before Apple and its publishing-industry conspirators sought to control the market.

Au contraire, says the brief. In fact, it said, Apple's entry into the market via its iPad reader introduced competition to a field that had been languishing under the monopoly control of Amazon, the online book vender, through its domination of the market with its Kindle electronic reader.

"Apple's entry had benefitted consumers," the brief states. "Apple's entry brought competition where none existed. Amazon still has a dominant share in eBook and physical distribution, with significant power it often leverages over the producers and consumers of books to the detriment of both. But prior to Apple's entry, Amazon effectively stood alone and unchallenged. No longer."

Moreover, the brief said, Apple's entry into the market ushered in "a new era of innovation and competition," causing the market to transform itself from a simple black-and-white model and moved it into the technicolor world, with such new features as color pictures, audio and video, the read and listen feature and the availability of a fixed display that works well for certain kinds of reading material, such as cookbooks and travel guides.

By attacking Apple and permitting Amazon to continue its dominance, the Justice Department is even damaging the cause of antitrust Apple said. "The government sides with monopoly, rather than competition, in bringing this case."

The brief marks Apple's first full response to the Justice Department's announcement on April 11 that it was filing a lawsuit against Apple, Inc., and five of the country's largest publishers of mainstream books, charging that they had conspired to raise the prices of electronic versions of those books. According to the complaint, this agreement affected the $300 million annual market for eBooks, and raised retail prices for the $9.99 price pioneered by Amazon to new price points that were commonly $12.99 to $14.99.

Three of the publishers—Hachette Book Group, HarperCollins and Simon & Schuster– had already signed consent agreements promising to drop the practices. DOJ is continuing to litigate against Apple, Macmillan and Penguin Group.

The brief is a kind of a fun read. See the reference below to check it out yourself.

REFERENCE:

http://ia701206.us.archive.org/6/items/gov.uscourts.nysd.394628/gov.uscourts.nysd.394628.54.0.pdf

Senate divide on Verizon Wireless deals

The two top dogs on the Senate antitrust committee are signaling they are taking opposing points of view on a complicated web of transactions between Verizon Wireless and its competitors concerning spectrum sale, marketing agreements and a joint technology venture.

On May 24, two letters were sent to Attorney General Eric Holder, of the Justice Department, and Julius Genachowski, chairman of the Federal Communications Commission, regarding the transactions, which are being reviewed by the Justice Department and the FCC. They both made reference to a hearing on the issue conducted on Capitol Hill on March 21, but the senators came away with different conclusions.

Veteran Democratic lawmaker Sen. Herb Kohl, (D-Wisc.) chairman of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, wrote that he believed the transactions "present serious competition concerns." He noted that Verizon Wireless already has a 33 percent market share and the agreements would boost its penetration into many markets, making it even harder for small firms to compete.

"Critics of these agreements fear that these deals signify a truce between one of the largest phone companies, Verizon, and four of the largest cable companies representing over 70 percent of the cable market, and that they represent an implicit promise by Verizon to step down from its competitive battle, particularly for video customers," he wrote.

Sen. Kohl did not think much of Verizon's argument that the acquisition of the spectrum is necessary to "meet the burgeoning demand for spectrum by smartphones and mobile devices," he wrote.

But his newcomer Republican colleague, U.S. Sen. Mike Lee (R-Utah) found that argument particularly persuasive, and a good argument for why Verizon needs to engage in these transactions to meet the needs of the future. "As consumption of data-intensive smartphones and tablets has grown, demand for data has exploded and continues to increase at exponential rates," he wrote. "Numerous sources estimate that data traffic will surge to many times the current levels in the next few years alone."

Sen. Lee wrote that he believed that criticism that the joint ventures would allow the combined firms to muscle new firms out of the market by refusing to license new technology to them was simply misguided. "Such criticism seems oblivious to the plain (and unchanged) economic incentives at play," Sen. Lee wrote.

REFERENCE:

C:\Users\Owner\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\B8ZA7A0F\Letter to DOJ & FCC re Verizon Cable Deals 5.24.12.pdf

C:\Users\Owner\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\36W7PNIS\Letter of Sen Lee re Verizon-Cable Deals[2].pdf

FTC wins first round in auto dealer credit case

The FTC has won the first round in a case that could affect car dealers around the nation.

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act of 2003, known as the FACT Act, to prevent identity theft and make it easier for consumers to dispute the accuracy of consumer records. It amended the Fair Credit Reporting Act by requiring that merchants provide a "risk-based pricing notice" if their credit reports contain negative information that may subject them to higher interest charges. The Act requires the FTC to enforce the law.

Last July, the agency promulgated amendments to the regulations that would require dealers, including those who obtain third-party financing, to give consumers notice if they are receiving less advantageous credit terms than other buyers. Consumers who learn they are receiving a higher interest rate would be able to obtain a free credit report to check the report's accuracy, or creditors would be allowed to offer all applicants a free credit score to justify the terms of the loan.

The National Automobile Dealers Association cried foul, challenging the action as "arbitrary and capricious," in court filings in Washington DC.

In an interview with *FTC:WATCH*, Paul D. Metrey, chief regulatory counsel for the National Automobile Dealers Association, said that the group believes the agency went too far by including auto dealers whose borrowers use third-party financing, where the loan application is sent off to a separate, unrelated business to determine if the borrower can receive a loan. Metrey said the majority of car dealers are providing the credit reports but the trade group is protesting on behalf of a "subset of auto dealers" who don't have personal contact with the credit report.

"It appears to us to be outside the scope of what Congress intended," Metrey said.

He said it is unduly burdensome to these auto dealers. "It's a costly proposition and it injects additional sensitive customer information into the transaction."

The trade group filed in both the District Court and D.C. Court of Appeals. In March, the Court of Appeals ruled that the District court had proper jurisdiction over the question.

On May 22, US District Judge Ellen Segal Huvelle ruled in the FTC's favor, saying that the "agency considered the practical implications of the issue and provided a well-reasoned basis for its decision that is consistent with the regulatory and statutory scheme….The factors guiding

this analysis are completely consistent with the Agency's preexisting regulations....There is no basis for invalidating the FTC's interpretation as arbitrary or capricious."

Metrey said NADA plans to continue its challenge of the FTC's stance.

"We were disappointed in the ruling and we intend to appeal," Metrey told *FTC:WATCH*.

REFERENCE:

Civil Case No. 1:11-cv-1711.

FTC BRIEFS

Fresenius

On May 25, the Federal Trade Commission approved a settlement of its case charging that Fresenius Medical Care's acquisition of Liberty Dialysis Holdings would be anticompetitive in the outpatient dialysis clinic market. Under the terms of the settlement, Fresenius will sell 60 outpatient dialysis clinics in 43 local markets in the U.S.—a requirement that will preserve competition in those local markets and ensure that renal care patients are not hit with anticompetitive price increases or reductions in quality of care, according to the FTC.

The FTC action had challenged a $2.1 billion deal dated August 1 of last year in which the German-based Fresenius would acquire Liberty, the third-largest provider of outpatient dialysis services in the U.S. That deal would have combined Fresenius, which operates more than 1800 outpatient dialysis clinics in the United States and treats about 130,000 patients a year, with Liberty, which operates some 260 dialysis centers at which about 19,000 patients are treated in 32 states and the District of Columbia.

As outlined by the FTC in a press release, the local market for dialysis treatment is where competition occurs and must be preserved. Given the nature of the intensive treatment for end stage renal disease, patients are often quite ill and find it difficult to travel more than 30 miles from their homes. They rely on dialysis to remove toxins and excess fluid from their blood, and, typically, receive treatments three times a week for periods of between three and five hours. The alternative to dialysis is a kidney transplant, but patients generally must wait years for such a replacement kidney during which time they continue to receive dialysis.

Given these factors, competition between dialysis clinics usually occurs at the local level. Had the original deal between Fresenius and Liberty been consummated, head-to-head competition between firms in 43 markets would have been eliminated and prices would have jumped, while the quality of care would have worsened, according to the FTC. Ultimately that original deal would have resulted in monopolies for outpatient dialysis services in 17 of the 43 local markets. And in 24 of those 43 markets, the proposed acquisition would have resulted in the number of dialysis providers to be reduced from three to two. In the other two markets, competition also would have been significantly diminished, the FTC alleged.

The FTC, in its final order, also changed some of the provisions of the divestiture. Initially, under the proposed order, Fresenius was required to sell two Liberty clinics in Memphis, Tennessee, to Dialysis Newco, Inc., the firm that will purchase most of the clinics that will be divested in the deal. The FTC changed that provision and, Fresenius will sell those two clinics to Satellite Healthcare Inc. within 25 days. Satellite is a company that the FTC maintains is well-positioned to restore competition that would have been lost in Memphis had the original transaction been consummated. Satellite does not currently have any dialysis clinics in Memphis.

The Commission approved the order on a 4-0-1 vote, with Commissioner Maureen K. Ohlhausen not participating.

JUSTICE BRIEFS

Ritz Camera

The Federal Trade Commission unanimously approved joining the Justice Department in a joint amicus brief in a case before the U.S. Court of Appeals for the Federal Circuit that raises the issue whether a direct purchaser of a product has standing to sue for damages under the antitrust laws when that purchaser is hit with overcharges flowing from a monopoly obtained through a fraudulently-procured patent.

The case, Ritz Camera & Image LLC v. SanDisk Corp., is on appeal from the U.S. District Court for the Northern District of California, where Judge Jeremy Fogel had ruled that Ritz Camera, a direct purchaser of SanDisk's products, and others in a class action, could pursue antitrust claims. He denied SanDisk's motion to dismiss the case. The FTC and Justice Department weighed in to support the lower court's decision and to ask for a broad ruling in favor of Ritz's standing to pursue its claims.

Ritz and others in the class had purchased flash memory products directly from SanDisk, but Ritz argued that

SanDisk monopolized the market for these products and, consequently, exacted higher prices in violation of the antitrust laws. In addition, Ritz alleged that SanDisk's founder had taken the flash memory technology from his former employer and obtained patents as a result of intentional false statements to the U.S. Patent Office. It also charges that SanDisk sought to exclude competition by bringing infringement claims based on the invalid patents.

Ritz relied on a 1965 Supreme Court case, Walker Process Equipment Inc. v. Food Machinery and Chemical Corp., that held that "enforcement of a patent procured by fraud on the Patent Office" may violate the Sherman Act so long as other elements required to make a Section 2 claim are present. Ritz claimed treble damages for the monopoly prices that SanDisk charged.

SanDisk countered that Ritz had failed to identify an antitrust market and lacked standing to bring the case because Walker Process claims must be brought in patent infringement actions and Ritz is not claiming that it had a patent that was infringed.

In their argument, the FTC and the Justice Department noted that courts have held that direct purchasers of a product have standing "to recover overcharges paid to unlawful monopolists." The agencies' amicus brief contended there is "no sound reason to depart from that well-settled principle when the anticompetitive conduct creating or maintaining the monopoly is the enforcement of a patent obtained through intentional fraud."

The agencies' brief also noted that in Walker, the Court had rejected the argument that because a private party can't bring a suit to cancel or annul a patent that the party also can't bring an antitrust claim because it would require the Court to decide the validity of the patent.

Ritz should be granted standing, the FTC and Justice Department argue, because it has alleged "precisely the type of injury the antitrust laws were intended to redress. As a direct purchaser, Ritz's injury is entirely distinct from that of an excluded competitor and its damages—the overcharges it paid for the monopolized product—do not overlap the lost profits that an excluded competitor might seek."

A patent obtained through intentional fraud contravenes the goals of both the antitrust and patent laws, the agencies argue. They contend that the district court did not offer a sufficiently expansive ruling on Ritz's standing, which should not depend on a determination in a separate proceeding about whether the patents were fraudulently obtained.

"This Court should not adopt a rule making direct purchaser standing turn on a separate proceeding over which the direct purchaser [i.e., Ritz in this case] has no control," Justice and the FTC argue. They also dismissed SanDisk's argument that by allowing Ritz to pursue this claim, a floodgate of litigation will follow and diminish the patent system's encouragement of innovation. Quoting from the Walker decision, the federal agencies conclude that, "to recover damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure."

REFERENCE:

http://www.justice.gov/atr/cases/f283500/283593.pdf

INTERNATIONAL BRIEFS

Google

The European Union recently gave Google "a matter of weeks" to respond to its concerns that the popular search engine uses its dominant position on the web to thwart competition. But the top competition official at the EU held out an olive branch even as he set out four areas of concern that had emerged from its investigation of Google that had been launched in November 2010.

Joaquín Almunia, the vice president of the European Commission responsible for competition policy, offered Google a chance to reach an amicable settlement rather than duking it out in court. "These fast-moving markets would particularly benefit from a quick resolution of the competition issues identified," Alumnia said in a statement on May 21. "Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement."

"Google Inc. has repeatedly expressed to me its willingness to discuss any concerns that the Commission might have without having to engage in adversarial proceedings," Alumnia continued. "This is why I am today giving Google an opportunity to offer remedies to address [our] concerns."

The key area of concern appears to center on the charge that Google gives its own content "preferential treatment" by displaying it higher—and thus, more advantageously—in its list of search results so that it gains an unfair advantage over its competitors.

Alumnia also charged that Google copied original content from its competitors' websites and used the material without authorization. "In this way, they are appropriating the benefits of the investments of competitors," he said. "We are worried that this could reduce competitors' incentives to invest in the creation of original content for the benefit of Internet users."

A third concern dealt with charges that Google's exclusive advertising deals with its partners shuts out competitors from placing so-called search ads that are displayed when a user types a query in a website's search box. The fourth area of concern relates to Google's restrictions on data being transferred from its own platform, AdWords, to competitors' platforms.

Alumnia said he had sent Google executive chairman Eric Schmidt a letter in which he offered the chance to respond to the concerns "in a matter of weeks, with first proposals of remedies." If such a package is forthcoming and addresses the concerns, Alumnia said he would instruct his staff to begin discussion to finalize a remedies package. Short of that, formal proceedings would continue, including the possible elaboration of a Statement of Objections.

In response to the EU action, Google issued a statement that focused on the growth of robust competition on the web that implied there is no need for intervention in this market. "We've only just started to look through the Commission's arguments. We disagree with the conclusions but we're happy to discuss any concerns they might have. Competition on the web has increased dramatically in the last two years since the Commission started looking at this and the competitive pressures Google faces are tremendous. Innovation online has never been greater."

Ironically, even as the EU seems eager to reach an accommodation with Google, the Federal Trade Commission seems to be arming itself for a showdown, as reflected in its recent decision to hire Beth Wilkinson, a star litigator with Paul Weiss.

GUEST OPINION

The Ongoing FTC Building Fiasco

In a recent letter to the House Transportation and Infrastructure leadership, the sitting Federal Trade Commissioners joined in "grave concern" over that Committee's plan to kick the agency out of the iconic, art deco building that FDR built for it nearly 75 years ago. The House Committee and its chairman intend to turn the building into a wing of the National Gallery of Art.

When I first heard about this mess (in February of 2011, when the Commissioners wrote a similar letter), I had thought the story was really about competition policy and the politics of regulation. Its apparent theme was poignant, bitter symbolism: a hostile and radically conservative House majority, intent on protecting the plutocracy from any government interference at all, had resolved to send a message. They would literally turn the Commission into a museum.

But as it drags on, it has come to seem quite different. The story is not actually that Congress has unwholesome motives or even any motives at all. The story is that Congress is completely broken.

A widely discussed opinion survey last year showed our Congress to be less popular among Americans than pornography, polygamy, British Petroleum during the Gulf oil spill, Richard Nixon at the peak of Watergate, and Communism. Let me say that again: Communism. King George III of England is reputed to have been twice as popular among Americans, during the American War of Independence, as their Congress is today. That's right, the one they called Mad King George.

Popular disgust surely reflects Congress's massive failure to act. The year 2011 was officially Congress's least productive year in history (at least since productivity records were first kept in 1947), and it occurred during a period of multiple crises of international significance. But it also must reflect the foolish and trivial nature of many of the things our legislators do occasionally seem to accomplish. Devoting their agendas to pet peeves, hobby horses, and small stunts apparently meant as campaign fodder now consumes a lot of their time, even as historic crises persist, and millions of average people suffer.

Of course, the FTC building effort could be spun as an austerity measure, meant to exploit beneficial "privatization" insofar as the Commission would rent privately owned quarters, and its proponents frequently so spin it. The handful of Republicans behind it argue that it would save at least $300 million, and they sometimes claim it would save as much as $540 million. They lend their cost-reduction claims conservative authenticity by throwing in anti-government aspersions, as by saying that the Commissioners really oppose the plan only because "[i]t ruins [their] view of the Capitol."

But the claim is so unlikely that one doubts it could be the real motive. The non-partisan, competent, and well

regarded Congressional Budget Office says that it will actually come at a net cost of $270 million, because the Commission must rent or build new quarters within the District and will incur costs in moving and outfitting a new building to meet its technological needs. (Admittedly, some Republicans question CBO's impartiality. But even if there were anything to their criticism, consider this: CBO says something will cost hundreds of millions of dollars, and then a Congressman—and as we shall see, it turns out to be one lone Congressman on a decade long vendetta—says that it will save as much as a half billion. Given those facts, you can feel pretty confident that it's going to cost something.)

The effort also appears to lack any clear constituency. While the National Gallery of Art now supports the plan, it was not their idea and they were initially non-committal.

And indeed, no common sense motive seems to be at work. This whole fiasco seems actually to be one House committee chairman's obsessive and apparently quite personal campaign, and one that has gone on for upwards of 10 years.

Republican John Mica represents a low-population district on the northeastern coast of Florida. He grew up in Miami, did community college and finished at the University of Florida, and then spent a few years in real estate before beginning well over three decades in politics. He first introduced a bill to evict the Commission in 2005, and has reintroduced it many times. He also appears to have pushed it with plenty of behind-the-scenes advocacy. Now, does "obsessive" seem like too strong a word? Well, during a subcommittee meeting in March 2011, Chairman Mica said "I have no other priority for the balance of my tenure in Congress."

Times were pretty bad just then. Unemployment remained at nearly 9%. An alarming downward revision of economic growth estimates, along with persistent fears of European debt and increasing oil prices, put the still fragile recovery in jeopardy. The news was full of stories of state and local budget crises so severe that the police could no longer enforce some laws. And yet Chairman Mica had no other priority than expanding an art museum. As he seems rather fond of telling people, he is "a persistent [expletive]."

So it appears that a Republican from conservative small-town Florida wants to spend at least a hundred million or so on this project. He wants to do it at a time when both parties are so intent on fiscal austerity that it seems not to matter that more American children live in poverty than at any time since records have been kept.

Why?

Well, it seems to be nothing more than that this one guy just really likes art. A Mica staffer who has handled the effort for some years gave only this as an explanation: "[Mica is] very much a fan of art in the [National Gallery] and just the arts in general." Mica himself feels free to tell reports that he's in it because art is his "weakness."

"Some people drink, chase women, golf," he told that reporter. "I like art, architecture, a few antiques... Everybody has their own thing. And this is mine."

He likes it, in other words, this one guy.

Meanwhile, what of the American consumer? What about that mass of average citizens who by wide, bi-partisan consensus benefit from consumer protection and antitrust enforcement? People who, also by wide consensus, are in dire straits in part because of conduct that the Commission and other federal regulators could address?

Let them eat cake.

The people by whom we are governed have apparently all gone crazy.

By Chris Sagers, James A. Thomas Distinguished Professor of Law, Cleveland State University

PEOPLE

Matt Reilly

Matt Reilly, former assistant director of the Federal Trade Commission, will join Simpson Thacher & Bartlett LLP as a partner, based in the firm's Washington DC office.

Reilly has been employed at the FTC for 13 years and until recently served as head of the FTC's Mergers IV division, where he led investigations into mergers involving hospitals, retailing and consumer products and was the chief litigator in several notable cases.

CALENDAR

June 5—Commissioner **Julie Brill** will provide a keynote address at the Trans-Atlantic Consumer Dialogue Meeting on Consumer Rights in the Modern Age, from 9:15 am to 10:45 am, at the U.S. State Department, 2201 C St NW Washington DC. For information, contact **Stacy Feuer**, at *sfeuer@ftc.gov.*

June 7—Commissioner **Julie Brill** will lead a panel discussion at the American Bar Association Forum on Consumer Protection, Competition, and Financial

Regulation, from 1:45 pm to 3:15 pm, at Columbia University School of Law, 435 West 116th Street, New York, NY 10027. For information, contact **Kim Findlay**, telephone 312-988-5792 or email at *Kimberly.findlay@americanbar.org*.

June 7-8—FTC Commissioner **Julie Brill** will participate in the Fifth Annual George Washington University – Berkeley Privacy Law Scholars Conference, from 9 am to 4 pm, at George Washington University Marvin Center in Washington, DC. For more information, contact **Daniel J. Solove** or **Chris Hoofnagle**, at *emails dsolove@law.gwu.edu* and *choofnagle@law.berkeley.edu.*

June 8—Commissioner **J. Thomas Rosch** will speak on consumer choice at an international conference in Brussels at the Institut Libre Marie Hapf.

June 13—FTC Commissioner **Edith Ramirez** will speak on "Privacy by Design and the Privacy Framework of the United States Federal Trade Commission" at the Privacy By Design Conference hosted by the Hong Kong Office of the Privacy Commissioner for Personal Data, in Hong Kong.

June 19—Commissioner **Julie Brill** will participate in the Practicing Law Institute Privacy Summit on a panel entitled "Privacy and Security Enforcement Agenda: The Regulator's Perspective," from 2:45 to3:45 pm in New York City. For more information, contact **Lisa Sotto** at Hunton & Williams LLP, telephone 212- 309-1223 or by email at *lsotto@huntion.com*.

June 22—FTC Commissioner **J. Thomas Rosch** will speak at the Annual Chatham house Competition Policy Conference in London, England.

August 19-21—FTC Commissioner **J. Thomas Rosch** will speak at the Technology Policy Institute's conference on "Washington, Silicon Valley & the 2012 Election" in Aspen, Colo.

September 12-15—FTC Commissioner **J. Thomas Rosch** will speak at the Mentor Group Boston's conference on Forum for EU-US Legal and Economic Affairs in Paris, France.

October 25-26—FTC Commissioner **J. Thomas Rosch** will speak at the 14th annual Sedona Antitrust Conference in Del Mar, CA

November 12-13—FTC Commissioner **J. Thomas Rosch** will speak at the 2012 Global Forum in Stockholm, Sweden.

EDITORS NOTE:

FTC:WATCH is open to publishing fresh or interesting perspectives on antitrust and consumer protection issues. For consideration of your views in an opinion piece, please contact publisher, Chris Amolsch, at chris@ftcwatch.com, or managing editor, Kirstin Downey, at kirstin@ftcwatch.com.