

# Everything but the Cape: Careers for Superheroes at the FTC

FTC Chairman Jon Leibowitz  
Remarks at Harvard Law School  
October 10, 2012

Thank you, Dean Martha Minow, for that kind introduction and for inviting me here today.

We at the FTC feel particularly at home at Harvard Law School: two of our five Commissioners (Edith Ramirez and J. Thomas Rosch) graduated from the law school.

To start today, I'd like to show you a brief video clip —some of you may remember this ad from a few years ago.<sup>1</sup>

*[Monster.com Ad Shown]*

What *did* you want to be?

A corporate lawyer? A tax attorney? A law professor? A federal regulator?

Of course not. That commercial never fails to remind me of how—sometime between lunchboxes on the playground and LSATs—our ideas about who we are and where we are going change profoundly. At some point, reality washes over all of us and we understand that we are not going to play in the NBA, record a Top 40 hit, or develop superpowers that allow us to fly down the street and vanquish the neighborhood bully.

And for many of you students here tonight, your next few months or years will be filled with job recruiters appealing to that adult self, offering—perhaps not the opportunity to “file all day” (at least not directly)—but pension plans, stock options, and partnership prospects.

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<sup>1</sup><http://www.hulu.com/watch/321947>.

My colleagues in the public sector will tell you about the satisfaction you can get from working for your government or for a cause, the excitement of joining colleagues fighting for ideals—the reward of seeing people’s lives get better because of you. And the Administrators here at HLS will, with justification, point with pride at the Low Income Protection Plan, the first program of its kind that repays loans for those entering public service.

All great, practical, adult arguments for a career in public service.

And all arguments I have made to audiences just like this. But this evening I would like to make a different case for working in public service in general—and at the FTC in particular. I want to bypass the adult who is starting to think about Roth IRAs and talk to the kid who wore a Spiderman costume for three straight weeks after Halloween.

Those of us who work at the FTC have not had to let go of those Superhero dreams. Mild mannered antitrust and consumer protection attorneys and economists by day—and actually by night, too—we take on the powerful when they abuse their power. We side with the little guy when big crooks or big business take advantage. We monitor the market and make sure it gives everyone the same fair deal.

In short, we fight for truth, justice, and the American way. We just don’t wear capes while we’re at it.

Like the Justice League of America, the FTC is an independent agency. We are not part of the Administration; we do not work for Congress; and we do not worry about poll results. We operate in a bipartisan manner to promote competition and protect consumers. We have to: No more than three Commissioners from the same political party can serve at the FTC at the same time.

Like any good collection of Superheroes, we don't confine ourselves to righting just one sort of wrong. We guard against attacks on consumer privacy. We get money back for people duped in financial scams—well over half a billion dollars in the last ten years. We review mergers to make sure the resulting conglomerates do not use their new power in any sort of—if not inter-galactic domination scheme—then market domination scheme. And we run the “Do Not Call” list—which, by the way, columnist Dave Barry has called the most popular government program since the Elvis stamp.

If we got cats out of trees for old ladies and wore tights, the FTC would probably have its own Saturday morning cartoon show.

Or maybe I should say, we would have our own iPhone app—since I am talking to a room full of people who were online before you were out of diapers.

Well, the FTC is online too, protecting your privacy. And by that, we mean more than just making sure your mom or your future boss doesn't see those unfortunate Facebook pictures. We are, in the words of that judicial superhero, Supreme Court Justice Louis Brandeis, securing Americans in “their beliefs, their thoughts, their emotions and their sensations” by safeguarding “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>2</sup>

More and more Americans are moving more and more of their lives online, and we are concerned that some in the online community are not heeding Spiderman's credo: “with great power there must also come great responsibility.”<sup>3</sup>

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<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928)

<sup>3</sup> [Lee, S (w), Kirby, J. (p), Ditko, S. (i).] “Spiderman.” *Amazing Fantasy #15* (August 1962), Marvel Comics.

As many of you know, when you surf the Web, a host of invisible data catchers report your online clicks to marketing firms that, in turn, sell an astonishingly complete profile of your cyber-behavior. The buyers are usually companies that target internet advertising to your particular interests. Once you enter cyberspace, your private information becomes a commodity out of your control, often without your consent or even knowledge.

At the FTC, we want you to get that control back. We have proposed a “Do Not Track” mechanism that will allow you to easily specify what information you want to share about your browsing behavior and have those preferences travel with you to every website you visit. Technologies to fuel such a system exist; Mozilla has implemented a system and Microsoft and Google are considering ways to incorporate “do not track” in their browsers.

Some in the online community argue that a “do not track” system will destroy the Internet advertising business that currently relies on trailing consumers, often covertly. That is certainly not the intent of “do not track” nor will it be its effect. Most consumers, including myself, like receiving internet advertising designed especially for us. And virtually all consumers appreciate the innovative and free web content that that advertising supports. But I don’t want the records of my online shopping, searches for information about a medical diagnosis, or my (now constant with the upcoming election) visits to political blogs to be sold to future employers or insurers.

“Do Not Track” does not stop advertisers from collecting information on consumers. It’s about giving consumers more choice. “Do Not Track” puts the burden on the advertisers to convince us not to opt out of tracking by assuring us they will treat our personal data with care.

And that makes sense. Because when it comes to a right as valuable as our privacy, we have to remember the words of Captain America: “When the mob and the press and the whole world tell you to move, your job is to plant yourself like a tree beside the river of truth, and tell the whole world—‘No. You move.’”<sup>4</sup>

Let me tell you in more detail about a few more areas in which the FTC is using our powers for good. The first is in the market for so-called “foreclosure consultants”—carrion that circle homeowners in financial distress to take the last dollar out of their pockets. As any superhero can tell you: where there is money, there are villains. And sadly, villains abound in this story, as do their prey—victims of the housing market collapse, of the record rise in foreclosures and, finally, of unscrupulous scammers who offer struggling homeowners a lifeline but throw them an anchor instead.

Take Homeowners Relief: That operation charged up to \$4,250 for a promise to reduce consumers’ mortgage payments, interest rates, and sometimes even loan balances. Homeowners Relief never contacted the mortgage servicers, leaving consumers’ already dry pockets thousands of dollars drier.

Or take Crowder Law Group, which masqueraded as a government bailout program, not only stealing money from homeowners but also diverting them from legitimate, free help from the government. We just received a \$2.6 million court judgment against them.

In each of these cases, and many other like them, the FTC sued, stopped the scams, shut the villains down, and returned the money to their victims. And we enacted rules that say in

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<sup>4</sup> [J. Michael Straczynski, Stan Lee (w), Ron Garney (p), Bill Reinhold. (i).] “Civil War.” The Amazing Spider-man #537, (Jan. 2007), Marvel Comics.

the future, before companies offering mortgage modifications can charge the first dollar, these companies have to deliver the mortgage modifications they promise.

Slapping down the bad guys. Helping victimized families. Making companies keep their word. All in a day's work at the FTC.

And we have not confined ourselves to the villainous fringe of foreclosure consultants. As many a Green Lantern has put it: "In brightest day, in blackest night, no evil shall escape [our] sight."<sup>5</sup>

Last June we announced one of the largest judgments in the FTC's history against two Countrywide mortgage servicing companies—\$108 million in refunds to the well over 450,000 homeowners we believed were victimized.

Countrywide profited from making risky loans to homeowners during the housing market boom and profited again when the market went bust. It took advantage in two ways: First, when homeowners fell behind on their payments, Countrywide overcharged them for default-related services, like property inspections and foreclosure trustee services. It created affiliated companies to perform the required services and added a big mark-up—often 300% or more—that Countrywide passed onto borrowers. Under Countrywide's vastly overpriced fee schedule, just mowing a lawn could result in a \$300 bill to a homeowner—even if Countrywide paid only a fraction of that.

Incidentally, and apparently of no interest to Countrywide, its own mortgage contracts prohibited these inflated charges, as does the FTC Act.

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<sup>5</sup>The Green Lantern cites an oath when he charges the ring that gives him his superpower. There have been almost as many oaths as there have been Green Lanterns. This quote is from the version favored by the Green Lantern, Hal Jordan.

In the case of Countrywide, the FTC followed the admonition of Captain America and spoke “loudly for those who have no voice.”<sup>6</sup> As I mentioned, we returned \$108 million to over 450,000 bilked consumers, which is not bad for an agency that handles both consumer protection and antitrust, covers almost all of the economy, has far fewer employees—about 1,200—than the SEC, FCC, EPA, and—by a large multiple—every single Cabinet Department.

There are other epic battles that we haven’t won yet—but we will. One of those is to keep greed from blocking consumers from obtaining reasonably priced generic drugs. Let me give you a brief history.

More than two decades ago, Congress passed the Hatch-Waxman Act to make it easier for generic medicines to enter the market, while giving brand name manufacturers the patent protection they needed to encourage the lifesaving research that is the hallmark of America's pharmaceutical industry. One of the critical parts of the law encourages generic drug firms to challenge weak branded drug patents—those that are likely invalid or not infringed.

For a time, the legislation worked. Generic manufacturers brought patent challenges and won in two-thirds of the cases in which they took on branded drugs, according to a 2002 FTC study. As generics entered the market, the price for prescription drugs fell.

Enter the bad guys: drug companies who derailed the law—and this is by no means *all* drug companies, by the way—by inventing pay-for-delay patent settlements. In these settlements, brand companies literally pay their generic competition to stay off the market—to “sit it out.”

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<sup>6</sup> The complete quote is: “I’ve always believed that all you need is one man to make a difference. To stand up when others are told to sit down. To speak loudly for those who have no voice. And to fight the good fight.” [Liefeld, R and Loeb, J (w), Liefeld, R (p), Sibal, J (i).] “Courage.” Captain America vol. 2, #1 (Nov. 1996), Marvel Comics.

It is true that if a generic competes, it makes a profit. But that profit is much smaller than the brand's loss when its monopoly pricing power evaporates. In fact, the brand can keep the bulk of its profits and still pay the generic more than the generic could earn by competing. That's because, on average, the generic costs 85 percent less than the branded product, meaning the generic's revenues and profits are tiny compared to the branded competitor.

In one of these sweetheart deals, the brand wins because it avoids the possibility of competition and the destruction of its franchise. The generic wins because it makes more than if it competes. Consumers lose because the agreement delays the generic entry that would have lowered their drug prices.

The FTC has targeted these deals from their inception. And at first, under the leadership of both Democrat Bob Pitofsky and Republican Tim Muris, we stopped them cold.

But since 2005, several circuit courts have mistakenly blessed these anticompetitive arrangements. Their decisions conclude that, because the brand's patent *might* block the generic's product, a brand can pay to eliminate the possibility of competition until its patent expires. That is a misguided approach, one at odds with both market realities and established antitrust principles.

An industry investment analyst got it right when he said that these court decisions "opened a Pandora's box of settlements." Instead of competing to be first to come to market, generic companies now compete to be the first to get a pay-off.

Some in the industry are quite candid—at least privately—about the greed that drives pay-for-delay deals. Some are even candid in public. The CEO of Cephalon, a company that is the subject of a current FTC action, announced settlements with four generic drug makers that



will keep the generic versions of Provigil off the market until 2012 (in return for compensation of roughly \$200 million collectively to the generics). He elatedly stated to the Philadelphia Business Journal: “We were able to get six more years of patent protection. *That’s \$4 billion in sales that no one expected.*”<sup>7</sup>

Who is paying that four billion dollars? Provigil is a wakefulness drug: it treats narcolepsy, and military pilots take it when they have long missions. Some of that four billion dollars is paid by narcoleptics, just for the privilege of functioning normally on a daily basis, and another chunk is paid by the military, which ultimately means you, me, and every American taxpayer.

Of course, that is just one example. In 2005, the year in which courts first blessed these agreements, there were only three. In 2007, there were 14, there were 16 in 2008, and 19 in 2009. In 2011, there were 28 pay-for-delay deals at a cost to consumers that our economists estimate at \$3.5 billion a year, on average.

The FTC is continuing to bring cases to protect consumers from these anticompetitive settlements, and we hope the trend in the courts will change. But waiting for a potential judicial solution is a time consuming and expensive prescription, so the agency strongly supports legislation to eliminate pay-for-delay deals. And Congress is close to passing that legislation.

We have powerful companies with big money at stake and thousands of pharmaceutical lobbyists (1,325 in DC alone) lined up against us. But we will continue the fight until we win.

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<sup>7</sup> John George, *Hurdles Ahead for Cephalon*, PHILADELPHIA BUSINESS JOURNAL, March 17, 2006 (quoting Cephalon CEO Frank Baldino) (emphasis added).

We have the law on our side. We have justice on our side. The health of millions of Americans hangs in the balance.

As Wonder Woman once said, “If it means interfering in an ensconced, outdated system to help just one woman, man, or child...I’m willing to accept the consequences.”<sup>8</sup>

And what are the consequences? In the case of pay-for-delay—and our other actions against abuses of market power and on the behalf of consumers—maybe a few angry lobbyists, a couple of bridges to the world of corporate law burned, and occasional screed against our work in an industry newsletter. Those are the downsides.

And the upsides?

Getting to fly down the block and vanquish the neighborhood bully—while collecting a paycheck for the privilege.

And you know what? It is even more fun than you imagined when you first imagined becoming a Superhero.

So, what *did* you want to be?

If NBA star is the answer, I can’t help you. When they start taking short lawyers, I plan to be first in line. But if Superhero is still somewhere in your plans, then come talk to us at the FTC. Just bring your own cape.

Thank you—I’m happy to take questions.

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<sup>8</sup> [Jiminez, P. and Kelly, J (w), Jiminez, P. (p), Lanning, A (i).] “She’s a Wonder.” Wonder Woman vol. 2, #170 (July 2001), DC Comics.