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THE HONORABLE DANIEL OLIVER

CHAIRMAN

FEDERAL TRADE COMMISSION

on

FEDERAL AND STATE ANTITRUST ENFORCEMENT:

CONSTITUTIONAL PRINCIPLES AND POLICY CONSIDERATIONS

before the

ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

House of the Association
New York, New York

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The views in these remarks are those of Chairman Oliver. They do not necessarily represent the views of the other members of the Commission.

I appreciate the opportunity to appear before you today. I must say that it is a pleasure to be back in New York City, especially now that milk here is so much cheaper.

The topic for discussion -- the appropriate role of the government enforcement agencies -- is one that interests me greatly. As some of you may know, I have previously argued that three propositions should guide economically sensible antitrust law enforcement. First, competition best allocates society's resources and maximizes consumer welfare. Second, restraints on competition misallocate resources and reduce consumer welfare. And, third, the principal source of restraints on competition is government. Government interference with the market when there is no market failure denies the American people the economic, social, and political benefits of free and unfettered competition. Political freedom and economic freedom are inextricably intertwined. Those of us who are concerned about the former must be vigilant in defense of the latter.

With all due modesty, I can report that the Commission is doing reasonably well when judged against these principles. It hasn't been perfect -- or I would not have dissented twice this past year from Commission decisions to issue antitrust complaints. But as a general proposition, while we may differ on some marginal details, all of us on the Commission recognize the benefits of competition, and are sensitive to the threat to consumers posed by government interference with the market.

Of course, federal policy has not always been economically defensible. Unfortunate examples from the past include the now-repudiated per se rule against non-price vertical restraints,[1] and the concentration ratio myopia of merger enforcement in the 1960's and 1970's.[2] Another example is embodied in a new proposal to prohibit -- at the federal level -- most physician dispensing of prescription drugs. This proposal is apparently motivated in part by the view that physician dispensing presents an inherent conflict of interest. But that sort of "conflict" arises whenever a physician -- or any other expert, for that matter -- recommends any service that he himself

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[1] Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 58 (1977).

[2] Economically disastrous applications of this theory reached their nadir in the Von's Grocery case, where the Justice Department succeeded in undoing a merger -- in the unconcentrated and highly competitive Los Angeles retail grocery market -- between two firms together accounting for only eight percent of market sales. United States v. Von's Grocery Co., 384 U.S. 270, 272-74 (1966).

provides. Absent compelling evidence to the contrary, there is thus no reason to injure consumers by limiting their choice among prescription drug dispensers to non-physicians.

Since Ronald Reagan became president, the discredited, anti-consumer, antitrust policies of yesteryear have now been repudiated at the federal level, because they are not legally or economically defensible. However, they are not wholly forgotten. They live on in the hearts and minds of interventionists and would-be industrial policymakers. Unfortunately, there is the possibility that one or a few state attorneys general may resurrect one or more of these policies. We have just in the last few years been able to rationalize federal antitrust policy, so that it is now based on sound legal and economic principles. This accomplishment is now imperiled.

None of you should be surprised to know that, in general, I am a great believer in decentralization of power whenever practicable. Nevertheless, certain matters properly belong in the federal sphere. Thus, the Constitution assigns primary responsibility for matters of interstate commerce to the federal government. In fact, one of the primary reasons for creating a strong national government was the need to remove state-imposed obstacles to interstate trade.[3] The Annapolis and Philadelphia conventions that led to the Constitution were premised upon a perceived need

> to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; [and] to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony . . . .[4]

In short, one of the raisons d'etre for the Constitution was to eliminate the "economic Balkanization" among the states that had prevailed under the Articles of Confederation.[5]

To that end, the Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the

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[3] Graglia, How the Constitution Disappeared, Commentary 19, 23 (February 1986).

[4] Historical Note on Formation of the Constitution, in The Constitution of the United States of America: Analysis and Interpretation xxxvi-xxxviii (L. Jayson, J. Killian, S. Beckey & T. Durbin eds. 1973).

[5] Hughes v. Oklahoma, 441 U.S. 322, 325-326 (1979).

several States."[6] The Commerce Clause thus creates "an area of trade free from interference by the States."[7] Moreover, it establishes a presumption against state regulation of "phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."[8] The Supreme Court recently reaffirmed that the Commerce Clause invalidates state statutes if they adversely "affect interstate commerce by subjecting activities to inconsistent regulations."[9] That possibility clearly arises when states undertake to enforce their own antitrust statutes.[10]

These principles help to explain why I prefer a uniform, economically defensible federal antitrust policy. When the Sherman Act and the Clayton Act became law, interstate and intrastate commerce were rather discrete, separate spheres. But as the scope of interstate commerce has expanded, the potential for conflict between state and federal antitrust enforcement efforts has expanded as well. The states still have an important complementary role, particularly with respect to conduct that is both clearly anticompetitive and more localized in character. Thus, for example, state actions against horizontal price fixing at the state and local levels represent an important adjunct to federal enforcement efforts.

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[6] U.S. Const., Art. I, §8, cl.3.

[7] Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-371 (1976), quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946); accord Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980); Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

[8] Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

[9] CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478, 4483 (April 21, 1987), citing, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. ____, ____ (1986).

[10] By contrast, when a state regulates aspects of corporate governance -- such as "voting rights only in the corporations it has created" -- the danger of inconsistent regulations from one state to another does not arise. CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. at 4483. For Commerce Clause purposes, a state may have a legitimate interest in adopting such regulations -- to govern firms incorporated within its borders that have "a substantial number" of resident shareholders -- even if they incidentally affect interstate transactions such as tender offers. However, a state has "no interest in protecting nonresident shareholders of nonresident corporations." Id. at 4484 (emphasis in original).

The state role should be considerably more limited, however, with respect to transactions in interstate commerce, particularly when the conduct at issue is not _per se_ illegal, but rather must be evaluated under the rule of reason. If conduct of this sort is subjected to both federal and state antitrust laws, then different standards are likely to be applied, and business uncertainty as to what sorts of conduct are illegal will increase.

The merger area offers perhaps the best illustration of this problem. The Commission, the Department of Justice, and the federal courts have created a relatively uniform body of federal merger law and policy that firms may rely on in determining whether to initiate acquisitions. Piecemeal challenges based on state law could subject these transactions to inconsistent state standards. Moreover, they would permit single states to thwart acquisitions that benefit other states and their residents, and the American people as a nation.

As an example, the California Attorney General has filed a suit in a California state court that seeks to force Texaco to divest the California assets Texaco acquired when it bought Getty Oil. If the California Attorney General obtains the divestiture relief he wants, his state court challenge will substantially dismantle one of the two largest acquisitions in history, to the detriment of consumers in many states, including California residents. The Commission studied the merger exhaustively -- and assessed many public comments, including those of the California Attorney General -- before making a decision. The consent order we secured addresses any competitive problems the acquisition might have created in California.[11] Fortunately, the California trial court dismissed the Attorney General's suit, and the intermediate appellate court affirmed on constitutional grounds.[12] The case is now before the California Supreme Court. It illustrates why merger enforcement efforts should be left for the most part to the federal authorities, and should be limited to the federal courts.[13]

Unfortunately, the horizontal merger guidelines recently issued under the auspices of the National Association of Attorneys General will significantly complicate federal-state

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[11] _Texaco, Inc._, 104 F.T.C. 241 (1984) (consent order).

[12] _Van de Kamp v. Texaco, Inc._, 219 Cal. Rptr. 824 (Cal. App. 3rd Dist. 1985), _pet. for review granted_, 223 Cal. Rptr. 267 (Cal. 1986).

[13] _See generally Lieberman v. FTC_, 771 F.2d 32, 39-40 (2d Cir. 1985); _Mattox v. FTC_, 752 F.2d 116, 117 (5th Cir. 1985).

coordination, to the detriment of businesses and consumers. If followed, they will make it harder for businesses to comply with the law. They differ in significant respects from the guidelines adopted by the Commission and the Department of Justice,[14] and from current federal case law. In particular, they overemphasize market shares and concentration ratios as a basis for challenging acquisitions. They accentuate this problem by defining relevant markets too narrowly. Moreover, the NAAG guidelines do not adequately consider other factors -- such as the absence of barriers to entry -- that may make concentration data irrelevant. The Attorney General of New Mexico recently recognized these problems and concluded that the guidelines are "an overly restrictive approach that will prejudice both legitimate business reorganization and consumer welfare."[15] As a result, applying the NAAG guidelines will tend to discourage or prevent many mergers that would benefit consumers. I would prefer to have the state attorneys general rely on the federal guidelines and federal case law in making enforcement decisions under both state and federal law. As an alternative, I hope to persuade the NAAG members to make their guidelines as consistent as possible with the federal guidelines.

We have made great strides at the federal level in the last six years. But an increased number of state enforcement actions that are not consistent with our approach will make our efforts to rationalize antitrust law considerably more difficult. I intend to work as closely as possible with the state attorneys general to ensure that their enforcement efforts and ours are as consistent and as legally and economically defensible as possible.

Thank you very much.

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14 Federal Trade Commission Statement Concerning Horizontal Mergers, 2 Trade Reg. Rep. (CCH) 4516 (June 14, 1982); United States Department of Justice Merger Guidelines, 2 Trade Reg. Rep. (CCH) 4490-4495 (June 14, 1984).

15 Letter from New Mexico Attorney General Hal Stratton to Arkansas Attorney General Steve Clark (President of NAAG) (April 7, 1987), quoted in 52 Antitrust & Trade Reg. Rep. 869-870 (May 7, 1987).