

TESTIMONY OF
COMMISSIONER PATRICIA P. BAILEY

BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 22, 1984

Good morning Mr. Chairman and Members of the Subcommittee. You have asked us to appear today to discuss the Commission's enforcement of the law with respect to resale price maintenance, the Robinson-Patman Act, and deceptive commercial practices. I will discuss each of these subjects in turn.

Resale Price Maintenance

The growing controversy over resale price maintenance (RPM) has developed against the following background. First, the former Assistant Attorney General for Antitrust at the Department of Justice, Mr. Baxter, made it clear that the existing law on resale price maintenance did not comport with his view of antitrust. To him, the judicially created doctrine of per se treatment of that practice was the product of "economically ignorant judges," whose decisions he called "whacko". Behind this colorful language was Mr. Baxter's conviction and that of a number of others that the judicial doctrine of the "rule of reason" should be applied to resale price maintenance situations, rather than the per se doctrine pronounced by the Supreme Court in 1911 in the Dr. Miles decision and constantly reiterated since. As part of an assault on the status quo, Mr. Baxter terminated Justice Department prosecution of new RPM cases.

The second event that increased concern with this issue was the Supreme Court's grant of a writ of certiorari to review related issues in the Monsanto decision, which was argued last December and is now awaiting decision. Originally, that case between private litigants did not necessarily raise the issue of the legal standard applicable to RPM. However, Mr. Baxter urged, in a brief filed amicus curiae at taxpayer expense, that the Supreme

Court use the lawsuit between these private parties in Monsanto as an opportunity to abandon per se treatment of RPM and extend to it the rule of reason. Mr. Baxter viewed such a change of law as a logical extension of the Supreme Court's 1977 decision in GTE/Sylvania, which extended rule of reason analysis to nonprice vertical restraints, such as territorial and customer restrictions, while expressly continuing per se treatment of RPM--an outcome Mr. Baxter and others have consistently viewed as anomolous. Critics of Mr. Baxter's determination to help the Supreme Court "correct" its oversight in GTE/Sylvania, pointed out that the Supreme Court since GTE has twice reaffirmed continued per se treatment of RPM. */

The third development influencing this debate is that Mr. Baxter's position in opposition to the existing law has ignited intense activism on the part of both small businesses and large discounters, who were facing coercive efforts by suppliers to force distributors to charge consumers uniform fixed high prices. Some of these concerned businesses are providing testimony before this subcommittee today.

The fourth stage of the RPM debate was Congressional response to the crescendo of business concern over the Justice Department's desire to change the law and the concomitant refusal to enforce the law until the change was made by the courts. Congress' response to almost three years of inaction was a decision to bar funding

*/ California Retail Liquor Dealers Ass'n v. Midcal Aluminum; Arizona v. Maricopa County Medical Society.

for any further advocacy of a legal standard different from the existing per se treatment of RPM. As a result, Mr. Baxter was barred from arguing his change of law position when he appeared before the Supreme Court last December to explain other points made in the amicus brief.

The present stance of the FTC on resale price maintenance (which I do not share) closely resembles Mr. Baxter's position on the merits. A number of studies have been undertaken by FTC staff to determine whether existing FTC orders involving RPM have had pro or anticompetitive effects, and whether change of the present per se legal standard is justified. Not all of these studies are complete. However, on the basis of what I've seen in draft form, there's a wide divergence of viewpoints. Even the more critical work in the area, however, has not criticized much of the Commission's actual past work. I believe the subcommittee will benefit from the views of Drs. Robert Stoner, Thomas Overstreet, and Robert Lande, and the work of Sharon Oster on the FTC's Levi Strauss case is also significant.

Aside from the studies of the effects of past per se RPM handling of FTC cases, what little newer investigative activity there is seems directed more at horizontal restraints of trade rather than the vertical kind which are the focus of the RPM debate. For instance, where dealers have colluded with each other to coerce suppliers to cut off other dealers, the FTC has had a few cases, such as the consent order in Great Dane, which was narrowly accepted 3-2 before Commissioner Clanton's departure last year.

More significant than these few cases, however, is the Commission's very clear record in undoing existing FTC orders in order to release respondents from various legal obligations not

to engage in resale price maintenance policies. Nowhere is this clearer than in FTC RPM orders that have contained a feature permitting transshipments of products by dealers to other dealers for resale. Suppliers seeking to control the resale prices of their products, and to maintain full control over the specific dealers with which they choose to deal, have often adopted policies that prohibit existing dealers from purchasing products which are then shipped to unauthorized dealerships for resale, often at discount prices. The FTC has had a number of orders barring suppliers from enforcing these bans against dealing with transshippers, but again and again in the recent past the Commission has voted to release these firms from their legal obligations and instead to permit restrictions on transshipments. I voted against such efforts in JBL Sound in 1981, Lenox, Inc. in 1982, and Magnavox and Bulova Watch in 1983. In U.S. Pioneer Electronics and a series of related audio products cases, Commissioner Pertschuk and I succeeded in forging agreement on a compromise middle ground, which did permit some supplier control over transshipments, but only where transshipped dealers were willing to adhere to Pioneer's criteria for product demonstration, display, and service.

The rationale for banning transshipments one often hears is that, if firms other than a supplier's authorized dealers are permitted to sell the supplier's products, they may not undertake properly to market the items. In other words, the unauthorized dealers will forgo demonstrating the product to the consumer, or

displaying it properly, or offering warranty and service work such as is often offered by authorized dealers. I have had difficulty accepting this explanation, because it seems to me too often to be simply a rationale for an unwillingness by suppliers to permit the transfer of their products into the hands of discounters whose only discernable failure is a disinclination to maintain the supplier's designated resale prices, and whose source of supply is transshipment from an authorized dealer. Take, for instance, the case of Lenox china, in which I voted to keep the FTC order intact. Lenox argued that the order's transshipment provision must be lifted to cut off shipments to unauthorized dealers, because only authorized dealers had the training and skills to explain to the housewives of America the special features, properties and correct uses of Lenox dinnerware china--such as tea cups, soup bowls, and salad plates. I consider that logic suited only to the Mad Hatter's tea party. And yet, the Commission modified that order.

The failure of the Commission to authorize a petition for certiorari in Russell Stover Candies underscores the determination of the agency and its staff managers to avoid a law enforcement litigation presence in the area of vertical price restraints. The Commission terminated the traditional process of judicial review of a Commission decision -- in this case, one rendered as recently as mid-1982. While the Commission divided (3-1) on whether resale price maintenance was per se unlawful, there was no dissent on the main analytic question that framed the issue. That is, the Commissioners were in accord that Russell Stover's announced policy

of terminating dealers for non-adherence to its designated resale prices, coupled with widespread compliance, constituted an agreement or combination between Russell Stover and its dealers. Thus, all of the Commissioners' viewpoints on this issue promoted the utility of the case as a means of testing whether Russell Stover's conduct was lawful or unlawful as a violation of the Sherman Act standard barring "contracts, combinations, or conspiracies" in restraint of trade. It is generally recognized in the literature that the answer to the question posed by this case has been unclear: that is, whether and under what conditions a seller may discontinue a discounting dealer for failure to adhere to a resale price policy. */ As a result of the Commission's decision here, this area of the law will remain unclear, perhaps for years to come.

This action, taken together with the well-documented and intensely controversial refusal of the Commission to bring new RPM cases, suggests an intention to speed administrative repeal of this law by whatever means are closest at hand. The technical existence, at any one time, of a few investigations in the Bureau of Competition is not reassuring.

As I have noted, critics of the per se treatment of resale price maintenance argue that there is no logical justification for treating vertical price restraints any differently from non-price restraints, and that the Supreme Court committed some kind

*/ It is not in dispute that a seller may unilaterally decide whether to select customers in the first instance.

of oversight in failing to recognize this in GTE/Sylvania as well as its two more recent restatements of per se treatment of RPM. The disagreement is fairly easy to state. A per se antitrust rule makes a particular practice flatly unlawful without analysis of the practice's specific competitive effects. This is the case because the practice subject to the per se rule is presumed to be so often of pervasive anticompetitive effect that detailed proof of such effects is waste of judicial resources. It follows that if a full analysis of the competitive effect of such a practice were undertaken, the analysis would nearly always demonstrate the kind of anticompetitive effects that justify the per se simplification. The critics simply are saying that "it ain't necessarily so" and that a full assessment of the competitive effects of RPM on a case by case basis will often (even most often) show that there are procompetitive business justifications for fixing resale prices. This weighing of pro and anticompetitive arguments is, of course, what is called, disarmingly, the "rule of reason."

Our former colleague, Robert Pitofsky, now Dean of the Georgetown University Law Center, in a recent article in the Georgetown Law Journal has made a convincing argument in favor of the per se illegality of resale price maintenance. His article illuminates the flaws in the main arguments advanced to justify the legality of the practice. */ According to Pitofsky, the imposition of uniform prices by a supplier onto a network of dealers is identical

*/ Pitofsky, "In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Price-Fixing," 71 GEO. L.J. 1987 (1983).

in economic effect to a dealer cartel that utilizes the supplier as a policeman for a horizontal price fix, a presumably per se violation. He attributes the false legal distinction between the two different sources of uniform pricing to the assumption made by rule of reason advocates that the supplier's interest is concurrent with the consumer's interest, which in the long run is higher output at lower prices. Pitofsky considers this a "rather impractical view of the distribution process," and he argues that "prices are just as likely to fall as suppliers are forced to react in their wholesale pricing to the success of discounting dealers."

The main argument of opponents of current RPM law is that fixed resale prices support a manufacturer's program of dealer services, such as point of sale showroom advertising, dealer demonstrations and post sale warranty programs. Dealers that seek to discount, this argument goes, may not perform these services for their customers, and instead seek to "free ride" on the performance of these services by dealers whose potential customers then cross the street to buy from discounters. I understand the theoretical appeal of that argument. As a practical matter, however, the "free-rider" might be characterized as the Loch Ness Monster of Antitrust - everyone's heard of it, but except for an occasional shadowy outline, nobody's ever seen it. Who are these so-called "free-riders"? They are presumed to be the discounters, those high-volume, low overhead sellers who provide aggressive price competition to the market and for consumers. As

Dean Pitofsky points out "Until the recent ideology about "free-riders" became fashionable, they [the discounters] were regarded as the very heart of a free market competitive system." In any event, as some of those who will testify here today will no doubt point out, it is by no means universally true that discounters provide no point of sale or post sale warranty services.

There is, in fact, some reason to doubt that many manufacturers seek to enforce resale price maintenance policies in order to induce dealer services. One recent comprehensive study of the subject reveals that during the era of "fair-trade" laws when RPM could be legally engaged in, those items most frequently "fair-traded" were not those for which the manufacturer could reasonably argue that RPM was necessary to induce much-needed dealer services to explain the product or provide post-sale service. Instead, they were items found most often in drug and grocery stores such as soap, toothpaste, razorblades, deodorant, and sanitary napkins. That suggests a number of things - among them an alternative definition for "free-rider" - i.e. those who would take advantage of a relaxed legal standard to engage in RPM where the main justification for allowing it was not present.

Robinson-Patman Act

The ebb and flow of today's RPM debate is reminiscent of a similar turmoil about 15 years ago, when the Commission's policy on enforcement of the Robinson-Patman Act was under concentrated fire. It has always been difficult to find an economist who defended the Robinson-Patman Act, because that Act has been

perceived as purely protectionist in nature, propping up inefficient small businesses at the cost of real competition and lower prices to consumers. The defenders of Robinson-Patman argue that price discrimination is a tool of predation used to eliminate competitors from the market, often through the use of subsidies from other more profitable company operations. Once a competitive rival is eliminated, these advocates believe, monopolistic pricing is achievable, and consumers will suffer.

The history of the decline of government enforcement of the Robinson-Patman Act is almost exclusively a Federal Trade Commission story, since the Justice Department has only rarely attempted to enforce RP. As recently as 1976, however, the Department of Justice proposed substantial revision or even repeal of the statute. An American Bar Association study in 1969, and studies of the antitrust laws under Presidents Johnson and Nixon, were all critical of FTC RP enforcement, and indeed, of the RP Act itself. In 1972, the Ralph Nader organization issued a report on the FTC in which the FTC's Robinson-Patman work was attacked. During this same time, in the late 1960s and early 1970s, an internal majority of the Federal Trade Commission itself brought to an end the commitment of about one-third of the FTC's resources to this kind of work.

In the 15 years that have passed since that time, the FTC has maintained a minimal Robinson-Patman presence, irrespective of whether the Commission was led by Democrats or Republicans. Maintenance of a modest enforcement presence of the Act has been

one of the notes of bipartisan unity at the Commission. Why this is so is something of a mystery since, like RPM, Robinson-Patman remains the law of the land. Even more clearly, Robinson-Patman remains an important component of private anti-trust enforcement. Scores, even hundreds of Robinson-Patman suits percolate through the federal courts. Yet at the FTC, the Bureau of Competition has carefully tended and periodically weeded a group of investigations that usually numbers between 15 and 30, few of which ever come to the Commission for action. Most of the cases that we still do see are the legacy of the Commission that sat before October 1981. Once these few cases have been quietly disposed of, I know of no new actions that are likely to be commenced.

The irony of this is that there is plenty of contemporary expression of support -- even at the FTC -- for the enforcement of the Act in "appropriate cases." This FTC position on RP is in contrast to the position taken on resale price maintenance - that a change of law is overdue. The former director of the Bureau of Competition, Thomas Campbell, for instance, testified on September 9, 1982, before the antitrust subcommittee of the House Small Business Committee that there were three distinct lines of cases that the Bureau of Competition might be expected to pursue. First, there were cases of price predation, or below-cost selling, as a part of a plan to monopolize a market. Yet, the Commission's most conspicuous action in this area to date has been to ask the Supreme Court to vacate an FTC decision */ that the Commission had won in

*/ Borden, Inc., 92 F.T.C. 669 (1978), aff'd, 674 F.2d 498 (6th Cir. 1982), vacated, 103 S. Ct. 2115 (1983).

the Court of Appeals! Rather than defend this affirmed decision before the Supreme Court, the Commission majority decided to enter into a settlement that vitiated the original FTC decision. I dissented from that decision.

The second line of cases endorsed by Mr. Campbell are those involving the acts of so-called "power buyers", large buyers who used their market power to demand, even coerce, a supplier into granting a price concession not granted to the supplier's smaller customers with which the power buyer competes. Only two cases were referenced by Mr. Campbell in his testimony, and I have not seen either case come forward as a law enforcement recommendation.

The third line of potential cases involves the decision of some suppliers to confer on a favored class of customers a special measure of market power denied to other customers of the supplier, in exchange for some commercial agreement for later preferential dealing by the dealer with the supplier. In the one adjudicative case that Mr. Campbell cited in his testimony, I recently read in the trade press that the present Director of the Bureau of Competition favors a totally new and different standard of proof than the one on which the case went to trial. */ The Commission will be considering this case in the months to come, and I cannot comment further on it.

*/ FTC Watch, January 13, 1984, p. 6.

In my separate statement attached to Mr. Campbell's testimony, I warned the Small Business subcommittee to beware of Commission promises in the area of both RP and RPM. Since my advice to this subcommittee today is exactly the same, my 1982 comments bear repetition. On RPM I noted that Mr. Campbell had agreed with Mr. Baxter's view that the law should be changed, and I noted my disagreement with Mr. Campbell on that score. With regard to R-P, I said in part "... [U]nless the Congress directs a change in the prevailing view of the limited application of the Robinson-Patman Act, the Congress should expect to see few, if any, recommendations for complaints from the Bureau [of Competition]. The reassuring technical existence of a few investigations, constant over time, should not be confused with litigation recommendations, which are always the true test of antitrust intentions in this area as in the area of resale price maintenance."

Enforcement of Consumer Protection Laws

As you are aware, last year the House Committee on Energy and Commerce requested that the FTC prepare and submit "an analysis of its deception jurisdiction as presently applied by the Commission and interpreted in case law." In October 1983, Chairman Miller forwarded a Commission statement on deception to Chairman Dingell. I dissented from the issuance of that statement because it was not an accurate or complete analysis of the law and if adhered to by the Commission would have the effect of restricting the Commission's traditional and important law enforcement activities. Currently I am in the process, together

with Commissioner Pertschuk, of preparing a separate and comprehensive legal analysis of the Commission's deception authority which will be forwarded to the Committee shortly. Accordingly, I will refrain from addressing at this time the numerous and complicated issues raised by this law enforcement policy debate and will focus instead on several programmatic concerns I have about the Commission's current exercise of its consumer protection mandate.

Chairman Miller has stated on a number of occasions that one of his primary goals for the Commission is a renewed commitment to the pursuit of cases involving hard-core consumer fraud -- a focus which he believes has suffered in past years while the agency pursued novel legal theories and industrywide trade regulation. I agree that there is a legitimate and continuing role for the Commission to play in pursuing the purveyors of consumer fraud, but I am troubled by an apparent concentration of our resources in the fraud program to the detriment of a more balanced law enforcement caseload.

I have enumerated my concerns often in the past in the context of individual case proposals, Commission budget reviews, and, most recently, in oversight hearings conducted by the Commerce, Consumer and Monetary Affairs Subcommittee of the House Committee on Government Operations. I will briefly summarize those concerns again here.

First, while I do not disagree that basic consumer fraud perpetrated by fly-by-night firms is an ongoing problem and that some of the cases generated in the last year or so may have aided

consumers, I remain unpersuaded that the benefits gained in most of these matters outweigh the costs of pursuing them. Many of our fraud cases -- most in fact -- have involved insolvent, nearly bankrupt, or thinly capitalized firms that offer little or no prospect of redress for consumers or, secondarily, civil penalties payments to the treasury. As a result, our potential remedy most often is a cease and desist order obtaining agreement from a respondent to refrain from fraudulent behavior in the future. It is not at all clear that such a remedy is as powerful a deterrent, either as to specific respondents or more broadly in the fight against hard-core fraud, as are those remedies available to other federal, state and local criminal and civil enforcement agencies. Moreover, practical experience has shown that the investigation and prosecution of small-time scams or larger, quasi-criminal rackets can be as costly and time consuming for us as the pursuit of larger operations whose deceptive conduct may affect significant numbers of consumers on a regional or national basis and whose annual revenues may provide meaningful redress for consumers.

Second, it is increasingly apparent to me that the ascendancy of the various fraud programs within the Bureau of Consumer Protection, along with increased staff attention to order modification requests, has been at the expense of the development or completion of other important consumer protection initiatives. I have long supported the pursuit of certain "fraudulent" sales practices, such as those involving the land sales industry or where elderly consumers are the primary

victims. My backing, however, has always been in the context of a more balanced consumer protection program which in at least equal measure addressed problems in the credit, health care, warranty protection, product defects, housing, food and drug advertising, and service industry areas. While the Commission continues to pursue several of these longstanding goals, such as those involving credit practices, deceptive advertising, and occupational deregulation, certain other of these traditional FTC objectives go unrealized at present. This restructuring of priorities is particularly troubling during a period of government-wide fiscal austerity in which there is an even more compelling need to target our limited consumer protection resources as carefully and effectively as possible.

Important categories of cases are not the only matters which are going unattended at present within the Bureau. We also need to devote the resources necessary to complete and resolve the rulemaking initiatives we have begun in the funeral, vocational school, used car, hearing aid, credit, mobile home and other industries, including the consideration of a case-by-case approach to the problems we have identified if our rulemakings founder. All of the areas I have mentioned have some important aspects in common. They often involve major purchases which are essential or highly desirable for the average working American. In contrast, many of the frauds which are the subject of recent focus involve highly questionable decisions by consumers about discretionary purchases or investments.

Only fifteen years ago the Commission was widely criticized for deliberately restricting its consumer protection activities and relying on enforcement methods that had little deterrent value. I do not wish to see the FTC repeat this discredited course. For the reasons outlined above, I have a longstanding request for an analysis of the cost of the fraud cases in terms of the FTC's resources and of their impact on the marketplace, for consumers or as a deterrent.

Unfortunately, the massive delays which have prevented the completion of numerous Commission rulemaking proceedings are occasioned by other factors in addition to shifting priorities and resource commitments within the Bureau of Consumer Protection. Some of the delay is, of course, simply unavoidable if substantive and procedural due process are to be ensured. Other causes may be less understandable, however. Over the past two years, we have witnessed significant delay caused by the arduous reexamination of some of the rulemaking records by senior staff in the Bureau, applying to those records evidentiary standards not previously articulated to the staff by the Commission, nor required by our legislation or the courts. The potential consequence of this heightened scrutiny may be effectively to preclude issuance of many, if not most, of the trade regulation proposals before us or in various stages of completion at the staff level. While I am pleased by the recent decision to promulgate the Credit Practices Rule, I remain concerned about the fate of the Commission's hearing aids, mobile

home, and vocational schools rulemakings, as well as the planned reconsideration of the Used Car Rule.

Ironically, continued public support for our rulemaking authority was revealed just last year by the Louis Harris opinion poll on "Consumerism in the Eighties". That surveyed showed that while public support for government regulation in general has declined, there is virtually no support for rolling back or dismantling consumer protection regulation.

Perhaps even more significantly, on January 12, 1984, the Fourth Circuit Court of Appeals affirmed the Commission's Funeral Rule. In a unanimous decision, the Court held, in relevant part, that the rule is supported by substantial record evidence in all respects. In view of this decision and the similarities between this and other post-Magnuson/Moss rulemaking records, I believe that the Commission and its staff should now apply more appropriate and judicially sanctioned standards of review to those rules still under consideration.

In conclusion, let me comment briefly on the continuing debate as to whether there has been a decline in output within the Bureau of Consumer Protection in recent years. Frankly, I believe that a review which examines only the raw data on complaints, consents, rulemakings, and order modifications begs the appropriate question. As Chairman Miller testified on December 13, 1982, */ "quantity tells us nothing about quality." He went on to state in that testimony that an analysis

*/ Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce.

that relies on statistics alone "makes no distinction between small, unimportant cases and large cases that have a sizeable impact."

I could not agree with Chairman Miller more. Indeed, as I have already indicated, I am deeply troubled by the possible reduction in meaningful protection to consumers -- as well as by the loss of trust by and guidance to consumers and the business community -- precisely because there has been a decline in both the number of cases brought in certain traditionally important areas and the overall quality of the FTC's consumer protection program. Accordingly, I believe any serious inquiry should focus on the numbers and types of cases brought, numbers of resources committed to various program categories (and in some instances to specific matters), and differing standards of review being applied by senior staff to different types of cases and other matters in order to assess accurately the success of the Commission's current consumer protection mission.

That completes my prepared testimony, Mr. Chairman, and I would be glad to answer any questions.