Federal Trade Commission

"Report from Official Washington"

Prepared Remarks of

The Honorable Janet Steiger
Chairman
Federal Trade Commission

Before

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Section of Antitrust Law
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Good morning. I am pleased to be here today to talk about consumer protection issues. No, I haven't brought the wrong speech; and, yes, I do intend to report on the work of our Competition Bureau. The point is that the goal of our competition work is the protection of consumers. Antitrust work can often seem abstract, so today I want to try to discuss not merely the theory of cur cases, but what remedies we have obtained and how those benefit consumers. I should note at this point that all of my remarks reflect my own views and not necessarily those of other Commissioners or the Commission as a whole.

I believe that the Commission has made significant contributions to the well-being of consumers over the past year by taking actions that have a sound legal and economic basis and by ensuring that the remedies we obtained are custom-designed to resolve the problem. Our accomplishments would not have been possible without the dedication and cooperation of my very able colleagues on the Commission and at the Department of Justice, the hard work and expertise of our excellent staff of economists and lawyers, and the assistance of the outside bar.

Our ability to help consumers is, of course, affected by the resources available. The FTC has obtained modest increases in appropriation for the past and current fiscal years. We have now put behind us the hair-raising situation we faced last year, when

26% of our budget depended directly on how many mergers were filed with the agency.

The increased budget has also allowed us to hire some new attorneys and economists, providing some relief for our greatly overburdened staff. The quality and number of applications as well as the acceptance rate of our job offers is up. Nearly 50% of the 42 offers we made to attorneys for the Bureau of Competition last spring were accepted. This, I believe, reflects a view that the Commission is an exciting place to work and offers our staff an important and meaningful role in protecting consumers.

As always, the bulk of our antitrust work involves mergers. Although the number of filings submitted this fiscal year through March has dropped almost 50% compared to a year earlier, the number of transactions requiring antitrust scrutiny remains high. This fiscal year, through the first week of April, we have issued 19 second requests. We have also taken 8 merger enforcement actions and 5 HSR enforcement actions.

Why, if mergers are down is the incidence of antitrust concern up? It may be that the nature of the transactions has changed. A recent study reported that leveraged buyouts in the United States, which usually involve merely a change in ownership and may raise no competitive concerns, have dropped 75%. The

number of divestitures, however, has increased 45%.[1] Common sense suggests that divestitures are more likely to raise competitive concerns, since competitors are a very likely source of buyers. We have seen in many cases that the company willing to offer the most money for assets is a rival who hopes to gain market share, and perhaps market power, as a result of the combination.

Far more important than mere numbers, however, is how enforcement actions benefit consumers. That is the ultimate inquiry we undertake in deciding whether to take action against a merger: will it hurt consumers? Will prices increase? Will output decrease? To attempt to answer these questions, we rely heavily on our Bureau of Economics. The analysis of our economists helps ensure that we are enforcing the antitrust laws based on fundamentally sound economic principles, and not based solely on "the numbers". The answers to these questions of competitive effects are by their nature usually predictive. However, we sometimes are able to see the benefits of taking enforcement action.

In IMO Industries[2], the Commission obtained a preliminary injunction against IMO's proposed acquisition of Optic-Electronic

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[1] Securities Data Co., Inc., Year-End Press Release, 12/31/90.

[2] FTC v. Imo Industries, Inc. and Optic-Electronic Corporation, Civ. Act. No. 89-2955 (D.D.C. Nov. 22, 1989).

Corp., and the transaction was abandoned. At issue were certain image intensifier tubes used by the Department of Defense in night vision devices, an item of great importance in the recent Gulf conflict, according to numerous news accounts of night action by coalition forces. The Department of Defense indicated that if the acquisition proceeded, it expected to pay about $1450 per tube. When the companies bid separately, IMO won the three year contract with a bid price of $950 per tube. Thus, our challenge to the acquisition may have saved the Department of Defense and the American taxpayers close to $22.5 million.

Another matter with potential to harm a vulnerable group of consumers was American Stair-Glide Corp.'s acquisition of Cheney Co.[3] This acquisition combined the two leading firms in the U.S. markets for stairway and vertical wheelchair lifts. These products are used to expand the mobility of elderly and disabled. The consent agreement which was accepted for public comment was narrowly tailored to address the Commission's specific competitive concerns. The agreement permits the acquisition, but requires that American Stair-Glide license Cheney's technology and trade-name available to a company that wishes to enter into the production of these products.

We look carefully to determine whether an acquisition is likely to harm consumers and where it appears it will not, even

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[3] File No. 911-0032 (accepted for public comment 1/25/91).

where concentration is raised in an industry, we will not challenge the merger. One such case involved a consummated merger in the commercial baking products industry. After the acquisition was announced, we received several customer complaints. The acquisition resulted in high concentration figures and it initially appeared that entry might be difficult. Nevertheless entry was occurring, but it was too early to determine how successful it would be. Staff left the investigation open for a short time to determine the success of the new entrant. Entry occurred within two years and the new entrant's market share was quite close to its projections. Thus, the investigation was closed. In my view, this case illustrates the FTC's dedication to economically rational enforcement.

Our ability to protect consumers from anticompetitive mergers depends largely on our ability to investigate and, if warranted, challenge them before assets have been scrambled. Thus, we insist on compliance with the Hart-Scott-Rodino premerger notification program. This year alone, we have taken action in 5 cases where companies violated the premerger notification rules. In one matter, ARCO and Union Carbide each agreed to pay $1 million in civil penalties.[4] The complaint charged that Union Carbide transferred beneficial ownership of certain assets to ARCO and received the full price before a filing was made. Union Carbide allegedly acted only as a

[4] File No. 901-0010 (settlement filed 1/31/91).

caretaker and essentially stopped acting as an independent competitor before an antitrust review was completed. As it turned out, there were substantive antitrust concerns and a consent agreement was obtained on the merits as well.

In another matter, Equity Group Holdings,[5] a partnership controlled by Steven and Mitchell Rales, agreed to pay $850,000 in civil penalties. The Rales' were charged with using a particular structure to purchase stock in order to avoid making a filing. Settlements were obtained in two other matters in which the complaints alleged that parties failed to fulfill premerger notification requirements, resulting in civil penalties of $550,000 and $500,000.[6] Finally, a complaint was filed in an ongoing action against General Cinema Corp.[7] for its alleged violations of the HSR rules.

These efforts should make quite clear that the government will not allow companies to avoid their merger reporting obligations and will seek civil penalties when they do so.

On the non-merger front, we have taken enforcement action in a variety of matters. One area in which questions often arise is

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[5] File No. 891-0003 (settlement filed 1/25/91).

[6] Reliance-Spectra Vision, File No. 871-0042 (settlement filed 11/31/90); SCI-Centurion, File No. 871-0053 (settlement filed 1/17/91).

[7] File No. 871-0047 (complaint filed 1/2/91).

our role in policing associations. Of course, associations often play an important role in collecting and disseminating information. Associations, being groups of competitors, run a risk, however, of behaving in anticompetitive ways. However, this does not mean that every act they engage in is anticompetitive, or that the Commission keeps a massive hit list of potential association respondents. Rather, we try, by speeches and through enforcement actions, to keep associations aware of their obligations under the antitrust laws. Commission enforcement actions proceed on a case-by-case basis.

In one case, we obtained consents from several New York pharmaceutical societies charged with illegally boycotting a state insurance plan.[8] The complaints charged that members of the societies agreed to refuse to participate in a new reimbursement plan at the proposed (lower) level. These actions were alleged to injure consumers by reducing price competition, coercing the state into raising the prices paid to pharmacies and forcing the state to pay substantial additional sums for prescription drugs under its insurance plan.

The consents accepted by the Commission are particularly interesting, because they contain not only cease-and-desist provisions, but "fencing in" provisions designed to prevent anticompetitive behavior in the future. Along with committing

[8] E.g., Empire State Pharmaceutical, D.9238 (Oct. 3, 1990).

not to enter into any agreement to refuse to participate in any reimbursement plan, the societies agreed, for 10 years, not to communicate to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention with respect to participating in any plan. They also agreed, for 8 years, not to provide comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of participating in any existing or proposed plan.

Another association matter you are probably familiar with is the administrative complaint issued against the College Football Association and ABC[9] for allegedly restricting competition in the marketing of college football games. Because this is in the administrative area, I cannot discuss further details of that case and refer you to the press release and complaint for as much further information as is publicly available at present.

Staff is also investigating a generic type of sham association that arises in the health care field: that is, sham independent practice associations ("IPAs"). Legitimate IPAs are integrated physician organizations that contract with health maintenance organizations to provide care. They reflect financial integration in the form of risk sharing and normally provide significant services on behalf of their physician

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[9] College Football Association/Capital Cities-ABC Inc., D. 9242 (Sept. 5, 1990).

members. We have heard allegations that groups of doctors who are not integrated have joined together in the guise of an IPA to negotiate on price. Where it is possible that an IPA label merely masks naked price-fixing, the Bureau of Competition will be quick to investigate.

Recently, we responded to a request from the Association of Trial Lawyers of America for an advisory opinion concerning a proposed code of conduct. The code had various ethical restraints concerning solicitations of customers needing legal services. The advisory opinion noted that the restraints could be interpreted or applied in various ways to restrict competition. For instance, the Commission recognized that "professional associations have an important role to play in policing false and deceptive advertising because of their professional expertise and their interest in protecting the image of the profession," and concluded that a provision prohibiting false or misleading representations of trial experience or past results of litigation was not on its face a violation of the antitrust laws. The Commission cautioned, however, that "it is possible to interpret the term 'misleading advertising' so broadly as to prohibit virtually any representations about past experience or litigation, which could lead to anticompetitive results." We hope such opinions provide useful guidance.

As many have noted, the Kreepy Krauly matter marked the Commission's first resale price maintenance action in nearly a decade.[10] Just yesterday, we accepted a consent agreement with Nintendo to settle allegations that it fixed the prices at which dealers advertise and sell Nintendo home video-game hardware to consumers. The consent agreement accepted for public comment requires Nintendo to refrain from fixing the price at which any dealer advertises or sells any Nintendo products to consumers. The most significant aspect of this case is that this matter represents a milestone in federal-state cooperation. Led by the States of Maryland and New York, a total of 39 states to date accepted a consent requiring the same prospective relief as required by the Commission order. Thus, Nintendo is subject to the same rules nationwide, rather than having separate obligations in each state, and consumers and dealers are afforded the same rights. I am delighted at the level of federal-state cooperation that has occurred over the past year and a half and hope and expect that it will continue.

A number of ongoing investigations involve matters of particular consumer significance. I can comment on two of them that have been the subject of Congressional testimony.

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[10] Kreepy Krauly, File No. 901-0089 (accepted for public comment 1/17/91).

One investigation concerns the infant formula industry. We have heard allegations of behavior by infant formula manufacturers -- such as frequent, substantial and parallel price increases -- that may raise antitrust concern. The Bureau is examining whether industry characteristics facilitate pricing above a competitive level. Another issue is whether anticompetitive conduct is occurring in the bidding process for sales to state Women, Infant and Children programs. Our investigation into this matter is ongoing, so I cannot discuss what we may find. However, because antitrust violations in this area could injure the most needy consumers, this is a high-priority investigation.

The Bureau is also investigating Sandoz for possible antitrust violations in connection with its sales of clozapine, a drug used in treating schizophrenia. The allegation is that Sandoz is requiring patients who purchase clozapine also to purchase monitoring services from Sandoz. The Veterans Administration and other providers believe they can provide patient monitoring services at much lower costs without a decrease in patient safety. I do not yet know how this matter will be resolved. However, in view of allegations that patients cannot afford such an important drug, in part because of the high price of testing and administration, we are vigorously pursuing our investigation of this matter.

We pursue competition policy in venues other through investigations of specific practices. Our Consumer and Competition Advocacy program provides, upon request, analyses of competition issues to other federal agencies and to state and local legislative and policymaking bodies. In response to a request from the Illinois Commerce Commission, our Bureau of Economics and Chicago Regional Office staff commented on the regulation of intrastate telecommunications services noting that economic theory and empirical evidence indicated that price cap regulation of telecommunication services would likely be preferable to the more traditional rate-of-return regulatory format, especially for those services where competition exists. The staff has commented in numerous instances on issues involving entry restraints. For example, the Bureau of Economics in conjunction with our San Francisco Regional Office noted that allowing additional entry into the intrastate trucking business in Tennessee and into cable TV markets in Ohio would likely benefit consumers in those states. Restraints on the ability of firms to choose their distribution channels has also been addressed in our advocacy work. For example, the Bureau of Competition recently commented on vertical restrictions on the distribution of power equipment in Alabama and on the distribution of gasoline in Virginia and Arkansas. As you can see, our Competition Advocacy program covers the same broad range of issues that we address in our casework.

There is also an international aspect to our competition policy concerns. I want to mention our ongoing work with the Department of Justice to provide technical assistance to Eastern European countries. Both the Commission and the Antitrust Division have received requests for competition policy and privatization advice for the governments of the USSR, Poland, Czechoslovakia and, most recently, Bulgaria. These countries are correctly concerned that replacing state run monopolies with private monopolies will deny the benefits of a competitive market to much of the population. We have been fortunate to be able to help spearhead the effort to explain free market principles to officials of these countries. Moreover, we have explained how antitrust enforcement and demonopolization are key elements in moving to a market economy. FTC Commissioners, economists, and attorneys have had meetings with officials from these countries and, using funds from AID, economists and attorneys have visited Poland, Czechoslovakia, Hungary and Bulgaria to provide technical assistance on competition matters. Officials from these countries have unanimously praised our assistance and requested more.

Part of the role we play at the FTC is to convey to you the rules of play themselves and to make sure they are understood and that they are sensible. We have done this in a number of ways over the past year. A number of our lawyers and economists, and my able colleagues, have given speeches and articles on a range

of subjects, from our analysis of horizontal restraints to what constitutes an acceptable consent in a merger case. This is an ongoing and traditional role of FTC Commissioners and staff alike, although I want particularly to applaud Kevin Arquit's courage in plunging into speechifying on Robinson-Patman issues.

We are also working on a number of projects relating to interpreting the Hart-Scott-Rodino Act. The Compliance Division and Premerger Office have prepared two booklets, in lay language, that provide a basic introduction to the premerger notification program and delineate which transactions are subject to the filing requirements. More such booklets are on the way. John Sipple, familiar to many of you as the head of the Premerger Office, is compiling an extensive collection of more detailed materials on HSR issues. On a daily basis, the Premerger Staff provides the invaluable function of rendering advice on the merger reporting requirements. Many of you have written letters praising the staff of that office for their fine work, a gesture that is greatly appreciated. We want to hear when you think we have served you well, as well as when you think we could do better.

Staff is also working with the ABA in an attempt to address concern that our second requests -- requests for additional information in merger cases -- can be overly burdensome. We are working on an evolving, streamlined second request and have been

using versions of it in some of our HSR inquiries. Additionally, where there appears to be a key issue that is sufficient to establish that the acquisition is not anticompetitive, the Bureau is using a "quick look" approach to investigate the transaction. Parties are invited to address first the key issues in a case, rather than submitting a full response. If staff is convinced on the key issue, they will not require further compliance and will recommend early termination of the waiting period. Already, nearly a dozen cases have been closed without the need for parties to submit a full response.

Over the past year, we have worked hard to make reality the message that antitrust enforcement is alive and well. I think that our actions over the year have given us a record of which we can be proud. Many of the initiatives we have begun in the past year have already borne fruit; others will become visible in the months ahead. I believe the Commission will continue pursuing antitrust violations we learn of in ways that are rational and benefit consumers.

It has been an exciting year and a half for me. Let me close with thanks to this section of the ABA -- for the reception given me upon becoming Chairman, for substantive help at every turn, and for the good working relationships we have forged. I look forward to continuing our efforts in your good company.