



Federal Trade Commission

ARCHIVES
HIDE 880
.S7
no. 30

JANET D. STEIGER

CHAIRMAN

FEDERAL TRADE COMMISSION

ASSOCIATION OF NATIONAL ADVERTISERS, INC.

83RD ANNUAL MEETING & BUSINESS CONFERENCE

**THE HOMESTEAD
HOT SPRINGS, VIRGINIA**

October 12, 1992

The views expressed are those of the Chairman and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

FEDERAL TRADE COMMISSION

OCT 28 1992

LIBRARY

Good afternoon. I am very pleased to be here.

National advertising is one of the most important components of the Federal Trade Commission's ("FTC" or "Commission") consumer protection mission. Today I would like to discuss the Commission's role in setting national advertising standards in two areas -- environmental and food advertising. Of course, the views I express here are my own and not necessarily those of the Commission or any other commissioner.

The FTC's current approach to advertising continues to be shaped by its longstanding recognition that, as a purely economic force, advertising is a dynamic, necessary part of the American economy. Good advertising can still make a new or obscure product successful. Truthful and accurate advertising is a primary source of product information and permits consumers to actively participate in and police the marketplace through informed decision-making.

Despite advertising's importance in maintaining a competitive marketplace, the American public is decidedly ambivalent about advertising. On the one hand, we love the entertainment value. Indeed, the entertainment produced by some ads can live on for years. From "plop plop fizz fizz" to "I can't believe I ate the whole thing" and to Tony the Tiger, advertising jingles and characters can become icons of our popular culture.

On the other hand, consumer surveys continue to show that the American public is deeply skeptical of advertising. Too many consumers believe that many of the advertisements they see are misleading or exploitative. Some skepticism probably is inevitable. But some also stems from consumer reaction to those advertisers who step over the line with claims that are misleading or unsubstantiated. That's where the FTC steps in -- particularly with respect to ads that are disseminated nationally. Why? Because to reach its full potential, advertising must have the public's confidence. False and deceptive advertising not only injures consumers, but also increases public skepticism which, in turn, diminishes the value of all advertising. And I know that this view is shared by your industry as underscored by your longstanding support of industry self-regulation through the NAD process.

When I first joined the Commission as Chairman in 1989, the agency -- rightly or wrongly -- was widely perceived to have abandoned its leadership role in the regulation of national advertising. The American Bar Association's "Kirkpatrick Report" on the FTC probably best summarized the situation. Although the Report noted that its committee members were "divided" as to whether the FTC was sufficiently active, they were "united" in the belief that the FTC could, and should, do more to articulate its advertising law enforcement agenda. "Too rarely," the Report concluded, "has the public received the message that the FTC believes it is important to move aggressively against false and

deceptive advertising." Because of this perception, I made a commitment to increase the agency's focus on national advertising.

Now that I have been at the agency for more than three years, it seems like an appropriate time to step back and assess how the Commission has done in achieving this goal and where we are headed. Today I would like to offer my impressions on how well the agency has fared in setting a national agenda for advertising regulation.

I am quite proud of our achievements over the past several years. I believe that the FTC of the 1990s has shown that the agency can maintain a strong but sensible advertising program that protects the interests of both consumers and competition. The Commission has established itself as a leader in enforcing high but fair deception and substantiation standards for today's major national advertising issues, including environmental (or "green") marketing, food advertising, and advertising for diet products and services.

The Commission has brought cases against leading national advertisers -- including companies with names recognizable in most U.S households -- and selling products as diverse as disposable diapers and cheese slices to toys and glittery hairspray.

I am happy to report that in this tough budget year, Congress funded the Commission at its current level. This means that the modest but important increases in funding of the last

three years will be maintained for fiscal year 93. Increasing the overall resources of the Commission was a major goal of mine when I first came to the Commission and I am proud that we have been so successful. I believe that it shows a congressional vote of confidence in the agency and its mission.

Most of our efforts, not unexpectedly, consist of law enforcement actions. After all, the FTC is primarily a law enforcement agency and I see no likelihood of change in that regard. But as the audience knows well law enforcement by itself isn't the whole story of what we do. As the federal agency charged with ensuring truthful and non-deceptive advertising, we also have the often very challenging responsibility to assert a leadership role in articulating a national advertising policy that can form the basis for a consistent and harmonious regulatory approach among the various state and federal agencies involved in the regulation of advertising.

The Commission's Green Marketing Guides, issued on July 28, demonstrates that the FTC is up to meeting that responsibility. The Commission's Guides are intended to provide a roadmap for reducing consumer confusion and preventing the deceptive use of environmental terms such as "recyclable," "degradable," and "environmentally friendly" in the advertising and labeling of products in the marketplace.

Our goal is to protect consumers and to bolster their confidence in environmental claims and to reduce manufacturer uncertainty about which claims might lead to FTC law enforcement

action. Describing the specific provisions of the Guides is beyond the scope of my discussion here. But those of you who have an opportunity to review them will find them a primer on advertising law -- grounded on the basic principles of advertising substantiation, careful qualification of claims and, clear and conspicuous disclosure.

As your own petition for guidelines recognized, these are not startling new principles, but rather the very useful application of basic advertising law to a new and rapidly evolving area of advertising claims.

I am pleased with the overwhelming support for the Guides -- not simply because the comments are positive -- but also because the support comes from such diverse parties. We have heard from sister federal agencies to state officials and from industry groups to consumer and environmental groups.

For example, EPA Administrator Reilly -- who was an important partner in our efforts -- has said: "The [FTC guidelines] will help provide environmentally conscious consumers with more reliable information, ensuring the use of accurate, specific claims and discouraging those that are vague, trivial and overstated. We will see further environmental benefits as consumers use the formidable power of the marketplace to help achieve environmental goals."

And Minnesota Attorney General Hubert H. Humphrey III, head of the Joint State Task Force on Green Marketing Claims, the individual who did more than anyone else to bring these issues to

National attention, is quoted as saying: "This is a real victory for business and consumers."

Similarly, a major national environmental group, the Environmental Defense Fund, issued a news release saying, among other things, "[t]hese guides represent a significant advance and a much needed national effort to reign in 'advertising pollution.'" Also, the newsletter Green MarketingAlert offered a perspective that I particularly like. It said: "while specific passages of the moderate and well-crafted document are bound to cause grousing from one set of stakeholders or another, that's inevitable with any middle-of-the-road document. Lawyers have a saying about negotiated settlements: 'If they're both unhappy, we know it's a fair deal.' And that's what the FTC guidelines are -- a fair deal."

I think the success of these efforts stems from three basic principles that underlie the process that was used in formulating the Guides.

First, we listened to businesses and consumer groups alike to learn the facts about green marketing -- not only to determine how consumers might be misled but also to understand the legitimate needs that businesses have. In formulating the Guides, we relied on the solid record of our law enforcement efforts, which provided context and a basis. We also relied heavily upon the solid record established through the Commission hearings and the more than 100 written comments. This record provided invaluable information concerning areas where consumers

might be confused or misled as well as areas where flexibility was important to ensure the free flow of advertising. And even more importantly, we had the benefit of carefully-crafted proposals from both the industry and from the state attorneys general. The ANA as one of the co-petitioners should be proud of the very positive contribution that it made to the success of this process.

The second key was to recognize that consumer protection activity should serve to protect both consumers and legitimate competition. By doing so The Guides will also protect consumers by providing truthful and accurate information that they can use to make informed decisions. I hope the Guides will protect legitimate competition by providing a level playing field. The FTC has no interest in telling you what product attributes to compete on. But we should insist that no one gains an unfair competitive advantage through consumer deception.

A third key was a close cooperation among federal, state and local regulatory efforts. The Commission was an active participant in the Joint Federal Task Force with the EPA and the U.S. Office of Consumer Affairs and both agencies participated actively in our guidelines process. FTC staff attended the hearings held by the state attorneys general task force on green marketing and representatives of the task force actively participated in our guidelines process. This close cooperation not only makes the most efficient use of scarce resources, but

also promotes one of the critical goals of the Guides: consistency and harmony among different regulatory approaches.

Of course, it is naive to think that the Guides themselves will produce uniformity in regulatory approaches. The Guides do not preempt state laws. Thus, it is likely that some diversity will continue. That is part of the process of our system of federalism. However, I hope that the positive reaction we have received from various state officials is an indication that the Guides will help promote consistency and that the Guides can serve as a useful model for future state activity.

And, of course, a strong and vigorous FTC will remain an essential complement to, and guardian of, the principles set out in the Guides. We intend to actively continue our on-going law enforcement program. With reasonable and fair guidelines and articulating them to the public, we have greatly enhanced the value of our enforcement efforts. And we expect to continue to bring cases, both on issues in areas covered by the Guides and on new issues as they occur.

We also expect to continue to work with our sister federal agencies and with the states as new or unanticipated issues arise -- as they undoubtedly will.

And, of course, I would hope that the industry self-regulation process would also continue its fine work in this area and that our Guides will be of assistance to this process as well.

In the long term, we recognize that technology will continue to change and that consumer perceptions about environmental issues may also evolve. Accordingly, the Guides state that parties may petition the Commission to amend the Guides, in light of substantial new evidence either on consumer interpretation of claims or on substantiation of claims. In addition, the Guides state that the Commission will seek public comment in three years as to whether and how the Guides need to be changed.

Now that the Guides have issued, it is time for the FTC to turn its attention to other equally important national advertising issues. One obvious area that does and will continue to attract the Commission's attention is food advertising. Right now, food advertising presents a number of extremely important as well as complex national advertising issues.

The first and foremost issue will be to determine how to harmonize the Commission's law enforcement policies with the Nutrition Labeling and Education Act ("NLEA") regulations to be issued by the Food and Drug Administration ("FDA") in order to ensure a coordinated federal policy with respect to food advertising and labeling. The Commission already has taken some steps with this goal in mind.

For example, we have strengthened our liaison efforts with FDA. Among other things, we have established a formal referral program whereby we refer label issues to FDA and FDA refers advertising issues to the FTC. (Of course, this process

merely formalizes an informal process already in place.) In addition, staff meets regularly with FDA to ensure adequate communication and a coordinated approach to food issues. And, of course, the Commission always has relied on FDA's expertise in developing its law enforcement actions.

We also have stepped up our on-going law enforcement program. Since early 1991 alone, the Commission has brought or finalized 13 food and food supplement cases. These cases address significant health issues such as important nutrient content information regarding fat, cholesterol, fiber, sodium and percentage fat-free claims and the entire gamut of health claims including cholesterol, fat and heart disease claims, fiber and cancer claims, and vitamins and cancer claims.

While I believe that our law enforcement efforts provide substantial guidance, the Commission recognized that there will be a need to provide specific and timely notification to both the food marketing industry and consumers once the FDA issues its final regulations this November. The Commission has already made a commitment to commence review of the FDA regulations when they are issued. At that time, it will determine the most appropriate manner in which to articulate to the public and the affected industry members the Commission's policy regarding food advertising in light of the new regulations.

On one hand, the FDA's proposed regulations and the FTC's traditional approach to advertising have many elements in

common that should facilitate the process. Both seek to protect consumers from false or misleading information. Both require rigorous support substantiating the claims made. Both require that the advertiser or labeler base the claim upon the full body of scientific evidence and not just on favorable evidence. And neither will permit claims based merely on preliminary or inconclusive evidence.

Still, there are some difficult issues we must address. For example, to what extent can the FDA's approach to disclosures for labels be applied practically to advertisements, particularly broadcast ads? Similarly, how should the FTC deal with health claims that have not yet received FDA approval for labels but may nonetheless be truthful and well-qualified?

I am sensitive to the need to find a consistent national approach in order to limit confusion that will place extra burdens on industry. At the same time, I also recognize the need to get important health information out to consumers. How to find the best way to harmonize the approaches presents difficult challenges.

Unlike the environmental claims area, however, there is not yet the kind of agreement that will facilitate resolution of these food issues. For example, the NLEA reflected an agreement that food labels should be reformed in order to help consumers select a healthier diet by providing accurate and useful dietary information. Yet the more than 30,000 comments that FDA has received on its proposed implementing regulations suggests, among

other things, that there still is substantial diversity of opinion on how to achieve this goal. But whether or not there is agreement on food labeling, advertising is not covered by the NLEA and it appears that before its passage there was no strategy as to how the NLEA would or should effect advertising.

Moreover, as to how the FTC should apply its authority, the Commission has not had the benefit of carefully focused reaction from either industry, public health or consumer groups. It appears that some groups, for example, believe that the only answer is for the FTC to enforce verbatim the FDA labeling rules, regardless of whether that results in a de facto ban on nutritional and health claims in television advertising. Others, in contrast, seem to believe that the FTC's advertising standards should allow them a ready vehicle to ignore the restrictions placed on them by FDA's labeling regulations.

The Commission is committed to developing an harmonious enforcement program once FDA's final regulations are issued. Already our current advertising cases offer an opportunity to explore some of these issues within the context of specific factual records rather than on the basis of abstract principles. And ultimately, the Commission itself has responsibility to devise an advertising enforcement policy that is both within our statutory authority and in the public interest. Still, I believe that both industry and consumer groups could facilitate this process by presenting us with carefully thought-out views on what these issues are and the best way to resolve them. I believe

that after the FDA issues its final regulations, the Commission should consider formally seeking these views. I want to stress, however, that to be useful, such views would have to be: (1) based on the Commission's existing authority to prevent deceptive, unsubstantiated or unfair advertising; (2) designed to ensure that advertising does not undermine the goals of the NLEA, while at the same time taking into account the differences between advertising and labeling regulation; and (3) reflect that the role of advertising regulation is to make sure that consumers have the information they need to make choices.

In conclusion, the Commission is committed to exercising a continuing, responsive and responsible leadership role in national advertising issues. I want to leave you with my view that as the Commission addresses areas of overlapping authority we will continue to take into account the concerns of both consumers and industry alike and work closely with other federal and state agencies. My goal is that we establish policies that will protect consumers as well as legitimate competition.

Thank you very much.



Federal Trade Commission

ARCHIVES
FD2500
157
no. 31

JANET D. STEIGER

CHAIRMAN

FEDERAL TRADE COMMISSION

NEW ENGLAND ANTITRUST CONFERENCE

CAMBRIDGE, MASSACHUSETTS

November 6, 1992

The views expressed are those of the Chairman and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners

FEDERAL TRADE COMMISSION

DEC 08 1992

LIBRARY

On this, my fourth visit to the New England Antitrust Conference, let me report on progress made on themes raised during my first visit here in 1989. At that time, I established as a goal the restoration of "public confidence in the Federal Trade Commission as a vigorous law enforcement agency."

In the merger area, I committed to "increase vigilance," and to "streamline" and "improve" review of acquisitions. In both procedural and substantive ways the Bureau of Competition has followed through on that commitment. Second requests now flow through a unified system to assure consistency and to minimize burden. Indeed, the amount of information called for typically is less than it was three years ago, due to the ongoing effort to streamline the second request process. Moreover, an expanded use of the "quick look" investigation approach has made it possible to narrow the issues to those truly raising enforcement concerns.

Substantive merger analysis has also improved with the issuance in the past year, along with the Department of Justice, of the 1992 Horizontal Merger Guidelines, which for the first time represent a unified statement of enforcement policy by the two federal agencies principally responsible for merger enforcement.

There has been a great deal of commentary about the 1992 Guidelines -- the new emphasis on sunk costs; the analysis of the timeliness, likelihood and sufficiency of entry; the expanded discussion of coordinated and unilateral anticompetitive effects. Every day the Commission and its staff, along with our counter-

parts at the Department of Justice, are gaining experience in applying these and other aspects of the Guidelines in our merger investigations.

The Guidelines preserve the fundamental approach of the 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Mergers. As a result, the Guidelines have not required major changes in the way we conduct our investigations. They do, however, improve on aspects of prior policy statements, better explaining the analysis, and incorporating advances in merger analysis that have taken place since the early 1980s.

One of the most notable changes in the 1992 Guidelines is in the analysis of entry. The Guidelines' treatment of this key issue has improved both in terms of its analytical rigor, and in terms of its practical value in describing how we actually analyze entry. In the past, entry would not have been found to alleviate competitive concerns about a merger unless it would be timely, likely and sufficient to deter or counteract those concerns, but now those requirements are fully articulated.

The Guidelines also spell out more clearly how to analyze the potential anticompetitive effects of a merger. Most often concerns will focus on the prospect that a merger will make coordinated interaction among firms more likely, and the Guidelines provide greater definition of whether firms can reach terms of coordination, and detect and punish cheating on those terms. Some mergers may create or enhance unilateral market power, and here too the Guidelines provide a more thorough

discussion of our analysis, both in markets where firms are distinguished primarily by capacity and in markets where products are differentiated.

I would also note that the Guidelines eliminated the section in the 1984 Guidelines dealing with the financial condition of firms in the market. This language had served as the platform for arguments by merging parties and their counsel that an otherwise anticompetitive merger should be allowed to proceed because a party was in weak financial condition, but was short of imminent failure -- sometimes termed a "flailing firm" defense. The elimination of this language should lay such arguments to rest. At the same time, the Guidelines set forth a framework for analyzing true failing firm or failing division arguments.

We are seeing increasingly sophisticated analysis by both staff and the parties, reflecting some of the advancements contained in the new Guidelines. In other words, I think the Guidelines have sharpened the focus on those areas that truly raise competitive concerns. This is not to say that the Guidelines have caused merger investigations to become more lengthy. One key objective in releasing the Guidelines was to make the federal antitrust agencies' approach to mergers more transparent to the public, and minimize the burden associated with what is, inevitably, a complex analysis. It is also not to say that the changes reflected in the 1992 Guidelines have led to a sea change. Indeed, during the past six months, I do not believe there have been any different conclusions on whether to

challenge a merger than would have been reached before the Guidelines were adopted.

Although the Guidelines required a few changes to the FTC's model second request, in areas such as sunk costs and minimum viable scale for entry, the overall amount of information called for in a typical second request remains about the same as before the Guidelines were released. By better articulating and focusing the approach to analyzing mergers, it is my belief that in many cases the new Guidelines will expedite the investigation and allow a conclusion to be reached more efficiently than before.

In the non-merger area, when I first addressed this conference in 1989 I committed to expand enforcement efforts, and to consider "application of antitrust scrutiny to activities and industries to which it has not previously been extended." In this regard, a general guidepost has been the well-regarded 1989 study of the Federal Trade Commission by the American Bar Association's Section of Antitrust Law.¹ The Special Committee that authored the Report was made up of top antitrust experts with experience in business, the private bar, government and academia. One of the most important conclusions of the study was that the Federal Trade Commission has a "special role" to play in non-criminal, non-merger enforcement, due in part to "the FTC's special attributes: an ability to seek injunctions without

¹ Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission, reprinted in 58 Antitrust L.J. 43 (1989).

establishing antitrust liability for purposes of private damages actions, an ability to devote substantial time to litigating complicated economic questions, and an ability to consider a variety of remedies for competitive harms."²

The ABA Report's recommendations focus on practices that economic analysis shows to be harmful to consumers, but the legality of which may be largely untested. I share the Report's view that the Commission is well-suited to apply its special expertise in antitrust law and economics to these cases. The resources of our Bureaus of Competition and Economics give us the ability to engage in a searching inquiry into the economic effects of suspect practices and to consider the benefits and possible costs of antitrust enforcement.

The vehicle for engaging in this exercise is section 5 of the FTC Act, which forbids "unfair methods of competition." Given the limited guidance provided by a literal reading of the statutory language, legitimate questions can be raised as to its appropriate scope. From my perspective, I regard section 5 as a gap-filler. I see it not as a cure-all intended to reach every business tort, but as a prohibition against conduct that technically may not be reached by the Sherman or Clayton Acts, but that nonetheless raises the same danger of competitive harm. As I will detail in a moment, I believe this is the common thread in several cases brought by the Commission under Section 5 in the past year.

² Id. at 16-17; 58 Antitrust L.J. at 61-62.

Since I spoke to you last, the Commission has successfully concluded three investigations involving innovative legal analysis of practices that economic analysis indicated were harmful to consumers. As I will elaborate on more fully, in the Vons case,³ the Commission ordered the divestiture of assets acquired in what the parties had claimed was a non-horizontal transaction, where the acquiring party had sold assets out of the market in a transaction that was inextricably intertwined with the challenged acquisition. In Quality Trailer Products,⁴ the Commission challenged an alleged unilateral solicitation to fix prices. And in the Infant Formula cases,⁵ the Commission dissected complex economic arrangements to halt unilateral, non-monopolizing conduct that was alleged to be anticompetitive, and challenged in federal court alleged anticompetitive agreements with respect to promotional practices and prices.

³ The Vons Companies, Inc., No. C-3391 (September 1, 1992) (consent order).

⁴ Quality Trailer Products Corp., No. C-3403 (November 5, 1992) (consent order).

⁵ Mead Johnson & Co., Civ. No. 92-1366 (D.D.C. June 10, 1992) (consent decree); American Home Products Corp., Civ. No. 92-1365 (D.D.C. June 10, 1992) (consent decree); Abbott Laboratories, Civ. No. 92-1364 (D.D.C., filed June 10, 1992); Abbott Laboratories, File No. 901 0119, ___ F.T.C. ___ (filed June 10, 1992).

The Vons Case -- Closing the Loopholes

A good example of the Commission's innovative economics-based approach is the recent consent order with the Vons Companies.⁶ The complaint in the Vons case alleges that in two transactions that were inextricably intertwined, Vons sold its only grocery store in San Luis Obispo, California, to a company that intended to operate it as a drug store, and purchased all of the grocery stores of its competitor, Williams Brothers, in the same market. As a result of these transactions, Vons' share of the San Luis Obispo market was approximately 50%, market concentration increased, and both the number of competitors in the market and market capacity were reduced. That market, according to the complaint, was highly concentrated and marked by entry barriers.

The complaint also alleges that Vons would not have sold its store but for the acquisition from Williams Brothers. In fact, Vons entered into a letter of intent to buy the Williams Brothers stores before agreeing to sell its own store. Moreover, the Commission alleged, Vons sold its store for use as a drug store for a lower price than had been offered by companies that would have operated it as a supermarket. It is a fair inference that Vons was willing to forego a higher price for its store and sacrifice short run profits in order to take capacity out of the market and obtain market power.

⁶ The Vons Companies, Inc., C-3391 (September 1, 1992) (consent order).

Because Vons sold its store in San Luis Obispo before consummating the Williams Brothers acquisition, it had no horizontal overlap with Williams at the time of the consummation. But this state of affairs was a fleeting one. For all practical purposes, Vons and Williams Brothers were competitors, for as alleged in the complaint, Vons at all times intended to remain in the grocery business in the San Luis Obispo market, and would not have sold its San Luis Obispo grocery store independently of the Williams Brothers acquisitions. The economic effect of the transaction was no different from that of an ordinary horizontal acquisition in a highly concentrated market, except in one respect in which this transaction had a potentially greater anti-competitive effect: it resulted in the elimination of capacity in the market.

The Commission's complaint against Vons charged that the acquisition violated both section 5 of the FTC Act and section 7 of the Clayton Act.⁷ The consent order requires Vons to divest one of the two stores acquired from Williams Brothers, in order to restore competition in the market.

The Vong case shows the ability of the Commission to use section 5 of the FTC Act, along with the other antitrust laws, to reach anticompetitive conduct that may be unusual but is capable of great mischief if not successfully challenged. One can

⁷ One of my colleagues, Commissioner Azcuenaga, concurred in accepting the Vong consent agreement on the basis of section 5 of the FTC Act, without reaching the question of whether section 7 of the Clayton Act applied to Vons' conduct.

imagine the kinds of transactions that might be attempted by business executives working with creative counsel if this conduct had gone unchallenged. By affirming that multiple, related transactions can be considered together to determine their overall effect on competition, the Commission prevented the opening of a potentially significant loophole.

Quality Trailer Products -- Invitations to Collude

In Vong the Commission proceeded both under section 7 of the Clayton Act and section 5 of the FTC Act. In other cases brought in the last year, the Commission relied exclusively on section 5 to challenge activity that would not be illegal under the Sherman and Clayton Acts. I will turn first to invitations, or solicitations, to collude. At this meeting last year I advised that the Bureau of Competition was investigating conduct of this type and would take enforcement action where appropriate.⁸

Under the leading case on invitations to fix prices, American Airlines,⁹ an unaccepted solicitation creates antitrust liability under section 2 of the Sherman Act where the soliciting and solicited party collectively possess market power. Section 2 reaches unilateral conduct that creates monopoly power or poses a dangerous probability of the creation of such power, and there-

⁸ See Prepared Remarks of Janet D. Steiger Before the 25th New England Antitrust Conference (Oct. 25, 1991).

⁹ United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985).

fore requires proof that acceptance of a solicitation would have created monopoly power.

But what of invitations that arguably do not satisfy the requirements of section 2, but which nonetheless raise competitive concerns? While section 1 of the Sherman Act does not apply so long as the invitation is not accepted, section 5 of the FTC Act, which prohibits unfair methods of competition generally, can reach this conduct.

What is the justification for attacking a unilateral solicitation to collude where the solicitor and solicited together lack market power? One reason is that the solicitation may facilitate successful cartel activity. As Harvard Professor Philip Areeda states, in oligopolistic markets, "a solicitation to raise prices in concert may reduce [firms'] uncertainty, either by setting a target price or by raising confidence that rivals will follow."¹⁰ That is, by its very existence, an invitation can facilitate pricing coordination among rivals. This "facilitating practices" theory is analogous to that underlying at least some of the claims in Infant Formula that I will discuss in a moment.

This week the Commission gave final acceptance to a consent agreement in Quality Trailer Products.¹¹ The complaint alleges that representatives of the respondent, which manufactures and

¹⁰ VI P. Areeda, Antitrust Law § 1419d, at 117 (1986).

¹¹ Quality Trailer Products Corp., No. C-3403 (November 5, 1992) (consent order).

distributes axle products, visited its competitor's headquarters and invited an officer of the competitor to fix prices. The complaint specifically alleges that Trailer Products officials "told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price." The officials also "provided assurances to the competitor" that Trailer Products would not sell certain axle products below a specified price.

There is no allegation of market power in the complaint. Thus, the case squarely presents the question whether the FTC Act should proscribe naked invitations to fix prices or divide markets without regard to market structure. That is, must the prohibition against naked solicitations be conditioned on a showing that the soliciting and solicited parties collectively possess market power, as in American Airlines, or at least that the market structure is oligopolistic and the challenged conduct is therefore likely to facilitate collusion? I think the answer to those questions is no. The central rationale for prohibiting naked invitations to collude in unconcentrated markets is deterrence: prohibiting attempts to reach agreements that would be per se violations of the antitrust laws if completed lessens the likelihood of such agreements occurring. And there is a sound basis for concluding that such agreements are likely to have anticompetitive effects, and therefore ought to be deterred.

I assume that firms are rational profit maximizers, and therefore can reasonably conclude that a firm would propose a price fixing agreement to a competitor only where it expected to benefit from the proposal. It may be that the seemingly isolated solicitation masks a broader attempt involving other firms to cartelize the market. There might be other solicitations that are not uncovered. The solicitor also may perceive the potential for the joint exercise of market power over a narrower group of customers than may be apparent to outside observers.

It is eminently reasonable to rely on the soliciting party's expectation that acceptance of its invitation, or the invitation itself, will produce anticompetitive gains. The solicitor presumably would not risk the heavy fines and jail sentences that would result for a completed price fixing agreement, if detected, without the belief that the agreement would produce a benefit. Relying on the assessment of market participants outweighs the benefits of a market structure inquiry, at least in the absence of any efficiency in the conduct under review.

Stopping price fixing and market division attempts will reduce the likelihood of completed agreements. To ignore the solicitation would give price fixers a "free bite at the apple" -- if an invitation is rejected, the inviter would not be subject to sanctions; and if the invitation is accepted, the resulting agreement might never be detected. Prohibiting all naked solicitations to fix prices and divide markets sets a clear standard

that prohibits conduct with a great anticompetitive potential that offers no countervailing benefits.

While Trailer Products suggests that section 5 can be applied to prohibit non-public invitations to enter into naked horizontal price fixing or market division agreements, regardless of market power, this does not mean that I believe we are going to start actively searching out invitations in unconcentrated markets or markets with no barriers to entry. As Commissioners Azcuenaga and Owen point out in their separate concurring statements in this case, the conduct here is a naked invitation and there is no fear of deterring procompetitive conduct. The invitation in Trailer Products was a non-public, naked solicitation, which would give rise to a per se price fixing violation if accepted by the solicited party. The principles underlying Trailer Products do not condemn solicitations that seek agreement on prices or market divisions ancillary to bona fide economic integration between the parties. When two firms in good faith explore the formation of a joint venture that would integrate activities or would undertake what neither could do independently, very different issues are raised.

Infant Formula -- Collusion-Facilitating Practices

The Infant Formula cases recently brought by the Commission represent complex civil cases where the Commission's legal and economic analysis can examine oligopoly behavior that has surface respectability but can result in significant harm to consumers.

On June 10 of this year, the Commission filed actions in federal court against the three leading manufacturers of infant formula -- Abbott Laboratories, Mead Johnson, and American Home Products -- as well as an administrative complaint against Abbott.¹² The complaints address a number of allegations of collusion-facilitating practices (and in one case, actual collusion) resulting from a thorough examination of the industry.

Litigation with Abbott is proceeding. Mead Johnson and American Home Products, however, entered into consent agreements, filed simultaneously with the complaints, providing for restitution under Section 13(b) of the Federal Trade Commission Act¹³ to the U.S. Department of Agriculture in the form of free infant formula, as well as restrictions on future conduct. This is the first time that the Commission has obtained restitution under Section 13(b) of the FTC Act for an antitrust violation.

Of course, given the ongoing and active nature of litigation with Abbott, I can only describe generally the allegations and legal theories alleged in the complaints.

The complaints filed in federal court allege that the \$1.6 billion domestic infant formula industry is extremely concentrated, in which the three defendants have accounted for more than 90% of sales. The complaints allege that barriers to entry into the manufacture and sale of formula are high, and that formula produced for consumption in the U.S. is homogeneous because of

¹² See n.5, supra.

¹³ 15 U.S.C. § 53(b) (1988).

anticompetitive pricing practices easier to coordinate and maintain. The complaints further allege that there has been only limited price competition in the industry, that there was virtually no advertising directly to the consumer until 1988, and that industry performance has been characterized by high profits.

Since the allegations against Abbott are in litigation, let me address them briefly first. In the federal court action, the Commission is seeking restitution as well as injunctive relief from Abbott. It is alleged that during bidding to supply formula to the Department of Agriculture's Women, Infant and Children ("WIC") program in Puerto Rico, Abbott "conspired or combined with others to fix, stabilize, or otherwise manipulate" bids and to undermine cost containment efforts by "guarantee[ing] an open market system." An open market system allows all eligible manufacturers to supply formula to the WIC program in an individual state. In contrast, under a sole source system, states select a single supplier after soliciting sealed bids. Open market systems for infant formula are generally costlier for the government than sole source bidding because a company with the exclusive right to supply formula within a state typically has a greater incentive to discount to win the bid than one not granted that privilege. In practice, sole source bidding has resulted in greater discounts to the states for infant formula than open market bidding. Because of such cost advantages, federal law creates a preference for a sole source award.

In a separate count in the federal action, the Commission alleged that Abbott provided information during the same bidding process "with anticompetitive intent or without an independent legitimate business reason" that broadcast to competing bidders the company's preference and intent to bid in such a way as to lead to an open market rather than sole source system in Puerto Rico. The complaint alleges Abbott's actions reduced uncertainty in the market, and that the resulting bids contained substantially higher prices than did contemporaneous bids in other WIC programs. Consequently, it was alleged, the government lost and is losing millions of dollars in rebates each year.

The allegation of unilateral conduct is based solely on section 5 of the FTC Act. The unilateral provision of information concerning a firm's bidding intentions to competitors in a highly concentrated market can facilitate collusion in the bidding process. The three competitors in the Puerto Rico bids ultimately submitted only open market bids at the WIC auction, at significantly higher prices than they had bid at contemporaneous WIC bids in other jurisdictions. The provision of the information that facilitated that outcome, done with anticompetitive intent or without an independent business justification as the complaint alleges, violates section 5 under the holding of the Court of Appeals for the Second Circuit in the Ethyl case.¹⁴ The complaints accompanying the settlements with Mead Johnson and

¹⁴ E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

American Home Products allege illegal unilateral conduct similar to that by Abbott in connection with the 1990 Puerto Rico WIC bids.

Last month Judge Gesell of the U.S. District Court for the District of Columbia denied Abbott's motion to dismiss the Commission's complaint, holding, among other things, that section 13(b) of the Federal Trade Commission Act "leaves discretion with the Commission in any proper case to proceed directly for relief in a U.S. District Court" for permanent injunctive relief.¹⁵

An administrative complaint filed simultaneously against Abbott alleges that Abbott "entered into a conspiracy with others to refrain from advertising" directly to consumers. The complaint also alleges that Abbott and members of the Infant Formula Council "exchanged information concerning each company's marketing practices . . . in the process of drafting marketing guidelines that would have prohibited the use of mass media advertising directly to the consumer." The complaint alleges that these practices reduced uncertainty among these competitors as to their respective marketing plans, lessening competition. Because the administrative case is in litigation before the Commission, I am unable to discuss it further.

The Mead Johnson complaint also contains an additional "price signaling" count relating to letters Mead sent to a number of states indicating the precise dollar amount it intended to

¹⁵ Federal Trade Commission v. Abbott Laboratories, No. 92-1364, slip op. at 3 (D.D.C. Oct. 13, 1992).

offer in upcoming sealed bids for WIC contracts. The complaint alleges that the company "knew or should have known" that the information in the letters would become known to its competitors and that its competitors did become aware of the contents of the letters. As a result, the complaint alleges that uncertainty relating to Mead's bids was reduced and competition diminished. While purchasers might seek information about future bids to facilitate their financial planning, it is difficult to discern any credible business justification for the predisclosure of bids when purchasers do not seek disclosure.

Of course, advance notice of price changes will often serve legitimate procompetitive purposes, but in the Infant Formula cases the complaint alleges that the advance announcement was made not for the benefit of purchasers but for the benefit of competitors. The predisclosure of bids in a highly concentrated market invites competitors to bid similarly and can thereby facilitate collusion. Given the unilateral nature of the conduct, which makes it immune to attack under section 1 of the Sherman Act, section 5 of the FTC Act is ideally suited to attacking this kind of anticompetitive conduct.

So the past year has been an interesting one. Several accomplishments saw efforts of preceding years bear fruit. And as I look back on what has already been achieved, I am also optimistic that what has been done will serve as a foundation for what remains to be accomplished.