Federal Trade Commission

A LOOK BACK AT 1993 AT THE FEDERAL TRADE COMMISSION

PREPARED REMARKS OF
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BEFORE

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

Good evening. It is a pleasure to be invited to address the New York State Bar Association. Since we are early in the new year, I thought I would take this opportunity to review the 1993 antitrust accomplishments of the Federal Trade Commission. I will discuss the Commission's merger and non-merger activities for the past year, with particular emphasis on Commission activities in a few key industries where some of our most challenging work has occurred. Of course, the views I express are my own, and not necessarily those of the Commission or any other Commissioner.

I. COMMISSION ACTIVITIES IN KEY INDUSTRIES UNDERGOING RAPID CHANGE

The only constant in a competitive, free enterprise economy is change. Without a flow of resources into and out of different companies and industries, the economy would stagnate. This is particularly true in times of rapid and sometimes fundamental economic changes. Right now, we see some industries undergoing enormous change in response to a variety of factors: innovative technology development, pressure to compete in world-wide markets, and regulatory restructuring -- just to point out some of the factors at work. Businesses face the challenge of keeping abreast of the opportunities provided by a rapidly evolving economic environment.

We face the identical challenge at the Federal Trade Commission. As one of the agencies responsible for enforcing federal antitrust law, the Commission must be just as aware of these changing economic environments as any active market participant. Thus, times of rapid change confront us with special challenges. We must focus our scarce enforcement resources to ensure that the business opportunities that change presents are not misused to cause competitive harm to consumers.

We have learned through experience that industries that are undergoing rapid technological, regulatory, or restructuring changes often present some of the most important antitrust issues. In an interesting article in its year-end review, the Wall Street Journal identified three industries where changing business environments are driving an increase in mergers: the health care industry, the defense industry, and high technology industries, particularly communications.[1] Indeed, last year this thesis was born out, as the Commission brought a number of important cases in precisely the areas identified by the Wall Street Journal: health care, defense, and telecommunications. As our antitrust actions in 1993 show, we have taken an active yet careful approach to these industries, and I will review our significant cases in each area.

A. Health Care

Even a cursory examination of the daily news reveals that health care is an industry in the midst of substantial restructuring. The Commission brought a number of cases in this industry last year, including one merger case that resulted in a

[1] Smith, "Merger Activity Shifts into High Gear as the Information Superhighway Opens," Wall Street Journal, January 3, 1994 at R8.

preliminary injunction. In May, a district court in Florida granted the Commission's request for a preliminary injunction against Columbia Hospital,[2] enjoining the acquisition of a hospital from Adventist Health System. The Commission alleged that the $40 million transaction would have harmed competition in the market for acute-care inpatient hospital services in Charlotte County, Florida. The Commission's administrative complaint in that case was withdrawn from adjudication in October for consideration of a possible settlement of the charges.[3]

Challenging this merger was more the exception than the rule. Indeed, most hospital mergers investigated by the Commission have been, on balance, competitively unobjectionable. There have been over 200 hospital mergers since 1987, and the Commission and the Department of Justice together have challenged only nine.[4] These statistics reflect the fact that the trend toward consolidation in the health industry, including hospital consolidation, appears to be primarily designed to achieve efficiencies in the delivery of this vital product. Health care

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[2] Federal Trade Commission v. Columbia Hospital Corp., 1993-1 Trade Cas. (CCH) ¶ 70,209 (M.D. Fla. 1993).

[3] The Commission also approved and issued one final consent order and in another hospital merger case accepted a consent agreement for public comment in 1993. Columbia Hospital Corp. (Galen), Dkt. C-3472, (Nov. 19, 1993); Dominican Santa Cruz Hosp., FTC File No. 901 0069 (February 24, 1993) (Commissioners Azcuenaga and Yao dissenting).

[4] See "Mergers Thrive Despite Wailing About Adversity," Modern Healthcare, Oct. 12, 1992, at 30; Department of Health & Human Services, Report of the Secretary's Task Force on Hospital Mergers, 9, 11 (January 1993).

reform, if enacted, may accelerate this process by putting a premium on larger organizations that can provide a broad spectrum of services in competition with other integrated entities.

As in any industry, however, there are instances where consolidation is anticompetitive. The Commission will continue to be vigilant to ensure that consumer welfare -- health care at a competitive quality and price -- will continue to be protected as this consolidation occurs.

The Commission has also been active in health care outside the field of merger enforcement, filing two administrative complaints during the course of 1993, and accepting two significant consent agreements for public comment. These non-merger enforcement activities reflect the important role that antitrust enforcement has to play in achieving cost containment in health care, while at the same time preserving the incentives for delivery of the highest quality health care goods and services.

One problem the Commission addressed last year involves the achievement of market power by certain health care providers -- market power that could enable certain providers to charge supracompetitive prices. In November 1993, the Commission accepted for public comment consent agreements in the Home Oxygen cases.[5] These are the first federal antitrust cases involving

[5] Home Oxygen & Medical Equipment Co., FTC File No. 9010109, and Homecare Oxygen & Medical Equipment Co., FTC File No. 9110020 (consent orders issued for public comment) (November 2, 1993) (Commissioner Azcuenaga concurred with separate statement; Commissioner Starek dissented).

joint ventures created by physicians to provide services that are ancillary to their professional practices. The Home Oxygen consents involve two partnerships formed by pulmonologists which provided oxygen delivery systems to patients in their homes. The use of home oxygen systems is almost always prescribed by a pulmonologist. The Commission's proposed complaints allege that the pulmonologists in partnership in the markets at issue are able to influence patients' choice of oxygen suppliers.

The complaints allege that roughly 60 percent of the practicing pulmonologists in each geographic market invested in (or practiced in groups with) the partnerships, and that each collection of physician-investors had market power in the market for pulmonary services, which created barriers to entry, and restrained competition in the market for home oxygen systems.

Because the antitrust concern arises from structural considerations, the proposed consent orders require divestiture of sufficient partnership interests to reduce to 25 percent or less the percentage of practicing pulmonologists in each geographic market that remain affiliated with either partnership.

The Home Oxygen orders do not prohibit self-referral. Our concern as antitrust enforcers is not with self-referral in itself, but with the creation or enhancement of market power in the market for the ancillary service. The Commission will remain vigilant to prevent anticompetitive physician joint ventures to provide ancillary services, since such joint ventures have potentially important effects on cost-containment efforts.

Another antitrust problem in the health care sector may arise when competing providers of health care goods band together unlawfully in direct opposition to cost-containment efforts. Last year, the Commission issued an administrative complaint in such a case, Maryland Pharmacists Association.[6] In this case, which was recently provisionally settled by acceptance of a consent for public comment, the Commission alleged that two associations, the Maryland Pharmacists Association and the Baltimore Metropolitan Pharmaceutical Association, conspired to boycott a prescription drug plan for Baltimore city employees. The city had made available to its employees and retirees a plan under which the plan manager, an insurance company, compensated pharmacies directly for the prescription drugs dispensed. According to allegations in the complaint, when the insurance company proposed a reduction in reimbursement rates, the two associations reacted by organizing their member pharmacists to refuse to participate in the plan under the reduced rates. The proposed consent agreement would prohibit the associations from entering into, organizing, or encouraging any agreement among pharmacies to refuse to enter into, or to withdraw from, any participation agreement offered by a third-party payor.

Another antitrust problem the Commission has encountered in the health care context -- restraints by associations of providers on advertising by their members -- may seem to present

[6] Maryland Pharmacists Ass'n, D. 9262 (complaint issued September 29, 1993).

a less obvious connection to the objectives of facilitating cost-containment efforts and preserving competition on quality and price. The connection is nonetheless real: If providers cannot advertise pricing practices or innovative services, their incentives to compete in either dimension are sharply reduced. Comparison shopping by consumers, which is greatly facilitated by advertising of prices and services, can be a key element in maintaining competitive prices.

The Commission last year filed a complaint against the California Dental Association alleging such advertising restraints.[7] The complaint alleges that the California Dental Association, which encompasses 75 percent of the dentists in California, prevents its members from providing truthful, non-deceptive advertising to consumers, with the effect that consumers are deprived of useful information and dentists' incentives to offer discounts or special services are decreased. This case is in the discovery phase.

Finally, I would like to point out one of our most significant achievements in the area of health care in 1993: the issuance of the Statements of Antitrust Enforcement Policy in the Health Care Area ("the Statements") jointly by the Commission and the Antitrust Division.[8] We issued the Statements in order to be

[7] California Dental Ass'n, D. 9259 (complaint issued July 9, 1993).

[8] United States Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in the Health Care Area (September 15, 1993).

responsive to antitrust concerns in this industry, and to clarify Commission and Justice Department policy regarding mergers and joint activities in health care. The Statements do not change current policy, but they clearly set out six "safety zones" for conduct that will not be challenged absent extraordinary circumstances. The Statements go on to summarize the antitrust analysis of conduct falling outside the safety zones. This articulation of the agencies' enforcement policy should aid the health care industry in complying with the antitrust laws in a changing environment.

The Statements are designed to provide concrete guidance in six areas where questions over antitrust enforcement have arisen: (1) hospital mergers; (2) hospital joint ventures for the purchase or lease of medical equipment; (3) physicians' provision of information to purchasers of health care services; (4) hospital exchanges of price and cost information; (5) joint purchasing arrangements among health care providers; and (6) physician network joint ventures.

The Statements further commit the agencies to respond to requests for advice on the safety zones no later than 90 days after all necessary information is received regarding any matter addressed in the statements, except requests relating to hospital mergers outside the safety zone. The agencies will also respond to advisory opinion or business review requests regarding other non-merger health care matters within 120 days after all the necessary information is received.

B. Defense

As you are all aware, the defense industry is also undergoing significant restructuring in response to changes in defense needs and continuing budget cuts. As the defense industry contracts, some analysts are predicting more mergers among defense contractors. Although some consolidation may well continue to occur, it is important that antitrust principles are not abandoned. Of course, the Commission applies careful analysis to be certain that it does not oppose procompetitive or competitively neutral mergers, but rather that it challenges only anticompetitive mergers. We have examined a number of mergers in this industry that we have declined to challenge. But in a few instances, consolidation has raised significant antitrust issues.

Indeed, the Commission recently brought an important merger case in the defense industry. Alliant/Olin[9] involved a merger to monopoly in a relevant market, specifically in the production of 120mm tank ammunition. The United States Army is the sole domestic purchaser of 120mm tank ammunition. All of its purchases are from either Alliant or Olin. The Army decided, however, that after fiscal year 1993 it would purchase all of its 120mm tank ammunition from one source. However, the Army's decision did not lead inevitably to the conclusion that sole sourcing should be achieved by a merger of the only two suppliers

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[9] Federal Trade Commission v. Alliant Techsystems, Inc., 808 F. Supp. 9 (D.D.C. 1992).

of the ammunition, rather than the competitive bidding on a 5-year sole source contract that the Army had planned.

The Commission alleged that the merger could lead to a substantial lessening of competition, including anticompetitive prices, for 120mm tank ammunition. The district court agreed and found that the merger could have led to increased ammunition prices to the Army of as much as $115 million.[10] The court rejected the defendants' claim that the technology transfer required if one party won the sole bidding contract from the other might result in delayed production and a consequent compromise in national security. The court found that either Alliant or Olin was capable of producing all of the Army's requirements for 120mm ammunition, that the subcontractors that produced the most critical components of the ammunition would be available to either firm, and that Olin's employees and expertise would be available to Alliant, should Alliant win a competitive bid, "either at the Army's direction, or on the open market."[11] The court granted an injunction against the merger, and the transaction was abandoned.

C. Telecommunications

The third area in which the Commission has recently been most active is in the area of telecommunications. New advances in technology in this and other areas inevitably attract new

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[10] Id. at 21.

[11] Id. at 18.

resources to these industries. They also attract Commission resources to ensure that the competitive environment is preserved as technologies and markets change.

The telecommunications industry is undergoing rapid change. It now appears that technological advances in this industry may make possible the production of entirely new products, and perhaps new industries, by combining intellectual and financial capital from a number of industries. During this period of dynamic evolution, the Commission will remain vigilant to ensure that market power is not abused or unlawfully obtained in the rush to restructure and combine resources and technologies.

The proposed acquisition of Paramount Communications by a group led by TCI, QVC, Liberty Media and others was one of the largest of a large number of recent mergers and proposed mergers in this area. The Commission investigated this acquisition because of several potential antitrust concerns, and ultimately accepted for public comment a consent agreement.

The complaint in the TCI case details the markets in which all of the firms involved compete. Paramount is primarily a producer of entertainment programs, although it is also a partial owner of a cable network. The acquiring company, QVC, owns two home shopping companies. QVC has a number of substantial shareholders, the largest of which is Liberty Media, which is also controlled by the individuals that control TCI. The combination of all of these companies would have a substantial market presence at all three levels of the cable television industry -- production, packaging, and distribution.

The transaction as announced raised vertical foreclosure concerns at two of these levels. The complaint accompanying the consent alleged that as a result of TCI/Liberty Media's gaining influence over Paramount, the acquisition may substantially lessen competition at the programming packaging level, specifically, the market for cable television premium movie channels. Second, the complaint alleged that the acquisition could make it necessary for entrants into subscription television distribution also to enter at the programming level.

The anticompetitive effects of this acquisition could include a reduction in the output and quality of premium movie channels. Additionally, the acquisition could give the TCI group sufficient market power to raise cable subscription fees to consumers, to raise programming fees to cable operators, and to increase entry barriers into subscription television distribution.

These competitive concerns flow from the vertical relationship between TCI/Liberty Media and QVC/Paramount; to remedy these concerns, the consent order severs that relationship by eliminating TCI's and Liberty Media's interest in, and influence over, QVC.[12] In addition to the required divestiture, the order further prohibits TCI and Liberty Media from entering

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[12] Tele-Communications, Inc. and Liberty Media Corp., FTC File No. 941 0008 (November 15, 1993) (Commissioners Owen and Azcuenaga dissenting).

into any agreements with QVC or Paramount for exclusive rights to exhibit certain motion pictures prior to completing the divestitures. Because the contest for control of Paramount is on-going, TCI and Liberty Media are not required to comply with the consent order if QVC abandons its bid for Paramount or does not acquire more than 10 percent of Paramount's common stock within twelve months of the order becoming final.

II. COMMISSION ACTIVITIES IN OTHER AREAS

By emphasizing our activities in the health care, defense, and high technology sectors, I do not mean to suggest that we have neglected the rest of the economy. In fact, we have a substantial enforcement record for 1993 in a variety of industries. I will cite some examples of particular interest.

A. Mergers

In terms of the number of investigations, fiscal 1993 was an active year on many fronts. In the merger area, Bureau staff reviewed 1,846 Hart-Scott-Rodino filings and issued thirty-two second requests for information. The last quarter of the year was particularly busy. The number of filings in the fourth quarter surpassed any quarter since 1989. Over the course of the fiscal year, the Commission authorized three preliminary injunction actions and accepted eleven consent orders.

Of the three preliminary injunction actions authorized last year, two were successful in the courts,[13] and the third transaction was abandoned before the Commission filed in court.[14] Even these statistics give an incomplete picture. In the last half of the year alone, fifteen mergers were abandoned after Bureau of Competition staff expressed concern to the parties about the potentially anticompetitive nature of the transactions.

In other merger activity last year, the Commission accepted consent orders affecting products and industries as diverse as dehydrated onions,[15] coal shipping facilities,[16] acrylic-plastics,[17] low voltage industrial fuses,[18] residential non-

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[13] Columbia Hospital, n.2 infra; Alliant/Olin, n.9 infra.

[14] In the last matter, the Commission authorized the staff to seek an injunction to prevent the acquisition of Chrysler's railcar assets by General Electric. The acquisition would have combined the two largest boxcar leasing companies in the United States and Canada. The transaction was abandoned after the injunction was authorized. General Electric Co., FTC File No. 931 0110 (September 29, 1993).

[15] McCormick & Co., Inc., C-3468 (November 17, 1993).

[16] Consol, Inc., C-3460 (September 27, 1993).

[17] Imperial Chemical Industries, PLC, C-3473 (November 29, 1993) (Commissioner Owen dissenting) (acquisition of certain DuPont assets allowed to proceed after divestiture by ICI of an acrylic plastic plant).

[18] Cooper Industries, C-3469 (December 10, 1993) (acquisition of a fusegear manufacturer by Cooper allowed to proceed after Cooper grants a license for the technology necessary to manufacture low voltage industrial fuses).

selective herbicides,[19] horizontal carousels used in materials handling,[20] coating resins,[21] and structural blind rivets.[22]

Let me go into more detail on a couple of the most interesting of these cases. In the dehydrated onion case, the Commission challenged the acquisition of Haas Foods by McCormick & Company. The two companies were horizontal competitors in the U.S. dehydrated onion business. Dehydrated onions are a unique product; they are used in the preparation of manufactured foods like powdered soups and chili mixes and in restaurants and other institutions for the bulk preparation of foods. Dehydrated onions in fact cannot be grown from regular onion seeds. The seeds have to be specially developed from low-water onions. The Commission complaint alleged that the need to possess these special seeds constitutes a substantial barrier to entry into the production of dehydrated onions, and further alleged that the

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[19] Monsanto Co., C-3458 (September 1, 1993) (Monsanto is allowed to acquire the Ortho Consumer Product Division of Chevron Corp. after divesting certain herbicide producing assets).

[20] Alvey Holdings, Inc., FTC File No. 931 0138 (December 7, 1993) (Alvey is allowed to acquire a manufacturer of horizontal carousels after divesting its own carousel business).

[21] Valspar Corp., FTC File 931 0098 (January 25, 1994) (Commissioner Owen dissenting) (Valspar is allowed to acquire a horizontal competitor in the manufacture of coating resins after it divests certain manufacturing assets of the acquired firm as well as certain of its own assets).

[22] Textron, Inc., D.9226 (October 28, 1993) (Commissioner Azcuenaga dissenting) (Textron's acquisition of a competing manufacturer of blind-rivet fasteners allowed, with requirement that Textron grant a license for the rights, technology, and know-how to manufacture certain fasteners in the U.S. and Canada).

merger of these two producers raised competitive concerns. The consent order settling the case required McCormick to divest enough specially bred seeds to produce a total of 100 million pounds of low-water onions and at least 5,000 additional pounds of onion seeds for future planting, in order to provide a new entrant with the seeds necessary to compete.

The coal case is similarly interesting. There, the Commission charged that the acquisition of a company that provided coal export terminal services in the port of Baltimore by Consol, Inc., its lone horizontal competitor, would allow Consol to unilaterally exercise market power, which could raise the price of export services to coal producers in the northern Appalachian region. The market of export loading services includes unloading coal from railroad cars, placing it in ground storage, blending it to achieve the proper mix, and loading it onto transoceanic ships. Thus, the Commission charged that the unilateral abuse of market power at this level could create a bottleneck to exporting coal and increase the costs of serving overseas markets to Appalachian producers. The Commission's consent required Consol to divest the acquired Baltimore export terminal to a Commission-approved acquirer.

B. Non-Merger Activity

The Commission has been similarly active in non-merger enforcement in 1993. Some of our efforts were grounded on our unique jurisdiction under Section 5 of the FTC Act. Section 5 empowers the Commission to proceed against "unfair methods of competition."[23] This statutory authority gives the Commission the power to pursue anticompetitive conduct that might fall outside the reach of either the Sherman Act or Clayton Act.

Current examples of the Commission's use of this authority are the consent agreements reached in the past year in two "invitation to collude" cases.

Let me mention one for your information.[24] The Commission charged AE Clevite, a manufacturer of locomotive engine bearings, with inviting a competitor to fix prices.[25] The Commission charged that an officer of J.P. Industries, since acquired by the parent company of AE Clevite, worried about price cutting by Miba, had a conversation with an officer of Miba concerning Miba's low prices, and that J.P. Industries then faxed to Miba comparative price data for bearings. The Commission alleged that this conduct amounted to an "implicit invitation . . . for Miba to refrain from competition in the pricing of locomotive engine bearings."

The consent in this case prohibited AE Clevite and related corporate entities from proposing or advocating that a competitor fix, raise, or stabilize prices or service levels. AE Clevite is

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[23] 15 U.S.C. § 45(a).

[24] The other "invitation to collude" case was YKK (U.S.A.), Inc., C-3445 (August 5, 1993) (Commissioner Azcuenaga dissenting).

[25] AE Clevite, Inc., C-3429 (July 1, 1993). (Commissioner Azcuenaga dissenting).

also prohibited from inviting a competitor to raise prices by stating its willingness to match any increase.

In these two cases, the Commission was able to provide an appropriate remedy to prevent conduct that our complaint alleged was clearly anticompetitive, but that may not have constituted a violation of the Sherman Act. In neither case did the Commission allege an agreement to restrain trade or the existence of a dangerous probability of monopolization relied upon in the Justice Department's American Airlines case.[26] Thus, Clevite and the other "invitation to collude case," YKK, along with a similar case in 1992,[27] are illustrative of the Commission's unique Section 5 jurisdiction.

The Commission also accepted consent orders in several other cases last year involving allegations of horizontal anticompetitive conduct, providing appropriate remedies against a group of providers of school bus transportation, based on an alleged agreement to divide markets;[28] an association of engineers, based on alleged restraints on advertising;[29] an association of soil engineers, based on an alleged agreement to

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[26] See United States v. American Airlines, Inc., 743 F.2d 1114, 1118 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985).

[27] Quality Trailer Products, C-3403 (November 5, 1992).

[28] B&J School Bus Services, Inc., D. 3425 (April 26, 1993) (Commissioner Azcuenaga dissenting in part).

[29] National Society of Professional Engineers, C-3454 (August 10, 1993) (Commissioner Starek dissenting).

restrain competitive bidding among members;[30] and an association of real estate brokers, based on allegations of various restraints in the market for residential real estate brokerage.[31]

Finally, let me describe one further example of our non-merger enforcement activity, a consent agreement, also accepted for public comment last year, in a resale price maintenance case. In Keds Corporation, the Commission alleged that a manufacturer of shoes restricted price competition among retailers of its products by obtaining agreements with retailers on the resale prices of the manufacturer's products.[32]

The consent agreement applies to athletic or casual footwear. It requires Keds to refrain from fixing the prices at which any dealer may advertise or sell the product, coercing any dealer to adopt or adhere to any resale price, attempting to secure commitments from dealers about the prices at which they will advertise or sell the products, or requiring or suggesting that dealers report other dealers who advertise or sell Keds products below a suggested resale price. Also, the order requires Keds to inform its dealers by mail that they are free to advertise and sell Keds products at prices of their own choosing.

CONCLUSION

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[30] ASFE (Soil Engineers), C-3430 (June 18, 1993).

[31] United Real Estate Brokers of Rockland, Ltd., C-3461 (September 27, 1993) (Commissioner Azcuenaga dissenting in part).

[32] Keds Corp., FTC File No. 9310067 (September 27, 1993).

As you can see, the Commission had a busy year in 1993. We pursued anticompetitive conduct in a number of industries undergoing rapid and fundamental economic change. By devoting attention to certain activities in these industries, we were able to anticipate potential harm to the competitive environment and take timely action to protect competition and consumers.