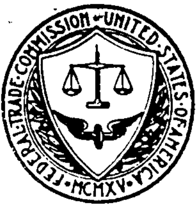

Federal Trade Commission

MUSINGS ON MERGERS AND OTHER MATTERS

Remarks by

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before the

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The remarks are those of the commissioner and do not necessarily reflect the views of the Commission or of any other commissioner.

Good morning. These are exciting times in the areas of trade and competition policy. This conference seems an appropriate precursor to the Asia-Pacific Economic Cooperation forum that will be held here in Seattle next week. I am genuinely pleased to join you today and to talk about federal antitrust enforcement from my perspective as a commissioner at the Federal Trade Commission. Before I go any further, there is one preliminary matter: I speak only for myself, not for the Commission or for any other commissioner.

Let me begin by answering the question I am asked most frequently, and that is, how have things changed under the new Administration? At the Commission, President Clinton has not yet had the opportunity to make any appointments. The Commission has a full complement of five commissioners who have staggered seven year terms. The President will have his first opportunity to appoint a commissioner when the first term expires in September 1994 or when one of the five commissioners chooses to leave, whichever comes first. At the moment, I know of no commissioner planning to leave before September 1994. The President has authority to appoint a different chair from among the sitting commissioners, but he has not done so.

At the Department of Justice, Anne Bingaman is the Assistant Attorney General for Antitrust. Assistant Attorney General Bingaman, an advocate of strong antitrust enforcement, already has made her mark, by, for example, withdrawing the Department's 1985 Vertical Restraints Guidelines[1] and implementing the Department's newly expanded Corporate Amnesty Program for antitrust offenders.[2] Assistant Attorney General Bingaman played a major role in fashioning the health care policy statements jointly issued by the Department and the Commission in September,[3] and we look forward to continuing a successful working relationship with her.

The joint agency health care antitrust enforcement policy statements were issued to respond to concerns expressed by groups in the health care industry and in parts of the government that additional antitrust guidance for the industry was needed. There was a sense by some that existing policy was dispersed among so many different sources -- adjudicated opinions, speeches and consent agreements, for example -- that compliance was difficult for responsible persons. The guides collect our enforcement policy in one place, providing a convenient source of reference.

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[1] <u>Reprinted</u> <u>in</u> 4 Trade Reg. Rep. (CCH) ¶ 13,105 (withdrawn Aug. 10, 1993).

[2] <u>See</u> United States v. Miles, 93-CR-0784 (N.D. Ill. 1993).

[3] Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, <u>reprinted</u> <u>in</u> 4 Trade Reg. Rep. (CCH) ¶ 13,150 (Sept. 15, 1993).

The policy statements speak for themselves, and the agencies have committed to analyzing specific proposals in a short period, so I do not plan to discuss the statements today.

Instead, I would like to concentrate on mergers and then add a few thoughts on other matters. Merger enforcement under Section 7 of the Clayton Act remains at the top of the Commission's antitrust enforcement priorities, as it has been for some years. Merger enforcement seems particularly topical today. Within the past month, I have seen a spate of press reports that a "merger frenzy" is underway. The Washington Post recently headlined "Takeover Mania's Back,"[4] and another recent article announced the "Return of the Urge To Merge."[5] Both articles reported the proposed Bell Atlantic-TCI deal but generalized about a broader wave of mergers. Last month, the Wall Street Journal also announced a "Revival of Merger Activity" and reported that the value of mergers in the first three quarters of 1993 is more than double that of mergers in the same period of 1992.[6]

Although I do not question the Journal's figures on the aggregate value of mergers, the number of mergers reported to the government under the Hart-Scott-Rodino Act,[7] which requires premerger notification for acquisitions meeting certain size thresholds, does not reflect such a strong increase in merger activity. During the fiscal year that ended September 30, 1,846 transactions were reported to the Commission, a solid but not eye-catching sixteen per cent increase over the previous year.

Bear with me while I give you some statistics that provide perspective on the current situation. In the early 1980's, the number of reported transactions gradually increased from about 1000 per year to 1600 in 1985. In the second half of the 1980's, the number of reported transactions abruptly increased to a peak of 2,883 in fiscal year 1989. In 1991 and 1992, perhaps reflecting changes in the economy, the number of reported transactions fell by almost half to between 1500 and 1600, about the same level as the mid-1980's. As you can see, the number of reported transactions is up in 1993 but so far nothing approaching the merger activity of the late 1980's. To extend

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[4] "The Merger Misconception: Takeover Mania's Back. Who Remembers Two Decades of Deals That Added Up to Less?," Wash. Post, Oct. 24, 1993, at H1.

[5] Wash. Post, Oct. 14, 1993, at D12.

[6] "Higher Stock Prices Are Feeding a Revival of Merger Activity," Wall St. J., Oct. 14, 1993, at A1.

[7] 15 U.S.C. § 18a.

the historical perspective a bit further, in 1979, it also was reported that we were in the midst of a major "merger wave," based on a reported 861 transactions having a total value of $43.5 billion.

I have talked about the number of mergers -- now what about the level of government enforcement? Throughout this period, the Commission has maintained a high level of enforcement activity in investigating mergers and challenging those that we have reason to believe are anticompetitive. One yardstick of the level of the Commission's activity is the number of second requests that are issued under the Hart-Scott-Rodino Act. Second requests are the letters asking the parties to a transaction for additional information after they have filed the standard premerger report. Second requests are issued only in the relatively small number of transactions in which the Commission believes that further examination is warranted. In fiscal year 1993, the Commission issued forty second requests. By the way, that works out to be about 2% of the reported transactions. Twenty-six second requests were issued in 1992; thirty-nine second requests were issued in 1988.

Another yardstick of the Commission's activity is the number of proposed transactions that we actually decide to challenge. Our primary enforcement tool in merger cases is to seek a preliminary injunction in federal district court to block the merger pending a full administrative trial. In fiscal year 1993, the Commission authorized three preliminary injunction actions in merger cases. Preliminary injunctions were granted in two cases, Alliant Techsystems,[8] which involved tank ammunition, and Columbia Hospital Corporation,[9] which involved a hospital acquisition in Florida. In the third case, which involved leased railroad boxcars, the parties abandoned the transaction after the Commission authorized a preliminary injunction action.

In 1992, the Commission did not authorize any preliminary injunction actions in merger cases. The number of preliminary injunction actions authorized by the Commission in 1992 and 1993 is down from a high of eleven in fiscal year 1988 and seven in each of the years 1989, 1990 and 1991. Despite the recent decline in the number of authorizations to seek a preliminary injunction, the Commission has not reduced its level of enforcement activity. The reason is that in recent years, more merger cases have been settled by consent orders than in the past. In the five years from 1983 to 1987, the Commission

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[8] FTC v. Alliant Techsystems, Inc., 1992-2 Trade Cas. (CCH) ¶ 70,047 (D.D.C. Nov. 23, 1992).

[9] FTC v. Columbia Hospital Corp., 1993-1 Trade Cas. (CCH) ¶ 70,209 (M.D. Fla. May 5, 1993).

accepted twenty-four consent orders in merger cases. From 1989 to 1993, the Commission accepted forty-eight consent orders in merger cases, exactly twice as many as in the previous five-year period.

What might explain the larger number of merger consent orders in recent years? I can think of some possible reasons. In the late 1970's and early 1980's, the Commission did not win many merger cases in federal district court. From 1976 to 1982, according to statistics maintained by the Commission, we won only two preliminary injunction cases and lost ten. Quite simply, the Commission's track record in merger cases may have encouraged firms to take a more aggressive posture against Commission merger enforcement. Why agree to a negotiated consent settlement when you might prevail in court?

In the 1980's, the Commission managed to turn that record around. From 1983 through 1989, we won eight preliminary injunction cases and lost only three. Success in litigation can foster success in negotiation. Recognition of this success may have resulted in a greater willingness of firms to search for a solution for competition problems. Another possible explanation for the increased number of consent orders may be the willingness of the Commission in some situations to accept remedies short of complete divestiture of overlapping assets.

With all this talk about winning, let me hasten to reassure you that winning is important only in conjunction with an appropriate exercise of prosecutorial discretion. The Commission must have reason to believe that a transaction would be unlawful before we bring a lawsuit and even before we accept a consent agreement. We do not take our prosecutorial responsibilities lightly. We are bound to consider each case on its merits, and Section 5 of the Federal Trade Commission Act explicitly imposes on us the duty to consider the public interest. Consistent with these obligations, if we believe that we have an anticompetitive story to tell, we should not be deterred from proceeding by undue fear of litigation risk.

Careful and thorough merger analysis, well grounded in law and economics, and solid case preparation probably explain the Commission's increased success in court. Our approach to merger analysis is set forth in the 1992 Merger Guidelines, jointly issued by the Commission and the Department of Justice.[10] The Guidelines set forth general principles to be used in analyzing

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[10] 1992 Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

mergers, an "analytical road map"[11] for the process. The analysis under the Guidelines seeks answers to the economic questions raised under the antitrust laws. The analytical process can appear quite complicated, especially to the uninitiated, and the facts that must be elicited to answer the questions can be, indeed, often are, complex. The challenge in analyzing a particular transaction is to integrate this set of complex facts into a story of how the market works -- the story of how competition works in the market for polyvinyl chloride, for example. (As you can see, working for the Federal Trade Commission can be great fun.) The parties to a merger can do a great deal to help us develop an understanding of how competition works in the market.

The Guidelines are the most comprehensive and, as a practical matter, the primary reference we use in analyzing mergers. But they are not the only source of wisdom regarding Section 7 of the Clayton Act. The courts continue to make important contributions to Section 7 law, and the Commission also contributes through its adjudicative opinions.

Some important decisions have come down in the last couple of years. Late last year, the Commission obtained a preliminary injunction in federal district court to block the proposed acquisition by Alliant Techsystems of Olin's Ordnance Division.[12] The firms were the only two U.S. suppliers of ammunition for battle tanks, and their only customer was the Department of Defense. The Army had decided to shift to a sole-source contract, so only one of the two suppliers would survive in the long run. The question under Section 7 was whether the taxpayers should have the benefit of competition in determining which firm would win the Army contract. By itself, the case is not unusually significant (it involved standard application of familiar Section 7 principles), but I think it is significant in the context of the times. The general downsizing of the military may precipitate a number of defense industry mergers, and there were murmurings for a while of an antitrust exemption for the defense industry. No such exemption has existed in the past, and the Olin/Alliant case may help quiet some of those murmurs.

The University Health[13] case in 1991 also was important. The court of appeals upheld the Commission's jurisdiction under

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[11] Statement, 1992 Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569.

[12] FTC v. Alliant Techsystems, Inc., 1992-2 Trade Cas. (CCH) ¶ 70,047 (D.D.C. Nov. 23, 1992).

[13] FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

Section 7 of the Clayton Act to challenge a merger involving a nonprofit entity. The courts had not previously decided the question.

The Ninth Circuit recently affirmed the Commission's decision in Olin Corporation,[14] requiring divestiture of certain swimming pool chemical assets. Market definition also was an issue in Occidental,[15] in which the Commission ordered divestiture of certain polyvinyl chloride assets. The Commission's decision in Owens-Illinois[16] demonstrates that even in highly concentrated markets, the Commission considers factors other than concentration in deciding whether anticompetitive effects are likely. The Commission concluded that an attempt to collude on price in identified segments of the glass container market likely would be defeated because of industry production capacity that could be shifted to these segments in a matter of hours. The case was dismissed.

There is an important lesson to be drawn from the decisions in the Owens-Illinois and the Occidental matters, which are the two most recent Commission opinions in Section 7 cases. In Occidental, the Commission found liability in a market that was only moderately concentrated under the Guidelines, and in Owens-Illinois, the Commission dismissed the complaint despite highly concentrated markets. It seems to me that this is incontrovertible proof that the Commission means it when it says that market concentration is only a starting point in Section 7 analysis. We take the other factors that are identified in the Guidelines seriously. I hasten to add that these two cases are not isolated examples -- just good demonstrations of the point in two recent decisions. I also commend these opinions to you because they may give you a sense of how the Commission actually works through its merger analysis.

Most of our merger cases do not elicit opinions either from the Commission or from the courts of appeals, because most transactions that the Commission challenges are settled or abandoned by the parties after a decision by the Commission to seek a preliminary injunction. Let me mention three of our most recent Section 7 cases. One recent challenge involved a proposed

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[14] Olin Corp. v. FTC, 986 F.2d 1295 (9th Cir. 1993), petition for cert. filed, No. 93-716 (Nov. 5, 1993).

[15] Occidental Petroleum Corp., 5 Trade Reg. Rep. (CCH) ¶ 23,270 (FTC Dec. 22, 1992) (Commissioner Owen dissenting in part), appeal withdrawn subject to reinstatement, No. 93-4122 (2d Cir. June 30, 1993).

[16] Owens-Illinois, Inc., 5 Trade Reg. Rep. (CCH) ¶ 23,162 (FTC Feb. 26, 1992).

acquisition by General Electric of the railroad boxcar leasing business of Chrysler. Both companies were major boxcar lessors. After the Commission announced that it would seek a preliminary injunction to block the merger, the parties abandoned the transaction.

Earlier this year, the Commission obtained a preliminary injunction blocking a proposed acquisition by Columbia Hospital of a hospital in Punta Gorda, Florida, from Adventist Health System/Sunbelt.[17] The matter has been removed from administrative adjudication so that the parties can propose a consent agreement to the Commission. Without commenting on the Columbia Hospital matter, which is pending, I will note that the Commission has challenged a few other hospital mergers in recent years. Hospital mergers virtually always involve local geographic markets, and the issues in these cases tend to be highly localized.

Our most recent case -- and, mind you, this is only as of today, November 12, 1993 -- involved an acquisition by Valspar of a division of Cargill.[18] Both companies make alkyd resins used in paint. Under the negotiated settlement, published for comment a few weeks ago, Valspar will divest the assets acquired from Cargill, plus three additional resin plants, to a newly created entity. Valspar also is required to license alkyd technology to the newly created entity.

Most of the Commission's merger enforcement cases involve horizontal mergers, but we also examine and, in some cases, challenge proposed acquisitions that pose vertical and potential competition concerns. I would like to spend a few minutes on potential competition. We don't hear that much about it these days, but I think there will continue to be potential competition cases that we can and should bring. I will begin with a brief review of the theory. Mergers or acquisitions that eliminate a potential competitor may lessen competition in the market if the acquiring firm was perceived by incumbent firms as likely to enter or if the acquiring firm, absent the acquisition, would actually have entered the market. An acquiring firm, in some circumstances, may be both an actual and a perceived potential entrant.

For potential competition theory to apply, the market must be concentrated, so that entry or the perception of entry would

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

[18] Valspar Corp., File 931-0098 (FTC press release Oct. 22, 1993).

have a procompetitive effect.[19] Entry into the market should be difficult but not so difficult that the potential entrant could not enter. The acquiring firm should be one of a very few potential entrants, and when the theory is actual potential competition, it must be shown that absent the acquisition, the acquiring firm would have entered the market independently.

Showing that the acquiring firm would have entered the market but for the acquisition has proved to be difficult. After some initial successes, the Commission had difficulty persuading some courts that an acquiring company would enter but for the acquisition. Some courts were quite critical of the Commission's conclusions about the likelihood of independent entry, variously describing them as "wholly speculative," "uncabined speculation,"[20] "unsupported speculation" and "devoid of evidentiary support."[21] This is pretty strong stuff.

The standard for proving a violation has not been entirely clear. Some courts have said that the evidence should show a "reasonable probability" of entry, a standard that may derive from Section 7 of the Clayton Act, which is concerned with "'probabilities,' not 'ephemeral possibilities.'"[22] One court said that there must "be at least a 'reasonable probability' that the acquiring firm would enter the market . . . and preferably clear proof that entry would occur . . . ."[23]

The Commission most recently adjudicated an actual potential competition case in B.A.T. Industries[24] in 1984. The complaint alleged that B.A.T.'s acquisition of the chemical carbonless paper assets of Appleton Paper would eliminate B.A.T.'s Wiggins Teape division, the largest producer of carbonless paper outside the United States, as a significant actual potential entrant in the United States. The case may sound familiar to some of you Washingtonians, because in 1991, the Commission sought a preliminary injunction to block the proposed acquisition by Wiggins Teape Appleton of the Vancouver, Washington, chemical

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[19] B.A.T. Industries, Ltd., 104 F.T.C. 852, 920 (1984).

[20] BOC International v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).

[21] Tenneco, Inc. v. FTC, 689 F.2d 346, 354 (2d Cir. 1982).

[22] United States v. Marine Bancorporation, 418 U.S. 602, 622-23 (1974), citing Brown Shoe Co., v. United States, 370 U.S. 294, 323 (1962).

[23] United States v. Siemens Corp., 621 F.2d 499, 506-07 (2d Cir. 1980) (Mansfield, J.) (citations omitted).

[24] B.A.T. Industries, Ltd., 104 F.T.C. 852 (1984).

carbonless paper mill of Boise Cascade.[25] In that case, the parties abandoned the transaction, and the Commission withdrew its request for a preliminary injunction.

In the 1984 B.A.T. case, the Commission said that there must be "clear proof" that the acquiring firm would have entered the market independently but for the acquisition.[26] The question is, what is "clear proof"? Those of you who are well versed in the law of evidence, please bear with me. According to Black's Law Dictionary, clear evidence or proof "necessarily means a clear preponderance" or perhaps "no more than a fair preponderance of proof," or it may "convey the idea of . . . certainty, or [be] understood as meaning without doubt."[27] This definition suggests that the Commission in B.A.T. may have been less than entirely clear. The statement of the Commission in B.A.T. that "[g]eneral circumstantial evidence . . . provides the best picture of whether an acquiring firm would have entered independently"[28] suggests that something less than absolute certainty was intended. Turning from the phrasing of the standard of proof to the facts, what the Commission decided in B.A.T. was that financial studies purporting to show that independent entry would have been profitable, unsupported by testimonial or documentary evidence, were not sufficient to carry the day, at least not when countered by equally weighty studies purporting to show that entry would not have been profitable. This result does not strike me as surprising under almost any standard, and, as a result, the case does not seem to shed much light on the "clear proof" standard.

The potential competition theory is sound,[29] and the Commission's issuance recently of consent orders settling allegations that the acquisition would eliminate potential competition is evidence of the Commission's belief in that. In Atlantic Richfield,[30] for example, the Commission alleged that ARCO's acquisition of certain chemical assets of Union Carbide

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[25] File 911-0006 (preliminary injunction action announced March 8, 1991; withdrawal of action announced April 5, 1991).

[26] 104 F.T.C. at 926 & 930.

[27] Black's Law Dictionary 228 (5th ed. 1979).

[28] 104 F.T.C. at 939. The Commission also said that non-public documentary evidence not prepared in contemplation of litigation would be particularly useful.

[29] See 1984 Department of Justice Merger Guidelines § 4.1, reprinted in 4 Trade Reg. Rep. ¶ 13,103, at 20,564.

[30] Docket C-3314 (issued Nov. 26, 1990).

would, among other things, eliminate perceived potential and actual potential competition in the markets. In another 1990 consent order, Roche Holding,[31] the Commission required divestitures to protect actual and potential competition in several pharmaceutical markets. In two of the markets, one of the parties to the merger had a dominant share and the other was developing a competitive product; in the third market, both of the firms were developing therapeutics. We also are investigating several cases involving potential competition issues. Given the Commission's willingness to endorse potential competition theories, as evidenced by the recent consent agreements, I expect that we will see more potential competition cases in the future. Perhaps the Commission will have the opportunity if one of these cases is litigated to attempt to elucidate further what kind of "clear proof" is sufficient to establish a case under the theory of actual entry.

Let me turn now from merger to non-merger antitrust enforcement. Merger and non-merger cases involve different theories of violation and usually are assigned to different members of the Commission's staff. The lawyers and economists who work on merger cases often put in long hours under tremendous pressure, because of the short statutory deadlines for action in merger cases. On the other hand, case generation is relatively easy for the merger people, because most of their investigations are identified through the premerger notification program. The lawyers and economists who work on non-merger cases usually have greater control over their working hours; they may even be able to plan vacations and buy nonrefundable airplane tickets. But the non-merger staff must search for cases by, for example, reading newspapers and trade journals and debating fine theoretical points concerning the ramifications of conduct. This can be a remarkably difficult task. There are advantages and disadvantages on both sides of the aisle.

In the non-merger area, the Commission recently issued two administrative complaints. One involves a professional association and alleges that the association, through its ethical code, unlawfully restrained advertising by its members.[32] The second complaint alleges that pharmacies in Baltimore engaged in a boycott to raise the prices paid by a prescription plan insurer.[33] Because these cases are pending in adjudication, I will not discuss them further.

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[31] Docket C-3315 (issued Nov. 28, 1990).

[32] California Dental Association, Docket 9259 (issued July 13, 1993).

[33] Baltimore Metropolitan Pharmaceutical Association, Inc., Docket 9262 (issued Sept. 28, 1993).

In an area along the new frontier of antitrust, that is, an area that is less traditional, several recent consent agreements issued by the Commission involve alleged unilateral invitations to collude.[34] The theory of violation is that an invitation to a competitor to fix prices harms competition by reducing uncertainty and facilitating actual collusion and that it serves no procompetitive purpose even if it is not accepted. By definition, of course, a unilateral invitation to collude is less harmful than actual collusion, because the invitation has not ripened into actual collusion. In my opinion, the evidence of an unlawful invitation to collude should be clear and unambiguous because of the danger of chilling legitimate communications. Also, in my opinion, the evidence of the alleged invitation should be independent of any evidence within the control of competitors of the alleged actor, because of the obvious incentives of one competitor to implicate another.

Among the most difficult questions the Commission addresses in non-merger cases is the evaluation of "efficiency justifications." This is a term that we have come to use for almost any kind of explanation that may show that challenged conduct is reasonable and therefore lawful, what the Court in National Society of Professional Engineers[35] called affirmative defenses. Years of judicial and Commission precedent have of course established the broad contours of acceptable defenses under the rule of reason, but clearly we do not know all the answers.

I refer back to two Supreme Court cases that, in particular, signal that careful review is appropriate in considering the antitrust implications of suspect conduct. In Broadcast Music, Inc.,[36] the Court concluded that what had been characterized by the court of appeals as *per se* unlawful price fixing was in fact the creation and marketing of a new product, a blanket music license, that no single composer could offer. In view of the potential benefits of the blanket license, the Court said, analysis under the rule of reason was appropriate. In NCAA,[37] the Court further focused the inquiry on the effect of a

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[34] *E.g.*, Quality Trailer Products Corp., Docket C-3403 (issued Nov. 5, 1992).

[35] United States v. National Society of Professional Engineers, 435 U.S. 679 (1978).

[36] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[37] National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).

challenged restraint on competition and did not condemn the restraint until after examining NCAA's purported justifications.

In considering justifications for suspect conduct, the question is whether the conduct creates or enhances competition by, for example, "reducing the costs of producing or marketing the product, creating a new product or improving the operation of the market."[38] The old ancillary restraints doctrine may come to mind here. The Commission and its staff are alert to possible efficiency justifications, and we will examine carefully any that come to our attention. The burden of showing affirmative defenses, however, is on the targets of our investigations, and no matter how sophisticated a firm or its counsel, the ability to identify and articulate efficiency justifications cannot be taken for granted. Indeed, it is easy to underestimate the difficulty of doing so. Businesses often make decisions based on trial and error. They may know what works, but they may not know why. When businesses become the subject of a Commission investigation, they may have more interest in a relatively inexpensive settlement than in undertaking to prove unexplored, unarticulated and perhaps unrecognized efficiency justifications.

I think that two points are important here. First, it is useful and advisable for the Commission to continue to evaluate new factual situations and to develop new theories under Section 5 of the Federal Trade Commission Act to remedy anticompetitive effects. Second, as we do so, we must be alert for and open to new justifications and understanding of markets. Caution is appropriate so that our enforcement decisions do not unnecessarily restrict competitively neutral or even procompetitive conduct.

In another application of Section 5 that is less traditional, the Commission recently published consent agreements in two cases involving California pulmonologists who comprise about 60% of the pulmonologists in the relevant markets and who own companies that supply oxygen to outpatients.[39] The complaints allege that the doctors, by referring their patients to the oxygen providers in which they own interests, foreclose competition in the home oxygen market. The orders require divestitures to reduce to 25% or less the percentage of pulmonologists that own each home oxygen company. These orders show that the Commission continues to be active in identifying

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[38] Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 604 (1988).

[39] Home Oxygen & Medical Equipment Co., File 901-0109; Homecare Oxygen & Medical Equipment Co., File 911-0020, FTC press release Nov. 2, 1993.

anticompetitive effects that arise in new situations and innovative in fashioning remedies.

I began this morning by talking about the question I am most frequently asked. Since I am in Seattle, let me conclude by turning to the second most frequently asked question: What happened in the Microsoft case? For those of you who may not know what I am referring to (perhaps you have been in a cave in Tibet for the last year), Microsoft is a recent case in which the Commission twice decided, each time on a 2-2 vote, not to bring an enforcement action. The Commission now has closed its investigation, and the Antitrust Division has opened its own investigation. All of this information has been made public by the agencies.

The Microsoft matter was the most public nonpublic investigation in my experience at the Commission and perhaps in the history of the Commission. The press reported, among other things, about nonpublic recommendations from the staff to the Commission and about nonpublic deliberations of the Commission. There were lists of reasons why Microsoft should be sued and lists of reasons why Microsoft should not be sued. When the Commission declined to issue a complaint, some said that the law had been changed. I have no reason to think that is true. As has been made public, I voted not to sue Microsoft. I concluded that there was not sufficient evidence to support a reason to believe determination that Microsoft had violated the law.

I have no complaints about members of the press. They were doing their job. Nevertheless, from my perspective as a commissioner, I found the publicity unfortunate at best. The commissioners and the members of the Commission's staff are obliged to refrain from disclosing information developed during a nonpublic investigation and also from disclosing the deliberations of the Commission in connection with prosecutorial decisions. The bar involves privacy, confidentiality and fairness concerns, as well as the risk of compromising prosecutorial decisions and the deliberative process. Occasionally, and most unfortunately, there are leaks, but for the most part, I think the obligation to remain silent is observed. Even if some information is available, other, equally important or even more important information may not be publicly available. This is something to keep in mind when you see news stories reporting what the staff have recommended or what the commissioners think about a particular matter unless the Commission has explained its decision formally.

I began by saying that I do not (indeed, I cannot) speak for other commissioners. I confess, I think that I am as able as anyone at discerning why individual commissioners reach particular decisions, but I do not presume to speak for other commissioners or to explain their reasons for decisions. Be

suspicious of anyone who does presume to offer this kind of insight. I can tell you absolutely, they do not speak for me.

The lesson for you as counsel is not to rely on news reports in advising your clients. It may be more interesting to read about mind-boggling multi-billion dollar mergers and titans of industry than it is to explore the intricacies of product market definition or the minimum viable scale of entry or other exciting antitrust principles. But the best guidance to Commission decision making still lies in the traditional if somewhat dusty and unexciting sources in the law library.

The Commission has from time to time been subjected to subtle pressure from various sources, to attempt to persuade us to pursue one course of action over another. I believe that the pressure is unavailing. The Commission has an obligation to make its decisions based on the merits, on the evidence and in the public interest. I am confident that is and will continue to be our consistent practice.

Thank you.