THE TARIFF IS STILL THE MOTHER OF THE TRUSTS;
or, ANTITRUST: IT'S NOT JUST FOR BREAKFAST ANYMORE

Remarks of

Mary L. Azcuenaga

Commissioner

Federal Trade Commission

before the

National Association of Attorneys General

Antitrust Centennial Symposium

Lawrence, Kansas

May 25, 1989

State antitrust law may be a century old, but it has never been the subject of more attention. Today no antitrust program seems complete without a discussion of or debate on state antitrust enforcement, which has become increasingly visible. This symposium celebrates the centennial of antitrust law in the United States, but in this final session we also look forward to the future of antitrust enforcement. I would like to approach that topic from a somewhat different direction: in addressing the question of what antitrust enforcement in the 1990's will be or should be, I will suggest that for state and federal officials alike, antitrust principles are too good to save for antitrust cases alone.

We have heard a great deal about the events of 1889 and 1890, when public resentment of the vast economic power of trusts and other business organizations reached the boiling point, and the first state and federal antitrust laws were enacted. I plan to journey back in time to the early days of antitrust in a moment, but I want to start with some history of a more recent vintage. Before I do that, I should remind you that the views I express today are my own, and are not necessarily shared by other members of the Commission.

In preparing my remarks for this conference, I came across the June 1961 issue of the Texas Law Review, which featured several articles on state antitrust enforcement. Some things haven't changed much since that issue appeared. For example, one

article notes that "the workloads of the federal enforcement agencies are greater than ever and . . . the appropriations for personnel are as inadequate as ever."[1]

But a lot of things were very different three decades ago. "The nation's development during the past fifty years has been aided enormously by our antitrust policy," according to an article by Professor James A. Rahl of the Northwestern University School of Law. Professor Rahl went on to say that

> All will agree that the federal accomplishments have been made without any important contribution from most of the state antitrust laws. Even in the most exuberant formative years of American antitrust policy, few state laws were vigorously enforced. And since before World War I, most of them have been virtually dead. In fact, they have been so dead that it may be wondered whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them.[2]

I am sure that no lawyer would make that mistake today.

In October 1960, at an antitrust conference sponsored by the Massachusetts Attorney General, the Assistant Attorney General for Antitrust, Robert A. Bicks, and the Chairman of the Federal Trade Commission, Earl W. Kintner, told the audience that they strongly supported increased state antitrust enforcement as an important counterpart to federal efforts.[3] Earlier that year, Assistant Attorney General Bicks had announced a new policy of

---

[1] Goldstein, The Tariff Is the Mother of Trusts, 39 Tex. L. Rev. 711 (1961).

[2] Rahl, Towards a Worthwhile State Antitrust Policy, 39 Tex. L. Rev. 753 (1961).

[3] Id. at 754-55.

liaison and cooperation with state antitrust enforcers.[4] Today, almost thirty years later, I am here to deliver a similar message of encouragement and support for increased state efforts against restraints on competition that harm consumers. But before disclosing exactly what sort of increased state efforts I would like to see, I want to talk about orange juice for just a moment.

Orange juice is a wonderful product -- unlike many other things, it both tastes good and is good for you. Indeed, to inject a personal note, I am one of those people who believes with a conviction just short of religious fervor that breakfast without orange juice is like a day without sunshine. Not everyone may feel as strongly as I do, but when most people think about breakfast, they think about orange juice. The reverse is also true -- when most people think about orange juice, they think about breakfast. This is both good news and bad news for the producers of orange juice. It is easy to sell orange juice as a breakfast drink, but it is not so easy to get people to drink orange juice later in the day. That is why the orange juice people ran all those ads that said "Orange juice -- it's not just for breakfast anymore."

Many people have an equally narrow view of the antitrust laws. When they think about antitrust, they think about corporate monopolists and price-fixers. The antitrust laws, which were largely responsible for the demise of the giant trusts

---

[4] See N.Y. Times, Mar. 11, 1960, at 16, col. 6.

of the late 1800's and early 1900's, remain a necessary weapon in today's battles against anticompetitive business practices. But the guiding principle behind the antitrust laws -- that restraints on competition harm consumers -- applies to anticompetitive restraints that are imposed by government as well as those that result from corporate or other private malefaction. Applying government antitrust resources only to policing corporate mergers and price-fixing conspiracies is like drinking orange juice only at breakfast: there's nothing wrong with it, but why limit yourself? Why not also apply antitrust principles to government-imposed restrictions on competition, which can harm consumers just as much as private anticompetitive conduct can?

The notion that government is sometimes a foe rather than a friend of competition is not new. The first article in the 1961 Texas Law Review issue I referred to a few moments ago takes its title from a 19th-century folk saying, "The Tariff Is the Mother of Trusts." The author, Professor E. Ernest Goldstein of the University of Texas Law School, pointed out that the powerful trusts of a century ago could not have succeeded without the government's help.

> [O]ne saw at the end of the Civil War the northeastern manufacturers and financiers unravaged by wartime destruction and fat with wartime expansion. Their economic power was in sharp contrast to the weakness of . . . the South and West. With foreign competition shut out by the tariff wall, the Northeast through trusts and combinations was able to exploit the rest of the country at its will. . . . This was the period when

Unfortunately, many other government actions also have anticompetitive consequences. For many years, the Commission has been an advocate for competition and consumers before other government agencies. The recent report of the ABA's "Kirkpatrick Committee" concluded that

> The FTC's Competition and Consumer Advocacy Program is one of the most important of the FTC's various projects. . . . The FTC has consistently, and on the whole correctly, pursued the objective of promoting consumer welfare. It has generally provided quality advice about issues of consequence.
>
> . . . .
>
> The limited available evidence suggests that the FTC's program has generally been successful. . . .
>
> . . . .
>
> . . . In the whirl of activity that precedes the adoption of federal or state regulations, or the enactment of . . . legislation, the FTC can offer an important, sometimes lonely, voice for the consumer.[9]

In recent years, that "lonely voice" has spoken in response to many requests from state legislators or other officials for comments on proposed state legislation or regulations. Some of those proposals were clearly anticompetitive. Let me give you some examples. Recently, the Commission's staff responded to a state senator's request for comments on a bill that would regulate relationships between manufacturers and dealers of construction equipment. That bill would have required a manufacturer to give a dealer whose sales or service performance did not meet the standards set out in the dealership agreement 180 days to correct the breach of contract. If the dealer failed

---

[9] Report of The American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission 73-75 (1989).

to clean up his act, the manufacturer would be required to give him an additional 90 days' notice before cutting him off. The manufacturer also would have to buy back the dealer's inventory, furnishings and equipment, and either pay the dealer three years' rent on his building or find someone to buy or lease it. The bill also provided that any manufacturer who wanted to establish a new dealership within 50 miles of an existing dealership had to prove that its action was "reasonable." The implications for private contracts were enormous. Our staff pointed out that the proposed requirements likely would discourage manufacturers from reorganizing their dealership networks in order to offer better service or operate more efficiently and deter suppliers from entering into contracts with dealers in the state.

In another recent advocacy comment, the Commission's staff recommended that officials in a large eastern city issue additional taxicab medallions. That city had issued no new medallions since 1934, even though the demand for cab rides had increased considerably during the intervening fifty-odd years. The government-imposed entry barriers had produced a severe shortage of taxicabs; the average wait for a radio-dispatched cab was 30 minutes. Other recent staff comments have supported deregulation of intrastate trucking rates, removal of limits on the number of branches that banks could operate, and repeal of certificate-of-need regulation of health-care facilities. Since October 1, 1988 -- when our current fiscal year began -- the staff has responded to more than 60 requests for comments.

It would be nice if what the Kirkpatrick Committee called the Commission's "lonely voice for the consumer" had some company. I know that many state attorneys general have spoken out against state regulation that harms competition and, ultimately, consumers. I applaud those efforts, but I would encourage you to do more.

Looking forward to the 1990's, I would like to see the state attorneys general and the Commission share information and coordinate activity in this area just as we have in other areas, such as telemarketing fraud. Our staff has considerable expertise in analyzing the competitive effects of certain kinds of regulation. But it is impossible for them to stay on top of regulatory and legislative proposals in all 50 states. You and your staffs become aware of local developments much sooner than we do. You also understand your state's politics and procedures far better than our staff can ever hope to. By cooperating, the attorneys general and the Commission could be more effective advocates for competition and consumers.

We may not always agree on whether a particular advertising campaign is deceptive, or whether a particular merger is anticompetitive. We may not always agree on whether a legislative or regulatory proposal harms consumers or helps them. But I am confident that we can find a good deal of common ground if we try. Together, we have a much better chance of winning a

few more battles in our "Hundred Years' War" on behalf of unfettered competition.

Thank you.