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FOR RELEASE 10:00 A.M., EDT
THURSDAY, JULY 14, 1955

ADDRESS

BY

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ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

before the

Small Business Administration
National Council of Consultants

Lafayette Building

Washington, D. C.

Thursday, July 14, 1955

10:00 A. M.

When Mr. Wendell Barnes invited me to be your speaker this morning I was happy to accept as I feel I am talking to a group with whom I am engaged in a common cause. Your interest in assisting small business through the tools given you under the Small Business Act is basically similar to the interest of the Justice Department when it enforces the antitrust laws. We are dedicated to keeping free and unfettered the channels of competition. Our history has demonstrated that, given a fair opportunity to compete, small business will be encouraged to take risks and will thrive.

Consideration for the welfare of small business is basic to antitrust philosophy. The popular conception of the antitrust laws is that they are antimonopoly. Certainly this is true, but they are equally, in my judgment, pro-small business. It is impossible to read the Congressional debates on our antitrust laws, whether it be the Sherman Act of 1890, the Clayton Act of 1914, or others, and not come to the conclusion that crucial in the minds of our legislators was the fate of small business and the effect that monopolistic practices would have on them. It is impossible also to go through one single day of antitrust administration without realizing that consideration of the interests of small business plays an important part in many decisions. These decisions -- perhaps to block a merger -- perhaps to file a case -- perhaps to insist on the inclusion of a certain provision in a final judgment -- can be of life or death concern to small business. A few specific examples will illustrate my point.

First I want to talk about mergers. All of us today are interested in this subject. The Federal Trade Commission recently filed a very fine detailed report on mergers. A substantial part of the activity of the Antitrust Division is today concerned with evaluating the possible legal effects of mergers. I think that the interests of small business are very vitally concerned. Section 7 of the Clayton Act, under which most mergers are considered, says that mergers are illegal where their effect may be substantially to lessen competition or to tend to create a monopoly. This language makes it necessary to evaluate many factors. One of these factors, and sometimes the most important, is the probable effect of the merger on smaller companies. We must consider whether an increase in the relative size of the enterprise making the acquisition would reach such a point that its advantage over its competitors threatens to be decisive. We must also consider whether the merger might result in the establishment of relationships between buyers and sellers which deprive rivals of a fair opportunity to compete. In applying these tests, we find in many cases that the small companies are the ones who are most likely to be affected disadvantageously. Let me be even more specific.

Brief comments on three merger cases which the Department has filed this year will illustrate our concern for small business. For example, our complaint against the General Shoe Corporation alleges a long series of acquisitions of both competing shoe manufacturers and of retail outlets. Our complaint alleges that these acquisitions put smaller companies in the industry at a disadvantage. It expresses concern for the small shoe manufacturer who is finding it more difficult to hold on to his retail outlets because of the tendency on the part of the larger manufacturers to acquire many of these outlets. An examination of the case which the Department filed against Schenley Industries also reflects the concern of the Department with respect to small competing distillers. These small companies are being faced with the competition of increasingly larger integrated distillers. It is getting to the point where a small distiller who needs cooperage will soon be dependent on his large integrated competitors for such cooperage. At the same time, certain cooperage producers are finding their markets dwindling because the small distillers who formerly were their customers are being acquired by large integrated distillers who produce their own cooperage. Finally, the case which the Department filed against Hilton Hotels Corporation reflects our concern for the small hotel operator who finds himself confronted with the combined assets of what were previously two of the largest hotel chains in the United States. In each of these cases, the Department believes that the effect of the mergers may be to substantially lessen competition or to tend to create a monopoly. It is important to remember that the Clayton Act, under which these acquisitions were brought, does not require actual monopolization as a prerequisite to a violation of law. Rather it requires only a reasonable probability of a substantial lessening of competition or of a tendency to monopoly.

You have probably all heard about refusal of the Department of Justice to approve a proposed merger between Bethlehem and Youngstown steel companies. You may be interested in knowing why we did this, while at almost the same time we approved certain mergers of the smaller auto producers. Let me first give you some of the important facts pertinent to the auto mergers. In early 1954, when the Department considered the proposed mergers of Hudson-Nash and Packard-Studebaker, there were three major, and several smaller concerns. The majors in 1949 produced more than 85 percent of new cars -- leaving the smaller firms with a meager 14 1/2 percent market share. By the first four months of 1954, moreover, the majors had jumped to almost 95 1/2 percent -- while smaller producers' share had shrunk to a bit over 4 percent. In 1954 some of the smaller firms actually operated at a loss. The picture confronting us, then, revealed the smaller companies falling fast behind and the larger producers surging rapidly ahead.

Against this background, our feeling was that the proposed mergers might revitalize these lagging smaller concerns. They would then have broader asset bases, might economize by eliminating duplicating facilities, secure better dealer representation and sell more complete lines of cars. It should be emphasized that these merging companies were the smallest in the business. Thus, their consolidation spelled no competitive disadvantage over the other smaller concerns. Vital to our determination of legality, I emphasize, was this consideration as to the mergers' probable effect, not only on the merging companies' ability to compete with their giant rivals, but also on any remaining smaller companies. In this case, not only were there no smaller concerns to be placed at a disadvantage, but the mergers, by increasing the smallest firms' strength, created far more competition than they eliminated.

Absent competitive disadvantage to smaller rivals, Congress beyond doubt intended us to consider mergers' effect on small companies' ability to compete with dominant firms. Thus The Report of the House Committee considering Section 7 asks, for example: "Would the Bill prohibit small corporations from merging in order to afford greater competition to larger companies." The Report then refers to the "objection that the suggested amendment would prohibit small companies from merging." Rejecting this possibility the Report concludes "there is no real basis for this objection." For, "obviously those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it." Applying this legislative guide, we concluded the auto mergers submitted constituted no substantial lessening of competition, nor tended toward monopoly.

A contrary conclusion was reached by us regarding the proposed Bethlehem-Youngstown merger. In steel, the three majors have 30 percent, 15 percent and 8 percent of the basic capacity. The remaining seven of the first 10 producers range from 5 percent to 1.7 percent of capacity. Of the proposed merging companies, Bethlehem is the second of the big three and Youngstown the sixth of the first 10. Moreover, much of both Youngstown's and Bethlehem's capacity stems from past mergers and acquisitions.

Unlike the auto mergers, however, there were, of course, many companies -- integrated and non-integrated -- much smaller than Youngstown. Further, there was no need for Bethlehem and Youngstown to combine in order to compete with the 80 smaller steel companies most of which are not even integrated. Thus, not only would this proposed merger eliminate competition between Bethlehem and Youngstown (in itself I believe substantial enough to violate the law) but equally important, it would increase concentration in the hands of two companies already industry leaders, and thus widen the competitive spread between the merged companies and their smaller rivals.

Arguing to the contrary, Bethlehem and Youngstown urge that by combining they may better compete with the largest steel giant -- U. S. Steel. Suffice it to say, in the language of the Federal Trade Commission in the Pillsbury case, the result of the proposed merger would be a market "dominated by a few large * * * companies * * *. This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the New Clayton Act antimerger provisions."

The facts of steel concentration underscore the necessity of applying that reasoning to halt the Youngstown - Bethlehem merger.

Were we not to take a position against the proposed Bethlehem - Youngstown merger, I pose the question, where would we begin to stop mergers in the steel industry? If the Bethlehem - Youngstown merger was approved, could we fail to approve any other proposed merger that resulted in less than U. S. Steel's 34 percent. Could we permit Republic, National, and all 23 of the fully integrated companies smaller than the first 10 to unite? Or should we permit the smaller 23 to merge with Kaiser and Colorado Fuel & Iron and Interlake and Armco and Inland and Jones & Laughlin? Neither of such mergers would create a company larger than U. S. Steel. Yet could such mergers conceivably be outside the Congressional intended ban? In short, stopping steel mergers now seems the only chance to avoid the troublesome problem -- some years from now -- which automobile concentration today poses.

Now, a few words about other antitrust enforcement work lest you think we are concerned only with mergers. One outstanding instance wherein antitrust enforcement has been effective in opening markets to competition by small businessmen is represented by the judgment we negotiated with Eastman Kodak in connection with its color film operations. Perhaps you will recall that about six months ago a civil complaint was entered at Buffalo, simultaneously with a consent judgment, which required Eastman Kodak, among other things, to discontinue tying together in any way the sale of its Kodachrome and Kodacolor amateur color films with its processing of these films. Unlike black and white film, which is developed and printed almost exclusively by small businessmen, these amateur color films produced by Eastman were processed only by Eastman. When the film was sold, the sales price included an unsegregated charge to cover the processing. The amateur would, after exposing the film, send it by mail to Eastman. He could not take it to the corner drugstore, nor to the local photographic shop. No one in the United States other than Eastman was prepared to process Kodachrome or Kodacolor film. The tie-in arrangement under which these films were sold kept the small businessman out of the processing field represented by these films.

The antitrust judgment entered at Buffalo will do more than merely prevent Eastman from tying together the sale and processing of films. Of direct and immediate benefit to independent film processors are the requirements of the judgment that Eastman grant, upon request, licenses under its pertinent processing and materials patents, upon reasonable royalties; that Eastman make available technical manuals describing its color film processing technology; that the company send technically qualified persons to plants of independent processors to supplement the technical information contained in the manuals, and that Eastman permit independent processors to send technical personnel to certain of its processing plants to observe the processing methods, processes, machines and equipment.

We feel that, given access to Eastman's processing and materials patents and technology, and the compulsory sale by Eastman of materials used in processing amateur color film, the independent processors will have an opportunity to compete against Eastman in the processing of its color film, and that resultant benefits will accrue to entrepreneurs.

The decree the Antitrust Division negotiated in the Eastman case has been the subject of some favorable comment by those independent small businessmen who should be most benefited by it, namely, the photo-finishers and their principal customers, the retail druggists. Shortly after the decree was entered, a drugstore trade publication carried a lead article captioned, "Big Rise in Drugstore Color Film Sales Seen as Result of New Eastman Policy -- Agreement with Justice Department Ends Single Price for Film and Processing". The article which followed predicted that as a consequence of the Eastman judgment, drugstore business in color film would show a considerable increase in the years ahead, compared with what it has been in previous years. In addition, it asserted that drugstores would tap a source of revenue almost entirely unknown in the drug field until now -- a revenue derived from the addition of color film finishing to the black and white film finishing, for which practically all drugstores today act as agents. According to the article, the reforms required by the judgment will lead to the increased use of color film for the average taker of snapshots who buys photographic supplies from a drugstore and has it handle the processing of his films.

According to the article, the executive secretary of the Master Photo Finishers Association has stated that within a year from 700 to a thousand of the association members will be finishing color film in all sections of the United States. When our judgment was entered, only 150 of the Association's 1,400 members did any such work. Their operations in the color film processing field were necessarily limited, and did not include Kodachrome and Kodacolor.

While the Eastman judgment is an outstanding example of how our activities aid small business, it is a primary objective of nearly all judgments entered in civil antitrust cases instituted by the Government to restore competitive conditions in the industry involved. To attain that objective, it is often necessary to deal with the property and assets of defendants in order to remove otherwise legal impediments upon others entering or continuing in the industry.

Very frequently defendants will have used both patents and technical information in such a way as to foreclose effective competition in the manufacture, use or sale of products. To assure that defendants may not continue to restrict competition by use of these patented and unpatented assets, judgments often require that certain of those assets be made available to all applicants on reasonable, nondiscriminatory terms. There have been approximately 77 judgments entered in cases instituted by the Government requiring defendants to make available to existing or prospective competitors certain of their patents; and approximately 27 judgments require the furnishing of know-how or technical assistance.

In cases involving defendants dominant in a particular industry, notice of entry of a judgment is often picked up by the wire services or trade journals. Very often our judgments require that the defendants themselves place notices in appropriate trade journals advising the industry of provisions of the judgment which are designed to benefit the trade. But this does not necessarily mean that people desiring to engage in a new line of business or desiring to operate under different processes, are fully aware that patents, know-how, blueprints, specifications and technical assistance may be had either without cost or upon payment of reasonable royalties or fees.

In order to do all that we can to make known to interested persons the possible benefits which they may secure from many of our judgments, the Antitrust Division is currently preparing for publication a booklet listing the products or processes covered by judgments requiring defendants to make available certain of their patents, technical information or technical assistance. It is expected that the booklet will list the names and addresses of the companies involved, and, insofar as possible, the terms upon which such licenses or know-how may be obtained. We do not know when this booklet will be ready for circulation but we will advise all appropriate Government agencies and Congressional committees when it has been published.

Beyond our litigation work there is another area of activity where small business receives aid from the Antitrust Division. Many letters are received describing hardship situations which may not involve violations of law or which are not in themselves of such major significance to warrant antitrust prosecution. We attempt to give "first aid" in many of these cases.

In one situation a small newspaper in a small Texas town was not able to buy comic strips from two large syndicates. The syndicates believed that they were already adequately represented in this territory because the comic strips were being carried by a paper in a larger Texas city approximately 200 miles away. We corresponded with all of the parties involved and worked out a favorable solution. The small Texas paper is now able to obtain the comic strips it desires. We were able to accomplish this not through compulsion, not through threats, but through appealing to the sense of fair play of the syndicates.

In another situation a small company engaged in servicing office machines was not able to obtain parts from the manufacturer of one popular machine. The manufacturer, after we called his attention to the effect his decision was having on this small service company, finally agreed to furnish parts to him. Here again, without threatening the institution of antitrust proceedings we were able to get action on behalf of a small businessman vital to his continued existence.

In closing, I would like to mention an example of how the Department of Justice and the Small Business Administration can work cooperatively to bring about relief to smaller companies.

In this situation a manufacturer of false teeth had complained that a Government department which purchased false teeth was using specifications which made it prohibitive for many of the smaller dental firms to submit bids. The Justice Department and the Small Business Administration held discussions with the Government department concerned. The result was that the latter agreed to modify its specifications so that the small companies would have a better opportunity of getting the business. It is my understanding that one of the smaller companies has actually been successful in getting some of the business.

I have outlined only a few instances of how the work of the Justice Department helps small business. We do much more -- and there is much more to be done. But from this resume you can see why I feel you and we are engaged in a common cause. While our methods may differ, our objectives are similar. You have my earnest assurance that we will remain dedicated to the cause. Your continued dedication is assured both by the very purpose for which your agency exists, and by the ardor of those in command.