Department of Justice

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ADDRESS

BY

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THE

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INTRODUCTION

I would like to thank Mr. Jones and the members of the Georgia State Bar Association for your kind invitation to attend your annual meeting here in Savannah.

The topic to which I will address myself this morning is the present and future application of the federal antitrust laws; particularly this Administration's policy toward current corporate merger trends.

It is now almost 80 years since the passage of the Sherman Act. It was our federal government's first major legislative program designed to combat the undue concentration of industrial and financial power.

The Sherman antitrust act reflects a fundamental national commitment that the freedom and viability of an open marketplace is the most efficient and most reliable guarantor of economic prosperity.

Its simple prohibition of "any contract, combination or conspiracy in restraint of trade" remains our guide.

Under our federal antitrust policies in the last 80 years, our gross national product has increased to $800 billion. Our national income, in terms of current

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prices, has grown 12 times. Our economy is vigorous. Our businessmen are showing record profits. Our average family yearly income has increased from \$3031 to over \$7500 in the last two decades.

Thus, the evidence strongly supports our belief that the antitrust laws have served us well, perhaps more successfully than the 1890 Congress could have envisioned.

We have constructed a complex economic structure which successfully reflects adherence to the political and social principles of our free society.

We have not succumbed to the cartel theories of Europe. Neither have we found it necessary to impose government regulation on more than one-eighth of our economy.

But I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers.

CONCENTRATION TRENDS

While the dimensions of the current merger movement have received widespread publicity, permit me to refresh your memory.

The number of corporate mergers has more than doubled in the last two years, reaching a total of over 4,000 in 1968. More importantly, these mergers have involved an increasing number of large firms.

Acquisitions of firms with total assets of over $10 million rose from 100 in 1966 to nearly 200 in 1968. The value of the assets of these acquired firms rose from $4 billion in 1966 to over $12 billion in 1968. Based on first quarter prediction for 1969, the value of acquired assets may reach $18 billion this year.

Many of the firms being acquired are of substantial size. At the beginning of 1968, there were about 1300 firms with assets of over $25 million. Had it not been for acquisitions during the past decade, these firms would now number well over 1900.

From 1948 to 1966, only five firms with assets of over $250 million were acquired. In 1967 alone, six such firms disappeared via acquisitions; and in 1968, the number rose to 12.

The nation's largest firms are playing an increasingly prominent role as acquiring, as well as acquired, corporations. Thus, in 1968, 74 of the 192 acquisitions of companies with assets over $10 million were made by companies among the nation's 200 largest firms.

In 1948, the nation's 200 largest industrial corporations controlled 48 percent of the manufacturing assets. Today, these firms control 58 percent, while the top 500 firms control 75 percent of these assets.

The danger that this super-concentration poses to our economic, political and social structure cannot be over-estimated. Concentration of this magnitude is likely to eliminate existing and potential competition. It increases the possibility for reciprocity and other forms of unfair buyer-seller leverage. It creates nationwide marketing, managerial and financial structures whose enormous physical and psychological resources pose substantial barriers to smaller firms wishing to participate in a competitive market.

And, finally, super-concentration creates a "community of interest" which discourages competitition among large firms and establishes a tone in the marketplace for more and more mergers.

This leaves us with the unacceptable probability that the nation's manufacturing and financial assets will continue to be concentrated in the hands of fewer and fewer people-- the very evil that the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Celler-Kefauver Amendment were designed to combat.

OTHER DANGERS OF CONCENTRATION

You may ask why I, as Attorney General, offer a statement of the Administration's position on mergers here, in Savannah. One might suggest that this speech should be delivered to bankers and corporate managers in New York or Chicago or Los Angeles.

I am speaking here precisely because most of you represent economic interests---distant from the centers of financial and managerial power---which may be injured by the current merger trend.

This Administration believes that one of the great benefits of an open marketplace is the active participation and control by as many of our citizens as possible in their own economic well-being--not just a small segment of our population in certain cities.

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An urban area should have a substantial influence over its local economy. Its businessmen should have an opportunity to be suppliers. Its lawyers should have the opportunity to act as counsel. Its unions should have the opportunity of negotiating in their own community, for their workers. And its consumers should have the opportunity to exercise local economic options in their choice of competing goods and services.

After all, the ultimate beneficiary of the antitrust laws is the average consumer. In smaller communities, where sources of supply tend to be limited, the consumer may soon find many of his purchasing alternatives diminished.

We do not want our middle-sized and smaller cities to be merely "branch store" communities; nor do we want our average consumers to be "second class" economic citizens.

THE HISTORY OF MERGERS

The history of the merger movement after World War II mainly involved horizontal mergers--mergers between direct competitors--and vertical mergers--those between firms which are in a direct line from raw materials to sales.

From 1948 to 1951, horizontal and vertical mergers amounted to 62 percent of all merger activity.

The Department of Justice increased its enforcement of Section 7 of the Clayton Act and the Celler-Kefauver Amendment. This amendment prohibits any acquisition whose "effect . . . may be substantially to lessen competition." Then they slowly declined: horizontal and vertical mergers represented 48 percent of all mergers from 1952 to 1959; 39 percent of all mergers from 1960 to 1963, 22 percent from 1964 to 1967 and only 9 percent in 1968.

Conversely, conglomerate mergers--including product extension mergers--sharply increased from 38.1 percent of all mergers from 1948 to 1951; to 91 percent of all mergers last year.

Furthermore, it is increasingly clear that the acquiring companies--in an effort to diversify--are often the leaders in one or more highly concentrated markets.

About one-third of all manufacturing is carried on in industries where four companies account for over 50 percent of production. In 14 percent of all manufacturing, 4 firms account for more than 75 percent of production.

These facts require us to move aggressively to counter-act this trend.

But, before I go into greater detail as to the dangers posed by the merger movement, let me point out what mergers do <u>not</u> do.

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They do not necessarily increase efficiency and profits. Studies show that, in general, the relative profits of medium size businesses are as large as those of giant firms.

Corporate bigness does not necessarily stimulate the most imaginative scientific research. Recent studies show that the medium size firm tends to be more productive in its scientific research precisely because it is not in a dominant position.

It has also been argued that the large firm, because of its concentration of talent and other resources, is better able to market goods and services that the public wants. But this, too, is not proven by the facts.

For example, leading firms in two of our most highly concentrated industries--automobiles and razor blades--only offered the American consumer important new products in response to aggressive foreign competition.

Thus, our experience has been, that the American consumer is not always benefited by the very large corporation. Indeed the evidence indicates that bigness may frequently favor the status quo.

Of course, we know that, in some industries, the large corporation is a recognized necessity for effective competition due to the requirements of large capital investment and complex distribution mechanism.

THE SPECIFIC DANGERS OF CONGLOMERATE MERGERS

(1) One of the most easily understandable dangers posed by the conglomerate merger is reciprocity--when a diversified corporation favors with purchases firms which purchase from it.

We know reciprocity is widely practiced.

For example, a poll of 300 purchasing agents by Purchasing Magazine in 1961 revealed that reciprocity was a significant factor in the buyer-seller relations of 51 percent of the companies surveyed and of 78 percent of those companies with a sales volume of more than $50 million.

Reciprocal arrangements may take a number of forms. A diversified corporation may keep records of which firms purchase from it and in what amounts and then apportion its purchases among them.

In addition, there may be overt favoritism where a small corporation, hoping to receive favorable treatment from one

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of the conglomerate's subsidiaries, channels its purchases to the conglomerate corporation.

(2) A more complex but equally troublesome danger in the conglomerate merger movement is the elimination of potential competition.

It has always been assumed that in our free market a businessman should be encouraged to enter an industry where profits and other conditions make his competition attractive. This should be particularly encouraged in a highly concentrated industry because such industries average substantially higher profits than unconcentrated industries.

But super-concentration, coupled with conglomerate corporate structures and large financial capabilities, discourages the prudent businessman from entering such an industry.

This elimination of potential competition tends to maintain the inflated price structure in a concentrated industry.

For example, we have evidence that the only significant seller of natural gas in a regional market reduced its rates by about 25 percent when it became clear a new competitor was ready to enter that market.

The elimination of potential competition has other aspects. The large conglomerate, with its broad financial base, should have the capability to become a new and effective competitor in a spectrum of industries. And yet, instead of starting a new, or purchasing a small firm and converting it into a significant competitor, the tendency has been for the large conglomerate to purchase a leading corporation; and thus to add its weight to an already entrenched market situation.

(3) Large conglomerate mergers also pose substantial dangers to free competition by the expansion of nationwide marketing structures, capital resources and advertising budgets. Such a structure may offer a diversified firm a physical advantage over its competitors in terms of volume discounts on transportation and advertising.

For example, as the Supreme Court pointed out in the Procter & Gamble case, large advertisers receive substantial discounts from communications media. As a multi-product producer, the conglomerate may enjoy substantial advantages in both advertising and sales promotion. It may also purchase network programs on behalf of several products, enabling it to give each product network exposure at a fraction of the cost per product that a firm with only one product would incur.

Thus, the conglomerate corporation, if it acquires a dominant firm in another industry, must by necessity capitalize on its own success and imagination in detriment to the smaller, single line, firms in the industry.

(4) Another danger posed by the current merger trend is what is known as a "community of interest" . But it is not a formal agreement but merely the recognition of common goals by large diversified corporations.

This situation derives as much from common sense as from economics. It posits that large diversified corporations may have little interest in competing with each other in concentrated markets. For, if the food subsidiary of corporation A aggressively competes with the food subsidiary of corporation B, then the electrical subsidiary of corporation B may start a price war with the electrical subsidiary of corporation A. Thus, it may be in both A's and B's interest to maintain the status quo and not to engage in the type of aggressive competition which we expect in a free marketplace.

This danger--the danger of a community of interest--becomes even more substantial when one realizes that the 200 largest manufacturing corporations are diversifying so quickly, that at the present rate, a significant number will soon be facing each other in several markets. And if, as we believe to be the case, they may control even more of the nation's manufacturing resources than the 58 percent last reported, we may soon be in a position where demands for more government regulation could be called for.

CONCLUSION

The matters I have outlined to you this morning form the basis for our serious concern over the present large corporation merger movement. Certainly, some of the issues are open to argument. If we all agreed on our premises and our facts there would be no disputes.

But, taken together, I think that the Celler-Kefauver amendment and its legislative history, the case law and current economic facts clearly support the Department of Justice's enforcement program.

As you know, we do not have to make an iron clad factual case. The Supreme Court has told us that: "The core question is whether a merger may substantially lessen competition, and (this) necessarily requires a prediction of the merger's impact on competition, present and future...(Section 7 of Clayton Act) can deal only with probabilities, not with certainties...and there is certainly no requirement that the anti-competitive power manifest itself in anti-competitive action before Section 7 can be called into play. If the enforcement of Section 7 turned on the existence of actual anti-competitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated."

Therefore, let me give you some of the probabilities:

--The Department of Justice may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries.

--The Department of Justice will probably oppose any merger by one of the top 200 manufacturing firms of any leading producer in any concentrated industry.

--And, of course, the Department will continue to challenge mergers which may substantially lessen potential competition or develop a substantial potential for reciprocity.

Some may regard these three probabilities as something of an expansion of the published antimerger Guidelines of the Department.

But we believe that, under today's circumstances, these probabilities are clearly authorized by present antitrust law.

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The results of this policy, I hope, will be to achieve the type of voluntary compliance we now have in most of the antitrust field. We only oppose about 20 out of every thousand mergers because the vast majority are not anti-competitive. Most lawyers understand our principles and persuade their clients to abide by them.

The benefits of this policy should be readily apparent. By halting the trend toward concentration, we remove what we believe is an inadvisable alternative of outright government regulation as is now applied to public utilities, communications and other highly concentrated industries. We will stimulate our most reliable economic regulator-free competition.

We will insure that consumers and businessmen everywhere will continue to participate fully in our prosperity. We will, despite expected criticism, be carrying out the mandate of this Administration to reflect the hopes and aspirations of all Americans for a free society.