



DEPARTMENT OF JUSTICE

ANTITRUST DIVISION COOPERATION WITH STATE ATTORNEYS GENERAL

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
National Association of Attorneys General

The Lord Baltimore Hotel
Baltimore, Maryland

October 11, 1995

UNPRECEDENTED LEVEL OF COOPERATION WITH STATE ATTORNEYS GENERAL

I am extremely pleased to be here today before the National Association of Attorneys General. One of my highest priorities -- and that of Attorney General Reno -- is to increase cooperation with the states. It makes sense from a resource point of view -- in an era of tight resources, the public expects all of us in law enforcement to combine resources and to be as efficient as possible. And it also makes sense from a philosophical standpoint -- the more we interact, the more consistent antitrust enforcement will be across the board. Consistent antitrust enforcement allows businesses to know what to expect and how to comply with the law as simply as possible.

To accomplish this objective, in June 1994 I appointed Milton Marquis, formerly with the office of the Attorney General of Virginia, as the Antitrust Division's State Liaison and Senior Counsel to the AAG. And the results have exceeded our expectations by far, including a record number of joint investigations with State Attorneys General.

In a little over a year, we undertook **27 joint investigations** with State Attorneys General. Ten of these investigations are still open. I am extremely proud to report that a number of these investigations have led to joint lawsuits and coordinated prosecutions:

Four of these investigations to date have resulted in **joint decrees** with states:

- **Morton Plant/Meese**. In the **first case that the Antitrust Division filed jointly** with a State Attorney General (which reversed longstanding Division practice), the **Division joined the Florida Attorney General** in challenging the proposed merger of two central Florida hospitals. The combination would have accounted for nearly 60 percent of the general acute care hospital services in North Pinellas County, creating a dominant provider and reducing options for managed care plans that have been instrumental in containing costs. An innovative consent decree was negotiated that preserves competition between the two hospitals for most services, while allowing them to act jointly where such action will not harm competition. The parties are allowed to combine certain administrative functions and the performance of certain high technology medical services, but they must market the latter independently. Most acute care hospital services will continue to be provided by the two parties independently. I would like to thank Florida Attorney General Bob Butterworth and Jerome Hoffman, the former chief of Attorney General Butterworth's antitrust division, for their help in this case.
- **Delta Dental**. In this **joint lawsuit**, the **State of Arizona** and the **Antitrust Division** challenged the **Delta Dental Plan's** use of a "**most favored nation**" clause in contracts with Arizona dentists, which discouraged dentists from offering other dental plans more favorable fee arrangements than they offered to Delta. Delta, which had affiliation contracts with 85 percent of Arizona's dentists, was able to enforce its MFN clauses, causing many Arizona dentists to stop offering discounts to competing dental plans and thwarting other plans from attracting enough dentists to compete with Delta. The consent decree prohibits Delta's use of the MFN clause and enjoins other practices. In addition to providing savings to Arizona's customers, this case has nationwide implications, because such contract provisions are widely used in the health care industry. I was extremely proud to work with Arizona Attorney General Grant Woods and antitrust chief Suzanne Dallimore.
- **Danbury**. Just recently, the **Division joined the Attorney General of Connecticut** in filing a **joint complaint** against **Danbury Hospital**. The complaint alleged that Danbury Hospital, the only acute care hospital in its area, had conspired with a majority of the doctors on its staff to delay and impede the development of managed health care plans in the Danbury area. The complaint also charged that the hospital had hindered competition among local physicians by working with doctors to limit the size and scope of its medical staff. The hospital was charged with illegally abusing its monopoly position in in-patient services to maintain profits and to gain undue power in the market for outpatient services. A proposed consent decree was negotiated that would end the anticompetitive practices and that

would allow doctors and hospitals to cut costs while preventing them from limiting competition. This case, along with a similar case the Division filed in St. Joseph, Missouri on that same day, is extremely significant -- it represents the Division's first venture into lawsuits pertaining to physician-hospital organizations. I am extremely pleased to have had Attorney General Blumenthal join us in this precedent-setting case. I also appreciate the efforts of his assistants Bill Rubenstein and John Brunjes.

- **Browning-Ferris Industries/Attwoods.** The Division joined the Attorney General of Maryland and the Attorney General of Florida in filing a **joint complaint** against Browning-Ferris Industries in connection with Browning-Ferris' hostile takeover of Attwoods. The complaint alleged that the acquisition of Attwoods would lessen competition in small containerized waste hauling service in certain areas of Maryland, Florida, Pennsylvania, and Delaware. A proposed consent decree was filed that would require the divestiture of Attwoods' small container assets in markets where both Attwoods and Browning-Ferris compete. Moreover, in the Baltimore, Maryland area and in the Polk and Broward counties in Florida the consent decree stipulates that Browning-Ferris must offer commercial customers new contracts that contain terms less restrictive than those it currently uses. These less restrictive contracts should enable new entrants to build profitable routes in these markets. I thank Maryland Attorney General Curran and members of his office, including Ellen Cooper, Allan Barr, and John Tennis. I also thank Florida Attorney General Butterworth and members of his office, Jerome Hoffman and Liz Leeds, for their help in this case.

Other significant cases involving significant federal-state cooperation include:

- **Playmobile.** This **resale price maintenance case** involved a Division decree and a state decree in which the state of **Pennsylvania** obtained monetary damages. The Division obtained a consent decree that prohibited Playmobile, one of the nation's largest specialty toy companies, from attempting to coerce its dealers to adhere to any specified level of resale prices. This case was referred to us by the Pennsylvania Attorney General's office which worked closely with us during the course of the investigation. I would like to thank Carl Hisiro and Jim Donahue of the Pennsylvania Attorney General's office for their invaluable help.
- **St. Joseph, Missouri.** Similar to the Danbury case, this case involved a Division consent decree which was obtained with the help of the **State of Missouri**. The State of Missouri is continuing its investigation. The Division's complaint charged that St. Joseph Physicians, Inc., a group comprising of 85 percent of the doctors in Buchanan County, Missouri, was formed in 1986 to thwart the development of managed care in the area. In

order to strengthen its efforts, St. Joseph Physicians then merged in 1990 with Heartland Health System, Inc., the only local hospital, to form Health Choice of Northwest Missouri. Since the formation of Health Choice, several managed care plans have attempted to enter the local market but have been unsuccessful. The proposed consent decree will allow managed care plans to compete. I would like to thank Attorney General Nixon and his special counsel Bennett Rushkoff for their help.

We also had great success with **joint approvals of bank mergers** involving substantial divestiture: (1) **Fleet-Shawmut** in which we worked with the State Attorneys General of **Connecticut** and **Massachusetts** for a successful joint approval. (2) Another bank merger where we jointly approved involved the **largest bank in Maine, Key Bank**, and we worked with the Attorney General's Office of **Maine**. I want to thank Steve Wessler, Director of the Maine's Attorney General Public Protection Unit, for his help.

We are proud of our record over the past year. It clearly illustrates the benefits of federal-state cooperation. These joint cases and joint prosecutions are the wave of the future -- in fact, many of these have been precedent-setting in their own right. Today, with a record level of merger activity now taking place, increased federal-state cooperation is vital to antitrust enforcement in this country.

I also want to thank the Federal Trade Commission for allowing us to be a participant in the **Common Ground Conferences**. These conferences have been extremely helpful in exchanging ideas and in developing relationships between federal and state antitrust enforcement officials.

The Division's Record

Now, I would like to describe several of our other major cases that we filed in the past year. Our success in filing these cases stems in large part from our reorganization two

years ago and increased specialization in the areas of mergers, civil non-merger, and criminal cases.

Criminal Cases

In **Fiscal Year 1995**, the Division obtained **\$41.6 million in criminal fines**. This is an increase over Fiscal Year 1994 (\$40.2 million). Our most important criminal cases include:

- **Explosives**. Just last month, **Dyno Nobel**, the world's largest manufacturer of commercial explosives, agreed to plead guilty for conspiring to fix the prices of commercial explosives and pay the **biggest fine ever imposed in a criminal antitrust matter -- \$15 million**. This was preceded by a case filed in August against **ICI Explosives USA, Inc.**, another explosives company, which pled guilty for conspiring to fix prices and was sentenced to pay a **\$10 million** dollar fine (the first time that the statutory maximum had been levied and that time, the biggest fine ever).
- **Fax Paper**. Last week, two additional Japanese companies -- **New Oji Paper Co.** and **Mitsubishi Paper Mills, Ltd.** -- agreed to plead guilty to criminal charges for participating in a world-wide price-fixing scheme to raise prices of fax paper and agreed to pay fines of \$1.7 million and \$1.8 million, respectively. This case follows up on an earlier case filed last year that was the first criminal antitrust prosecution of a major Japanese corporation headquartered in Tokyo, in which **Kanzaki Specialty Papers** and the **Mitsubishi Corporation** paid criminal fines of \$4.5 million and \$1.26 million, respectively, for conspiring to fix prices of thermal fax paper.
- **Plasticware**. Three companies and seven individuals were charged with conspiring to fix the prices of disposable plastic dinnerware. All defendants pled guilty and were fined a total of \$9.1 million and the individuals were sentenced to serve an average of 8 months in prison.

The Division takes its criminal enforcement program seriously. We will continue to provide assistance to state and local procurement officials to help detect anticompetitive contract activities. A good deal of our enforcement centers on procurement efforts. I urge you to call Milton Marquis if you need assistance in this area.

Civil Non-Merger

The Division continues to be active in investigating and in bringing civil non-merger cases. In addition to the numerous cases we brought with the assistance of the State Attorneys General, some of our more notable civil cases include:

- **Treasury Securities.** In December 1994, the Division and the SEC announced that **Steinhardt Management Company** and **Caxton Corporation**, two of the country's leading investment fund managers, agreed to pay \$76 million (of which **\$25 million represented antitrust fines**) to settle antitrust and securities charges connected with the auction of Treasury securities.
- **El Paso** The Division filed a complaint and proposed consent decree to prohibit El Paso Natural Gas -- a major gas pipeline owner and gatherer in the San Juan Basin (ranging from New Mexico to Colorado) -- from tying the sale of meters and meter installation services to the use of the company's gas gathering system. The Division alleged that El Paso was requiring producers to purchase El Paso's meter installation service as a condition for connecting natural gas wells to the El Paso system. The settlement ends this tying arrangement and allows producers to seek alternative contractors.

In the last few months, the Division filed three noteworthy cases dealing with trade associations:

- **American Bar Association.** In June, the Division filed a civil lawsuit and proposed consent decree to resolve charges that the ABA process for accrediting law schools had been distorted to serve the interests of faculty. The ABA was charged with fixing faculty salaries at inflated rates and effectively boycotting state-accredited law schools and their students. Under the proposed consent decree, the ABA would be prohibited from enforcing base salary and benefit requirements among ABA-accredited schools or make it a stipulation of the accreditation process. The ABA would also have to allow ABA-accredited schools to accept students from non-accredited schools and provide transfer credits. Finally, the ABA would no longer be able to refuse to accredit a school simply based on its for-profit status. The decree also opens up the accreditation process so that it is no longer controlled by the law school faculty.

- **NADA**. Last month, the Division filed a complaint and proposed consent decree to end anticompetitive practices by the National Automobile Dealers Association (NADA). NADA was engaged in a pattern of anticompetitive activities such as (1) attempts to persuade car dealers to boycott or reduce purchases from auto manufacturers offering consumer rebates as well as (2) asking member dealers to reduce inventories so that manufacturers would be pressured to reduce high-volume discounted sales to fleet buyers, and (3) attempting to persuade member dealers to stop advertising retail prices based on the dealer's wholesale cost which NADA believed led to lower retail prices. The consent decree prohibits these practices and forbids NADA from terminating the membership of a dealer for reasons relating to the dealer's prices or advertising policies.
- **Florists' Transworld Delivery Association**. In August, the Division filed a complaint and a proposed consent decree against the Florists' Transworld Delivery Association (FTD) for violating a 1990 consent decree. The FTD, after it had been purchased by an investment banking group in 1994, split into a for-profit corporation that handles the business, including the Mercury network, and into a non-profit trade association that provided assistance to retail florists. The for-profit corporation had set up an incentive program which allowed members financial benefits and other perks if they gave up their membership with other flower wire services. This so-called "FTD Only" program was a clear violation of the 1990 Consent Decree because it had the effect of limiting membership to FTD. The FTD has agreed to end the "FTD Only" program and to set up an internal antitrust compliance program.

Health care is a major priority. Some of our cases in the past year include:

- **Vision Service Plan**. Last December, the Division filed a consent decree that prevents a vision care insurance plan operating in 46 states and the District of Columbia from using the Plan's use of a "most favored nation" clause that caused participating optometrists to be unwilling to cut their prices or offer discounts to competing lower-priced vision care insurance plans.
- **Classic Care Network**. Last December, the Division filed a consent decree that prevents a hospital network and its eight member hospitals from coordinating their contract negotiations with HMOs and other third party payers, which were designed to thwart the efforts of payers to obtain discounts off inpatient hospital rates.

Mergers

We are in the midst of a record-breaking merger wave that shows no signs of slowing down. Some of our more interesting merger cases in the past year include:

- **Microsoft/Intuit**. After the Division challenged Microsoft's proposed acquisition of Intuit in May, Microsoft abandoned the transaction.
- **Arkansas Newspapers**. In June, the U.S. District Court in Fayetteville, Arkansas, agreed with the Division and issued a permanent injunction against the merger of the Northwest Arkansas Times and the Morning News of Northwest Arkansas. This injunction followed an eight-day trial in which the Division contended that the proposed merger would lead to lower quality and higher prices for newspaper readers and advertisers.
- **Dubuque Hospitals**. The Division challenged the merger of two hospitals in Dubuque, Iowa, and concluded a trial last December in which we stated that the merger would have a monopoly over inpatient hospital services in the area. We are awaiting the judge's decision.

The Division has also **restructured** a large number of transactions -- especially in high-tech and communications industries -- to remove the anticompetitive aspects of the transactions. Among the more interesting transactions that were **restructured** in the past year include:

- **Sprint/FT/DT**. In July, the Division filed a complaint and proposed consent decree that would restructure the proposed alliance of Sprint/France Telecom/Deutsche Telekom (involving a \$4 billion purchase of Sprint stock). Under the consent decree, Sprint and the joint venture cannot own, control or provide certain services until competitors have the opportunity to provide similar services in France and Germany. Likewise, they are prohibited from obtaining anticompetitive advantages from their affiliation with FT and DT. In addition, they cannot gain proprietary information or pricing data about their US competitors that FT or DT may have gained through their relationship as suppliers to Sprint's and the joint venture's competitors. This case marks the second time that the Division has opened up foreign telecommunications markets (the first case was BT/MCI, filed in June 1994).
- **Computer Associates/Legent**. In July, the Division filed a complaint and proposed settlement to alleviate the anticompetitive aspects of the Computer Associates/Legent transaction, especially in mainframe computer software

markets. The proposed settlement is designed to offer customers of certain products an alternative to Computer Associates. Under the proposed settlement, a new viable competitor would be established for five computer systems management software products -- security software, tape and disk management software, job scheduling software and automated operations software. The proposed settlement would give the DOJ total discretion on whether to accept or reject proposed licensees. If suitable licensees cannot be found, the settlement would permit the court to order Computer Associates to dispose of additional assets or to establish a new viable competitor.

- **Nextel/Motorola**. Last year, the Division filed a complaint and a proposed settlement to alleviate the anticompetitive aspects of Nextel Communications' purchase of the assets of Motorola's specialized radio service. Under the proposed settlement, Nextel and Motorola have to relinquish control of certain SMR channels they own or manage. The consent decree does not affect Nextel's strategy to create a wireless telephone service that will compete with cellular telephone service, and the decree will allow Nextel to proceed with its plans to introduce new digital wireless telephone technology.
- **Bread Merger**. In July, the Division filed a complaint and proposed settlement that substantially modified the proposed acquisition of Continental Baking Company (maker of Wonder Bread) by Interstate Bakeries Corporation (maker of Sunbeam, Butternut and Weber's). The complaint alleged that the merger would reduce competition for white pan bread in five local markets across the country. Under the proposed settlement, Interstate has agreed to sell either Wonder bread or another one of its premium white pan breads in each of the geographic areas. It will also sell any other assets, such as bread plants and route systems, that may be needed to maintain that brand's level of sales in the marketplace.

Conclusion

We are proud of our accomplishments -- many of which were made possible by an unprecedented level of cooperation and coordination with State Attorneys General. We will do our utmost to sustain and expand this progress, and together we will continue to meet the many pressing challenges over the next year. Thank you again for your help.