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ANTITRUST, CONSUMERS AND SMALL BUSINESS

REMARKS OF

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AT THE

21ST NEW ENGLAND ANTITRUST CONFERENCE

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Introduction

Good morning. It is a pleasure to address the 21st New England Antitrust Conference. The Conference brochure and introductory remarks this morning suggest there is a "counterrevolution" brewing in the courts and Congress to reverse advances in antitrust policy made over the past several years. I hope not, because "counterrevolution" in this case means taking a giant step backward to policies that hurt American consumers and American businesses.

My purpose here today is to explain the benefits of current antitrust policy. I would be remiss, however, if I did not make a few observations about the "counterrevolution."

First, let me caution you to question the "counterrevolutionaries" closely on their facts and assumptions. It has been my experience that all too often the counterrevolutionaries substitute demagoguery for careful analysis, and platitudes for objectively verifiable facts. Moreover, the counterrevolutionaries rarely are willing to address current policy on the merits, or even to acknowledge its accomplishments. Instead, these critics specialize in attacks on a "strawman" that is a barely recognizable caricature of the actual policy it purports to represent.

Second, I urge you to go behind the sloganeering and demand that the counterrevolutionaries spell out clearly their vision of our society and its economy. It appears to me, for example, that despite their self-annointed status as "consumer advocates," many of these counterrevolutionaries actually harbor an elitist disdain for the common consumer who has a nasty habit of exhibiting preferences that are at odds with their own. But I cannot be sure. Because their arguments are often phrased in undefined and subjective terms, it is not possible to predict with any degree of certainty the implications of the policy the counterrevolutionaries advocate. One thing is clear, however: their policy would greatly increase government interference in the marketplace and thus substantially raise the cost of legitimate private market transactions.

In these complex and difficult economic times, we must look forward, not backward. We need an intelligent antitrust policy that does not stifle efficiency and innovation. We need a policy that promotes dynamic markets -- one that will protect consumers from private restraints on output but that will not prevent American businesses from competing successfully in global markets. Far from counterrevolution, what we desperately need today is a continuation of the "revolution," in order to ensure that American consumers and businesses have an opportunity to reap the benefits of what has been sown.

This morning I want to explain why I believe that consumers and small businesses have been the primary beneficiaries of the revolution in antitrust policy. I also want to discuss legislation to overturn the Supreme Court's decision in Monsanto that currently is moving through Congress. I will explain that the legislation represents a serious threat to consumers and small businesses and is really special interest legislation for out-of-work antitrust lawyers. Finally, I will announce the publication of a pamphlet entitled "Antitrust Enforcement and the Consumer." This pamphlet spells out to American consumers just how the antitrust laws work for them, and how consumers can help us enforce those laws. The pamphlet should make plain that the Antitrust Division is the consumer's best friend.

Maximizing Consumer Welfare

"Consumer welfare" is the guiding principle of this Administration's antitrust enforcement policy. At their core, the antitrust laws represent this nation's commitment to a free market economy -- that is, to an economy unimpeded by either private or governmental restraints. The law is based on our capitalist traditions, which rely on the "invisible hand" of impersonal market forces efficiently to allocate resources and, thus, to maximize the economic welfare of our society.

Consumer welfare is maximized when two conditions hold. First, goods and services should be produced, distributed and marketed using just enough of society's scarce resources to ensure that those goods and services are as desirable as possible to consumers. Second, those goods and services should be sold at prices equal to the cost of the last, or marginal, unit sold. In short, the objective of a consumer welfare standard is to maximize the well-being of society by stretching its resources to the maximum extent possible.

In the jargon of economists, the consumer welfare standard seeks to maximize total surplus. Total surplus, for those of you that like graphs, is the area under the demand curve and above the marginal cost curve.

Thus, contrary to what some critics have argued, current enforcement policy does not seek to maximize producer surplus -- roughly, profits -- at the expense of consumers. On the other hand, the policy does not blindly seek to maximize consumer surplus -- the difference between what a product is worth to consumers and the price they pay for the product -- without regard to impact on production efficiency. Producer surplus provides the incentive for risk-taking, innovation and other fixed investments. Moreover, it is not necessarily clear who -- the consumer or the producer -- is more worthy of the

surplus generated by a particular transaction. It is not clear, for example, that policy should be skewed toward consumers of luxury items such as Cadillacs and against "producers" of the product, who may, in the final analysis, be the proverbial widows and orphans whose only source of income is the dividends from the "producers'" stock. Thus, a consumer welfare -- or total surplus -- standard is the preferable policy.

Consumers are better off when goods or services are produced, distributed and marketed as efficiently as possible. This is obvious when competition drives prices down to the lower cost. But it is also true even when the greater efficiency results in no short-run decrease in price but in an increase in producer profits, because greater efficiency frees resources to produce additional goods and services.

When conduct results in no significant efficiencies but only restricts output and raises prices above cost, total surplus declines and consumer welfare is reduced. That is why our enforcement policy is aimed primarily at bid-rigging and price-fixing cartels among competitors that produce no integrative efficiencies. It is also why, in merger enforcement, we focus on the likelihood that a merger will enable competitors to raise prices above competitive levels.

The Only Legitimate Standard For Antitrust Enforcement

The Antitrust Division under this Administration, following the lead of the courts, has focused its enforcement policy on the maximization of consumer welfare. This focus is not an idiosyncracy of this President or of a group of iconoclasts on the shores of Lake Michigan. Rather, it is the focus that is dictated by the Sherman and Clayton Acts. In addition, it is the focus that best preserves not just the economic values, but also many of the social and political values, Congress was attempting to preserve in enacting those statutes.

In their attempt to dislodge the antitrust laws from their consumer welfare foundation, some counterrevolutionaries have tried to justify their crusade by pointing to the legislative history of the Sherman and Clayton Acts. And no doubt some in Congress were motivated by a desire to protect not just economic, but also social and political, institutions from a perceived threat posed by large trusts and corporations. Some feared that changes in organizational structures brought about by the Industrial Age threatened the small farmers and entrepreneurs that traditionally had been the bedrock of American society. And some were concerned that large trusts would dominate and control political institutions and, in time, threaten individual political liberties.

The overwhelming concern of Congress, however, was the economic implications of large trusts. It was feared at the time that the economic power wielded by huge impersonal commercial organizations would ultimately eliminate competition and subjugate American consumers to the greed and avarice of those organizations.

Of course, Congress could have responded to these concerns in many ways -- albeit ways that might be unconstitutional. It could have tried to nationalize the trusts or to limit their size, but it did not. It could have tried to guarantee the survival of small businesses, but it did not. It could have prohibited specific categories of prohibited conduct, but it did not. Or it could have tried to regulate prices throughout the economy, but it did not.

Instead, Congress enacted statutes that generally prohibit conduct by which firms collectively or unilaterally restrain trade or lessen competition. In other words, Congress prohibited economic conduct that violates economic criteria. The statutory language thus provides a limited but flexible prohibition of certain commercial conduct that threatens the economic fruits of competition, "consumer welfare."

Nowhere in the language of the antitrust laws is there a mandate to keep businesses small or industries atomistic, to redistribute wealth to select classes of citizens, or to achieve any other identifiable social or political goals. Some members of Congress may have hoped, or even expected, that the economic policy embodied in those laws would serve to foster those goals. Nevertheless, those hopes and expectations cannot be used to override the language of the laws.

Advocating an enforcement agenda based on vague populist concerns and which yields results that reduce consumer welfare is fundamentally at odds with the principle of separation of powers. In this 200th anniversary of our Constitution, we should remember that only the Legislative Branch, and then only through constitutionally enacted statutes, can override the consumer welfare focus of the current statutes.

Moreover, intruding into private transactions when there is little, if any, proof they will result in tangible harm to consumers would seriously threaten the tradition of individual liberty the founders of this nation sought to preserve. Truly the greatest threat to individual liberty is not private power, economic or otherwise; it is government's power to coerce. And the greatest protection for individual liberties is a limited government. An interpretation of the antitrust laws that is

not founded on the objective criterion of consumer welfare embodied in the statutory language, but that calls for government intervention in the market to achieve ill-defined, subjective "values," is a prescription for tyranny. It is nothing more than central planning by lawyers.

During the last fifteen years, the courts consistently have recognized efficiency and consumer welfare as the basis for sound antitrust enforcement. In cases like General Dynamics, 1/ GTE Sylvania, 2/ Monsanto, 3/ and Matsushita, 4/ the Supreme Court has recognized that behavior previously viewed with suspicion, and sometimes even condemned as per se unlawful, often benefits consumers. In GTE Sylvania, the Court expressly recognized that antitrust rules must be based on "demonstrable economic effect[s]." 5/ We would have an awfully hard time winning cases if we pursued an enforcement policy that ignored consumer welfare and economic efficiency. The

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1/ United States v. General Dynamics Corp., 415 U.S. 486 (1974).

2/ Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

3/ Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752 (1984).

4/ Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986).

5/ 433 U.S. at 59.

"Chicago School," accurately characterized, now truly is the mainstream.

Benefits to Consumers

Adhering to the aim of maximizing consumer welfare has substantially benefitted American consumers. Indeed, our focus on consumer welfare has led to the most vigorous criminal enforcement program in the history of the Antitrust Division. That program has targeted for investigation and prosecution the kinds of horizontal price conspiracies that most seriously and unambiguously injure competition. These efforts have saved consumers millions of dollars and have deterred illegal conduct that would have cost many millions -- perhaps billions -- of dollars more.

In the past year alone (fiscal 1987), we brought 92 criminal prosecutions, primarily for price-fixing and bid-rigging; we obtained 114 convictions of individuals and corporations, we imposed almost 18 million dollars in fines, and we put individual defendants in jail for a total of 1,994 days. We set two important all-time records last year by opening more grand jury investigations -- 59 -- and indicting more individual defendants -- 116 -- than ever before in the history of antitrust enforcement. I believe 1988 will be even better.

In bringing this record number of criminal cases and investigations, we have not ignored our obligation to challenge mergers that might harm competition. We have not hesitated to challenge any merger that thorough economic analysis shows would likely have an adverse effect on competition. Just this week, for example, the Division indicated its intention to challenge a joint venture that would merge the mining, production and distribution assets of the two largest producers of attapulgite clay products. Many of the "big" mergers that we have not challenged -- but that have generated so much publicity -- have been divestitures, conglomerate mergers, or mergers in markets with very little concentration that no administration would have challenged.

I have seen no evidence that any merger we decided not to challenge has resulted in higher prices or reduced competition. On the other hand, to the extent our Merger Guidelines have created greater certainty as to whether a proposed transaction will or will not be challenged, they have reduced the costs of the "good" mergers -- the ones that create no monopoly power but which enhance efficiency -- to every consumer's benefit.

By limiting our intervention in the market to only those situations where there is a significant likelihood of harm to

consumer welfare, and by explaining the circumstances in which conduct will create such a likelihood, we have provided businesses with a clearer understanding of what they can and cannot do. In the past, uncertainty over where the line would be drawn between efficient and unlawful practices, combined with automatic treble damages liability, has chilled the development of more efficient business practices. By eliminating some of the frost, our enforcement policies have allowed the dynamism of the market to make things more efficient, thereby reducing costs, improving quality, and expanding consumer choice.

Impact on Small Businesses

Some critics have argued that current antitrust policies hurt small businesses. They are simply wrong. Current policy is the best friend small business has ever had.

Small businesses traditionally have played an important role in our economy by bringing innovative new products and services to the market and by identifying and exploiting important new product "niches." They provide vigorous competition that lowers prices and enables this country to participate fully in world markets. It is creative individuals, through the medium of small business, that make our economy unique and dynamic.

A free market economy, unfettered by unnecessary government intervention, is the best environment for small businesses. Because the market is always evolving, new opportunities and market niches are always being created for entrepreneurs. Any enforcement policy that stifles the dynamism of the market serves to entrench existing dominant players. Government regulation, including intervention in the form of antitrust enforcement, has all too often penalized innovative small firms and protected the large firms against unsettling competition. In the past, the antitrust laws in fact have at times been used to challenge innovative arrangements that small firms have adopted to compete with their larger rivals. Topco and Sylvania provide two examples of such conduct that was challenged -- in one case successfully.

This view of the marketplace is not the idealistic fantasy of a Chicago School graduate. It is supported by plentiful statistics that smaller businesses, not mega-conglomerates, continue to dominate the economy and are even gaining ground relative to the largest firms. The percentage of assets held by the top 100 and top 200 U.S. corporations remains below 1970 levels and has been relatively stable for the past seven years. The percentage of employment accounted for by these same large firms has been declining during the same period. According to a January 21, 1987, Wall Street Journal article,

the total number of U.S. corporations has grown 80 percent since 1970, with nearly the entire increase attributable to firms with sales of less than one million dollars. Although some industries might be more concentrated than 10 years ago, other are dramatically less concentrated. Areas of increased concentration generally are not the growth areas of today's economy, where small businesses thrive.

Not only is a free, competitive marketplace good for small businesses generally, but our specific enforcement policies also benefit small businesses directly.

Our merger enforcement policy, for example, helps small businesses in two ways. First, we do not challenge mergers unless there is some plausible threat to consumer welfare that outweighs potential efficiency gains. As a result, our policy allows small firms to achieve, through combinations and acquisitions, economies of scale, scope, and integration that may be necessary to compete against larger rivals.

Second, eliminating unnecessary antitrust interference with mergers increases the pool of potential buyers for, and lowers the cost involved in the sale of, small businesses when their owners decide to cash-in. Our policy allows entrepreneurs to reap the full commercial reward for their endeavors. By

reducing the cost of exit for investors, such a policy encourages entry by new firms that keeps the incumbents on their toes.

Our policy with respect to non-price vertical restraints also helps small businesses at all levels of the distribution chain. The Supreme Court recognized in GTE Sylvania 6/ that non-price vertical restraints, such as exclusive territories, more often that not enhance competition and should therefore be analyzed under a rule of reason. Such an analysis acknowledges the possible procompetitive benefits of business arrangements. The Sylvania decision was widely hailed and has become an integral part of antitrust analysis over the past decade.

The beneficiaries of current enforcement policy clearly have been not just consumers, but small businesses as well. The rule of reason approach to non-price vertical restraints has provided small business with greater flexibility to market their goods and services in the most efficient way possible, so they can compete effectively against larger rivals.

6/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

As a result, the options available to American consumers -- both in terms of products and services and in terms of distribution channels -- have grown exponentially. Without the freedom afforded by Sylvania, some manufacturers would have been practically foreclosed from successfully introducing new products and services. And some distributors would have been unwilling, or unable, to obtain established products or services to sell to the public.

Our policies toward mergers and non-price vertical restraints are merely two of the more prominent examples of how the current approach to antitrust benefits small businesses. There are others. For example, our current approach to restrictions in technology licenses has reduced the cost of disseminating technology. That reduction makes it easier for small businesses to exploit technology they develop and to obtain access to technology developed by others. Similarly, the current skeptical approach to evaluating allegations of "predatory conduct" helps small business. It reduces the risk associated with hard competition by small firms that want to give their larger, incumbent rivals a run for their money.

H.R. 585

The developments of the last fifteen years have benefitted consumers and small businesses; about that there can be little doubt. And most of those familiar with these developments have welcomed them. Accordingly, while some dissent was inevitable, I do not believe the "counterrevolution" presents a serious threat to most of these developments.

One storm cloud, however, looms in the otherwise azure blue sky of antitrust policy. That storm cloud is legislation currently moving through the House and Senate, as H.R. 585 and S. 430, that would purportedly overturn Monsanto and codify the per se rule of illegality for resale price maintenance. The legislation is a serious threat to consumers and small business, and a boon only to antitrust lawyers. It is a storm cloud that potentially has the destructive force of a hurricane.

H.R. 585, which has passed the full House and is on its way to the Senate, would codify a per se rule against resale price maintenance and overrule the Supreme Court's decision in Monsanto Co. v. Spray-Rite Service Corp. I have very serious concerns about the competitive effects of H.R. 585, even assuming the wisdom of preserving the per se rule against resale price maintenance.

In Monsanto, you will recall, the Supreme Court ruled that evidence of complaints concerning a price-cutting dealer was not by itself sufficient to support an inference that the manufacturer and its dealers had entered into an agreement to fix resale prices. To overturn this result, H.R. 585 would create the presumption of an illegal resale price maintenance agreement whenever a dealer introduces some evidence -- it is anybody's guess how much -- that (1) he or she was terminated or cut off from supplies (2) in response to communications received by the supplier from one or more competitors of the terminated dealer. Under such a standard, a supplier might well find itself in violation of the antitrust laws for terminating a distributor who failed to pay his bills, simply because the distributor discounted just enough to get another distributor to complain.

H.R. 585 would not, as its proponents claim, simply reestablish the pre-Monsanto law. Rather, it would irrevocably alter the flexible nature of Sherman Act jurisprudence. In its place, H.R. 585 would substitute a rigid standard that bears no relation to the competitive dangers the Sherman Act is intended to address. Any statutory standard for antitrust liability -- such as the one in H.R. 585 -- that is not at least implicitly pegged to adverse effects on competition and consumer welfare will produce perversely anticompetitive effects.

More importantly, H.R. 585's storm cloud may send a lethal lightning bolt straight to the heart of Sylvania. Particularly in the Senate version, the statutory language purportedly codifying the per se rule of illegality for resale price maintenance could create uncertainty with respect to the legality of non-price vertical restraints. Such vertical restraints, for example, exclusive territories granted to distributors, restrict competition among distributors and so affect price competition among them. Thus, as the Supreme Court itself recognized in Sylvania, resale price maintenance and non-price vertical restraints will often be indistinguishable in terms of their effects on competition. Because the bills would codify the per se rule against resale price maintenance in broad terms, courts may feel compelled when there is any doubt to err on the side of characterizing a vertical restraint as resale price maintenance. As a result, distributional restraints that may enhance competition among brands but that do not involve direct restraints on the pricing freedom of distributors may be summarily condemned by courts deferring to the broad mandate of Congress.

Proponents of H.R. 585 misleadingly claim that the bill will benefit consumers and independent distributors. But H.R. 585 will in fact have the precisely opposite effect. Because any price-related communications from their dealers could

plunge them into extortionate litigation, H.R. 585 could ultimately force manufacturers to avoid dealing with independent distributors. As incumbent manufacturers turn away from independent dealers, there will be significantly fewer opportunities for small businesses to distribute the products of others.

H.R. 585 would also make it more difficult for new firms to enter markets by precluding them from establishing efficient distribution networks. By increasing the cost of distribution and deterring efficient new entry, H.R. 585 would result in higher prices to consumers, not lower prices as envisioned by the bill's sponsors.

My position is not "anti-discounting." Price competition is the fundamental tenet of the free market economy we work so hard to preserve. But a manufacturer generally has all the incentive it needs to ensure that its products are distributed as efficiently as possible. Any excess it allows its distributors to earn is profit the manufacturer could otherwise earn itself.

Moreover, competition among manufacturers will likely lead them to adopt different schemes of distribution. Some will maximize point-of-sale services by limiting competition among

their distributors, while others will find their sales and profits to be greatest when they utilize discounters. It is extremely ironic that at the same time H.R. 585 is being touted as essential to preserve discounters, the number of discounters has burgeoned. According to one survey, from 1960 to 1985, the dollar volume of sales made by discounters increased by 3400 percent. During the first five months of 1987, sales by full-line discount department stores outpaced sales by all other types of department stores with a volume of $23.6 billion. This is hardly an industry in desperate financial straits. Sadly, the only true beneficiaries of H.R. 585 will be antitrust lawyers who will get to bring and defend more cases, none of which will benefit consumers.

Because of the risk of harm to the law of non-price vertical restraints, to the law of antitrust conspiracy in general, and to the specific legal distinction between unilateral decisions and conspiratorial actions by manufacturers, we will strongly recommend a Presidential veto if H.R. 585 is enacted.

Conclusion

As we enter the decade of the '90s, it is indeed an appropriate time to assess the correctness of our antitrust

policies. This appraisal should not be a conducted in a vacuum, but in the context of a world marketplace in which, perhaps more than ever, we cannot tolerate policies that hamper innovation and efficiency. It is a good time to ask: Do we want markets in which inefficient businesses are protected from competition and innovation is stifled? Or do we want a dynamic marketplace in which the most efficient practices and competitors succeed, in which American consumers are given the widest choice of the most innovative and lowest-cost products and services, and in which American businesses are able to compete effectively? For me, the answer is clear.

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Before I end, I would like to announce publication by the Justice Department of a new pamphlet, titled "Antitrust Enforcement and the Consumer." Written in language that should be understandable to all, this pamphlet makes plain that the Antitrust Division is the consumer's best friend.

I believe it is important that all Americans understand the critical role antitrust laws play in preserving dynamic, competitive markets and the importance of antitrust enforcement to their daily lives. At a time when the we are conducting more grand juries than ever before in history, we have not lost

sight of the fact that a large percentage of our investigations result from complaints received from consumers and businessmen and women. With the public mobilized against antitrust criminals, we can continue to make America safe for competition.

I encourage any individual or group that is interested in receiving this pamphlet to contact the Antitrust Division by mail or telephone at 202-633-2481. We will be happy to send you a copy free of charge.