Department of Justice

GOALS AND ACHIEVEMENTS OF THE
ANTITRUST DIVISION -- NEED FOR LEGISLATION

"Fast-Fish and Loose-Fish --
Reason In All Things,
Even In Law"

Remarks of

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I am pleased to participate in this conference on "Antitrust Developments and the Agenda for Change." There have been developments for antitrust, some movement forward, some backward. These developments in turn have caused reassessments of agendas for change all over the antitrust world.

Many take the position that all defects in antitrust law or policy must be remedied by new legislation. Others argue that no changes are in order -- that the world as we find it is, on balance, just fine. The Division has a middle position. There are changes that are needed urgently -- some procedural, some substantive. Given the nature of the legislative process, its uncertainty, its broad-ranging and unpredictable scope, legislative priorities must be carefully selected, and pursued with an eye cocked to the realistic chances for success. But the battle must be fought. Procedures must be modernized; the substance of the law must be focused on the realities of the business world and the goal of antitrust to make competition work in our economy, and work well.

Thinking about our achievements versus the task before us, I am reminded of the description by Herman Melville in Moby Dick of the terse code devised by the American fisherman.

They acted as their own legislators and lawyers on the matter of which ship has the right to any particular fish. Their code was:

> "I. A Fast-Fish belongs to the party fast to it.
>
> II. A Loose-Fish is fair game for anybody who can soonest catch it."

Melville commented:

> "But what plays the mischief with this masterly code is the admirable brevity of it, which necessitates a vast volume of commentaries to expound it."

Like Melville's whaling laws, our relatively terse antitrust laws have spawned both academic commentaries and the commentaries of the antitrusters themselves, those "hard words and harder knocks -- the Coke-upon-Littleton of the fist" of litigation. While I doubt Melville's assertion that the fundamentals of all human jurisprudence can be deduced from the law of the fast-fish and the loose-fish, let me at least share with you some of the fast-fish of our achievements and then discuss some of the loose-fish we see swimming in our legislative waters.

In the last three years we have moved forcefully against violations of the Sherman Act. Two hundred fifty-three individuals were indicted for antitrust violations; nearly 400 corporations were indicted as well. Increasing numbers of these prosecutions have been for felonies, as more and

more of our actions are based on acts occurring after the passage of the Antitrust Procedures and Penalties Act of 1974. Indeed, just a month from now, the statute of limitations will run on antitrust violations occurring before that act, and the misdemeanor provisions of the Sherman Act will pass into history.

The fact that Sherman Act violations are now felonies has, we believe, had an impact on the attitude of judges in sentencing antitrust defendants. Jail sentences for individuals are now becoming commonplace, and the maximum corporate fine of $1 million has been imposed in several instances. In fiscal 1976 individual fines were $551,000; in 1979, $2.1 million. Corporate fines rose from $3.7 million to $25 million, and days to be spent in jail rose from 560 to 2,360.

In the merger area, the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act were implemented in the summer of 1978. Since then we have received 1,095 premerger notifications, have screened each of them, but have found it necessary to open preliminary inquiries on only 129 of them and, together with the Federal Trade Commission, have filed only 13 cases. We believe that is a tribute to the success of earlier merger enforcement efforts and the relatively well developed nature of merger law. We are already taking steps, published in the Federal Register, to make certain

technical amendments in the premerger notification rules so as to cut down by about 20 percent the number of such notifications that must be lodged with us and the Federal Trade Commission.

Hart-Scott-Rodino's civil investigative demand amendments have made the CID a truly effective enforcement tool. We have taken full advantage of our ability to conduct depositions, to submit interrogatories, and to direct demands to third parties. During fiscal 1976, the last full year under the old law, the division issued only 66 CIDs. During fiscal 1979, we issued 367 documentary CIDs, 301 interrogatory CIDs, and 32 deposition CIDs.

To address competitive questions concerning our concentrated industries, we have instituted screening investigations in over 340 concentrated industries, seeking shared monopoly cases and, in any event, a better understanding -- that can be reported to the public -- of how competition works in those contexts. We have actively continued our competition advocacy role in the regulated industries area, filing 446 interventions in fiscal 1979. In addition, we act as competition analyst for over 300 legislative proposals sent to us each year from Capitol Hill.

In view of our fiscal 1980 budget of $43.5 million for the division itself -- about $6 million of which is for

litigation support efforts to bring our capability more in line with that of the private bar -- and with some 960 people in total working for the division, we believe we have made "fast" enough "fish" to be deemed effective antitrust whalers. So much for "fast-fish."

While the 70's have seen real improvements in the antitrust laws and their enforcement, there remain matters of both substance and procedure that require legislative attention. Let me turn now to the "loose-fish" I see in our legislative waters.

We already have one harpoon in the package of procedural improvements, largely recommended by the National Commission for the Review of Antitrust Laws and Procedures, and embodied in Senator Metzenbaum's bill, S. 390, which successfully passed the Senate. Mark-up of similar bills has occurred in Chairman Rodino's Subcommittee and I am hopeful that we will shortly see its provisions enacted into law.

One of the key provisions would permit the government to have access to discovery materials produced during private antitrust litigation, thus eliminating our needless reinvention of the wheel in another court setting. While we believe present law authorizes us to obtain such materials, including analyses,

summaries, and indexes of documents, all of the issues have not been finally resolved and we believe they should be clarified through legislation. As passed by the Senate, the bill would establish procedures by which we would be required to notify persons who had produced discovery of the fact that their materials were being demanded. The mechanism for challenging our demands is also provided. Products of discovery that we receive pursuant to a CID will, of course, be treated confidentially. The bill also expressly states that production of such materials will not waive any right or privilege.

S. 390 would also expedite private litigation by clearly authorizing courts to give collateral estoppel effect to litigated antitrust issues, and makes a number of other changes designed to speed up antitrust cases. It would impose sanctions on attorneys who intentionally and unreasonably delay litigation and would permit award of pre-judgment interest at commercial interest rates on the actual damages, in the court's discretion.

Finally, the Senate version would amend Section 7 of the Clayton Act by making the coverage apply to "persons" instead of "corporations," while the House bill would in addition overturn the Supreme Court's decision in United States v. American Building Maintenance Industries, so as to permit

challenge to any merger involving firms whose activities affect commerce.

I am very hopeful that under the leadership of Chairman Rodino this legislation can move swiftly through the House, and through any conference that may be necessary to reconcile differences with the Senate-passed version. While there have been some minor disagreements concerning the Antitrust Procedural Improvements Act, I am pleased that, by and large, it has drawn broad support. I think that broad support is reflective of a deep commitment to be alert in the coming decade to adjustments in our procedural rules that will help to make litigation of our antitrust laws more effective and more efficient.

More controversial is this Administration's support for reversal of the Illinois Brick decision. As you know, the Supreme Court there held that only those who purchase directly from an antitrust violator may recover damages. President Carter declared in his State of the Union message: "This decision undercuts state and private enforcement of the antitrust laws, reduces their deterrent effect, may contribute to higher prices, and often allows the violator to keep his gain at the expense of the injured consumer."

Considering that private antitrust cases filed in the district courts outnumber government cases by a factor of more than ten, the importance of private enforcement becomes apparent. To the extent that indirect purchasers were part of the effective private enforcement effort, that effort has been undermined. Moreover, to the extent that indirect purchasers, in fact, are the victims of the antitrust violation and sustain the actual damage, the Illinois Brick decision has denied them a remedy in our courts. I would note that in many cases the indirect purchaser will be a governmental entity; state and local governments, as well as the federal government, have suffered millions of dollars in injury, all of which are ultimately paid for by the taxpayer. In our view, this result alone requires congressional action. Finally, it's important that we realize that the Illinois Brick rule threatens the effectiveness of the parens patriae remedy granted state governments in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Because deterrence of antitrust violations, remedy for injury, and effective use by state governments of the parens patriae provisions, continue to be important to us, we will continue our efforts legislatively to reverse the Illinois Brick decision.

We are closely studying possible legislative improvements in the law of attempted monopolization. The National Commission for the Review of Antitrust Laws and Procedures found that the development of the law of attempted monopolization has been uneven; the scope of the offense is much disputed and remains unclear. Even within a single circuit, courts often apply different standards, and, unfortunately, the Supreme Court has repeatedly declined to resolve these conflicts.

There are two aspects of attempted monopolization in need of attention. The first is the inability of Section 2 to reach unambiguously anticompetitive conduct by firms with less than a near-monopoly market share. A majority of courts seem to equate a dangerous probability of success with achieving a close proximity to or a high probability of actual monopolization. The result has been that plainly predatory or vicious anticompetitive conduct goes unchecked. Empire Gas is a case in point. There the Eighth Circuit Court of Appeals found that a defendant with a dominant position had engaged in anticompetitive conduct with a specific intent to monopolize the market. Nevertheless, the court upheld dismissal on the ground that actual monopolization was not dangerously probable.

The Commission was critical of this rigid view. It pointed out that some federal courts have taken a more flexible -- and I think more sensible -- approach. For example, Judge, now Justice Stevens, writing for the Seventh Circuit, stated:

> We do not understand the 'dangerous probability' test to involve an evaluation of the actual likelihood that an attempt would have succeeded . . . . Rather, it requires an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of his overt actions . . . . The ultimate concern is the firm's actual or threatened impact on competition in the relevant market.

The Commission found that Justice Stevens' approach is consistent with Justice Holmes' original understanding of the dangerous probability requirement when he introduced that standard in the Swift case. Consequently, the Commission recommended that Section 2 of the Sherman Act be amended to require courts to determine whether a dangerous risk of monopoly exists by weighing three factors: the defendant's intent, the defendant's present or probable market power, and the anticompetitive potential of the conduct involved.

This standard would enable the Department of Justice to challenge egregiously anticompetitive conduct without lengthy market analysis because such analysis would be unlikely to affect the court's assessment of the conduct's competitive impact. The defendant's market share, however, would be a more important factor in determining liability where the competitive effects of challenged conduct were arguably ambiguous.

The Commission also focused on the increasing tendency of courts to regard below-marginal cost pricing as a prerequisite

to holding that pricing behavior violates Section 2. The Commission, however, concluded that in some instances the temporary lowering of prices to levels above marginal cost may be anticompetitive and injurious to consumers in the long run. I agree strongly with the Commission that the marginal cost standard is sometimes too restrictive, especially when it is applied to pricing by a firm in a dominant market position. For example, where a major firm in a market undertakes a pattern of pricing behavior directed at excluding new entrants from a market in circumstances in which the firm could expect such efforts to be successful, liability should possibly attach even if the lowest prices charged are above marginal cost. Liability should also be possible where a dominant firm undertakes a pattern of pricing behavior with the intent of "disciplining" or "policing" competitors by discouraging price-cutting and encouraging pricing behavior consistent with that of the dominant firm.

In essence, problems with the marginal cost test arise only where the relationship between marginal or average variable cost and price is considered alone. At the same time, I share the Antitrust Commission's recognition that any alternate approach must also avoid discouraging aggressive, competitive pricing, particularly by non-dominant firms that have neither the incentive nor ability to engage in predatory conduct.

The Commission recommended adding a provision to Section 2's attempt-to-monopolize provision that would instruct courts to treat the relationship of price to either average variable or marginal cost as but one factor that may properly be considered in assessing the defendant's conduct. Thus, the price-cost relationship would be highly relevant, but it would not be determinative of a violation in and of itself, unless evidence of cost was the only evidence presented.

These proposals have evoked much criticism. That criticism is largely based on a concern that, regardless of the care used in drafting, these modifications could encourage the filing of unfounded private litigation that could not easily be dismissed until a hearing on the merits. Such litigation, it is argued, would impose a further burden on the courts and business, and potentially could have a chilling effect on aggressive price competition.

In a footnote to the Commission's report, I suggested a possible solution: limiting the suggested revisions to suits brought by the Department of Justice. We are presently at work drafting legislation based on this concept. Leaving enforcement to the Department of Justice, which has no private economic interests to protect, should eliminate the possibility that the new language could be used to attack legitimate competition. Such an approach would also minimize the initial uncertainty that could result from the first few years of private enforcement, until appropriate precedents were

established. At the same time, we would hope that courts would not use passage of a separate, government-only provision as an excuse to avoid rationalizing the general law of attempt along the lines suggested by the Commission.

The Justice Department has also proposed legislation to stem the tide of large conglomerate mergers. Section 7's apparent inability to deal effectively with these mergers is a matter of great concern to me. The best available economic evidence seems to show that large conglomerate mergers provide few, if any, benefits in terms of enhanced efficiencies or real growth. Indeed, while conglomerate mergers occasionally may have some positive effects, in other instances corporate performance actually can be hurt by a conglomerate acquisition. Moreover, funds used for acquisitions may be diverted from more productive uses, such as internal expansion or de novo entry into new markets.

For the most part, conglomerate mergers appear motivated by relatively transitory financial factors. Potential tax savings, the inflation-generated attractiveness of purchasing existing assets, or the peaks and valleys of the stock market each play a part.

Unfortunately, while the motives behind conglomerate mergers may be transitory, the structural changes they bring

to our economy are relatively permanent. As antitrust enforcers, we are concerned about these mergers' cumulative impact on our economy, the needless loss of potential entrants and the needless reduction in the number of independent decisionmakers in the business community.

While courts have been ready to accept in theory doctrines such as potential competition, entrenchment, and reciprocity, in practice they have been reluctant to apply them to prevent conglomerate acquisitions. Indeed, no purely conglomerate transaction has been found unlawful by a court since 1974.

For these reasons, the Justice Department earlier this year recommended that Congress enact legislation that would restrict mergers among very large firms as well as acquisitions by very large enterprises of leading firms in sizeable concentrated markets. Proponents of such mergers, however, could defend them on the grounds that the proposed transaction would substantially enhance competition.

Our proposal is in full accord with basic antitrust principles. No absolute limits are set on corporate growth either through internal expansion or acquisition. Rather, the Justice Department's proposal merely requires proponents of

major acquisitions to prove that the likely effect would be to provide public benefits in the form of increased competition. While the Administration has not yet taken a position on such legislation, the Justice Department continues to advocate the adoption of a statute based on these concepts.

In my judgment, the important issues inherent in any conglomerate merger legislation require the best thinking of all who are concerned that, in the years to come, our antitrust laws effectively grapple with questions of how our largest firms should organize and conduct themselves -- the very kinds of issues that gave rise to the Sherman and Clayton Acts.

The Department's current legislative efforts are not limited to straight antitrust issues. For example, the Department and the Administration are working with the Congress to develop legislation that would put appropriate limits on major acquisitions by oil companies unless the proponents could show enhancement of competition or enhancement of energy availability. The goal here is to channel the large revenues of these companies into the energy area.

Another important effort is the Administration's strong support for legislation to deregulate rail and truck transportation. We have put these initiatives at the top of our agenda.

Finally, let me turn to some other ideas about legislative change that deserve our attention. Generically, I think they represent -- or should represent -- an effort at fine-tuning our antitrust law system. I would warn against their being used to effect fundamental changes in the balance of power between antitrust plaintiffs and defendants.

The first of these is the concept of contribution. Until the Professional Beauty Supply case, antitrust precedent was clear: each antitrust defendant was jointly and severally liable for damages attributable to the antitrust violation, and there was no contribution among defendants. In that case the Eighth Circuit in essence adopted a rule saying that contribution might be obtained between antitrust defendants if equity so requires. The Fifth Circuit, in Wilson P. Abraham Construction Corp. v. Texas Industries Inc. and the Tenth Circuit in Olson Farms, Inc. v. Safeway Stores, Inc. (decided last week) have denied contribution in antitrust cases. Senator Bayh's bill, which passed the Senate Judiciary Committee but has not yet been acted on by the Senate, may be contrasted with the Eighth Circuit's approach: it would allow contribution in price-fixing cases only, and only according to a formula based on sales volume, a formula having obvious implications in the context of vertical price-fixing. The ABA's Section on Antitrust Law

has circulated drafts of alternative versions of a contribution statute. I also note that the American Law Institute, after several years of trying to evolve specific contribution rules for joint tortfeasors, has been unable to reach a conclusion on the important settlement rule.

As you know, at all stages in the debate on contribution, I have urged caution -- that any changes not only not skew the fundamental balances between plaintiffs and defendants but also not further burden courts unnecessarily. I am also concerned that any rules we adopt on issues of contribution among defendants not diminish the deterrent effect provided by our present treble damage remedy plus the old and honored rule of joint and several liability for damages flowing from antitrust violations.

In the decade ahead, I think we may well wish to enhance enforcement efforts by allowing the Justice Department more authority to create incentives for companies to confess violations. For example, one proposal that merits thought is to allow the Justice Department to "de-treble" the damage liability of confessing defendants who otherwise meet the requirements for the leniency program I announced last year. If, as some claim, the threat of treble damage liability in the event of a confession has prevented use of our leniency program,

it may be a highly cost-effective remedy to permit the Justice Department to de-treble the liability in exchange for getting that "first confession" that enables us to break up a price-fixing conspiracy. Note that the victims would continue to be able to obtain actual damages from the violator, and treble damages from other members of the conspiracy. We are currently closely studying the implications of such a proposal and believe that, at the least, it merits debate.

Finally, in this same area, proposals have been advanced that would retain treble damage liability only for per se antitrust offenses -- those as to which, almost by definition, reasonable men do not differ. This clearly would be a very much more fundamental change, but warrants debate if for no other reason than to address the concerns of those who believe that the fear of very large treble-damage liability in rule-of-reason cases, or in Section 2 cases, has in fact had an inhibiting or skewing effect on the development of the law itself. I wish to make plain that I do not now advocate these changes; I advocate only that they are the type of issue that merits being put on the list of items to be analyzed and debated in the years to come.

In closing, let me draw a caution for all of us "antitrust whalers" from Rule II of Melville's Moby Dick. If you recall, Rule II says that "a Loose-Fish is fair game for anybody who can soonest catch it," implying that energy and vigor will win the day. More resources in the Antitrust Division are devoted to working with the Congress than ever before -- in offensive efforts, in damage minimization situations or, as is most often the case, in simply working through the uneasy but ultimately constructive day-to-day relationship between the Congress and the Executive. The Antitrust Division cannot withdraw, even though some of the efforts are fruitless, sometimes pointless. To do so would be to yield the field to the special interests who would just as soon see antitrust riddled with exceptions, or wiped away completely. There are few enough voices in the public debate raised in support of free enterprise, and more than enough on the other side. Nor do we wish to withdraw. The stakes are high, the problems difficult, the correct answers important to derive. So, in short, the Antitrust Division will be engaged -- full speed, up to the hilt, in participation in the legislative process, no matter the cost in terms of resources or political capital. And I guarantee you, we will get our share of "Loose-Fish."

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