APPENDIX 3

Department of Justice

FOR RELEASE AT 4 P.M.
THURSDAY, SEPTEMBER 9, 1982

REMOVING THE JUDICIAL FETTERS: THE ANTITRUST DIVISION'S JUDGMENT REVIEW PROJECT

Remarks by

JEFFREY I. ZUCKERMAN
Special Assistant to the
Assistant Attorney General
Antitrust Division

Before the

Council on Antitrust and Trade Regulation
of the Federal Bar Association

Hyatt Regency Hotel
Crystal City, Virginia

September 9, 1982

It is my pleasure to be here today to discuss with you the Antitrust Division's Judgment Review Project--our systematic review of the over 1300 judgments that have been entered in Government civil antitrust actions since 1890 and which remain in effect today.

The basic mission of the Antitrust Division is to preserve and promote "free and unfettered competition as the rule of trade." 1/ Success in this mission should yield, in the eloquent words of the Supreme Court, "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." 2/

We try to eliminate fetters upon competition in whatever form we find them. For example, if competitors agree to restrain competition by fixing prices or restricting output, we prosecute the firms under the Sherman Act. Where a proposed rule or administrative action by a regulatory agency would unnecessarily constrain competition, we seek to persuade the agency not to issue the rule or take the action. When Congress is considering legislation that would unnecessarily reduce competition, we argue against enactment of the proposal.

1/ Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

2/ Id.

To the extent that injunctions entered in antitrust actions go beyond enjoining behavior which is per se illegal, they restrain competition to some degree. A key goal of the Judgment Review Project is to identify injunctions that are today unnecessarily restraining competition, and to secure their modification or termination, as appropriate.

There are essentially two reasons why an antitrust decree may contain provisions whose effects today are unreasonably anticompetitive. First, decree provisions that were perfectly sensible and desirable when entered can be unreasonable today if they have been successful in promoting competition where there previously was none. When rival firms agree to restrain competition among themselves, there are usually elements of their agreed upon behavior that would not be unlawful if undertaken independently by one or more of the firms. Where the Department of Justice is able to secure injunctive relief against the parties to such an unlawful agreement, we often seek to bar the continuation of all the practices that were part of the conspiracy, including those which would be unobjectionable if independently pursued. The purposes of enjoining otherwise legitimate behavior are (1) to make it impossible for the parties to continue their conspiracy through a tacit agreement to conduct their business as in the past, and (2) to force them into thinking and acting independently.

Prohibiting lawful competitive behavior may, of course, preclude the realization of certain benefits that flow from "free and unfettered competition," but this welfare loss is outweighed by the gain achieved from ending the collusion. With time, however, if the collusion ends, no further benefit remains to be gained from the injunctive restraints upon otherwise legitimate competitive behavior, but the losses continue. Accordingly, relaxation of the restraints then becomes appropriate and the Division will seek their termination.

Similarly, when a single firm unlawfully monopolizes a market, its behavior will include predatory practices as well as reasonable and lawful conduct. The Department has often sought to enjoin both the predatory practices and some of the otherwise lawful conduct in a deliberate effort to weaken the monopolist and thus encourage new entry. With time, if entry occurs, there remains no reason to restrain the former monopolist from engaging in legitimate competitive behavior. And if no entry occurs, then the restraints are not serving their intended purpose, but operate only to make the defendant an inefficient monopolist--which is even worse than an efficient one.

A decree may also unreasonably restrain competition today if its provisions were a mistake from the outset. Our understanding of industrial organization and the dynamics of competition has improved markedly in recent decades. Many

older decrees reflect economic theories that we now realize were mistaken. The Supreme Court itself has recognized the errors inherent in some past antitrust theories. Probably the best known example is the Court's action in GTE Sylvania, 3/ replacing the per se ban on exclusive territories articulated in Schwinn 4/ with a rule of reason approach. Similarly, Fortner II 5/ reflected a far better analysis--howbeit not perfect--of the competitive effects of tie-ins than had previously been displayed in Supreme Court opinions, including the Court's opinion eight years earlier in the same case. 6/

Notwithstanding these very salutary developments in judicial interpretation of the antitrust laws, decrees entered on the basis of misguided and now universally rejected theories remain in effect. These decrees bar firms from engaging in behavior that, if engaged in by their competitors, would be subject to rule of reason analysis and, more often than not, be found reasonable and lawful. It seems obvious to me that decrees restraining perfectly reasonable competitive behavior for no good reason should be terminated.

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

4/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

5/ United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

6/ Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

Elimination of these judicial fetters upon competition is not the only goal of our Judgment Review Project. We also expect that as a result of the Project, the Division will be better able to enforce decrees which do promote competition. The universe of decrees requiring enforcement attention is not, however, defined simply as those decrees that do not affirmatively restrain competition. For example, there are decrees to which no one is subject because all the parties are dead individuals, or defunct firms that have no successors. There are also decrees that have expired by their terms, such as those which mandated the divestiture of certain assets and nothing more. Obviously, these judgments do not restrain competition, but neither do they merit any enforcement attention. We are noting these decrees as we encounter them in our review, and putting them into our institutional dead letter file.

There are also decrees that add nothing to the general antitrust laws; they only enjoin conduct which would, and should, constitute a per se violation of the antitrust laws. In days gone by, these types of decrees served certain very useful functions. The maximum penalty for violation of the Sherman Act, then a misdemeanor, was a $50,000 fine and imprisonment for one year. 7/ But if a person subject to an injunction against, for example, horizontal price fixing

---

7/ 15 U.S.C. § 1 (1970) (amended 1974).

violated the decree, it would have been subject to much greater penalties through criminal contempt proceedings. In 1974, however, as part of the Antitrust Procedures and Penalties Act, 8/ Congress amended the Sherman Act to make its violation a felony, to allow the imposition upon corporate violators of fines up to $1,000,000, and to authorize fines up to $100,000 and imprisonment up to three years for individuals. It is unlikely, barring special circumstances, that a court today would impose any greater penalty for violation of a fifty-year-old injunction against horizontal price fixing than it would impose in a criminal proceeding under the Sherman Act.

Perpetual injunctions against per se unlawful behavior, through their visitation clauses, also once provided the Antitrust Division with a means to obtain information that might not otherwise have been available. Enactment in 1962 of the Antitrust Civil Process Act, 9/ which authorized us to issue civil investigative demands, and the subsequent improvement of this investigative tool by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 10/ reduced the need for perpetual visitation rights.

8/ Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974).

9/ Pub. L. No. 87-664, 76 Stat. 548 (1962).

10/ Pub. L. No. 94-435, §§ 101-106, 90 Stat. 1383 (1976).

Recognizing that, as a general rule, perpetual decrees against per se unlawful behavior eventually cease to have any deterrent effect beyond that of the antitrust laws in general, the Antitrust Division, some 3 1/2 years ago, adopted a policy of generally limiting consent decrees to a term of ten years. As part of our current review, we are identifying the earlier "per se decrees"--decrees that enjoin only behavior which is, and should be, per se unlawful.

We are not at this time planning to seek the termination of all these decrees, because this would be, in many cases, an unnecessary use of our resources. If, however, a party to such a decree wishes to move its termination, and has some plausible and legitimate reason, we would be inclined to consent to the motion. There will, however, be exceptions to this policy. For example, through our review we are identifying certain firms and industries that seem to have a proclivity toward price fixing. We would be inclined to oppose the termination of per se decrees against such firms or in such industries, particularly if the structure of the market remains conducive to cartel behavior. If the parties were to engage in price fixing again, we would consider bringing a criminal contempt proceeding and asking the court to impose stiffer penalties than those permitted under the Sherman Act, so as to root out the parties' recidivist tendencies.

Once the decrees that unnecessarily restrain competition are terminated, and those that have expired or which otherwise have no competitive effect are identified, the remainder should be decrees that affirmatively promote competition. We intend to monitor closely compliance with those judgments, and to enforce them vigorously. We intend also to keep a close watch on the recidivist firms and industries that we identify. Our review has already prompted a few enforcement investigations, and we expect that more will follow. We are also about to implement a new computerized system for monitoring judgment compliance, which will strengthen our enforcement capabilities.

While I am on the subject of our enforcement intentions, I should also warn defendants against unilaterally deciding that a particular decree provision is anticompetitive and then proceeding to violate it on the assumption that we would not care. If we were to discover such patently contumacious behavior, we would consider bringing a criminal contempt action, even if we agreed that the decree should be terminated. I probably need not remind any of you that a court order remains in effect until the court terminates it. We urge that any party which is being restrained from competing by an injunction in a Government antitrust action write to us and call the situation to our attention. We are anxious to remove unreasonable injunctive restraints, and we are prepared to review decrees quickly where appropriate and necessary. We cannot, however, countenance contempt of court.

Finally, I would like to say a word about the procedures we are employing in connection with judgment modifications and terminations. In most cases, the motion to modify or terminate is made by the defendant(s). At the same time as the motion is filed, the parties file a stipulation in which the defendant agrees to publish notice of its motion in two consecutive issues of the national edition of The Wall Street Journal and in two consecutive issues of the trade journal(s) most likely to be read by persons interested in the market(s) affected by the judgment. The notice (1) summarizes the complaint and the judgment; (2) explains where copies of all the relevant papers can be inspected (in most cases, at the offices of the Antitrust Division and of the clerk of the court where the motion was filed); (3) states that copies of the papers can be obtained from the Antitrust Division, upon request and payment of the copying fees prescribed by Justice Department regulations; and (4) invites all interested persons to send comments concerning the proposed modification or termination to the Antitrust Division during the next sixty days.

The stipulation also contains the Division's consent to modification or termination of the decree, but provides that the court will not rule upon the motion for at least seventy days after the last publication of notice, and reserves the Division's right to withdraw our consent at any time until the decree is modified or terminated. The Division also

files a memorandum with the court explaining why we have consented to the motion, and issues a press release similar to the notice published by the defendant(s). Thereafter, we file with the court copies of all comments that we receive. If the comments persuade us that our consent was in error, we will withdraw it. Otherwise, we may or may not file a response to the comments, depending upon their nature.

The essential thrust of our Judgment Review Project is to make the Division's judgment enforcement consistent with, and an integral part of, our basic mission of promoting "free and unfettered competition as the rule of trade." The enforcement of decrees that unnecessarily restrain competition violates this mission and is patently undesirable. By terminating such decrees, and separating the wheat from the chaff among the others, we will be able to concentrate our efforts upon enforcing those decrees that truly promote competition.

Thank you very much.