

August 18, 2004

**ABA Sherman Act Section One Committee
Questionnaire for Commissioner Pamela Jones Harbour
Federal Trade Commission**

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Q: What role do you believe the Commission has with respect to enforcing violations of §1 (or §5 of the FTC Act)?

The Commission's enforcement role includes the entire panoply of non-criminal cases that might be brought under §1. Throughout the agency's history, the Commission has brought a wide range of enforcement actions in the §1 area - and not surprisingly, many of these actions have evolved into leading cases and often-cited opinions. The Commission has brought cases targeting various forms of anticompetitive conduct, including resale price maintenance,⁵ adherence to a trade association pricing system,⁶ use of a common sales agent to set prices,⁷ fixing product inputs,⁸ prohibition of truthful advertising and business solicitation,⁹ group boycotts,¹⁰ agreements limiting hours of operation,¹¹ horizontal price fixing and state action,¹² horizontal market allocation,¹³ and agreements not to compete.¹⁴

During my term as Commissioner, I intend to exhort two goals for the Commission's §1 agenda. First, I would like the Commission to pursue a variety of cases that will help to refine the burden of proof requirements under the rule of reason, along the continuum of

<http://www.ftc.gov/os/caselist/0423033/040603statementharbour0423033.pdf>.

- ⁵ Beech-Nut Packing Co., 1 F.T.C. 516 (1919), *rev'd*, 264 F. 885 (2nd Cir. 1920), *rev'd*, 257 U.S. 441 (1922).
- ⁶ Pacific States Paper Trade Ass'n, 7 F.T.C. 155 (1923), *enforcement denied in part and granted in part*, 4 F.2d 457 (9th Cir. 1925), *rev'd in part and FTC order enforced*, 273 U.S. 52 (1927); Cement Institute, 37 F.T.C. 87 (1943), *rev'd*, 157 F.2d 533 (7th Cir. 1946), *rev'd*, 333 U.S. 683 (1948).
- ⁷ Virginia Excelsior Mills, Inc., 54 F.T.C. 455 (1957), *aff'd*, 256 F.2d 538 (4th Cir. 1958).
- ⁸ National Macaroni Manufacturers Ass'n, 65 F.T.C. 583 (1964), *aff'd*, 345 F.2d 421 (7th Cir. 1965).
- ⁹ American Medical Ass'n, 94 F.T.C. 701 (1979), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).
- ¹⁰ Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510 (1986), *rev'd*, 856 F.2d 226 (DC Cir. 1988), *rev'd*, 493 U.S. 411 (1990).
- ¹¹ Detroit Auto Dealers Ass'n, Inc., 111 F.T.C. 417 (1989), *aff'd in part and rev'd in part*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992).
- ¹² Tigor Title Ins. Co., 112 F.T.C. 344 (1989), *rev'd*, 922 F.2d 1122 (3rd Cir. 1991), *rev'd*, 504 U.S. 621 (1992).
- ¹³ Schering-Plough Corp., FTC Dkt. No. 9297 (Commission opinion issued Dec. 8, 2003), *available at* <http://www.ftc.gov/os/adipro/d9297/031218commissionopinion.pdf>, *appeal pending*, No. 04-10688 AA (11th Cir. Feb. 13, 2004).
- ¹⁴ Polygram Holding, Inc., FTC Dkt. No. 9298 (Commission opinion issued July 24, 2003), *available at* <http://www.ftc.gov/os/adipro/d9298/030724commopinionandfinalorder.pdf>, *appeal pending*, No. 03-1293 (D.C. Cir. Sept. 22, 2003).

liability standards ranging from the most cursory analysis to the “full Monty.”¹⁵ Second, the Commission should bring cases that will confirm the continuing vitality of the *per se* rule in appropriate circumstances.¹⁶

The Commission also has an important role to play in the development of the law, beyond the traditional process of case selection and the formulation of guidelines that inform the exercise of prosecutorial discretion.¹⁷ The Commission is uniquely situated to conduct studies and issue reports relating to discrete areas of §1 analysis.¹⁸ An excellent example is the Commission’s Generic Drug Report,¹⁹ in which the Commission reviewed a number of problems that arise from the special competitive relationship between name-brand and generic drugs, and set forth detailed recommendations for possible legislative remedies. That report also has informed the Commission’s own §1 enforcement agenda in cases involving related patent litigation settlements.²⁰

Q: What are the FTC’s current enforcement priorities in the §1 area (or §5 of the FTC Act)? Do you anticipate any changes or new emphases in the future?

The Commission’s recent §1 cases have focused on a few different areas. Health care probably has been the Commission’s top enforcement priority. Most recently, the Commission authorized staff to file stipulated permanent injunctions settling allegations of an unlawful market allocation agreement between Perrigo Company and Alpharma Inc., the only two approved manufacturers of store-brand, over-the-counter liquid ibuprofen (the generic version of Children’s Motrin). Under the proposed final orders, the parties will pay a total of \$6.5 million, representing disgorgement of illegally-obtained profits; the Commission will use these funds to compensate customers harmed

¹⁵ Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L. J. 495 (2000) (stringency of rule of reason analysis varies on a case-specific basis from minimal to total along a sliding scale).

¹⁶ See, e.g., Federal Trade Commission v. Perrigo Co. & Alpharma Inc., Civ. No. 1:04CV01397 (RMC) (D.D.C. complaint filed Aug. 17, 2004), available at <http://www.ftc.gov/os/caselist/0210197/040812comp0210197.pdf>; see especially *id.* at ¶43 (per se count). This case is discussed in greater detail *infra*, text accompanying note 21.

¹⁷ See Federal Trade Commission & U.S. Dept. of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

¹⁸ 15 U.S.C. § 46(f).

¹⁹ Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

²⁰ *Schering-Plough*, *supra* note 13, at n. 2.

Congress has provided state attorneys general with additional incentives to sue, including the availability of *parens patriae* treble damages on behalf of individual consumers,³⁷ costs and attorneys fees,³⁸ and evidentiary advantages following a successful federal prosecution.³⁹ In many cases, state attorneys general have comparative advantages over the federal agencies, and these advantages should be exploited wherever possible.⁴⁰ For example, in a case where it is particularly important to understand local institutions and markets (such as a retail merger), state attorneys general have the advantage of proximity. Where one hopes to obtain recovery for injuries suffered by individual citizens, the states' ability to sue for *parens patriae* damages may offer a superior remedy.

Antitrust enforcement by state attorneys general undoubtedly helps consumers. There have been instances where businesses unsuccessfully have sought enforcement help from the federal agencies, but ultimately have had their problems resolved by timely state enforcement action.⁴¹ Moreover, ever since Congress granted *parens patriae* authority to state attorneys general, millions of dollars have been recovered for antitrust injuries to individual consumers who otherwise might have obtained no relief at all.⁴² The federal antitrust enforcement agencies also benefit from assistance from their state counterparts - both in cases where the states join the federal agencies in litigation,⁴³ as well as in cases where the federal agencies may refer a matter to a state attorney general for enforcement.⁴⁴

Our system of dual enforcement has its critics. Antitrust violators, merging parties, and other targets of antitrust enforcement activity occasionally may be frustrated when they have resolved their problems with one set of enforcers, only to learn that they still face

³⁷ 15 U.S.C. § 15c.

³⁸ 15 U.S.C. § 15(a).

³⁹ 15 U.S.C. § 16(a).

⁴⁰ See Stephen Calkins, *Perspective on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003).

⁴¹ Alan R. Malasky, *Commentary: Antitrust Federalism*, 29 WASHBURN L.J. 185, 185-86 (1990).

⁴² See generally <http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html> (listing, *inter alia*, state *parens patriae* settlements).

⁴³ The Commission's recent federal district court litigation in the *Arch/Triton* matter is one example of close coordination between federal and state antitrust enforcement officials. Federal Trade Commission v. Arch Coal, Inc., et al., Civ. No. 1:04CV00534 (JDB) (D.D.C. complaint filed April 1, 2004); see also FTC News Release, *FTC Files Federal Complaint Challenging Arch Coal's Proposed Acquisition of Triton Coal Company* (April 1, 2004), available at <http://www.ftc.gov/opa/2004/04/archcoal.htm>. Six states have joined the Commission's action (with Missouri leading Illinois, Arkansas, Iowa, Kansas and Texas).

⁴⁴ See Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, available at <http://www.ftc.gov/os/1998/03/mergerco.op.htm>.

another set of enforcers who are not like-minded.⁴⁵ But Congress, in creating a dual

Commission's external website. I would like to see the Commission take this to the next level, to streamline the internal mechanics of our adjudicative process, which hopefully will enable us to more quickly resolve adjudicated matters.

Q: Now that Congress has funded a panel to study the reform the antitrust laws, what do you believe the panel's priorities will be? Any thoughts as to the potential impact of the panel?

The Antitrust Modernization Commission (AMC) has both the opportunity and the resources to conduct an exhaustive, non-partisan review of the current structure and performance of our economy - on a scale that has not been undertaken since the review conducted in 1941 by the Temporary National Economic Committee. Unlike some of its predecessors, the AMC does not have a discrete focus for its inquiry.⁴⁶ Rather, it is free to define its own agenda, so long as it takes care to "solicit views of all parties concerned with the operation of the antitrust laws."⁴⁷

Ideally, the panel will undertake a principled review of changes in the economy over the last few decades. If nothing else, a detailed report would provide an informed predicate for the AMC's ultimate reform recommendations and any subsequent debate, regardless of the content of the AMC's suggestions. In particular, I would like to see the panel focus on one consistent theme: how best to ensure the existence of competitive markets. Promoting consumer welfare in this manner would be an outcome worthy of the resources that have been committed to the AMC.

Q: What is your view of the Supreme Court's holding in *Empagran*?

Where price fixing injures purchasers in the United States and in foreign countries *and* those injuries are unrelated, the Court held that a foreign purchaser in a foreign market who suffered no injury from effects in United States markets may not sue for treble damages under §4 of the Clayton Act for such unrelated foreign injuries.⁴⁸ Agreeing with the interpretation advocated by the United States as *amicus curiae*, the Court found that Congress did not intend the Foreign Trade Antitrust Improvements Act of 1982⁴⁹ to

⁴⁶ The National Commission for Review of the Antitrust Laws and Procedures established by Executive Order in 1977 was tasked, for instance, to study the unnecessary protraction of complex antitrust cases and to review existing immunities and exemptions. See Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFFALO L. R. 1029, 1041-42 (2003).

⁴⁷ 21st Century Department of Justice Appropriations Act, § 11053.

⁴⁸ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

⁴⁹ 15 U.S.C. § 6a.

extend to wholly foreign injuries, even when remedies for the domestic injuries springing from the same conspiracy may be available to other injured parties.⁵⁰

The brief of the United States, signed by representatives of the Commission and the Department of Justice, advised the Court that such an extension of Sherman Act jurisdiction (i.e., allowing foreign purchasers to sue for treble damages) would have significant adverse effects on criminal enforcement generally (by making cooperating witnesses less likely to come forward) and also might be offensive to other nations.⁵¹ The Court, finding it lacked an adequate factual basis for resolving the competing claims regarding a potential effect on enforcement, refused to allow such a policy argument to outweigh the otherwise clear meaning of the statute.⁵² The Court also recognized that international comity - recognition of the rights of other countries to regulate their own domestic commerce - counseled restraint in interpreting the extraterritorial reach of our antitrust laws.⁵³

The Court's opinion limits the extraterritorial reach of American antitrust damage remedies to injuries that are causally related to an effect on American markets. In my view, that result does no fundamental damage to our law. Indeed, it is too early to tell whether the respondents in this case ultimately will be left without an American damage remedy. The Court of Appeals on remand may well find, as urged by respondents,⁵⁴ that their foreign injury was not wholly independent of the domestic harm in the United States, in which case their damage claims may yet be cognizable under our antitrust laws.

Q: With a new Chairwoman about to assume leadership of the FTC, do you foresee any changes to the FTC's competition or consumer protection agendas?

Each Chair has the ability to steer or even radically modify the Commission's agenda, based upon the Chair's own enforcement and policy priorities, along with the Chair's particular management style and the predilections of the Bureau Directors whom the Chair selects. I would assume, therefore, that a change in Commission leadership will lead to, at least, a few noticeable shifts in the Commission's agenda. One important and unique aspect of the Federal Trade Commission, however, is its five-member, bipartisan composition. Not to diminish the extremely important role of the Chair - but the Chair is

⁵⁰ *Id.* at 2367 (refusing to extend the reach of the Sherman Act to injuries arising from “*foreign harm alone*”) (emphasis in original). The Court of Appeals for the D.C. Circuit had found that the additional deterrence which would result by extending the reach of the Sherman Act to wholly foreign injuries justified its broader interpretation. *Empagran S.A. v. TJT*, 05-1008, 2005 WL 1553070 (D.C. Cir. 2005).

entitled to only one vote on any decision requiring Commission approval. Moreover, each Commissioner has an equal opportunity to voice her or his opinions, both within the Commission and to the public. Finally, the Commission has a large number of exceedingly talented staff members who have been with the agency for many years, and who continue to do their best work no matter who is in charge. Collectively, I think that these factors tend to foster continuity during times of transition at the Commission, at least in the short term. Changes inevitably will occur when a new Chair arrives, but change will be an evolutionary process. Eventually, the overall “chemistry” of the Commission will adjust as the new arrival learns to work with the remaining four