

**Opinion of Commissioner Orson Swindle,
Concurring in Part and Dissenting in Part**

In the Matter of

TOYS "R" US, INC.

Docket No. 9278

I concur in the Commission majority's determination that respondent Toys "R" Us, Inc. ("TRU"), entered into a series of anticompetitive *vertical* agreements with various toy manufacturers, and I join in the portions of the Commission's order aimed at proscribing the vertical restraints. In my view, however, the evidence does not support the majority's finding that some toy manufacturers entered into an anticompetitive *horizontal* agreement, and thus I dissent from my colleagues' conclusion that TRU orchestrated such a horizontal combination.

The evidence shows that club stores loomed as a small but growing threat to TRU's status and self-image as the leader in discount toy retailing. By dint of its powerful position as the indispensable retail outlet, TRU induced a number of key manufacturers to accede to its plan to choke off the supply of desirable toys to the clubs. Pursuant to TRU's vertical agreements with Mattel, Hasbro, Fisher Price, and others, certain manufacturers began to make toys unavailable to the clubs -- or available to them only on economically disadvantageous terms -- and the clubs'

In laying out the evidence of a horizontal agreement,⁽¹⁾ my colleagues portray TRU as the communications hub of a conspiracy involving multiple manufacturers. These manufacturers purportedly used TRU to signal to one another their views and intentions about whether -- and under what conditions -- they would sell to the clubs. The majority infers from the record that the manufacturers used their direct *individual* communications with TRU as a mechanism to reach a common plan to boycott the clubs. Pursuant to this supposed scheme, TRU shuttled the manufacturers' fears and concerns back and forth until a horizontal consensus emerged.

The majority's view would be more plausible-2(y)5(us)-/uJ 0.0artal consenf BT isenfl6s aod Tsen iignalu

case, a manufacturer's unwillingness to go forward alone simply indicates its need -- before entering a vertical agreement with TRU -- to ascertain whether TRU planned to apply the same policy to other manufacturers. It does not necessarily show that that manufacturer reached any horizontal understanding with its competitors.

Moreover, the majority implies that each conspiring manufacturer was intent on achieving a uniform response *among all manufacturers*, rather than just among its direct competitors. A toy train probably does not compete with a Barbie doll, and a Barbie probably does not compete with toys for two-year-olds. As my colleagues seem to recognize,⁽⁹⁾ a manufacturer of infants' and toddlers' toys is likely to be largely indifferent to whether a manufacturer of older children's toys abides by TRU's policy, and thus a manufacturer is unlikely to care whether toy producers in general arrive at "a uniform, joint reaction to TRU's policy." It taxes credulity to assert that "a uniform, joint reaction" was vital from each manufacturer's perspective.

Other evidence further undermines the theory of a horizontal boycott involving the manufacturers. For instance, when certain manufacturers went back on their commitment to TRU and sold product to the clubs behind TRU's back, TRU tried to bring these wayward firms back into line with the club policy. If there really was a horizontal agreement to boycott the clubs, why was so much prodding and cajoling on TRU's part necessary to secure obedience? The answer is that the commitments all ran vertically, not horizontally. The glue that held TRU's scheme together was each manufacturer's individual decision not to cross its most important customer's interests.

A recent appellate decision helps illustrate the problems with the majority's finding of a horizontal conspiracy. In *Rossi v. Standard Roofing, Inc.*, No. 97-5185, 1998 U.S. App. LEXIS 21911 (3d Cir. Sept. 9, 1998) -- cited at several points in my colleagues' opinion -- the court of appeals considered plaintiff roofing distributor's allegations that it was the victim of a boycott organized by its direct competitors (and including certain manufacturers of roofing materials). The court of appeals determined that Rossi had presented sufficient evidence against two of its horizontal competitors (Standard Roofing and Arzee Roofing Supply) and against manufacturer GAF Corporation to survive those defendants' motions for summary judgment.

The evidence of horizontal conspiracy in *Rossi* stands in stark contrast to the evidence in the present case. Rossi was a price-cutting distributor who earned the enmity of its direct competitors, including Standard and Arzee. Standard and Arzee instigated and orchestrated the boycott, including persuading key supplier GAF to withhold product from Rossi. The court of appeals describes in detail the substantial proof that Standard and Arzee agreed *between themselves* to design a plan that would remove Rossi as a threat to their pricing equilibrium and prevailed upon GAF to go along with their plan.

In contrast, the evidence against TRU and the toy manufacturers on the horizontal issue is much less substantial. The prime mover behind any plot against the club stores was unmistakably TRU *acting alone*, rather than (as in *Rossi*) the victims' direct competitors acting in concert. *Rossi*

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