



**Testimony of Jeanette Contreras,  
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**Subcommittee on Competition Rights, Antitrust, and Consumer Rights  
U.S. Senate Committee on the Judiciary**

**Baby Formula and Beyond: The Impact of Consolidation on Families and Consumers**

**June 15, 2022**

The National Consumers League (NCL) shares the concerns of new parents regarding the recent shortage of infant formula. Our hearts go out to parents who have lost babies due to contaminated powdered formula and those whose infants suffered devastating health consequences from contaminated product. At NCL, we believe all goods and services sold to consumers should be safe and meet all legal requirements. This includes complying with regulatory guidelines set forth by the U.S. Food and Drug Administration (FDA).

A core principle of our advocacy stipulates that the marketplace should encourage competition to guarantee consumers have choices for safe goods and services at a fair price. Monopolies harm competition, leaving consumers with fewer options at higher prices. Monopolistic practices are especially harmful when they occur in the health care arena, where they can exacerbate existing health disparities.

### **Importing Foreign Baby Formula**

NCL applauds the FDA and the Biden administration for adopting a multifaceted approach to increase the supply of infant formula, including allowing foreign manufacturers to sell their products in the United States. Additionally, we believe invoking the Defense Production Act to require suppliers to prioritize getting needed inputs to infant formula manufacturers was sound policy.

These measures are helping to solve the immediate logistical problem of getting baby formula onto store shelves across the country. However, we do not believe importation of foreign products is a safe and effective long-term strategy. Specifically, implementing such a program would require significant federal funding to mitigate risks to public safety of formula importation from countries outside of the FDA's jurisdiction. This increases the risk that dangerous products end up on store shelves and, ultimately, in infants' bottles.

While addressing the immediate formula shortage is the most pressing issue, we are also troubled that it took the FDA roughly four months to act on the whistleblower complaint sent to the agency in October 2021.<sup>1</sup> This complaint should have received immediate attention given the vulnerability of infants and the gravity of the allegations against company officials at the Abbott facility in Michigan. We support a full investigation of the Abbott facility and, if warranted, bringing criminal and civil charges against those who falsified data or knowingly allowed the shipment of contaminated formula. NCL also recommends that the U.S. create a single food safety agency and dedicate an office to oversee the safety and supply of infant formula.

## **Monopolies Hurt Consumers**

Competition is crucial for a fair marketplace. It should concern every American that one manufacturer – Abbott -- controls 40% of the U.S. infant formula market. This is not a new situation. In 1986, subsidiaries of only three manufacturers – Abbott, Bristol-Myers, and American Home Products -- accounted for 99 percent of the total U.S. market share of infant formula.<sup>2</sup> Since then, little has changed with three companies, Abbot, Mead Johnson, and Nestle, controlling 98% of the industry.<sup>3</sup>

The consolidation of the infant formula market is a major contributor to the current crisis. However, this is only one example of how excessive market concentration in recent decades has limited competition and harmed consumers. For example, NCL continues to raise concerns about the consolidation of the airline industry. Due to weak enforcement of existing antitrust laws, from 2005 to 2015, the number of major U.S. airlines declined from nine to four.<sup>4</sup> These airlines – American, United, Delta, and Southwest – today control more than 80 percent of the U.S. market.<sup>5</sup>

Our antitrust laws have also failed to protect consumers who attend live events. After merging with Ticketmaster in 2010, Live Nation Entertainment, controls roughly 80% of the primary ticketing market in the U.S.<sup>6</sup> The Justice Department is aware of this and has stated that Ticketmaster benefits from “high barriers to other companies successfully, substantially, and profitably entering or attempting to

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<sup>1</sup> Vakil, Caroline. “Top FDA Official Says He Didn't See Whistleblower's Baby Formula Plant Complaint for Four Months.” The Hill. The Hill, May 27, 2022. <https://thehill.com/policy/healthcare/3501165-top-fda-official-says-he-didnt-see-whistleblowers-baby-formula-plant-complaint-for-four-months/>.

<sup>2</sup> U.S. General Accounting Office, Human Resources Division. Infant Formula: Cost Containment and Competition in the WIC Program. GAO/HRD-90- 122. Sept. 1990.

<sup>3</sup> Stoller, Matt. “Big Bottle: The Baby Formula Nightmare.” BIG by Matt Stoller. Substack, May 13, 2022. <https://mattstoller.substack.com/p/big-bottle-the-baby-formula-nightmare?s=r>.

<sup>4</sup> Koenig, David, and Scott Mayerowitz. “Analysis: Consolidation of U.S. Airline Industry Radically Reducing Competition.” Skift. Associated Press, July 14, 2015. <https://skift.com/2015/07/14/analysis-consolidation-of-u-s-airline-industry-radically-reducing-competition/>.

<sup>5</sup> “Airlines & Monopoly.” Open Markets. Open Markets Institute. Accessed June 14, 2022. <https://www.openmarketsinstitute.org/learn/airlines-monopoly>.

<sup>6</sup> United States Government Accountability Office. *Event Ticket Sales: Market Characteristics and Consumer Protection Issues*. (April 2018). Pg. 4. <https://www.gao.gov/assets/gao-18-347.pdf>

expand in the market for primary ticketing services to major concert venues.”<sup>7</sup> One need only see how many fees are added to the price of a ticket to understand the impact of Live Nation’s dominant position in the marketplace. Airlines and live events are just two of the more egregious examples of consumer harm that has resulted from a lack of teeth in our antitrust laws and a lack of nerve by antitrust enforcers.

## **Health Care Industry Consolidation**

Action by Congress to enact new antitrust laws to increase competition and strengthen regulation of monopolistic practices is urgently needed. What we see time and again in the health care industry is that consolidation leads to higher costs for consumers without an increase in quality or access to care. We are pleased that the Biden administration is looking into how hospital prices have increased after acquisitions. We are also hopeful that the ongoing review by the DOJ and FTC of their merger enforcement guidelines will result in more action by those agencies. Stronger antitrust enforcement would be particularly beneficial for curtailing anti-competitive conduct in the hospital care industry- the costliest aspect of the U.S. health care system.

In particular, NCL applauds the recent vote by the FTC to open an investigation of the unfair business practices of pharmacy benefit managers (PBMs). NCL works tirelessly to raise awareness of the outsized role that PBMs play in driving up prescription drug prices for consumers. According to a 2021 report, the three biggest PBMs controlled roughly 77% of all U.S. prescription drug claims in 2020.<sup>8</sup> As middlemen corporations, PBMs often demand that drug companies provide them “rebates” or discounts to offer medicines as part of a drug benefit plan. These discounts are meant to lower the out-of-pocket costs consumers pay at the pharmacy counter. In reality, consumers aren’t seeing the savings. As a recent Senate Finance Committee report found, some PBMs are getting a 70% rebate on insulin, while out-of-pocket costs for this life-saving medication continue to rise.<sup>9</sup> It is critical that this issue be remedied, to ensure consumers are able to access and adhere to their medications.

## **Conclusion**

Infants are our most vulnerable and precious consumers and they rely on us to protect them. As the past weeks have shown, the systems they and their parents depend on to ensure a safe supply of formula failed. It is imperative that safety provisions are put into place to protect them now and in the future.

Nevertheless, in order to ensure a crisis like this does not happen again, market consolidation must be addressed so that the temporary shutdown of a single factory does not result in the collapse of an entire supply chain. This is not a problem unique to the infant formula industry. Since the 1990s, market

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<sup>7</sup> United States Department of Justice. *Competitive Impact Statement, United States of America v. Live Nation Entertainment, Inc.*, No. 1:10-cv-00139 (D. D.C. Jan. 25, 2010). <https://www.justice.gov/atr/case-document/competitive-impact-statement-209>

<sup>8</sup> Fein, Adam J. “The Top Pharmacy Benefit Managers of 2020: Vertical Integration Drives Consolidation.” Drug Channels. Pembroke Consulting, April 6, 2021. <https://www.drugchannels.net/2021/04/the-top-pharmacy-benefit-managers-pbms.html>.

<sup>9</sup> United States Senate Finance Committee. *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug*, Staff Report. Washington, D.C.: U.S. Senate Finance Committee, 2021, [https://www.finance.senate.gov/imo/media/doc/Grassley-Wyden%20Insulin%20Report%20\(FINAL\).pdf](https://www.finance.senate.gov/imo/media/doc/Grassley-Wyden%20Insulin%20Report%20(FINAL).pdf) (Accessed June 13, 2022).

concentration has increased in over 75 percent of U.S. industries.<sup>10</sup> Whether it is baby formula, airline travel, live event tickets, or pharmaceutical sales, the lack of competition is having increasingly negative impacts on consumer welfare.

The cases mentioned today are just a few examples of how monopolies and anti-competitive practices have become a problem for consumers. Action by Congress to address America's antitrust problem is urgently needed to protect and promote a fair and safe marketplace for consumers.

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<sup>10</sup> Gustavo Grullon, Yelena Larkin, Roni Michaely, Are US Industries Becoming More Concentrated?, *Review of Finance*, Volume 23, Issue 4, July 2019, Pages 697–743, <https://doi.org/10.1093/rof/rfz007>