

## ADVISORY OPINION DIGESTS\*

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### **No. 157. Paying advertising allowances in selected trade area.**

The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by Section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

"This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

Concluding its opinion, the Commission said :

Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission.

(File No. 683 7035, released Jan. 4, 1968.)

### **No. 158. Proposed trade association adoption of a pricing manual for common use by electronics servicemen members.**

The Commission rendered an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

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\*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects. (File No. 683 7045, released Jan. 4, 1968.)

**No. 159. Advertising offering sale of treatment for athlete's foot.**

The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so. (File No. 683 7047, released Jan. 12, 1968.)

**No. 160. Advertising promoting sale of information and a product.**

The Commission issued an advisory opinion today in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

Its opinion concluded with the following statement :

The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

(File No. 663 7009, released Jan. 12, 1968.)

**No. 161. Advertising promoting sale of information and a product.**

The Commission issued its advisory opinion concerning proposed advertising offering for sale for \$1 a pamphlet which (1) advises a method for curing athlete's foot and (2) recommends the use of a specific proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

The Commission stated that use of the proposed advertising would be violative of Sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care." The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's

foot are now available which have hitherto been withheld from the public.

Its opinion concluded with the following statement:

The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

#### DISSENTING OPINION

BY ELMAN, *Commissioner*:

He does not agree that selling advice is in the same category as selling a product. Recognizing that a good deal of foolish and worthless advice is being peddled to the American people, and not merely in the field of medicine or health, Commissioner Elman does not believe that Congress intended that the Federal Trade Commission or any other government agency should set itself up as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories disseminated to the public. (File No. 673 7028, released Jan. 18, 1968.)

#### No. 162. Exchanging wage rates among association members.

The Commission rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence it is the potential danger

inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

(File No. 683 7051, released Jan. 27, 1968.)

**No. 163. Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.**

The Federal Trade Commission rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance" or other similar terminology.

The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisfactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers will be made from time to time and those who are not keeping pace will be discontinued.

The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their ability to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not designed to maintain suggested prices, is one which will seriously affect those prices.

The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go

beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril. (File No. 683 7063, released Jan. 31, 1968.)

**No. 164. Premerger clearance: No anticompetitive effects foreseeable.**

The Commission issued an advisory opinion on May 14, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding (1) that competing distributors would not be foreclosed from supplies he distributed and (2) that preexisted relationships between him and said supplier would not be altered without prior Commission approval. (File No. 643 7025, released Feb. 13, 1968.)

**No. 165. Premerger clearance: Deteriorating financial condition.**

The Commission issued an advisory opinion on July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, nonviable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers. (File No. 653 7003, released Feb. 13, 1968.)

