IN THE MATTER OF

OLD EMPIRE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6401. Complaint, Aug. 24, 1955—Decision, Apr. 3, 1956

Consent order requiring a perfume manufacturer in Newark, N. J., and its franchise distributor in New York City to cease representing falsely through statements in circulars, letters, and on containers and labels that $25 per bottle was the customary retail price of its "Marche Nuptiale" perfume, that it was displayed and sold by named large and well-known department stores, was manufactured from essence imported from France, and that they maintained a branch office in Paris; and supplying to retail purchasers gummed labels bearing the figure "$25.00" to affix to the "Marche Nuptiale" packages.

Before *Mr. John Lewis*, hearing examiner.
Mr. William L. Taggart for the Commission.
Mr. Seth Harrison, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Old Empire, Inc., a corporation; Julio de Elorza, Raymond Barnett, John de Elorza and Pearl de Elorza, individually and as officers of Old Empire, Inc.; Pierre Marche, Inc., a corporation; Louis Manus, Mrs. Samuel B. Kline, also known as Bebe Aaron, and Ruth Robbins, individually and as officers of Pierre Marche, Inc., and Samuel B. Kline, individually and as General Manager of Pierre Marche, Inc., all hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Old Empire, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 865 Mount Prospect Avenue, Newark, New Jersey. Respondents Julio de Elorza, John de Elorza, Raymond Barnett and Pearl de Elorza are president, treasurer, vice-president and secretary, respectively of said corporate respondent. These individuals acting in cooperation with each other formulate, direct, and control the acts, practices and policies of said corporate re-

spondent. Their address is the same as that of the said corporate respondent.

Respondent Pierre Marche, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at Room No. 720, 580 Fifth Avenue, New York, N. Y. Respondents Louis Manus, Mrs. Samuel B. Kline, also known as Bebe Aaron, Ruth Robbins and Samuel B. Kline are president, vice-president, secretary and general manager, respectively, of said corporate respondent. These individuals, acting in cooperation with each other, formulate, direct and control the acts, practices and policies of said corporate respondent. Their address is the same as that of the said corporate respondent.

PAR. 2. Respondent Old Empire, Inc., is now, and for more than one year last past has been, engaged in the manufacture, sale and distribution of perfumes, colognes, and allied products, including a perfume sold and distributed under the brand and trade name of "Marche Nuptiale." Respondent Pierre Marche, Inc., is now and for more than one year last past has been, the franchise distributor of the said perfume, Marche Nuptiale.

PAR. 3. Respondents cause their said products, when sold, to be transported from their places of business in the States of New Jersey and New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, among and between the various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of their said businesses, respondents are now and have been at all times mentioned herein in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the manufacture, sale and distribution of perfumes, colognes and allied products, some of which products are compounded in the United States, others are compounded in France and imported into the United States.

PAR. 5. Respondents, in the course and conduct of their aforesaid businesses and for the purpose of inducing the purchase of their perfume described and sold under the brand and trade name of "Marche Nuptiale" have made numerous statements and representations, with reference to said product, in brochures, circulars, and letters, and upon packages, containers and labels of said product.

Among and typical but not all inclusive of said statements and representations are the following:

(Appearing on cover of four-page circular:)

For over thirty years, women of fashion have chosen Marche Nuptiale as their own favorite scent. This fabulous perfume is the creation of the world-famous perfumer, Marques de Elorza.

Marche Nuptiale has been featured and sold in many famous department stores and women's specialty shops in this country, and throughout the world, at $25.00 per bottle. Also advertised extensively in newspapers, magazines and trade publications; displayed in department store windows, etc. (See inside for reproductions of only a few of the countless ads.)

(Appearing on inside pages of said circular are purported reproductions of window displays of large and well known named department stores advertising Marche Nuptiale:)

MARCHE NUPTIALE as displayed in the windows and sold at the perfume counters of these fine stores at $25.00 per bottle.

These are but a few of the ads which featured MARCHE NUPTIALE at $25.00 per bottle in newspapers across the country, national magazines plus tremendous trade paper coverage.

MARCHE NUPTIALE
in its newly-designed spillproof bottle and modern package. Shaped for more sales.

1 Fluid Ounce
PARIS—NEW YORK

(Appearing on one window display:)

For the Supreme Moment
Parfum MARCHE NUPTIALE
(Wedding March)
MARQUES DE ELORZA

73 Avenue des Champs Elysees
Paris

37 West Thirty-seventh Street
New York

The package and container of Marche Nuptiale in addition to displaying the French national flag also contains the wording:

Fabrique Avec Essences Importees de France
MARCHE NUPTIALE
(Wedding March)
MARQUES DE ELORZA
Paris—New York * 1 fl. oz.

PAR. 6. Through the use of the aforesaid statements and representations and others of similar import but not specifically set out herein, respondents have represented and now represent that their said perfume designated as "Marche Nuptiale" has a retail price of $25.00 per bottle at which price such perfume ordinarily and customarily is sold to consumers; that said perfume is now displayed and sold by named large and well known department stores; that said perfume is manufactured from essences imported from France;

that respondents maintain a branch office or establishment in Paris, France.

PAR. 7. The aforesaid representations are false, misleading and deceptive. In truth and in fact, respondents' perfume designated as "Marche Nuptiale" does not have a retail price of $25.00 per bottle and is not ordinarily and customarily sold at that price; said perfume is actually sold to consumers at $3.00 per bottle or less; said perfume is not displayed and sold by any of the named large and well known department stores and has not been so displayed and sold at said stores for as long as fifteen years; said perfume is not manufactured entirely from essences imported from France but is manufactured in Newark, New Jersey from essences purchased by respondents within the United States, which contain only a small fraction of ingredients which come from France; respondents do not maintain a branch office or establishment in Paris, France.

PAR. 8. Respondent Pierre Marche, Inc., acting under the direction of its general manager, respondent Samuel B. Kline, in addition to supplying brochures and circulars to prospective and actual retail purchasers also supplies to such retail purchasers small gummed, sticker-type, labels bearing the figure "*$25.00*" for the purpose of enabling the said purchasers to affix said labels or stickers to the "Marche Nuptiale" packages. The practice of supplying such labels or stickers, in addition to the brochures and circulars, containing the fictitious retail prices for said Marche Nuptiale places in the hands of retailers buying such products from respondents, an instrumentality and means whereby such retailers may mislead and deceive and do mislead and deceive the purchasing public as to the quality and origin of said product and enables such retailers to represent and offer for sale and sell said product at a price greatly in excess of the usual and regular retail price thereof.

PAR. 9. There is a preference on the part of substantial numbers of the purchasing public for perfumes and similar products manufactured and compounded in France over those manufactured and compounded in the United States.

PAR. 10. The use by respondents of the foregoing false, misleading and deceptive statements and representations has the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such representations and statements are true and to cause substantial members of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' products. As a result, trade has been diverted to respondents from their com-

petitors and substantial injury has been done and is being done to competition in commerce.

PAR. 11. The aforesaid acts and practices as herein alleged are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on August 24, 1955, charging them with the use of unfair methods of competition and unfair acts and practices in commerce, in violation of the provisions of the Federal Trade Commission Act. After being duly served with said complaint, the respondents appeared by counsel and subsequently entered into an agreement containing consent order to cease and desist dated January 12, 1956. Said agreement, which has been signed by counsel supporting the complaint, counsel for respondents, and all respondents, and approved by the Director of the Commission's Bureau of Litigation, has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Commission's Rules of Practice and Procedure.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with said agreement. It has been agreed that the order to cease and desist provided for in said agreement may be entered without further notice, that when so entered it shall have the same force and effect as if entered after a full hearing, and that the complaint herein may be used in construing the terms of said order. Said agreement purports to dispose of all of this proceeding as to all parties and has been entered into by respondents for settlement purposes only and without admitting that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent

order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of the proceeding as to all parties, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision pursuant to Section 3.21 and 3.25 of the Rules of Practice and Procedure, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent Old Empire, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 865 Mt. Prospect Avenue, Newark, New Jersey. Respondents Julio de Elorza, Raymond Barnett, John de Elorza and Pearl de Elorza are president, treasurer, vice-president, and secretary, respectively, of said corporate respondent. Their address is the same as that of said corporate respondent.

Respondent Pierre Marche, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Room 720, 580 Fifth Avenue, New York, New York. Respondents Louis Manus, Mrs. Samuel B. Kline, also known as Bebe Aaron, and Ruth Robbins and Samuel B. Kline, are president, vice-president, secretary and general manager, respectively, of Pierre Marche, Inc. Their address is the same as that of said corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent Old Empire, Inc., a corporation, its officers, and respondents Julio de Elorza, Raymond Barnett, John de Elorza and Pearl de Elorza, individually and as officers of Old Empire, Inc., and respondent Pierre Marche, Inc., a corporation, its officers, and respondents Louis Manus, Mrs. Samuel B. Kline, also known as Bebe Aaron, and Ruth Robbins, individually and as officers of Pierre Marche, Inc., and Samuel B. Kline, individually and as General Manager of Pierre Marche, Inc., their agents, representatives, and employees, directly or through any corporate or other device in connection with the sale and distribution of perfumes, colognes, and allied products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying customers or purchasers of said products or any of them with price tags, labels, stickers or other advertising material bearing amounts which are, in fact, in excess of the prices at which said products are usually and customarily sold.

2. Representing directly or by implication:

(*a*) That the retail price of any of said products is in excess of the price at which said product is usually and customarily sold.

(*b*) That said products or any of them are currently being displayed or sold by any specified store or any class of stores, when such is not the fact.

(*c*) That said perfumes are made from essence imported from France unless it is clearly and conspicuously disclosed in immediate conjunction therewith, that part of the essences are not so imported, when such is the fact.

(*d*) That any of respondents maintain an office or establishment in France unless such is the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

FELLER'S, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 6429. Complaint, Oct. 19, 1955—Decision, Apr. 4, 1956

Consent order requiring a furrier in Harrisburg, Pa., to cease violating the Fur Products Labeling Act through failing to comply with the labeling, advertising, and invoicing requirements.

Before *Mr. Robert L. Piper*, hearing examiner.
Mr. Philip R. Melangton, Jr. for the Commission.
Mr. David E. Feller, of Washington, D. C., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Feller's, Inc., a corporation, and Charles Feller and Oscar Feller, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Feller's, Inc., is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business at Third & Market Streets, Harrisburg, Pennsylvania. Respondents Charles Feller and Oscar Feller are president and secretary-treasurer, respectively, of said corporate respondent. These individuals, acting in cooperation with each other, formulate, direct and control the acts, policies, and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act, August 9, 1952, respondents have been and now are, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold,

advertised, offered for sale, transported, and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce," "fur," and "fur products" are defined in the said Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 4 (1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4 (2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 5. Certain of said fur products were misbranded in that, on labels attached thereto, respondents set forth the name of an animal other than the name of the animal that produced the fur product, in violation of Section 4 (3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were misbranded, in violation of the Fur Products Labeling Act, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(A) Required information was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations.

(B) Required information was mingled with non-required information on labels, in violation of Rule 29 (a) of the aforesaid Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of said Fur Products Labeling Act, in that the respondents caused the dissemination in commerce, as "commerce" is defined in said Act of certain advertisements with respect to said fur products through the medium of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of said Act and which advertisements were intended to aid and did aid, promote and assist, directly and indirectly, in the sale and offering for sale of said fur products.

PAR. 8. Among said advertisements but not limited thereto, were advertisements disseminated by the respondents in various issues of the "Evening News," "The Patriot," and "Sunday Patriot-

451524—59——68

News," newspapers published in Harrisburg, Pennsylvania, and each having a wide circulation in said State and in various other States of the United States.

By and through the means of the aforesaid advertisements as well as others of the same import and meaning, not specifically referred to herein, respondents falsely and deceptively:

(A) Failed to disclose the name and names of the animal or animals that produced the fur contained in the fur products, as set forth in the Fur Products Name Guide, in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

(B) Failed to disclose that fur contained in fur products was bleached, dyed or otherwise artifically colored fur, when such was the fact, in violation of Section 5 (a) (3) of the Fur Products Labeling Act.

(C) Failed to disclose the name of the country of origin of imported furs contained in fur products, in violation of Section 5 (a) (6) of the Fur Products Labeling Act.

(D) Failed to disclose that certain fur products were in truth and in fact second-hand, in violation of Rule 23 of the Rules and Regulations promulgated pursuant to said Act.

(E) Set forth the name or names of animals other than those producing the fur contained in the fur products, in violation of Section 5 (a) (5) of the Fur Products Labeling Act.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required under the provisions of Section 5 (b) (1) of the said Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 10. Certain of said fur products were falsely and deceptively invoiced by the respondents in that invoices furnished to purchasers thereof set forth the name of an animal in addition to the name of the animal which produced the fur; further, that the respondents in addition misrepresented therein the country of origin of imported furs contained in said fur products, in violation of Section 5 (b) (2) of said Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder.

PAR. 11. Respondents, in the conduct of their business, are in substantial competition with other firms, corporations, and individuals in the sale, advertising, distribution, offering for sale, and selling in commerce of fur products.

PAR. 12. The acts and practices of the respondents as hereinbefore alleged were and are in violation of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder,

and constitute unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on October 19, 1955, charging them with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated February 3, 1956, containing a consent order to cease and desist disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement (1) cover all of the allegations of the complaint except the allegation that respondents in certain advertising failed to disclose that certain fur products offered for sale were second-hand, which allegation, as explained by memorandum of counsel supporting the complaint and affidavit of respondent Charles Feller, was abandoned for good

reasons shown, and (2) provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Feller's, Inc. is a corporation existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at Third and Market Streets, in the City of Harrisburg, Commonwealth of Pennsylvania. Respondents Charles Feller and Oscar Feller are individuals and officers of said corporate respondent and have the same address as that of the said corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents above named. The complaint states a cause of action against said respondents under the Fur Products Labeling Act and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondents Feller's, Inc., a corporation, and its officers, and Charles Feller and Oscar Feller, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(A) Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produce the fur from which such product was manufactured;

(2) Failing to affix labels to fur products showing:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(*c*) The name of the country of origin of any imported furs used in the fur products;

(*d*) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(*e*) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(3) Setting forth on labels attached to fur products, the name or names of any animal or animals other than the name or names provided for in paragraph A (2) (a) above;

(4) Setting forth on labels attached to fur products:

(*a*) Non-required information mingled with required information;

(*b*) Required information in abbreviated form;

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, notice, or in any other manner, which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

(1) Fails to disclose:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(*c*) The name of the country of origin of any imported furs contained in fur products;

(2) Sets forth, directly or by implication:

(*a*) The name or names of any animal or animals other than the name or names provided for in Paragraph Five (a) (5) of the Fur Products Labeling Act;

C. Falsely or deceptively invoicing fur products by:

(1) Failing to furnish invoices to purchasers of fur products showing:

(*a*) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(*b*) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is a fact;

(*c*) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

(*d*) The name and address of the person issuing such invoice;

(*e*) The name of the country of origin of any imported furs contained in a fur product;

(2) Using on invoices the name or names of any animal or animals other than the name or names provided for in paragraph C (1) (*a*) above, or furnishing invoices which misrepresent the country of origin of imported furs contained in fur products, or which contain any form of misrepresentation or deception, directly or by implication, with respect to such fur products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 4th day of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Feller's, Inc., a corporation, and Charles Feller and Oscar Feller, individually and as officers of Feller's, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

DODGE INCORPORATED ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6438. Complaint, Nov. 7, 1955—Decision, Apr. 4, 1956

Consent order requiring a Chicago manufacturer to cease falsely representing trophies, awards, and miscellaneous synthetic jewelry with simulated silver lettering as genuine onyx or marble through describing them as "Rio Onyx" and "Marblette," "engraved * * * in Silver," in catalogs and advertising material furnished to dealers and by them widely distributed to prospective purchasers.

Before *Mr. Robert L. Piper*, hearing examiner.
Mr. Terral A. Jordan for the Commission.
Lord, Bissell & Brook, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dodge Incorporated, a corporation and Ray E. Dodge and J. J. Kuhn, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Dodge Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 702-706 North Hudson Avenue, Chicago, Illinois. Respondents Ray E. Dodge and J. J. Kuhn are respectively President and Vice-President of the corporate respondent. The individual respondents, acting in cooperation with each other, formulate, direct and control all of the policies and acts of said corporation. The address of said individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now and have been for more than one year last past, engaged in the manufacture, sale and distribution of trophies, cups, plaques, medals, jewelry, and gift items, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at

all times mentioned herein have maintained, a substantial course of trade in said articles, in commerce, among and between the various States of the United States.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are now and for more than one year last past have been engaged in the manufacture, sale and distribution of the aforesaid articles under the name of the said corporate respondent and under the trade name, Lawrence Manufacturing Company. Sale of said articles by the respondents are to retailers and dealers for resale to the purchasing public.

PAR. 4. To facilitate and assist in the sale of the said articles to the purchasing public respondents supply to said retailers and dealers a variety of catalogs, leaflets and other advertising material. Said advertising material is widely distributed by said retailers and dealers to prospective purchasers of the merchandise advertised and offered for sale therein. Said advertising material contains numerous false, misleading and deceptive representations respecting the quality, composition and characteristics of the merchandise offered for sale therein.

Typical and illustrative of said representations are the following:

1. Lawrence Manufacturing Company,
Golden Arrow Awards for Champions
Imported Pedrara Onyx
Black and Gold Italian Marble and
Rio Onyx.

2. Latest Styles Feature "Rio Onyx" the newest trend in modern design depicting real Brazilian Green Onyx.

3. RIO ONYX (this representation is made in immediate conjunction with pictorial depictions of trophies, awards etc., which appear to be made in part of an onyx-like material).

4. Series CS5C3 feature Marblette bases and are available in a choice of Ivory and "Onyx Red" color.

5. Genuine Black Marblette.

6. The R51C, RB51C, and R52C series of awards embody Diamond Black Engraving columns. When engraved the lettering shows through in Silver against an Ebony Black Background.

PAR. 5. Through the use of the foregoing representations respondents represent that certain of the aforesaid articles are made in part of genuine Onyx; that certain of the aforesaid articles are made in part of genuine marble; and that the lettering in certain of the aforesaid articles is made of silver metal.

PAR. 6. Such representations are false, misleading and deceptive. In truth and in fact the material described by respondents in their aforesaid advertising material as "Rio Onyx" and "Marblette" is

not genuine onyx and marble, respectively, but such material is of synthetic composition simulating genuine onyx or marble. Furthermore, the lettering on certain of aforesaid articles is not made of silver metal but is done in such a manner as to simulate letters made of silver.

PAR. 7. By selling and distributing to retailers and dealers said catalogs and advertising material as aforesaid, respondents furnish to such retailers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the quality, composition and characteristics of the said articles offered for sale therein.

PAR. 8. In the course and conduct of their business respondents are in direct and substantial competition with other corporations, firms and individuals engaged in the sale and distribution in commerce of trophies, cups, plaques, medals, jewelry and gift items.

PAR. 9. The distribution in commerce of respondents said advertising material has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into erroneous and mistaken beliefs respecting the quality, composition and characteristics of said trophies, cups, plaques, medals, jewelry and gift items and into the purchase of substantial quantities of such articles because of such erroneous and mistaken beliefs. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 10. The aforesaid acts and practices of the respondents as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on November 7, 1955, charging them with having violated the Federal Trade Commission Act. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated January 31, 1956, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

The proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Dodge Incorporated is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 702-706 North Hudson Avenue, in the City of Chicago, State of Illinois. Respondents Ray E. Dodge and J. J. Kuhn are individuals and are respectively president and vice president of the said corporate respondent. The address of the said individual respondents is the same as that of the corporate respondent.

2. The Federal Trade Commision has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents, Dodge Incorporated, a corporation, and its officers, and Ray E. Dodge and J. J. Kuhn, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of trophies, cups, plaques, and gift items, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Rio Onyx" or any other word or words implying genuine onyx to describe the aforesaid or other articles not made of genuine onyx, provided, however, that nothing contained herein shall prevent representations, not implying genuineness, that the aforesaid articles have the color of onyx;

2. Using the word "Marblette" or any other word or words implying genuine marble to describe the aforesaid or any other articles not made of genuine marble without revealing the fact that such articles are not made of genuine marble;

3. Using the word "Silver" or other words implying precious metals to describe lettering not made of silver or precious metals on the aforesaid or other articles, provided, however, that nothing contained herein shall prevent representations that the lettering on the aforesaid or such other articles has the color of silver or other precious metals.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 4th day of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Dodge Incorporated, a corporation, and Ray E. Dodge and J. J. Kuhn, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

HUDNUT SALES CO., INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF THE CLAYTON ACT

Docket 6440. Complaint, Nov. 8, 1955—Decision, Apr. 4, 1956

Consent order requiring a New York City manufacturer of cosmetics, beauty aids, and toilet preparations, sold under trade names "Richard Hudnut," "Courtley," "DuBarry," and "Chen Yu," to cease violating Sec. 2 (d) of the Clayton Act, through entering into cooperative advertising arrangements with certain favored customers whereby it paid all, or a portion, of the cost of newspaper advertisements of its products run by them.

Before *Mr. Robert L. Piper*, hearing examiner.

Mr. Donald K. King for the Commission.

Mudge, Stern, Baldwin & Todd, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that Hudnut Sales Company, Inc., hereinafter designated as respondent, has violated and is now violating the provisions of sub-section (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Hudnut Sales Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 113 West 18th Street, New York, New York.

PAR. 2. The respondent is now and for a number of years has been engaged in the business of manufacturing and selling cosmetics, beauty aids, and toilet preparations under various trade names such as Richard Hudnut, Courtley, DuBarry and Chen Yu. Said products are sold to customers with places of business located throughout the several states of the United States and in the District of Columbia for resale to consumers within the United States.

PAR. 3. In the course and conduct of said business, respondent has engaged in commerce as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, having shipped its products or caused them to be transported from its said place of business to said customers with places of business located in the

several states of the United States and in the District of Columbia.

PAR. 4. In the course of said business in commerce, particularly during the past two years, respondent has paid or contracted to pay, money, goods, or other things of value to or for the benefit of some of their customers as compensation or in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the processing, handling, sale or offering for sale of said cosmetics, beauty aids, and toilet preparations which respondent manufactures, sells, or offers for sale; and respondent has not made, or contracted to make such payments or consideration available on proportionally equal terms to all other of their customers competing in the sale and distribution of said products.

PAR. 5. Specifically respondent has entered into cooperative advertising arrangements with some of its favored customers whereby respondent has paid all, or a portion of the cost of newspaper advertisements dealing with respondent's products run by such customers.

The percentage of cost reimbursed or paid by respondent to such customers for such newspaper advertisements was arbitrarily determined by negotiations between respondent and such individual customers.

Such customers were in competition with other customers of respondent in the resale of respondent's products.

Such payments were not made available on proportionally equal terms or were not made available on any terms at all to certain other customers of respondent.

PAR. 6. Illustrative of the practices described in Paragraph Five of this complaint were respondent's dealings with its customers located in Chicago, Illinois during the last half of 1954. Of the large number of customers respondent has in that city only eight received an advertising allowance from respondent. These favored customers, the amounts paid to them by respondent, and the percentage of such payments to the customer's total newspaper advertising expenses with regard to respondent's products may be listed as follows:

Customer	Allowance	Percentage	Customer	Allowance	Percentage
Carson, Pirie & Scott	$1, 400. 00	100	Mandel Bros	2, 750. 00	87
The Fair	2, 658. 00	100	Sears Roebuck	918. 40	100
Stineway-Ford Napkins	4, 631. 00	100	Walgreen	17, 240. 68	100
Marshall Field	4. 010. 89	100	Wieboldt's	2, 959. 70	96

PAR. 7. The acts and practices of the respondent as above alleged violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Section 13).

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on November 8, 1955, charging it with having violated Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act. After being served with said complaint, respondent appeared by counsel and entered into an agreement, dated February 1, 1956, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement, has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint and Trade Practice Rule 16 C.F.R. 221.1 (g) may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of the proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Hudnut Sales Co., Inc.[1] is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 113 West 18th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent above named. The complaint states a cause of action against said respondent under the Clayton Act as amended by the Robinson-Patman Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent, Hudnut Sales Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the sale or offering for sale of cosmetics, beauty aids and toilet preparations in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist from:

Paying, or contracting to pay, to, or for the benefit of, any customer of respondent, anything of value as compensation or in consideration for advertising, display, demonstrator, promotional, or other services or facilities furnished by or through such customer in connection with the handling, processing, sale, or offering for sale of respondent's products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the resale of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 4th day of April 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Hudnut Sales Co., Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

[1] Incorrectly referred to as Hudnut Sales Company, Inc., in the caption of the complaint and other documents.

IN THE MATTER OF

THE C. H. MUSSELMAN COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6041. Complaint, Sept. 8, 1952—Decision, Apr. 6, 1956

Order dismissing, for failure to sustain the allegations, complaint charging more than 1700 apple growers and their trade associations and five corporate processors of apples in the "Appalachian Belt" with concertedly fixing and maintaining the prices paid to growers for raw apples and diverting shipments from one to another processor for the purpose of averting a price-break from the established prices by any processor.

Mr. Leslie S. Miller, *Mr. William J. Boyd*, *Jr.* and *Mr. Wilmer L. Tinley* for the Commission.

Mr. Daniel R. Forbes, of Washington, D. C., for National Fruit Product Co., Inc., and along with—

Keith, Bigham & Markley, of Gettysburg, Pa., for The C. H. Musselman Co., and

Mr. J. P. Arthur, of Winchester, Va., for Shenandoah Valley Apple Cider & Vinegar Corp.

Mr. David Putney, of Harrisburg, Pa., for Knouse Foods Cooperative, Inc.

Wharton, Aldhizer & Weaver, of Harrisonburg, Va., for Bowman Apple Products Co., Inc.

Mr. Lyman S. Hulbert, of Washington, D. C., for Appalachian Apple Service, Inc.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On September 8, 1952, the Federal Trade Commission issued its complaint, charging the respondents named above with entering into "an understanding, agreement and combination" to restrain trade in raw apples in interstate commerce in the "Appalachian area of Virginia, West Virginia, Pennsylvania and Maryland" by (1) fixing, establishing and maintaining prices to be paid for apples for processing purposes; (2) fixing and establishing a mathematical percentage pricing formula for calculating the prices to be paid for various grades of apples and price differentials between such grades; and (3) diverting raw apples from one processor to another for the purpose of maintaining the prices thereof set by

respondents, all in violation of the Federal Trade Commission Act. Answers were filed severally by all respondents, denying the above charges.

In due course counsel in support of the complaint completed their presentation of evidence and rested their case, whereupon respondents moved that the complaint be dismissed on the grounds of insufficiency and lack of substantiality of the evidence. By an initial decision issued on April 15, 1953, the hearing examiner then presiding herein granted respondents' motions. Appeal from his decision dismissing the complaint was taken to the Commission, which, on September 15, 1954, issued its order setting aside the hearing examiner's initial decision and remanding the proceeding to him for further appropriate action.

Immediately thereafter, the hearing examiner disqualified himself from further participation herein, and, without objection from any of the parties, the proceeding was reassigned for adjudication to the hearing examiner now presiding. Hearings on behalf of the respondents were thereafter held in Winchester, Virginia, and Washington, D. C., and on February 7, 1955, counsel for the respondents rested their case. Thereafter proposed findings as to the facts and proposed conclusions were presented by all parties, and oral argument was heard thereon.

The length and complexity of the record herein necessitates a careful analysis of the many factors involved, together with a review of the structure of the Appalachian area apple industry in general, and the activities of each respondent in particular.

IDENTIFICATION OF RESPONDENTS

Respondent C. H. Musselman Company is a Pennsylvania corporation, with its principal office and place of business located at Biglerville, Pennsylvania, and is engaged in purchasing raw apples from growers thereof and processing them into various food products, including canned sliced apples, applesauce, apple butter, jellies, juice and vinegar, with their processing plants located at Biglerville and Gardners, Pennsylvania, and inwood, West Virginia.

Respondent National Fruit Product Company, Inc., is a Virginia corporation, with its principal office and place of business located at Winchester, Virginia, and is engaged in the same type of business as Respondent C. H. Musselman Company, with processing plants at Winchester and Strasburg, Virginia, and Martinsburg, West Virginia.

Respondent Knouse Food Cooperative, Inc., is a cooperative organization incorporated March 15, 1949, under the laws of the State

of Pennsylvania, with its principal office and place of business located at Peach Glen, Pennsylvania, and a membership of 428 apple growers. It is likewise engaged in the purchase and processing of raw apples, with processing plants located at Peach Glen, Chambersburg, Altoona and Scotland, Pennsylvania.

Respondent Bowman Apple Products Company, Inc., is a Virginia corporation, with its principal office and place of business located at Mount Jackson, Virginia. It is similarly engaged in the business of purchasing and processing raw apples, and operates a processing plant at Mount Jackson, Virginia.

Respondent The Shenandoah Valley Apple Cider & Vinegar Corporation is a Virginia corporation, with its principal office and place of business located in Winchester, Virginia. It is engaged in the same type of business as the other respondents hereinabove described, and operates a processing plant at Winchester, Virginia.

Respondent Appalachian Apple Service, Inc., is a West Virginia corporation, with its principal office and place of business located at Martinsburg, West Virginia. It is essentially a growers' organization, with approximately 1,700 grower-members in Virginia, West Virginia, Maryland and Pennsylvania, and is supported in part by tax assessments collected by the State Apple Commission in Virginia and Maryland, and in part by direct dues paid by apple-growers in Pennsylvania and West Virginia. It is engaged primarily in advertising and promoting the sale of apples grown by its members, and in keeping its members informed of market conditions in the apple industry throughout the Appalachian area.

THE APPLE INDUSTRY OF THE APPALACHIAN AREA

Approximately one-third of the apples processed annually in the United States, in the manufacture of food products such as applesauce, cider, apple juice, jellies and vinegar, are grown in the orchards of the Appalachian area, which embraces parts of the States of Virginia, West Virginia, Pennsylvania and Maryland. Of that one-third, approximately seventy-five percent is processed by the five respondent processors named herein. Although some apples are sold through brokers, the majority are sold directly by the growers to these processors, and are delivered to their processing plants, some of which are located in States other than the States of origin of the apples.

The apple-harvesting season generally extends over a period of approximately three months, beginning south of Roanoke, Virginia, in August, moving northward through the Shenandoah Valley to Maryland and Pennsylvania, and ending in the northernmost part

of the area in late October or early November. The individual grower, however, has only, at the most, six weeks during this period, within which he must harvest and dispose of his crop. Because of this short harvesting season, the various apple growers compete keenly with each other in selling their apples. It is not uncommon for a grower to sell and deliver processing apples to several of the respondent processors. Fieldmen of the respective respondent processors maintain contact with the growers throughout the year and solicit and urge the growers to deliver apples to the particular respondent processor they represent. Not infrequently, the growers begin delivering apples to the processors before knowing what price they are to receive therefor. The record shows, however, that with apples selling at three dollars and twenty-five cents per hundredweight, a variation of five cents more or less would be sufficient to determine to which processor the particular grower would sell his crop. From this it is evident that the competition among the respondent processors is also keen.

In the Appalachian area processing apples are sold on a graded basis. An inspector from the Federal-State Inspection Service grades the apples for quality and size, using a machine and a sizing ring, and grading representative samples of fruit from one crate of apples for each 100 crates delivered. The grades and sizes accorded these representative samples determine the grades and sizes for the whole load of apples.

In the Appalachian area it is customary for the respondent processors to issue a price scale announcement to the growers, usually late in August or early in September each year, naming the prices which will be paid the growers at respondents' plants for the various sizes, grades, and varieties of processing apples. The price announcements are usually mailed by each processor to all of the growers from whom apples are regularly purchased. It is customary, however, for each respondent processor to purchase apples from a regular group of growers, which are considered its growers. The prices named in the announcement usually prevail throughout the season, and are the minimum prices on which the processor bases his transaction with the grower for all apples purchased. In addition to this minimum price, however, the respondent processors frequently make concessions of various kinds to individual growers, such as furnishing the grower with apple crates or transportation for his apples from orchard to processing plant; storing a portion of his crop; or accepting a higher proportion of culls than that originally announced as acceptable. Such concessions are obviously considerations of value which tend to

augment the minimum price to a greater or less degree, the amount of which varies from grower to grower.

Another factor which tends to result in different rather than identical prices paid to individual growers by respondent processors is the fact that in some years, at the end of the apple-harvesting season, respondent processors have paid bonuses, in varying amounts, to the growers, apparently for the purpose of retaining their good will and assuring themselves of a continuing supply of apples.

BACKGROUND OF APPALACHIAN APPLE SERVICE, INC.

Respondent Appalachian Apple Service, Inc., was organized in 1936 as Appalachian Apples, Inc., and was founded for the principal purpose of advertising and promotion of the sale of apples grown in the States of Maryland, Pennsylvania, Virginia and West Virginia. Although membership is open to anyone contributing over twenty-four dollars per year, control of the organization is vested in its apple-growing members. From 1936 through 1941, it was primarily concerned with the advertising and promotion of the sale of fresh apples.

The grower members in Pennsylvania and West Virginia pay dues directly to the organization, but the growers in Virginia and Maryland contribute indirectly through their State Apple Commissions, which support Respondent Appalachian Apple Service, Inc., by appropriating a portion of an apple tax assessed against growers in those States. In addition to assessments from its grower members, this respondent, over the years from 1937 through 1949, has received financial support from "Allied Industries," which includes concerns related to the apple industry, such as cold storages, processors, dealers, package people, spray material manufacturers and basket or crate manufacturers. Respondent Bowman Apple Products Company, Incorporated was an Allied Industry member from 1942 through 1949. Respondent The C. H. Musselman Company contributed several hundred dollars a year to Respondent Appalachian Apple Service, Inc., from 1936 through 1949. Respondent National Fruit Company, Incorporated contributed five thousand dollars to the support of the organization between 1943 and 1947.

THE MARKETING CLINICS

Respondent Appalachian Apple Service, Inc., usually holds a Marketing Clinic, generally late in August each year, attended by seventy-five to one hundred representative growers, handlers, processors and others from the Appalachian area interested in buying

and selling apples. The function of these clinics is to develop and present information and data concerning all prevailing conditions and circumstances which have any bearing on the marketing of the forthcoming apple crop, such as the size of the prospective apple crop and of particular varieties of apples, the carry-over of canned apple products and the price levels on such products during the preceding year, the general over-all economic outlook, and any other factors which may affect the price structure of general selling of apples.

COOPERATIVE ACTIVITIES DURING WORLD WAR II

During the period from 1942 through 1946, the close relationship and cooperation between Respondent Appalachian Apple Service, Inc., and the respondent processors developed rapidly under the influence of the Office of Price Administration, the United States Department of Agriculture, and the War Food Administration. During this period a committee of growers and processors from the apple industry in the Appalachian area cooperated and rendered advice and assistance to the Government in the promulgation and administration of emergency measures relating to price controls, allocations and set-aside orders for the Armed Forces. These cooperative activities between the growers and processors during this period seem to have resulted in the formation in 1946 of the Joint Grower-Processor Committee of Respondent Appalachian Apple Service, Inc. This committee consists of six grower representatives and six processor representatives. From the time of its organization throughout the period involved in this proceeding, this committee has held periodic meetings at which the various problems of grower and processor have been discussed, including the prices to be paid for raw apples. Carroll R. Miller, the Secretary-Manager of Respondent Appalachian Apple Service, Inc., appears to have been primarily responsible for its formation, and to have been the chief leader in promoting cooperation between grower and processor. From 1949 until the present, all respondent processors have had representation on this committee.

ACTIVITIES FROM 1947 TO 1949

There is considerable evidence in the record concerning the activities of the Joint Grower-Processor Committee during the years 1947 to 1949, and of the efforts of the Secretary-Manager of Appalachian Apple Service, Inc., to promote concerted price-fixing by the respondents. In fact, the activities of the Secretary-Manager during this period seems to have been designed to accomplish un-

lawful concerted price control. There is, however, no reliable, probative or substantial evidence that such an illegal objective was accomplished.

ACTIVITIES IN 1950

The activities of the Joint Grower-Processor Committee and of the respondents, in 1950, relative to cooperative price control present, however, a more serious issue. In fact, it appears that it was such activities which formed the basis for the Commission's decision holding that, at the completion of the presentation of evidence in support of the complaint, a *prima facie* case had been established. Now, for the first time, those crucial facts are being considered in the light of the entire, completed record, including the rebuttal evidence presented by the respondents.

Three meetings of the Joint Grower-Processor Committee were held in 1950. The first was held on August 15th, at which discussions took place concerning the current apple crop, its size in the Appalachian area and throughout the country, competitive crops, the increasing cost of production, available markets for both fresh and processing apples, processors' cost of production, and other subjects, including prices. In view of all the evidence relative to this meeting, and in the light of the subsequent meetings in 1950 at which prices were discussed, the conclusion is compelled that no agreement on price was reached at the meeting on August 15th.

The second of the three meetings in 1950 was held as a marketing clinic. It was attended by a large number of growers and representatives of processors. Various subjects concerning apples were discussed, including prices. It appears that the growers outlined to the processors their difficulty in meeting the cost of producing apples, and did their best to justify asking for a higher price for their apples. On the same day, the six grower-members of the Joint Committee adopted the following resolution:

> After further study of all available information it is the judgment of the 6-man growers' half of The Joint Grower-Processor Committee of this Appalachian Belt that it will take a starting price scale based on not less than $3.50 per hundredweight for Class A, U.S. 1 Canners, 2½ inches up to channel sufficient apples to processing from the present crop; assuming that Class B and lower sizes and grades carry the same dollars-and-cents differentials as last season.

The above resolution, and other evidence relative to the second meeting in 1950, indicate clearly that the growers were merely announcing a desired price, but that no agreement between them and the processors resulted at that time.

The day following the marketing clinic discussed above, the Secretary-Manager of Appalachian Apple Service, Inc., notified the processor-members of the Joint Grower-Processor Committee that the grower-members of the Committee urgently requested a meeting of the full Committee to be held on Saturday, August 26th, at the Shenandoah Hotel in Martinsburg, West Virginia. In response to his summons, the third meeting of the Committee in 1950 was held on August 26th. This meeting was attended by ten persons, including the Secretary-Manager of Appalachian Apple Service, Inc., of the others, five were executive representatives of the processor respondents, one was an executive representative of a processor not a respondent herein, and four were growers. All testified under lengthy examination concerning what occurred there. Although all the witnesses admitted that prices to be paid by the processors to the growers for the forthcoming harvest of apples were discussed, they all denied that any agreement was entered into concerning those prices. Witness Stockdale, a representative of Zero-Pack, a processor not a respondent in this proceeding, who was not, therefore, as directly an interested witness as the others who testified herein, in response to the direct question by the hearing examiner, "What did this meeting accomplish?", stated:

> Nothing, to my viewpoint, except that it has been pretty clearly—I felt, pretty clearly that the growers represented there were telling us that they believed $3.50 was the price; I felt pretty clearly that the ones that stipulated prices of the processors, which mainly was Mr. Hunt, was $3.00, and I left there and when I reported to my office in Cincinnati I told them then, they asked me how I thought the thing would wind up, and I said, "It looks to me like a $3.25 price"; but as to the actual meeting, that was evolved in my own mind out of the various discussions that I heard at the meeting, but to say the meeting, itself, accomplished anything other than to bring forth these points in discussion, I couldn't name any reason for it.

In addition, Witness Hauser, President of Respondent C. H. Musselman Company and representative of that organization on the Committee, testified that the Musselman corporation conducted an orchard survey in the area each year in order to determine the prices to be paid for raw apples, and that such a survey was conducted in 1950, before the meeting on August 26th. This testimony is confirmed by that of two growers. This survey, according to Witness Hauser, indicated that three dollars per hundredweight would be too low a price to be paid for apples, whereas three dollars and fifty cents would be too high. He concluded that the growers would be happy with a price of three dollars and twenty-five cents. As a result of his company's survey, Witness Hauser determined that his company would pay

a top price of three dollars and twenty-five cents per hundredweight, weeks before the meeting on August 26th, and that he had caused his price announcement to that effect to be mimeographed before the date, intending to issue it regardless of the outcome of the meeting. He nevertheless delayed its release in order to see if he could learn anything new from the discussions at the meeting. After the meeting, however, he concluded that he had "hit the nail on the head." This latter testimony is corroborated by another witness, and also by Witness Bigham, who testified for respondents on rebuttal.

All the witnesses who attended the August 26th meeting, as well as all the witnesses who testified concerning the activities of the respondent processors, were unanimous in stating that no agreement was made at the August 26th meeting or anywhere else, by them or by their organizations, with the apple growers of the Appalachian area or with anyone else, concerning the prices to be paid for the 1950 crop of apples.

Tending, by implication, to contradict the above testimony is the fact that shortly after the meeting on August 26th each of the processors issued price announcements identical in all respects for each of the sixteen classes and grades of apples purchased by them, excluding prices for culls. Such uniformity in the prices announced by competing processors following a meeting by them with growers, at which price was one of the principal topics of discussion, suggests that an agreement for the payment of uniform prices had been entered into. On the other hand, before such an inference can be drawn, fairness to respondents requires that consideration be given to all other relevant circumstances. The record shows very clearly that keen competition existed among the few processors located in the relatively small Appalachian apple-growing area, so that a difference of five cents per hundredweight could determine which processor would get a grower's apples. This fact would tend to compel each processor to meet the price of the others, and therefore to result in uniform prices independent of any agreement. The fact, therefore, that uniform prices were announced by the respondent processors, in the light of all the circumstances relevant thereto, does not of itself supply the basis for a trustworthy inference that respondents had agreed on such prices.

Furthermore, the record shows that throughout the season the prices paid by the respondent processors were varied, and that respondent growers received, in many instances, added considerations for their apples over and above the announced price, such as free transportation of apples from orchard to processing plant, storage

facilities, free use of crates, and payment for culls. In addition, Respondent The C. H. Musselman Company paid a season-end bonus to growers, which had the effect of augmenting further the price already received by such growers for their apples. It is also a fact that many growers actually sold their apples to these same processors for prices over and above the announced price. These facts clearly demonstrate that uniform prices were not maintained throughout the season, and also tend to refute the inference that any agreement setting such prices was ever made.

In addition to the fact of uniform price announcements, counsel supporting the complaint insists that the letter written by the Secretary-Manager of Appalachian Apple Service, Inc., on September 2, 1950, to the President of that organization, relative to the meeting of August 26, 1950, should, because it was written contemporaneously with that meeting and before the beginning of this litigation, outweigh the unanimous and uncontradicted testimony relative to such meeting of all the witnesses who had attended the meeting, and testified concerning it. The letter in question is as follows:

> You have the results of last Saturday's Joint Committee session. In general, growers seem satisfied with the scale, so far as I've heard. It was all that seemed justified at the time—and the door was left open for action later if warranted.
>
> The processors were much more co-operative than ever before. We really negotiated with them, for the first time. It is conservative to say that grower organization pushed the price up from $2.75 to $3.25 "top" and pushed the scale up proportionately. If the deal goes well, as it should, by another year we can probably make some headway on these other questions:—the differentials etc.

The above letter, which recites that "we (the growers' organization) really negotiated with them (the processors)" and "pushed the price up from $2.75 to $3.25 'top,'" seems to show, by inference, that an agreement concerning such prices had been reached at the meeting on August 26th. It is necessary, however, in evaluating this letter, to consider the temperament of the writer; the relationship between the writer and the president of the growers' organization, to whom he was writing; and the fact that the writer himself, in testifying, joined in the unanimous denial by all witnesses that any agreement had been reached. The writer of the letter, Mr. Carroll R. Miller, demonstrated by his testimony and demeanor in testifying that he was a voluble type, prone to exaggerate the achievements of the Committee which he had created and the value of his services to his organization. It is reasonable to expect, therefore, that he would, in a letter to his superior, present,

as facts accomplished, the objects which he may have hoped to accomplish at the meeting on August 26th. Although this letter indicates that announcement of higher prices followed the meeting, the letter, like the testimony of its author, is ambiguous as to what caused the higher prices. In view of this ambiguity, and of the unanimous testimony of all the witnesses, who attended the meeting on August 26th that no agreement as to price was there made, the letter cannot be taken as a basis for a conclusion that such an agreement was entered into by respondents.

FIRST CONCLUSION

Considering the entire record, it seems fair to conclude that there is no reliable, probative or substantial evidence therein to support the first allegation of the complaint, that the respondents entered into an understanding, agreement or combination to establish and maintain prices to be paid for raw apples in the Appalachian area.

PRICING FORMULA

The second allegation of the complaint avers that the respondents fixed by agreement a mathematical percentage pricing formula for calculating the prices to be paid for various grades of apples, and price differentials between such grades. The record discloses that in 1943, under the authority of the Office of Price Administration, such a formula was established for raw apples. The record contains, however, no evidence that the respondents, by understanding or agreement, continued the 1943 mathematical percentage formula, or that they ever, by agreement, established any similar formula. Correspondence in the record shows that in 1950 Witness Hunt suggested the adoption of changes in grades of apples rather than in prices; but all members of the Joint Grower-Processor Committee testified that this suggestion was not adopted by their Committee or by the respondents, and that no agreement was made to establish such a formula or scale. Also, Mr. Miller, in his letter to the President of Appalachian Apple Service, Inc., above referred to, states that "by another year we can probably make some headway on * * * the differentials, etc.," thereby tacitly admitting that his Committee had not agreed on differentials.

SECOND CONCLUSION

Accordingly, it must be concluded that there is no reliable, probative and substantial evidence in the record to sustain the second allegation of the complaint.

DIVERSION

The third allegation of the complaint avers that the respondents, by agreement, diverted raw apples from one processor to another for the purpose of maintaining the prices therefor and thus preventing a price-break during a period of over-production in one area and under-production in another. Although it was the normal custom of Pennsylvania processors, year after year, to buy some of their apples in Virginia, the evidence concerning this charge refers solely to the 1950 apple season. During that season, the apple crop in Virginia and West Virginia was unusually heavy, whereas the apple crop in Pennsylvania was unusually light. As a result, it appears that the two respondent processors located in Pennsylvania, The C. H. Musselman Company and Knouse Foods Cooperative, Inc., were not receiving as many apples as they could normally process, whereas the respondent processors located in Virginia and West Virginia, particularly Respondent National Fruit Products Company, Incorporated, were receiving raw apples in excess of their normal and expected needs.

Witness Hunt, Vice-President of Respondent National Fruit Product Company, Incorporated, explained that under such circumstances it would have been simple for his company to curtail its purchase of apples, but that such action would have resulted in a serious loss of the goodwill of the growers. According to his explanation, respondent processors regard the growers from whom they buy regularly each year as "their" growers, and attempt to "take care of" these regular suppliers. Growers will not sell to a processor in a lean year if that processor does not buy all the apples they have to offer him in a year of abundance. Accordingly, Witness Hunt's company concluded that it was facing a serious problem. It must either buy more apples than it could economically process, or it must sacrifice the goodwill of its grower-suppliers. Not wanting to adopt either of these alternatives, Witness Hunt requested the Secretary-Manager of Appalachian Apple Service, Inc., to call a meeting of the grower representatives to discuss "the market situation." In response to that request, a meeting of the Joint Grower-Processor Committee was held on October 23, 1950, at Hagerstown, Maryland.

At this meeting, Witness Hunt described the market situation to those present and suggested that his company pay to the growers selling to it fifty percent of the announced price on delivery, with the understanding that if all of the processed apples could be marketed at the current price, the remaining fifty percent would

be paid, but if the price for processed apples declined, the growers would get proportionately less than the announced price. Witness Hunt characterized this proposal as a "trial balloon" to ascertain the reaction of the growers. When that reaction proved to be definitely adverse, the suggestion was abandoned. Thereupon representatives of Respondent Processors Knouse Foods Cooperative, Inc., and The C. H. Musselman Company observed that the crop in Pennsylvania was light and that they could handle more apples, to which the growers responded that it looked as if the thing to do was to send some of their fruit up to Pennsylvania. With regard to this suggestion, Witness Hunt testified, "Now we were no party to that agreement." It is obvious that his use of the words, "that agreement," refers to the suggestion recited above rather than to any agreement in the sense of mutually-exchanged promises among the parties; and his further testimony explains his meaning and the dilemma in which his company found itself, as follows:

> We could not say, "Don't send your fruit up there." And we couldn't agree to it. I would be foolish to say to a grower, "Well, you take your fruit up there," because next year—I am going to put you in a grower position again—suppose that I would say to you, "Well, I am sorry, we can't take any more of your fruit. You haul it up into Pennsylvania." Then next year if it was a short crop, and for your information traditionally we have a short crop following a large crop for the reason that the York Imperial which is the variety that we use in the largest volume is a biennial bearer and if I said to you in 1950, "Sorry, we can't take any more of your fruit; you haul it to our competitor up in Pennsylvania," and then we came to 1950 and the crop was short, which by all the laws of averages it should be, and we got in a competitive situation fighting for fruit, and I went to you and you would say, "Well, you didn't take care of my fruit last year; I am going to give it to the other man." We did not want to be in that position. So as a result, after the meeting we went home and the following day we went into a huddle as to what to do.
>
> We decided this: to borrow more money and continue taking apples.

Finally, rather than risk losing the good will of their regular grower-suppliers by refusing to purchase more of their apples, Respondent National Fruit Product Company, Incorporated borrowed a million, seven hundred fifty thousand dollars and purchased more apples for processing in order to avoid diverting apples to other processors, and, but incidentally, lost money on the transaction.

One of the growers who attended the meeting testified that he thought some of the Virginia apples were delivered thereafter to Pennsylvania processors, but could not say definitely that this was true.

Following this meeting, the Secretary-Manager of Appalachian Apple Service, Inc., issued a bulletin, on October 24, 1950, in which he reported upon the October 23rd meeting as follows:

NOT FOR PUBLICATION: FOR MEMBERS' USE ONLY.

SOME VIRGINIA CANNERS ARE FILLING: PENNSYLVANIA CANNERS NEED FRUIT:

In 1949, "the apple crop was in Pennsylvania." This year, the apples are in The Virginias. The crop in The Virginias has been notably increased by the ample late rains; and percentage of packed fruit has been reduced by russeting. A result of this is that several Virginia processors in the heart of the Virginia production have received apples beyond early-season expectations, and are approaching the limits of what they feel they can accept, hold either in storage or otherwise, and process and sell. When this limit is reached, they expect to shut off acceptance of apples, except those previously contracted for.

Larger Pennsylvania processors, in the midst of Pennsylvania's short crop (which seems, as short crops do, to be getting smaller) are not facing this situation; will need a considerable volume of apples from south of The Potomac. This is the reverse of 1949, when Virginia processors, in the middle of a short Virginia crop, took considerable fruit from Pennsylvania's large crop.

The above is the result of a conference of The Joint Grower-Processor Committee for Appalachia, held Monday at Hagerstown. Several Virginia processors noted that their pack-out so far was larger than ever before at the same period; that their cold-stored apples, for later use, were far above any previous holdings; that they are approaching the volume of pack, in both sauce and slices, that they feel can be well sold; and when that point is reached, they must stop acceptance of any fruit not previously contracted for.

Pennsylvania processors, in the middle of a light-crop area, have no such inventory of stored fruit nor of their finished product; and indications are that, by and large, they will be in the market for sufficient apples to "take up the slack" of Virginia's processable fruit.

The above bulletin appears to be self-explanatory. It sets forth the condition of the apple crop in the entire Appalachian area, and the situation of the processors with regard to the amount of apples they would be able to process. No mention is made of any agreement to divert apples from Virginia to Pennsylvania. In fact, the report states that the "* * * indications are that, by and large, they (the Pennsylvania processors) will be in the market for sufficient apples to 'take up the slack' of Virginia's processable fruit." Such a statement does not reflect an agreement to divert, nor does it constitute a diversion. Contrariwise, it appears to be a simple statement of existing market conditions and an exposition of the needs of the processors in the Appalachian area, for the information of all concerned. Furthermore, it would appear that in making such a statement, the Secretary-Manager of Appalachian Apple Service, Inc., was merely performing the function for which his organization was created, namely, the advertisement and promotion of the sale of apples. The only fair inference which can be

drawn from this document is that it does not warrant the conclusion that respondents agreed to divert, or actually did divert, any apples from Virginia to Pennsylvania.

A search of the record fails to reveal any reliable, probative or substantial evidence that any Virginia or West Virginia apples were actually delivered to any respondent processor in Pennsylvania as a result of agreement among the respondents, or for any other reason.

THIRD CONCLUSION

Accordingly, it must be concluded that the third allegation of the complaint, with respect to diversion of raw apples for the purpose of maintaining prices, is not supported by any reliable, probative or substantial evidence.

FINAL CONCLUSION

In the light of the entire record, it appears that, for the reasons hereinabove set forth, the complaint herein should be dismissed. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

Per Curiam:

The hearing examiner's initial decision on the merits provides for dismissal of the complaint. Counsel supporting the complaint has appealed from that decision and the case is presented here on the appeal, briefs in support of and in opposition thereto and oral arguments of counsel.

The complaint under which this proceeding was instituted charges the respondents with entering into an unlawful understanding and combination to restrain trade and interstate commerce in raw apples produced and processed in an area known as the Appalachian Belt comprising Virginia, West Virginia, Pennsylvania and Maryland. It further charges that, in effectuating their alleged combination and agreement, the respondents engaged in a planned common course of action for, among other things, fixing, stabilizing and maintaining the prices paid by the respondent processors to the growers. Named as parties are five corporations engaged in processing apples in the area and Appalachian Apple Service, Inc. The latter is a trade association and its membership has included more than 1,700 growers, who control its activities, and a number of the area's canners including the respondent processors.

Among the evidentiary matters relevant to the complaint's allegations of unlawful fixing of purchase prices for apples and dis-

cussed in the initial decision were those relating to certain meetings held in the fall of 1950. In August of each year, the respondent Appalachian Apple Service, Inc., sponsors a clinic for exchanging market information on the forthcoming apple crop which is attended by growers, processors and handlers. Its Joint Grower-Processor Committee consists of six grower members and six representatives of processors. In 1950, all of the respondent processors were represented on the committee. During the clinic held on August 23, 1950, the grower members of the Joint Grower-Processor Committee met separately and adopted a resolution to the effect that, on the basis of available market information, it was their judgment that a starting price scale of $3.50 per cwt. would be necessary to channel sufficient apples to processors. The committee convened on Saturday, August 26, and the growers' resolution was presented and discussed. On Monday, August 28, one of the respondent processors issued a top price announcement of $3.25 per cwt., f.o.b. factory, with proportionately lower prices for other sizes, grades and classes of apples; and the others on August 29, 30, and 31, and September 1, announced prices identical thereto.

Growers and processors' representatives who attended the meeting have testified that no pricing agreements were entered into there or elsewhere. The initial decision recognized nonetheless that the announcements of uniform prices by the respondent processors shortly after meetings where price was the principal topic of discussion indicated and suggested that the prices may have been adopted as a result of agreements and understandings. It concluded, however, that findings of collusive agreements were not warranted when due weight was accorded to evidentiary matters negating inferences of agreement.

One evidentiary matter cited by the hearing officer as tending to refute conclusions of collusion by the processors in promulgating their price announcements is the testimony indicating that respondent, The C. H. Musselman Company, had determined after an orchard survey and sometime prior to the meeting of August 26, to pay a top price of $3.25. Mimeographing of its announcement was completed prior to the meeting, and, according to a company official, its release was intended following the meeting irrespective of what occurred there. Various matters are cited in support of the appeal's contentions that this testimony was in part misrepresented in the initial decision and should be disregarded. We deem these exceptions to be without merit, however, and think the hearing examiner's evaluation of this aspect of the evidence was substantially correct.

It also was concluded in the initial decision that payments or allowances above the announced prices were received by apple growers throughout the season, and that uniform prices were not maintained by respondent processors during that period. The appeal states that the hearing examiner should have found instead that the prices were adhered to and that there was no showing in the record as to how often or to what extent the respondent processors may have departed from their announced terms. There can be no question but that a substantial amount of fruit was bought by the respondent processors at their announced opening prices. However, one of the respondent processors paid a bonus of approximately $75,000 at the end of both the 1949 and 1950 seasons; and there is substantial evidence showing that this concern frequently accorded special allowances for hauling and handling when purchasing its apples. Moreover, the testimony of various growers is to the effect that allowances and concessions as to handling, culls and other price-related matters were made available by various other respondent processors.

In this situation we perceive no substantial error in the hearing examiner's findings to the effect that pricing departures were general; and, when considered with related evidentiary matters, we share the initial decisions view that there is inadequate record support for conclusions that such uniformity as did exist with respect to purchase prices indeed resulted from agreements to maintain uniform prices. Those pricing departures tend also to refute inferences that the announced prices were originally established through processors' collusion.

Additional allegations of the complaint charge that respondents have unlawfully fixed and maintained a mathematical pricing formula for establishing price differentials between the various grades of fruit and that they diverted raw apples from one processor to another for maintaining their allegedly collusive prices. These allegations and the evidence pertinent thereto are closely related to the previously discussed price fixing charge, and we find no error in the initial decision's conclusions that these additional charges likewise lack adequate record support.

This case previously was considered by the Commission on an appeal from an initial decision rendered when the presentation of evidence in support of the case in chief was concluded. The Commission then held that a prima facie case had been established and remanded the matter for further appropriate proceedings. The appeal argues that the evidence received after the remand fails to rebut the evidentiary matters originally received into the record

and held by the Commission to establish a prima facie case and that the initial decision is in erroneous conflict with the Commission's earlier interlocutory decision.

After the remand approximately 400 pages of evidence was received and thirteen witnesses appeared before the hearing examiner. In addition to testimony by growers, which is relied on by respondents as evidence that price competition existed on the processors' purchase of fruit, the rebuttal matters include statements relative to bonus payments by a respondent processor in certain years and policies adopted by other processors in purchasing fruit. The hearing examiner manifestly gave weight to these evidentiary matters in reaching conclusions to the effect that the greater weight of the evidence does not support findings of unlawful combination and collusive action by the respondents. Not only was that evidence in major part relevant to the issues, but it obviously tended to place the evidentiary material previously received in its proper perspective and to corroborate certain factual aspects adverse to the position adopted earlier in the proceeding by counsel supporting the complaint. We do not construe the initial decision to be in erroneous conflict with the Commission's prior interlocutory decision on the basis of the present record.

The appeal is denied and the initial decision affirmed.

Commissioners Secrest and Kern did not participate in the decision herein.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having come on to be heard upon the record including the briefs and oral arguments of counsel, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Commissioners Secrest and Kern not participating.

451524—59——70

IN THE MATTER OF

YARDLEY OF LONDON, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (e) OF THE CLAYTON ACT

Docket 6442. Complaint, Nov. 8, 1955—Decision, Apr. 19, 1956

Consent order requiring a manufacturer of soaps, cosmetics, perfumes, etc., with principal place of business in Union City, N. J., to cease discriminating in price in violation of Sec. 2 (e) of the Clayton Act through furnishing demonstrator services or allowances to some customers, when not according such services on proportionally equal terms to all their competitors.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. Donald K. King for the Commission.
Appell, Austin & Gay, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that Yardley of London, Inc., hereinafter designated as respondent, has violated and is now violating provisions of Subsection (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Yardley of London, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 620 Fifth Avenue, New York, New York. It also maintains plants and warehouses at Union City, New Jersey, Chicago, Illinois, Dallas, Texas, and San Francisco, California.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of manufacturing and selling soaps, cosmetics, perfumes, beauty aids and toilet preparations. Respondent divides its products into four different categories or lines as follows: The "A" line which is its general line of merchandise; the "B" line, consisting of skin treatment creams and allied products; the "Flair" line, consisting of perfume, bath oil and dusting powder; and the "Lavanesque" line, a perfume and toilet water preparation marketed under the brand name of "Lavanesque." These various lines are sold by respondent to some 12,000 retail customers with places of business located throughout the several

States of the United States and the District of Columbia for resale to consumers within the United States.

PAR. 3. In the course and conduct of said business respondent has engaged in commerce, as "commerce" is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped its products or caused them to be transported from its said places of business to said customers with places of business located in the several States of the United States and the District of Columbia.

PAR. 4. In the course of said business in commerce respondent has furnished, contracted to furnish, or has contributed to the furnishing of certain services and facilities to some of its customers in connection with the processing, handling, sale or offering for sale of respondent's products by them; and respondent has not made such services and facilities (or in the alternative, equivalent payments or allowances) available on proportionally equal terms to all other of its customers competing in the sale and distribution of said products.

PAR. 5. In dealing with its customers respondent furnished or contracted to furnish demonstrator services or allowances to some competing customers in amounts (based on respondent's costs) not equal to the same percentage of net purchase of respondent's products by such customers (and not proportionally equal by any other test); and respondent did not offer or make available such services (or in the alternative equal promotional allowances) in amounts equal to the largest of such percentages to all competing customers (and not proportionally equal by any other test).

PAR. 6. Specifically during the year 1954 respondent paid to each of its customers selling the A line a promotional allowance in the amount of 6% of such customer's annual net purchases in excess of $860 (all A line accounts are furnished sales aids having a value equal to 6% of annual net purchases up to $860) with the exception of those customers selling both the A and B line.

Respondent paid allowances for or furnished to its customers selling both the A and B line a sales person (known in the cosmetic industry as a demonstrator) at a cost to respondent of $50 for salary a week plus a 5% commission on B line retail sales and a 2% commission on A line retail sales. As a condition to the receipt of demonstrator services such customers were each required to waive the 6% promotional allowance hereinbefore described. Allocation of the demonstrator's salary on the basis of ratio of percentage of such customer's retail "A" line sales to its total "A" & "B" line sales, together with the other promotional allowances applicable to the "A" line merchandise results in a number of such customers re-

ceiving larger contributions for the promotion of the "A" line than competing customers, who sold only the "A" line, received.

For example, in the Washington, D. C., trading area the only account handling both the A and B lines received a combination of promotional and demonstrator services and allowances at a cost to respondent equaling 16.1% of that account's A line purchases while respondent's other accounts which carried only the A line received from respondent promotional allowances equaling 6% of net purchases as is shown in the following computation:

	"A" and "B" account	"A" account
Net purchases on "A" line merchandise	$9,782.00	$11,349.69
Display material furnished on basis of 6 percent of $860 worth of "A" line merchandise	51.60	51.60
6 percent allowance on purchases over $860		629.38
2 percent commission on retail sales of "A" line merchandise	308.92	
Allocated portion of demonstrator's salary	1,211.87	
Total allowance	1,572.39	680.98
Percent of allowances to net purchases	16.1	6.0

Similarly, in the Chicago, Illinois, trade area, the one A and B line account received 12.9% as is shown in the following computation:

	"A" and "B" account	"A" account
Net purchases on "A" line merchandise	$13,376.00	$2,754.80
Display material furnished on basis of 6 percent of $860 worth of "A" line merchandise	51.60	51.60
6 percent allowance on purchases over $860		133.69
2 percent commission on retail sales of "A" line merchandise	432.87	
Allocated portion of demonstrator's salary	1,239.68	
Total allowance	1,724.15	165.29
Percent of allowances to net purchases	12.9	6.0

PAR. 7. The acts and practices of the respondent as above alleged violates Subsection (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C., Title 15, Section 13).

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on November 8, 1955, charging it with a violation of subsection (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

After the issuance of said complaint and the filing of its answer thereto, the respondent entered into an agreement with counsel supporting the complaint, dated February 6, 1956, providing for

the entry of a consent order disposing of all the issues in this proceeding, which agreement was duly approved by the Director and the Assistant Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

By said agreement respondent's answer to the complaint shall be considered as having been withdrawn and the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the said agreement. Respondent in the agreement expressly waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the said agreement. It was further agreed that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint and Rule 1 (VII) of the Amended Trade Practice Rules for the Cosmetic and Toilet Preparations Industry, promulgated September 10, 1954, (Title 16 C.F.R. 221.1 (g)) may be used in construing the terms of the order.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Yardley of London, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 600 Palisades Avenue, Union City, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, which is in the public interest, and of the respondent hereinabove named; the complaint herein states a cause of action against said respondent under the provisions of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Section 13).

ORDER

It is ordered, That respondent, Yardley of London, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the sale or offering for sale, of cosmetics, beauty aids, and toilet preparations in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist from:

Furnishing or contributing to the furnishing of demonstrator services to any purchaser of its products when such services are not accorded on proportionally equal terms to all other purchasers who resell such products in competition with purchasers who receive such demonstrator services.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner, as corrected by his order filed March 26, 1956, shall, on the 19th day of April 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

HAYR CHEMICAL CO., INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6157. Complaint, Jan. 21, 1954—Decision, Apr. 24, 1956

Order requiring sellers in Newark, N. J., to cease representing falsely in advertisements in newspapers and magazines that the blocking of hair follicles with foreign matter was a cause of diminished hair growth, excessive hair loss, baldness, and dandruff; and that removal of the foreign matter by use of their "Hayr Application for the Scalp and Hair" would correct such conditions and cause hair to grow on bald or partially bald heads.

Mr. Jesse D. Kash, *Mr. William M. King* and *Mr. John J. McNally* for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for Hayr Chemical Co., Inc., Phillip Kalech, Nathan Kalech and Myrtle L. Larsen.

Harkavy & Lieb, of Newark, N. J., for Arthur W. Herrigel, assignee of assets.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, including additions to proposed findings and conclusions submitted by counsel in support of the complaint, and the hearing examiner having considered the matter and being now fully advised in the premises makes the following findings as to the facts and conclusions drawn therefrom and order:

1. Respondent Hayr Chemical Co., Inc., is a corporation organized under the laws of the State of Delaware, having its office and principal place of business located at 304-306 Mt. Pleasant Avenue, Newark, New Jersey. Respondents Phillip Kalech, Nathan Kalech and Myrtle L. Larsen were, at the time of the filing of the complaint herein, officers of said respondent corporation. Respondent Dr. Joseph Caspe immediately prior to September 1953 was also an officer of said respondent corporation, but at that time severed his connection with said respondent corporation and did not file an answer or appear in this proceeding. Respondent Louis F. Herman is an individual, trading as Louis F. Herman Advertising Agency. Respondent Eugene Kesselman is an individual who placed advertising material submitted by the officers of the respondent

corporation through respondent Louis F. Herman Advertising Agency, which advertising was placed in three newspapers—the New York Sun News, New York World Telegram and the Chicago Sun Times. During the trial of this proceeding respondent Phillip Kalech departed this life and his death was duly suggested on the record in this proceeding.

2. The corporate respondent and its officers have been engaged in the sale and distribution, in interstate commerce, of a drug and cosmetic preparation for the hair and scalp designated "Hayr Application for the Scalp and Hair," which will hereinafter be referred to as "Hayr." The formula and directions for use of said product "Hayr" are as follows:

Formula:

50% Isopropyl Alcohol Extract of Non-Alkoloidal Botanicals, Worm Wood Herb, Chick Weed Herb

Ingredient	Percent
Water	48.400%
Isopropyl Alcohol	48.800%
Thyroid Powder	0.035%
Resorcin	0.650%
Oleic Acid	0.750%
Neutronyx 333	0.350%
Natural Oil of Cade	0.050%
Lactic Acid U.S.P. 85%	0.820%
Perfume	0.145%
	100.000%

Directions for use:

Apply daily, place finger tips on head, moving scalp in circular motion for one minute. Shampoo weekly.

3. The ingredients of respondents' preparation, with the exception of thyroid powder, have been generally used by dermatologists in various combinations for the treatment of conditions of the skin and scalp. Thyroid powder is usually administered by mouth to control the secretions of the thyroid gland. It is of no value when administered externally because of the inability of penetration and further because the glands in the scalp have nothing to do with the thyroid, which is a gland of internal secretion, and the glands in the scalp are sebaceous glands.

4. In the course and conduct of the business of corporate respondent, respondents have disseminated and caused the dissemination of, various advertisements concerning said drug and cosmetic preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements inserted in various newspapers and magazines for the purpose of inducing and which were

likely to induce, directly or indirectly, the purchase of said drug and cosmetic preparation; and respondents have disseminated and caused the dissemination of advertisements concerning said drug and cosmetic preparation for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drug and cosmetic preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. In the advertising disseminated by the respondents it was represented that dirt, grime, oil secretions and bacteria become imbedded in the scalp, forming a tough, gummy film which plugs the hair follicle preventing normal functioning of the glands and causing hair loss, dandruff, itching scalp, and eventual baldness; that the use of respondents' preparation "Hayr" would remove the accumulations of such material from the scalp and hair follicles, increase hair growth, prevent excessive hair loss, eliminate dandruff and cause hair to grow on bald or partially bald heads.

6. In their defense to this proceeding the respondents introduced evidence designed to support their contention that baldness is caused by the plugging of the hair follicle and that in some mysterious way their preparation was effective in removing such plugs and permitting the hair to grow.

7. The first expert witness called by the respondents was a specialist in dermatology in Chicago. He attempted to give lip service to respondents' theory of plugging, but only to the extent where such plugging is caused by a diseased condition of the scalp, where either the hair follicle or the sebaceous glands have become infected and inflamed, causing an improper functioning of the sebaceous glands, resulting in a condition known as folliculitis or inflammation of the hair follicle. In this connection this witness contended that inflammation of the sebaceous glands causes a thickening and congealing of the sebaceous oil that is within the hair follicle itself, which congealed material continues to thicken and to some extent to obstruct the follicle. While this witness testified that the cause of premature baldness was not known and was affected by heredity, age and metabolism, he nevertheless attempted to give externally caused "infection" a major role as a causative factor of baldness. While supporting the plugging theory, this witness also testified that dust and grime on the scalp would not penetrate the hair follicle and that unplugging of the follicle would not in itself cause hair to grow. In the absence of infection it would appear from the testimony of this witness, that the scurf and scum which serves as a basis of respondents' theory of baldness, could be removed by ordinary hygiene.

8. The second expert witness for the respondents, a dermatologist located in Newark, New Jersey, attempted to place a larger cause of hair loss upon scurf and scum present on the scalp. He claimed to have used this preparation with satisfactory results on a number of patients whose case histories he failed and refused to produce although he had promised to produce these records. This witness, who was partially bald, claimed to have used the preparation on his own head with satisfactory results, although these results were not readily discernible to the hearing examiner. On the basis of his limited experience, covering a period of five or six months, this witness was very emphatic on the effectiveness of the product "Hayr" and asserted that respondents' preparation, because of the mixture of the ingredients, has an unusual and unexplained buffering action which causes the various ingredients to become more effective than when ordinarily used by other competent physicians, but that he did not know how this buffering action took place but based his testimony entirely upon information given to him by the chemist employed by the respondents. In attempting to explain the penetration of the thyroid powder the witness used what might be termed a certain amount of medical jargon in stating that respondents' preparation is buffered to a clinical pH or a pH of an "isoelectric pH of the skin" neutralizing the "dielectric set-up by the skin." The theories advanced by this witness were completely disproved by a rebuttal witness, J. H. Draize, a well-qualified pharmacologist. After observance of this witness on the witness stand and noting his testimony, the hearing examiner is of the opinion that his testimony is not worthy of consideration and has no value as probative evidence in this proceeding.

9. The third expert witness called by the respondents was their medical advisor, formerly a professor of pathology at Temple University, who had a fine head of skin with a narrow border of fringe connecting the ears. He stated that he was no longer concerned with appearance of his head and for that reason did not attempt to use the product "Hayr" to accomplish any hirsute adornment for his scalp. While not a dermatologist and although his experience with dermatology of the scalp was limited to his connection with respondents, he attempted to testify generally as to the theory of plugging of the hair follicles, but did not go into the so-called buffering action of respondents' preparation. He attempted to draw certain conclusions from enlarged photographs of slides. These conclusions were completely dissipated by a witness called in rebuttal, Dr. Hans Elias, a professor of anatomy of the Chicago Medical School whose chief field was microscopic anatomy and histology.

10. In the case in chief in support of the complaint, three well-qualified physicians were called who were specialists in dermatology, and they were all in agreement that the plugging of the hair follicle is not one of the causes of baldness; that dust, grime and dandruff scales would not penetrate the hair follicle sufficiently to cause any obstruction; that the hair had the ability to force its way through obstructions; and that the use of respondents' preparation, while effective in the temporary removal of dandruff scales and the clearing up of certain scalp conditions because of its antiseptic properties, would not be effective in preventing hair loss or in causing hair to grow on bald or partially bald heads.

11. The most frequent type of baldness or partial baldness, accounting for from 90 to 95 percent of all cases and constituting the type at issue in this proceeding, is alopecia prematura, sometimes referred to as "male pattern baldness." The exact cause of this condition is not definitely known to the medical profession. It is believed, however, that this condition results from the interaction of three causative factors, namely, age, heredity and endocrine imbalance. According to the overwhelming weight of the reliable, probative and substantial evidence of this record, it is found as a fact that there is no cure, effective treatment, remedy or relief known to medical science for this type of hair loss. Respondents' preparation used as directed, or otherwise, or any other preparation consisting of the same or similar ingredients will accordingly have no effect whatsoever on cases of baldness or partial baldness of this type. The remaining 5 to 10 percent of the cases of baldness or partial baldness are outward manifestations of certain diseases, such as syphilis or conditions such as trauma. In the majority of such cases, when the disease or such underlying condition has been cured or has run its course, the outward manifestation of loss of hair disappears. Respondents' product used as directed, or otherwise, or any other product consisting of the same or similar ingredients will have no effect whatever upon cases of baldness or partial baldness that are outward manifestations of such diseases or conditions.

12. The hair on the scalp consists in the main of terminal hair and also of lanugo hair, which forms of hair differ greatly from each other. Though terminal hair is thicker and harder, has body texture and pigment, grows to a greater length and has a longer life, lanugo or fuzz is softer, downier, finer, colorless, unpigmented, grows to a short length only and has a much shorter life. Lanugo is not true hair and it rarely gets beyond the stage of fuzz, is of short duration and never develops into true hair. It is not at all an

unusual occurrence for new lanugo growth to occur on bald scalp areas, particularly when the scalp has been irritated by such means as light, massage, sunburn or chemicals. Such newly stimulated lanugo growth is of particularly short life, lasting up to about six or eight weeks as a rule.

13. Respondents' preparation is mildly irritating to the scalp, particularly when applied with massage as directed. As a consequence thereof it may, in some instances, like scalp irritants, result in new lanugo growth. It has never resulted in new hair growth nor can it ever do so. The lanugo growth caused by the irritant properties of respondents' product undoubtedly accounts for the fuzz sometimes seen on the hopeful prospect's head after use of respondents' preparation.

14. In addition to the expert testimony, the respondents introduced a number of individuals having varying degrees of baldness who claimed to have used respondents' preparation with success. These varied from a shining pate resembling a ripe tomato to partial frontal baldness. The Commission in turn introduced a number of witnesses with varying degrees of baldness who claimed to have used respondents' preparation without any appreciable effect. A number of these individual users testified to the presence and disappearance of fuzz on the head.

15. Respondent Nathan Kalech, president of respondent corporation, testified that through the use of the preparation he had been successful in growing curly hair, bushy hair and thick hair on stone-bald individuals. None of the witnesses produced, however, could qualify for any more than a bald pate so far as the examiner could ascertain. In fact, Mr. Kalech himself had a bald ring on the crown of his head which he covered by combing back the hair from the front instead of growing hair with his own preparation.

16. Based upon the testimony of the witnesses in this proceeding, it is apparent that the respondents mixed a certain amount of psychology with the irritating properties of the preparation. They advertised for individuals, sometimes offering a supply of "Hayr" for the working of a puzzle. When the individual called at their place of business they gave him a bottle of respondents' preparation and asked him to come back for examination at periodical intervals, usually about the time that the first bottle would be used. It was explained to the individual that when his hair began to grow it would be immediately adjacent to the existing hair line and would gradually proceed over the bald area. When the subject called at respondents' place of business for a check-up, he was then placed under a very bright light and a number of persons would

then examine his head and become enthusiastic over the hair growing, particularly along the hair line, and fuzz appearing at various portions of the scalp. The witness was then asked to see for himself, and under the bright light would see hair or lanugo, some of which had probably gone unnoticed by him prior to his approach to the respondents. While the subject was in the state of enthusiasm and was convinced that he was growing hair, he was then requested to sign a questionnaire stating what the condition of his hair was and whether the product was growing hair. By this means a number of questionnaires were obtained from individuals stating that the product was growing hair, when, in fact, they were seeing hair which they already had and had not noticed, and also were seeing lanugo which after a short period of time would disappear.

17. Based upon the appearance of the witnesses, their demeanor on the witness stand, and considering their testimony in connection with other testimony in this proceeding, the hearing examiner is of the opinion that none of the consumer witnesses produced by the respondents had been successful in growing hair through the use of respondents' preparation.

CONCLUSIONS

1. The advertisements disseminated by the respondents as herein found were misleading in material respects and constituted false advertisements as that term is defined in the Federal Trade Commission Act.

2. The use by the respondents of said advertisements containing materially misleading statements and misrepresentations has had and now has the tendency and capacity to mislead a substantial number of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce the purchase of substantial quantities of said preparation because of such erroneous and mistaken belief.

3. The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

4. The participation of the respondents Louis F. Herman and Eugene Kesselman in the acts and practices hereinabove described is not such as would warrant a finding that said respondents had disseminated false advertisements in violation of the Federal Trade Commission Act.

5. The death of Phillip Kalech during the course of these proceedings having been suggested upon the record, the complaint should be dismissed as to this respondent.

ORDER

It is ordered, That the respondents Hayr Chemical Co., Inc., a corporation, and its officers, and the individual respondents Dr. Joseph Caspe, Nathan Kalech and Myrtle L. Larsen, and their respective representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of a drug and cosmetic preparation designated "Hayr Application for the Scalp and Hair," or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(*a*) that the plugging of hair follicles with foreign matter is a cause of diminished hair growth, excessive hair loss or baldness.

(*b*) that the removal of foreign matter from the hair follicles by the use of respondents' preparation will correct a cause of diminished hair growth, excessive hair loss or baldness.

(*c*) that the removal of foreign matter from the hair follicles by the use of respondents' preparation will increase hair growth, prevent excessive hair loss or baldness.

(*d*) that the use of respondents' preparation as directed or otherwise will cause hair to grow on bald or partially bald heads.

(*e*) that the use of respondents' preparation has any effect upon dandruff other than the temporary removal of dandruff scales.

2. Disseminating or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 of this order.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Phillip Kalech, Louis F. Herman, and Eugene Kesselman.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The date on which the hearing examiner's initial decision in this matter would have otherwise become the decision of the Commission under § 3.21 of the Commission's Rules of Practice having been

stayed by order issued March 1, 1956, for the reason that service of said decision had not been effected on all the parties; and

It appearing that service of said document has now been completed; and

The Commission being of the opinion that the aforesaid initial decision is adequate and appropriate to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed January 16, 1956, did on April 24, 1956, become the decision of the Commission.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order contained in said decision.

IN THE MATTER OF

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6237. Complaint, Oct. 14, 1954—Decision, Apr. 24, 1956

Order requiring an insurance company with principal place of business in San Antonio, Tex., selling eight types of life, health, and accident policies through agents in 14 States, to cease misrepresenting the benefits of its policies through statements in brochures and application forms sent to its agents and used by them in selling the policies.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Robert R. Sills, *Mr. William R. Kearney* and *Mr. Joseph Callaway* for the Commission.

Boyle, *Wheeler*, *Gresham*, *Davis & Gregory*, of San Antonio, Tex., for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 14, 1954, issued and subsequently served upon respondents, The American Hospital and Life Insurance Company, a corporation, its complaint, charging said respondent with the use of unfair and deceptive acts and practices in commerce in the sale of health and accident insurance policies, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, respondent filed its answer and, in conjunction therewith, a motion for dismissal of the complaint on the ground that the Commission is without jurisdiction in the matter. This motion having been denied by the hearing examiner duly designated in the complaint, for the reason that the question of jurisdiction could be resolved satisfactorily only after the submission of evidence, certain testimony and other evidence in support of the allegations of the complaint were introduced before the hearing examiner and were duly recorded in the office of the Commission. No further evidence having been presented by respondent, the matter was considered by the hearing examiner upon the complaint, respondent's answer thereto, the testimony and evidence, proposed findings as to the facts and conclusions presented by counsel, and additional motions for dismissal, filed by respondent, and the hearing examiner, on

December 8, 1955, filed his initial decision in which he ordered that the complaint be dismissed.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint filed an appeal from said initial decision, and, the Commission, after considering said appeal, respondent's brief in opposition thereto, oral arguments of counsel, and the entire record herein, rendered its decision granting the appeal and vacating and setting aside the initial decision.

Thereafter, this matter came on for final consideration by the Commission, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order, which, together with the aforesaid decision on the appeal shall be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

1. Respondent, The American Hospital and Life Insurance Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at Pecan & St. Mary's Streets in the City of San Antonio, State of Texas. Said respondent is authorized by charter to engage in, and it does engage in, the business of life, health and accident insurance. It is licensed to conduct such business in the States of Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. Respondent's life insurance business is not involved in this proceeding.

2. Respondent maintains a substantial course of trade in commerce, as that term is defined in the Federal Trade Commission Act, in health and accident insurance, issuing policies to purchasers thereof located in each of the fourteen States in which it is authorized to do business. Among the policies so issued are those for individuals and family groups identified by respondent as follows:

(1) American Family Accident Policy, Form A (1).

(2) American Standard Accident Policy, Form ASA.

(3) All American Accident Policy, Form AAA.

(4) Income Protection Policy, Form A&H3.

(5) Business and Professional Men and Women's Income Policy, Form BPI.

(6) Preferred Individual Hospital and Surgical Insurance Policy, Form PRI.

(7) American Economy Hospital and Surgical Insurance Policy, Form AE Rev.

451524—59——71

(8) All American Automobile Accident Policy, Form AAAA. The substantiality of respondent's business is indicated by the fact that its premium receipts from its health and accident insurance business during the year 1953 was $4,835,523.05 and during the year 1954 was $5,009,184.47.

3. Respondent's health and accident insurance business is conducted through agents in the various States in which respondent is licensed. When an agent in any State other than Texas secures an application for a policy, the application is sent through the mail by the agent to respondent's home office in San Antonio, Texas, where the policy is issued. The policy is then mailed back to the agent in the other State for delivery to the purchaser.

4. A substantial number of persons who have purchased policies of health and accident insurance from respondent while living in States in which respondent was licensed to do business have later moved into States in which respondent was not so licensed. It is respondent's practice in such cases to mail to such insureds or policyholders premium notices and receipts and to receive from them premium payments renewing the coverage afforded by their policies. Premium payments so received by respondent from States other than those in which it was licensed to do business for the year 1953 amounted to $47,305.72, and for the year 1954 amounted to $78,-417.89. To this extent respondent is regularly engaged in commerce with residents of States other than those in which it is licensed to do business.

5. In connection with and to promote the sale of each of the policies listed in paragraph 3, above, respondent prepares and issues a circular or brochure consisting of four pages. There is one exception—the circular relating to the policy Form AE Rev. consists of but a single page. The brochures are sent by respondent from its home office in San Antonio, Texas, to its agents located in the various States in which respondent is licensed, and are used by such agents, and often shown by them to prospective purchasers, as aids in selling the policies to which they refer. The first and second pages of each brochure contain advertising matter; the third page consists of an application form; and the last page either is blank or contains information helpful in determining premium rates. Upon completion of a sale, the applicant for insurance fills out, or furnishes the information for filling out, and signs the application form, which is then torn from the brochure and sent in to respondent with the proper premium payment; the agent issues a receipt for the premium received, usually on the form at the bottom of the second page of the brochure, and then leaves

pages 1 and 2 of the brochure with the applicant. Upon acceptance of the application at its home office, respondent issues the policy and transmits it to the selling agent for delivery to the insured.

6. In the brochure relating to respondent's policy, Form ASA, the following advertising statements are made:

NO AGE PROVISION terminating or reducing benefits because of increasing age. and

POLICY FORM ASA issued to Men and Women, ages 18 to 60. Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

The same statements are made in the brochure relating to the policy, Form AAA.

The complaint alleges that through the use of these statements, respondent represents that the indemnification provided by its policies may be continued to age 60 or for an indefinite period at the option of the insured. Such representation is false, the complaint charges, because respondent's policies are term policies and are renewable at the option of respondent only. Further, the policies are automatically terminated upon the payment of certain cash benefits.

The Commission does not construe these statements as having the meaning ascribed to them. Said statements can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified; and the evidence is that the statements as so construed are both true. On this phase of the case the allegations of the complaint have not been sustained.

7. In the advertising section of the brochure relating to respondent's policy, Form A&H3, the following, among other boxed items, appears:

: CONFINING :
: ILLNESS :
: INDEMNITY : $___________________________ PER MONTH

for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)

Substantially similar statements are made in the brochure relating to respondent's policy, Form BPI. The record shows that the blank amount of dollars is usually filled in by the agent before or at the time he is talking to the prospect, based on the premiums paid.

Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to any and all sickness or illness.

In truth and in fact, respondent's policies do not so provide. The coverage under the policy, Form A&H3 is expressly restricted to indemnification for loss of time due to sickness or disease contracted and commencing after the effective date of the policy and while the policy is in force which wholly, necessarily and continuously disables and prevents the insured from engaging in any business, profession or employment for wage or profit and only for such period of time as the policyholder is regularly visited and attended by a legally qualified physician (M. D.), surgeon (M. D.) or osteopath, other than himself. Nor does the policy cover loss of time for illness due to pregnancy, miscarriage or childbirth in case of a woman policyholder, regardless of how long the policy has been in effect. The policy, Form BPI, also contains substantially the same restrictions on respondent's liability, none of which restrictions are disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to sickness or illness are, therefore, false and deceptive.

8. Respondent's brochure relating to its policy, Form BPI, also contains the following with respect to loss of time due to accidents:

: TOTAL :
: ACCIDENT :
: DISABILITY :

$__________________________ PER MONTH

for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled. and

: PARTIAL :
: ACCIDENT :
: DISABILITY :

$__________________________ PER MONTH

for loss of time from accidental injury, beginning with the first day and continuing for the period of partial disability (limit 3 months).

Substantially the same statements are also made in the advertising sections of the brochures relating to respondent's policies, Forms A&H3 and AAA.

Through such statements, respondent represents, directly and by implication, that its policies provide indemnification for loss of time due to all or any accidents.

In truth and in fact, respondent's policies do not so provide. Under the policy, Form BPI, respondent's liability for loss of time due to total accident disability is limited to accidents that shall

within twenty days after the date of the accident wholly, necessarily and continuously disable and prevent the insured from performing each and every duty pertaining to his occupation for the first twelve months. After that time, the insured, in order to collect the indemnity, must be wholly and continuously disabled by reason of the accident from engaging in any occupation for wage or profit. Furthermore, the policy expressly limits the company's liability for loss of time due to either total or partial accident disability to such periods of time as the policyholder is under the regular care of a legally qualified physician (M. D.), surgeon (M. D.) or osteopath, other than himself. The policies, Forms A&H3 and AAA, contain similar limitations on respondent's liability, none of which limitations is disclosed in the sales brochures.

Respondent's representations as to the indemnification provided by its policies for loss of time due to accidents are, thus, false and deceptive.

9. Respondent's advertising brochure for its policy, Form AE Rev., contains the following:

> *ROOM SERVICE
> 31 days each entry
> *HOSPITAL EXPENSE
> 1. Operating Room
> 2. Anaesthetics
> 3. Laboratory Service
> 4. X-Rays
> 5. Dressings
> 6. Drugs
> 7. Blood transfusions
> Any service of the hospital necessary
> to the recovery of the patient
> *SURGERY
> From $3.00 to $150.00 $150.00
> Depending on seriousness of operation
> Additional Benefits
> * * * MATERNITY: Up to $______after insurance has been in force 10 months. * * *

Through such statements, respondent represents, among other things, that said policy provides indemnity up to a maximum sum of $150 for any operation serious enough to cost such an amount, and that the maternity benefits mentioned are in addition to payments for room service and hospital expenses.

Actually, the policy does not so provide. Under the terms of this policy, payment for surgeon's bill is in accordance with a schedule of fixed fees for different types of operations. Only six

out of sixty-seven operations listed call for a surgeon's fee of as much as $150. For twenty-nine of the listed operations, the surgeon's fees allowed are $25 or less, regardless of the actual cost of such operations to the policyholder.

Said policy likewise does not provide for the payment of a maternity benefit after ten months, or at any other time, in addition to the payments provided for room service and other hospital expenses. The maternity benefit is obtainable only by payment of an additional premium over and above the regular premium provided in the policy and is covered by a supplemental agreement or rider attached to the policy. Moreover, said supplemental agreement or rider expressly provides that payment of the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital services," and it is, thus, clear that the maternity benefit, instead of being an additional benefit, as represented, is merely a substitute.

Respondent's representations to the contrary are false and deceptive.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over all of the respondent's acts or practices alleged in the complaint to be unlawful.

2. The public interest in the proceeding is clear and substantial.

3. The use by respondent of the statements and representations, found herein to be false and deceptive, with respect to the terms and conditions of its policies of insurance, and its failure to reveal the limitations of the coverage of said policies, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce the purchase of said policies of insurance because of such erroneous and mistaken belief.

4. The aforesaid acts or practices of respondent as above set forth are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, The American Hospital and Life Insurance Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and dis-

tribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication:

1. That said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided are set forth conspicuously, prominently, and in sufficiently close conjunction with said representations as will fully relieve it of all capacity to deceive.

2. That said policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the schedule of payments for which the policy provides is made conspicuously, prominently, and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.

3. That said policy provides for the payment of certain benefits in addition to other benefits when such is not the fact.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioners Gwynne and Mason dissenting.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Counsel in support of the complaint issued in this proceeding has appealed from the hearing examiner's initial decision, in which, after holding that Public Law 15 of the 79th Congress (McCarran-Ferguson Insurance Regulation Act)[1] limits the Federal Trade Commission's jurisdiction herein to respondent's activities in the State of Mississippi, he dismissed the complaint for failure of proof.

Respondent, a Texas corporation, is licensed to conduct, and does conduct, a health-and-accident insurance business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Tennessee, and Texas. It sells its health-and-accident insurance policies exclusively through licensed agents in each of those States, and its only advertising

[1] 59 Stat. 33 (1945); 15 U.S.C. 1011ff.

consists of printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

That statute[2] directly and expressly provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the

[2] The McCarran-Ferguson Act reads in full text as follows:

An Act to express the intent of the Congress with reference to the regulation of the business of insurance

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as

business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is inconsistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation, admits of such a construction.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), the Supreme Court in effect overturned *Paul* v. *Virginia*, 75 U.S. 168 (1868), and the line of related cases, all of which were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intra*state, and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business violates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intra*state and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regulation. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but

---

amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted the year following *South-Eastern Underwriters*. Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner*, the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Commission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.[3]

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not already possess. Silence on the part of Congress was not to be construed as imposing any barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitations upon State regulation: Areas in which the States could never regulate were not dealt with one way or the other.

---

[3] The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intra*state activities which affect interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*, supersedes existing state legislation on the same subject." *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U.S. 439, 446 (1915).

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

We now approach the determination of the proper construction of the crucial second section of the McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronouncement that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b):

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *.

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e.g., the postal statutes. See *United States* v. *Sylvanus*, 192 F. 2d 96, 100 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952). Such laws cannot impair or supersede State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1954).

Section 2 (b) continues:

> Provided, That after January 1, 1948,* * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, therefore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox* v. *Hart*, 260 U. S. 427, 435 (1922). The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance

---

* The so-called "moratorium" was later extended by Congress until after June 30, 1948. 61 Stat. 448 (1947).

company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3 (a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply *to the business of insurance* or *to acts in the conduct thereof*" until January 1, 1948,** we think it logically follows that they were to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2 (b), is inconsistent with any notion that the Commission's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal Trade Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters* decision. And, as the Court recognized in that case, there were elements of interstate transactions which the States could not regulate.[4]

** *Ibid.*

[4] "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U. S. at 552.

The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of "affecting interstate commerce" by Federal legislation not expressly relating to insurance. Thus we find in the reports of the committees of both Houses of Congress this statement:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
>
> Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1–2; H. R. Rep. No. 143, 79th Cong., 1st Sess., 2.]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 277) * * * [H.R. Rep. 143, 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occurring within its boundaries. We would be hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute and exclusive State power for the

Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States* v. *Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intra*state aspects of the defendant's deceptive practices:

> [I]t cannot properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execution or attempted execution of that scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders* v. *U.S.*, 240 U.S. 391 * * *, or that the scheme charged involved a transaction forbidden by the laws of the state. *O'Hara* v. *U.S.*, 6 Cir., 129 F. 551.
>
> We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment. [192 F. 2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra*, the Court held that a postal statute banning a course of conduct which in its *intra*state aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission

jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjunction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State regulation is one of long standing.[5] Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest in the hands of respondent's agent within a State). See *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633, 635–6 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between

[5] As recently as April 2, 1956, the Supreme Court of the United States reaffirmed this principle in *Pennsylvania* v. *Nelson*, 350 U. S. 497, declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

Federal and State Governments is embedded in a number of statutes, in addition to the McCarran-Ferguson Act. Examples of these are acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prize-fight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarran-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own agents in various States for local use, and that hence its advertising occurred only in *intra*state commerce. We consider such an analysis factitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about $2,750,000. It employs an indisputable channel of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, to its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not compartmentalized. *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co.* v. *FTC*, 114 F. 2d 33, 36 (2d Cir. 1940); *Ford Motor Co.* v. *FTC*, 120 F. 2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or deceptive, irrespective of the existence of State statutes applicable to the *intra*state elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

Respondent was charged with falsely representing, among other things, that the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which state as follows, or similarly:

NO AGE PROVISION terminating or reducing benefits because of increasing age,

and—

POLICY FORM ASA Issued to Men and Women, ages 18 to 60.

Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are term contracts renewable at the option of the company on the premium data. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or accidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

(CONFINING)
(ILLNESS)
(INDEMNITY) $______________________ PER MONTH

for loss of time from illness, beginning on the fourth day and continuing for one year for each illness. (Up to two months full benefits for non-confining illness.)

Total
Accident______________________per month
Disability

for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.

Partial
Accident______________________per month
Disability

for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limiting the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "CONFINING ILLNESS INDEMNITY—$______per month for loss of time from illness, beginning on the fourth day and continuing for one year for each illness," or "TOTAL ACCIDENT DISABILITY—$______per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of the sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of which the prospect has little or no opportunity to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. "Under repeated decisions, the purchaser is entitled to rely upon the representations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely

difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States* v. *Sylvanus*, 192 F. 2d 96, 105 (7th Cir. 1951) *cert. denied*, 342 U.S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp.* v. *FTC*, 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc.* v. *FTC*, 186 F. 2d 821, 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common knowledge—if it be a fact— is generally known even to the "Reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impelling him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC*, *supra*, 143 F. 2d at 680

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation

to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales practices whereby he was induced to purchase the insurance. He may be discouraged by the literal terms of the policy from seeking legal redress. We do not consider that the fact that if he perseveres to his State supreme court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the reasonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not germane to the question of whether respondent's representations tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had represented its hospital-and-surgical-expense policy to provide for the payment of $150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that respondent disseminates a one-page advertisement which, among other things, states that the policy provides for—

SURGERY
from $3.00 to $150.00 $150.00
depending on seriousness
of operation

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to $150: operations for removal of a portion of the lung, removal of kidney, removal of a portion of the vertebra, removal of entire prostate or thyroid gland, and cutting into the cranial cavity.

Only $25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount.

Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

On the advertisements for this type of policy, following a listing of the benefits of room service, hospital expense, and surgery, there is shown as one of the "Additional Benefits:"

Maternity: Up to $______after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is in *addition* to the other benefits provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute* benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such advertising as this can engender in the minds of couples seeking to provide financially for the birth of children is especially vicious. There can be no question that it is a patent deception to describe as "additional" a benefit which excludes participation in other benefits, directly following a broad representation that hospital and surgical expenses are covered.

In view of the foregoing, the initial decision is vacated and set aside, and our findings as to the facts, made on consideration of the whole record including the initial decision, and conclusions and order to cease and desist will be issued in lieu thereof.

Commissioners Gwynne and Mason dissent.

JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U.S.* v. *South-Eastern Underwriters Association*, (1944) 322 U.S. 533. It was to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the re-

spective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul* v. *Virginia*, 8 Wall. 168, to *New York Life Insurance Company* v. *Deerlodge County*, 231 U.S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. Consequently, the states found few obstacles to regulating it to the fullest extent and in the manner the respective legislatures thought to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C.J.S. p. 518; *LaTourette* v. *McMaster*, *Insurance Commissioner*, 244 U.S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Supreme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post offices and post roads [*U.S.* v. *Sylvanus* (1951), 192 F. 2d 96] and many others. In fact they were, and still are, subject to all restraints properly imposed by paramount power, except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, of course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944 in the *South-Eastern Underwriters* case, the court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable uncertainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as courts made decisions on specific problems.

(2) It might write a comprehensive law for Federal regulation of insurance,—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer

to a simple question, namely, is there state regulation to meet the particular problem presented by the facts.

That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United States Constitution* as prepared by the Legislative Reference Service. Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U.S. v. Darby* (1944), 312 U.S. 100, in which the court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

> That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, * * *.

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public

interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the interpretation that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, the Supreme Court of the United States had this to say:

> Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several States in these respects.
>
> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.
>
> * * * * * * *
>
> * * * it clearly put the full weight of its power behind existing and future State legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

That a declaration of policy by Congress will be given weight by the courts is well settled. See *U.S.* v. *Darby*, 312 U.S. 100.

Continuing, the statute further provides:

> * * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce. The

supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has received a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2 (a) provides:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay* v. *Roth*, Calif. (1923), 221 P. 967; *Davis* v. *City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul* v. *Virginia* to *New York Life Insurance Co.* v. *Deerlodge County*, insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state laws, only to the extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2 (a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters*.

Section 2 (b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Sec. 2 (b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relates to insurance. It recognized: first, that insurance has some problems peculiar to that industry; second, that many states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg* v. *Young* (1950) Minnesota 42 N.W. 2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance,—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such version set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3 (a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reason-

ably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3 (b) provides:

> Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain.

The fact that Section 3 (b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3 (b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters case* was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the exception of those situations where a state either did not or could not adopt the necessary regulations.

There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

SENATOR MURDOCK. And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except ——

SENATOR McCARRAN. Except as the states themselves have provided regulation.

* * * * * * *

SENATOR PEPPER. States may determine whether or not the Sherman and other acts become applicable to the business of insurance?

SENATOR McCARRAN. Yes.

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the state legislatures. Other states have adopted laws which in effect are equivalent.

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal court cases. In none of them, did the court experience any difficulty in determining what the McCarran Act meant. In the Sylvanus case, the court said:

It is clear, we think that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several States.

In *Maryland Casualty Company* v. *Cushing* (1953), 347 U.S. 409, the Supreme Court said:

Even the most cursory reading of the legislative history of this enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the court decision in the South-Eastern Underwriters case might be found to leave on state regulation of insurance.

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the South-Eastern Underwriters case.

A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could hardly be found.

In *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co.* v. *Benjamin*, supra, p. 429 of 328 U.S.

In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson* v. *People of State of Calif.*, 328 U.S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual, we think, would be absurd.

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state without reference to transactions, whether interstate or local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was not, and the reason given was that a state tax or regulation discriminating against interstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner*, the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South-Eastern Underwriters* Case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

No law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce clause.

There, the Federal power is paramount. *Parker* v. *Brown*, 317 U.S. 34. *Southern Railway Company* v. *Railroad Comm. of Indiana*, 236 U.S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field." This intention to occupy a limited field is the very essence of the McCarran Act.

Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the South-Eastern Underwriters case, immediately after and prior to the McCarran Act, and under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where

the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion in inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the over-all intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

That the Congress hereby declares that paramount regulation and taxation by the Federal government of the business of insurance, rather than the continued regulation and taxation thereof by the several states, is in the public interest.

Section 2. (a) The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.

Section 2. (b) Any act of Congress, whether it specifically relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the state law conflicts with such act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any state regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the South-Eastern Underwriters decision. The nature and extent of that confusion was well expressed by the dissenting judges. The late Mr. Chief Justice Stone said:

* * * And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn*, 317 U. S. 111; *Polish Alliance* v. *Labor Board*, *supra*, there can be no doubt of the power of Congress if it so desires to regulate many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in the briefs and argument or in the Court's opinion.

The late Mr. Justice Jackson said:

The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.

The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *

It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation

which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect.

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial policies of the companies licensed to do business in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal antitrust laws.

In this connection, the majority opinion says:

However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers.

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In South-Eastern Underwriters, the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do

with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter into states where it was licensed to do business. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, *supra*, is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

> 3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. 85 F. Supp. 961, at p. 964.

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner then considered the alleged illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some jurisdiction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public.

Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi had adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al.* v. *Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

> And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future.

In *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

"As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

ADDITIONAL VIEWS OF COMMISSIONER MASON

The issue here resolves itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and

the countless other components of the internal management of any single company or companies.

To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

IN THE MATTER OF

CLOVER FARM STORES CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (c) OF THE CLAYTON ACT

Docket 6444. Complaint, Nov. 8, 1955—Decision, Apr. 24, 1956

Consent order requiring 27 wholesale grocery firms, their wholly owned service corporation, and its subsidiary, to cease discriminating in price in violation of Sec. 2 (c) of the Clayton Act as amended, through receiving and accepting from sellers, brokerage and other compensation for services commonly rendered by independent brokers which Clover replaced in many transactions between sellers and respondent wholesalers.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Mr. Newell Blair, of Washington, D. C., and *Mooney, Hahn, Loeser, Keough & Freedheim*, of Cleveland, Ohio, for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Clover Farm Stores Corporation, hereinafter sometimes referred to as respondent Clover, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2135 Columbus Road, Cleveland, Ohio.

It is wholly owned and controlled by a group of wholesale grocery firms, all or substantially all of which are the respondents listed in Paragraph Three. Said respondent was incorporated in Ohio on August 1, 1947, although the business had been operated under the same corporate name as a Delaware corporation by substantially the same owners and along similar lines for many years prior to its incorporation in Ohio.

PAR. 2. Respondent The Lane-Lease Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of

business located at 2135 Columbus Road, Cleveland, Ohio. It is wholly owned and controlled by respondent Clover and hereinafter a reference to respondent Clover is to be interpreted as including respondent The Lane-Lease Co., Inc. Said respondent was incorporated in Ohio on November 16, 1940, although the business had been operated as a Delaware corporation under a somewhat similar name (The Lane-Lease Company) by substantially the same owners and along similar lines for many years prior to respondent's incorporation in Ohio.

PAR. 3. Each respondent named below is a corporation which is organized, existing, and doing business under and by virtue of the laws of the state specified, and whose principal office and place of business is located at the address shown, opposite its name:

Respondent	State of incorporation	Location of principal office and place of business
The Bayer-Gilliam Company	Pennsylvania	Alley K and 10th St., Tyrone, Pa.
Fox Grocery Company	Pennsylvania	300 McKean Ave., Charleroi, Pa.
The John Blaul's Sons Company	Iowa	600 1st St. SE., Cedar Rapids, Iowa.
W. E. Osborn Company	Pennsylvania	8th St. and 5th Ave., New Brighton, Pa.
Jos. A. Goddard Company	Indiana	215 West Seymour St., Muncie, Ind.
Frey & Son, Inc	Maryland	1401 Cherry Hill Rd., Baltimore, Md.
Consolidated Foods, Inc	New Hampshire	375 West Hollis St., Nashua, N. H.
Krenning-Schlapp Grocer Company.	Missouri	3800 North Broadway, St. Louis, Mo.
Jageman-Bode Company	Illinois	1704 East Jefferson St., Springfield, Ill.
The F J. Beasley Co	Ohio	91 West Union St., Athens, Ohio.
M. B. Glackin, Inc	Pennsylvania	143–47 North Duke St., York, Pa.
Guyer & Calkins Company	Illinois	Spring St. and Liberty Ave., Freeport, Ill.
Arthur J. Hanson Company	Wisconsin	411 11th Ave., Ashland, Wis.
The Hornor-Gaylord Company	West Virginia	601 Baltimore St., Clarksburg, W. Va.
David Kirk Sons Company	Ohio	130 East Sandusky St., Findlay, Ohio.
Layton & Company, Inc	Delaware	Division St. and Pennsylvania RR., Dover, Del.
The Leedom & Worrall Company	Pennsylvania	200–202 Center Ave., Butler, Pa.
Peter G. Lennon Company	Illinois	114 Lafayette St., Joliet, Ill.
J. B. Maltby, Inc	New York	99 Chestnut St., Corning, N. Y.
Northern Sales Company, Inc	Maine	74 Bangor St., Houlton, Maine.
Plumb & Nelson Company	Wisconsin	716 Buffalo St., Manitowoc, Wis.
The Theo Poehler Mercantile Company.	Kansas	701 East 8th St., Lawrence, Kans.
Rice Lake Grocer Company	Wisconsin	16 East Messenger St., Rice Lake, Wis.
E. T. Smith Co	Massachusetts	203 Summer St., Worcester, Mass.
Standard Wholesale Co., Inc	Rhode Island	63–65 Long Wharf, Newport, R. I.
Waples-Platter Company	Texas	1819 Jones St., Fort Worth, Tex.
Wilcox Brothers Grocers Inc	New York	472 West 1st St., Oswego, N. Y.
Barrow Grocery Company, Inc	Virginia	Blackstone, Va.

Said respondents are the wholesale grocery firms referred to in Paragraph One and are sometimes hereinafter referred to as respondent members.

PAR. 4. Respondent Clover is now, and continuously since its organization in 1947 has been, engaged in acts and practices which facilitate transactions or purchase and sale of food products, grocery products, grocers' supplies, and grocers' equipment between sellers of such products and respondent members who purchase such food and grocery products for resale to retail grocery stores and who purchase such supplies and equipment for their own use and for resale to retailers.

In most of such transactions the member respondents order directly from and are invoiced by the sellers; but in others the member respondents order from and are invoiced by respondent Clover which is invoiced by the sellers.

Said acts and practices of respondent Clover consist in part of making arrangements with the sellers to sell products under brands which are owned by respondent Clover; of designating such sellers as approved suppliers; of listing such sellers in a book supplied by respondent Clover to respondent members; and of urging respondent members to buy directly from such sellers. Respondent Clover engages in substantially similar acts and practices with respect to the same and other sellers as to products sold under brands owned by the sellers.

Most of the transactions are between sellers and respondent members located in different states; and most of the products involved in such transactions are shipped across state boundaries.

Par. 5. In engaging in the acts and practices above alleged respondent Clover is performing services commonly rendered by independent brokers which respondent Clover replaces in a large number of such transactions of purchase and sale.

In consideration for such acts and practices, many of the sellers pay or grant to respondent Clover, and respondent Clover receives and accepts from such sellers, sums of money as brokerage and as allowances and discounts in lieu of brokerage.

Prior to about 1953 such sums were typically a percentage of the purchases of respondent members. Subsequently many sellers, at the instance and request of respondent Clover, paid lump sums, the amounts of which were the same or approximately the same as theretofore paid on a percentage basis.

In some transactions where the seller invoices respondent Clover and it invoices respondent members, the payment takes the form of a discount which is in lieu of brokerage.

Par. 6. The funds received by respondent Clover as brokerage and as allowances and discounts in lieu thereof are used by it, together with other funds received by it from respondent members, to pay its operating expenses. When such funds exceed expenses in any year, the excess or part thereof may be, and often is, distributed to respondent members as patronage dividends.

Par. 7. For many years prior to 1947, respondent Clover's corporate predecessor, referred to in Paragraph One, engaged in the same business as respondent Clover as above alleged.

Par. 8. The acts and practices of respondents and of each of them, as hereinabove alleged and described, violate subsection (c)

of Section 2 of said Clayton Act as amended by the Robinson-Patman Act.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On November 8, 1955, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, by receiving and accepting, directly or indirectly, commissions, brokerage or other compensation, or allowances or discounts in lieu thereof, from many of the various sellers from whom they purchase food and grocery products, grocers' supplies and grocers' equipment in commerce for their own accounts for resale.

Thereafter, on February 3, 1956, Respondents filed with the Commission their answer to said complaint, and on March 5, 1956, Respondents Clover Farm Stores Corporation and The Lane-Lease Co., Inc., by Grant A. Mason, their President and Treasurer, and Gladys S. Clark, their Assistant Secretary, and all the other Respondents herein, except Respondent The John Blaul's Sons Company, by their counsel of record, Samuel G. Wellman and Newell Blair, entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner an Agreement Containing Consent Order To Cease And Desist, supported by formal statements of consent thereto and authorization therefor by all the wholesale member Respondents entering into said Agreement by their counsel, Samuel G. Wellman and Newell Blair, and an Affidavit executed by Attorney Samuel G. Wellman, attesting to the formal consent by all wholesale member Respondents to the form of the proposed consent cease-and-desist order contained in the agreement.

At the same time counsel for Respondents submitted a Motion To Dismiss Complaint As To One Respondent, The John Blaul's Sons Company, stating therein that said company had, on January 1, 1955, prior to the issuance of the complaint herein, ceased to be a stockholder-member of Respondent Clover Farm Stores Corporation, and, by about June 30, 1955, had been fully dissolved and its assets distributed. Therewith counsel for Respondents also submitted an Affidavit executed by Theo F. Blaul, the last acting president of The John Blaul's Sons Company, attesting to those facts. In view thereof, and of the fact that counsel supporting the complaint does not oppose the granting of said motion, the complaint herein will be dismissed as to Respondent The John Blaul's Sons Company.

Respondents are identified in the agreement as follows:

Each Respondent named below is a corporation which is organized, and doing business under and by virtue of the laws of the state specified, and whose principal office and place of business is located at the address shown opposite its name:

Respondent	State of Incorporation	Location of principal office and place of business
Clover Farm Stores Corporation	Ohio	2135 Columbus Rd., Cleveland, Ohio
The Lane-Lease Co., Inc.	Ohio	2135 Columbus Rd., Cleveland, Ohio
The Bayer-Gillam Company	Pennsylvania	Alley K and 10th St., Tyrone, Pa.
Fox Grocery Company	Pennsylvania	300 McKean Ave., Charleroi, Pa.
W. E. Osborn Company	Pennsylvania	8th St. and 5th Ave., New Brighton, Pa.
Jos. A. Goddard Company	Indiana	215 West Seymour St., Muncie, Ind.
Frey & Son, Inc.	Maryland	1401 Cherry Hill Rd., Baltimore, Md.
Consolidated Foods, Inc.	New Hampshire	375 West Hollis St., Nashua, N. H.
Krenning-Schlapp Grocer Company	Missouri	3800 North Broadway, St. Louis, Mo.
Jageman-Bode Company	Illinois	1704 East Jefferson St., Springfield, Ill.
The F. J. Beasley Co.	Ohio	91 West Union St., Athens, Ohio
M. B. Glackin, Inc.	Pennsylvania	143-47 North Duke St., York, Pa.
Guyer & Calkins Company	Illinois	Spring St. and Liberty Ave. Freeport, Ill.
Arthur J. Hanson Company	Wisconsin	411 11th Ave., Ashland, Wis.
The Hornor-Gaylord Company	West Virginia	601 Baltimore St., Clarksburg, W. Va.
David Kirk Sons Company	Ohio	130 East Sandusky St., Findlay, Ohio
Layton & Company, Inc.	Delaware	Division St. and Pennsylvania R.R., Dover, Del.
The Leedom & Worrall Company	Pennsylvania	200-202 Center Ave., Butler, Pa.
Peter G. Lennon Company	Illinois	114 Lafayette St., Joliet, Ill.
J. B. Maltby, Inc.	New York	99 Chestnut St., Corning, N. Y.
Northern Sales Company, Inc.	Maine	74 Bangor St., Houlton, Maine
Plumb & Nelson Company	Wisconsin	716 Buffalo St., Manitowoc, Wis.
The Theo Poehler Mercantile Company	Kansas	701 East 8th St., Lawrence, Kans.
Rice Lake Grocer Company	Wisconsin	16 East Messenger St., Rice Lake, Wis.
E. T. Smith Co.	Massachusetts	203 Summer St., Worcester, Mass.
Standard Wholesale Co., Inc.	Rhode Island	63-65 Long Wharf, Newport, R. I.
Waples-Platter Company	Texas	1819 Jones St., Fort Worth, Tex.
Wilcox Brothers Grocers Inc.	New York	472 West 1st St., Oswego, N. Y.
Barrow Grocery Company, Inc.	Virginia	Blackstone, Va.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents, in the agreement, waive any further procedure before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith. All parties agree that the answer heretofore filed by all Respondents shall be considered as having been withdrawn, and for all legal purposes it will hereafter be so regarded; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that the agreement is for settlement purposes only and does not constitute an admission by Respondents that they have violated the law as alleged in the complaint.

The agreement sets forth that the order to cease and desist contained therein shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint herein may be used in construing the terms of said order.

After consideration of the charges set forth in the complaint, the agreement, the documents appendant thereto, hereinabove cited, and the provisions of the proposed order, the Hearing Examiner is of the opinion that such order will safeguard the public interest to the same extent as could be accomplished by an order issued after full hearing and all other adjudicative procedure waived in said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Respondents Clover Farm Stores Corporation, a corporation, and The Lane-Lease Co., Inc., a corporation, their officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food products, grocery products, grocers' supplies and grocers' equipment, or other merchandise, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, for resale

to their stockholder members, or upon any purchase made by any of said members.

It is further ordered, That the Respondents, The Bayer-Gillam Company, a corporation, Fox Grocery Company, a corporation, W. E. Osborn Company, a corporation, Jos. A. Goddard Company, a corporation, Frey & Son, Inc., a corporation, Consolidated Foods, Inc., a corporation, Krenning-Schlapp Grocer Company, a corporation, Jageman-Bode Company, a corporation, The F. J. Beasley Company, a corporation, M. B. Glackin, Inc., a corporation, Guyer & Caulkins Company, a corporation, Arthur J. Hanson Company, a corporation, The Hornor-Caylord Company, a corporation, David Kirk Sons Company, a corporation, Layton & Company, Inc., a corporation, The Leedom & Worrall Company, a corporation, Peter G. Lennon Company, a corporation, J. B. Maltby, Inc., a corporation, Northern Sales Company, Inc., a corporation, The Theo Poehler Mercantile Company, a corporation, Plumb & Nelson Company, a corporation, Rice Lake Grocer Company, a corporation, E. T. Smith Co., a corporation, Standard Wholesale Company, Inc., a corporation. Waples-Platter Company, a corporation, Wilcox Brothers Grocers, Inc., a corporation, and Barrow Grocery Company, Inc., a corporation, their respective officers, directors, agents, representatives, and employees, directly or through Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or any other corporate or other device, in connection with the purchase of food products, grocery products, grocers' supplies and grocers' equipment, or other merchandise, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, or from Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or from any other agent, representative, or other intermediary, acting for or in behalf or subject to the direct or indirect control of said buyer Respondents, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof upon any purchase made by said member Respondents, or for them by Respondents Clover Farm Stores Corporation, a corporation, or The Lane-Lease Co., Inc., a corporation, or any other such intermediary.

It is further ordered, That the complaint, insofar as it relates to Respondent The John Blaul's Sons Company, a corporation, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Clover Farm Stores Corporation, a corporation, The Lane-Lease Co., Inc., a corporation, The Bayer-Gillam Company, a corporation, Fox Grocery Company, a corporation, W. E. Osborn Company, a corporation, Jos. A. Goddard, a corporation, Frey & Son, Inc., a corporation, Consolidated Foods, Inc., a corporation, Krenning-Schlapp Grocer Company, a corporation, Jageman-Bode Company, a corporation, The F. J. Beasley Company, a corporation, M. B. Glackin, Inc., a corporation, Guyer & Calkins Company, a corporation, Arthur J. Hanson Company, a corporation, The Hornor-Gaylord Company, a corporation, David Kirk Sons Company, a corporation, Layton & Company, Inc., a corporation, The Leedom & Worrall Company, a corporation, Peter G. Lennon Company, a corporation, J. B. Maltby, Inc., a corporation, Northern Sales Company, Inc., a corporation, The Theo Poehler Mercantile Company, a corporation, Plumb & Nelson Company, a corporation, Rice Lake Grocer Company, a corporation, E. T. Smith Co., a corporation, Standard Wholesale Company, Inc., a corporation, Waples-Platter Company, a corporation, Wilcox Brothers Grocers, Inc., a corporation, and Barrow Grocery Company, Inc., a corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

WILSON TOBACCO BOARD OF TRADE, INC., ET AL.

Docket 6262. Order and opinion, Apr. 25, 1956

Denial of leave to intervene in cross-appeals from hearing examiner's initial decision to applicant having a substantial private controversy with respondents.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Rufus E. Wilson for the Commission.

Lucas, Rand & Rose, *Gardner, Connor & Lee*, *Mr. Chas. B. McLean* and *Carr & Gibbons*, of Wilson, N. C., *Battle, Winslow & Merrell*, of Rocky Mount, N. C., *Blackwell, Blackwell & Canady*, of Winston-Salem, N. C., and *Sanders, Gravelle, Whitlock & Markey*, *Diamond & Brylawski* and *Howrey & Simon*, of Washington, D. C., for respondents.

ORDER DENYING APPLICATION FOR LEAVE TO INTERVENE

An application having been filed by C. B. Renfro, of Wilson, North Carolina, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission on the pending cross-appeals from the hearing examiner's initial decision; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the request should not be allowed:

It is ordered, That the aforesaid application for leave to intervene be, and it hereby is, denied.

Commissioner Kern not participating.

ON APPLICATION FOR LEAVE TO INTERVENE

By SECREST, Commissioner:

This matter is before the Commission upon an application, filed by C. B. Renfro, requesting leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission. The application is unopposed by counsel in support of the complaint, at least insofar as filing brief is concerned, but is resisted by respondents.

The complaint charged the respondents, the Wilson Tobacco Board of Trade, Inc., and its member warehousemen, with an unlawful conspiracy to suppress competition in the sale and purchase of leaf tobacco on the Wilson, North Carolina, tobacco market. The con-

spiracy was carried out, it was alleged, through the adoption of rules and regulations having the effect of preventing the erection of new tobacco auction warehouses or the expansion of existing warehouses and excluding would-be traders from the Wilson tobacco market. After the holding of twenty-two hearings over a period of six months, resulting in a record of 3163 pages of transcript and 215 exhibits, the hearing examiner on December 20, 1955, filed his initial decision which satisfied neither side, and both counsel in support of the complaint and the respondents have appealed. The case has been scheduled for oral argument on the merits on May 2, 1956.

In support of his application for permission to intervene the applicant states that he is the operator of the Liberty Warehouse, which was constructed in Wilson, North Carolina, just prior to the adoption of the regulations challenged by the complaint. He states further that since he was not joined as a party respondent nor called as a witness in the hearings, he has had no opportunity to be heard. He alleges, however, that he has been highly prejudiced before the Commission in that the examiner erroneously found that he, as a recently admitted member of the respondent Board of Trade, voted for the performance system of allocating selling time among the warehouses which was adopted by the respondents on April 8, 1952, and states that as the operator of a tobacco warehouse on the Wilson market, he will be bound by any order the Commission may issue. His right to exist in competition with other warehousemen in Wilson, he says, may be, and in all probability will be, conclusively determined in this proceeding.

Under Section 5 of the Federal Trade Commission Act, any person, partnership or corporation may make application, and "upon good cause shown" may be allowed by the Commission to intervene in a proceeding. Under § 3.11 of the Commission's Rules of Practice, opportunity may likewise be afforded of filing an appropriate brief as amicus curiae. Under both the statute and the rule, however, intervention and the extent thereof is at the discretion of the Commission, and in the exercise of its discretion the Commission must necessarily examine all the pertinent circumstances.

One of the grounds upon which the applicant bases his application is that he, as a warehouseman on the Wilson market, has had no opportunity to be heard in this proceeding. Just why he was not called as a witness does not appear. In fact, as the examiner pointed out in the initial decision, a showing of the applicant's experience after his entry into the market might have shed consider-

451524—59——74

able light on the reasonableness or unreasonableness of the regulation of the Board of Trade concerning which the applicant now complains. But, be that as it may, the record does not support an inference that the applicant's position was wholly disregarded. It strongly indicates, on the other hand, that Mr. Renfro has taken a rather active interest in this case, even to the extent of cooperating with counsel in support of the complaint in obtaining and interviewing prospective witnesses. He obviously had the opportunity of calling to the attention of trial counsel those facts which he believed would assist in the making of a proper record, and the Commission cannot take too seriously the applicant's argument that he has had no opportunity to be heard. Having stood quietly by during the six months the hearings were in progress, it ill behooves him to now complain of results, the possibility of which was apparent from the very beginning of the proceeding.

The Commission likewise does not understand the applicant's assertion that he will be bound by any order the Commission may issue, or that his right to exist in competition with other warehousemen in Wilson will be determined in this proceeding. It is elementary that the Commission's orders, when issued, go no further than to require the respondents in a proceeding and their privies to refrain in the future from engaging in the unlawful acts or practices in which they were found to have been engaged in the past. And, except in a class action, no person is bound, even to that extent, by an order arising out of a proceeding in which he was neither served with process nor given an opportunity to litigate his claims or defenses. Accordingly, the applicant, who was not a party respondent in this proceeding and whose rights have not been determined herein, will not be bound by any order the Commission may issue and could not be subjected to penalties for acts done contrary thereto. The applicant's right to exist in competition with other warehousemen in Wilson will be determined not by any order the Commission may issue, but by conditions and circumstances wholly separate therefrom.

It is apparent to the Commission that this application must be denied for still another and even more persuasive reason. The record discloses that Mr. Renfro at one time filed a private lawsuit in a state court against the respondents in this proceeding. The record further discloses that thereafter he instituted another action in a United States District Court under the Sherman Antitrust Act against the same parties. Thus, while the nature of those proceedings is not shown, it is apparent that there exists between Mr. Renfro and the respondents herein a substantial private controversy.

The Commission acts only in the public interest, any protection afforded private persons being only incidental, and it must be ever vigilant against the possibility of its processes being used to further the private interests of any party. This consideration alone would be sufficient to require a denial of the applicant's request for permission to intervene, especially in the absence of any showing that the case will not be adequately presented by counsel in support of the complaint whose duty it is to call to the Commission's attention any errors or inequities in the initial decision.

The application for leave to intervene will be denied and an appropriate order will be entered.

Commissioner Kern did not participate in the decision of this matter.