POST-HEARING PROCEDURES AND COMPLIANCE

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The substance of this address can be summed up simply as (1) shaping the remedy and (2) making the remedy work.* * I am most pleased to discuss these two subjects because they represent the culmination of the Commission's prime function -- the protection of the free enterprise system -- and because I can assure you that these subjects, the importance of which sometimes has been neglected, are going to receive more concentrated attention than they ever have had in the entire 39 years of the Commission's existence.

The Commission's fact-finding mission -- the indispensable basis for all Commission action -- comprising the methods of developing and analyzing economic evidence, and the informal means of preventing unfair methods of competition have been covered in the preceding talks. Mr. Kern's discussion has taken the Commission's proceeding after complaint up to the point where appeal has been made to the Commission from the hearing examiner's initial decision. The next step is an oral hearing before the Commission, if the parties so desire.

Hearing Before the Commission

The party who takes exceptions to an initial decision may obtain oral hearing before the Commission by making application in writing at the time he files his brief on exceptions,1/ which must be within 30 days of the date of service of the initial decision.2/ I am not aware of any case in which oral hearing on the merits has been denied.

In atmosphere, procedure, and general conduct, an oral argument before the Commission resembles that before any United States court of appeals. The Commission desires a clear oral presentation of the heart of the case. Commission trial counsel is expected to review the allegations of the complaint, the type of order that is desired, and the evidence that has been introduced to warrant the issuance of such an order. Salient features of all defenses should be brought to the Commission's attention by counsel for respondent. The importance of resolving questions of fact should not be minimized, for where the legal issues are close, the facts are often decisive. I might add that the Commission respects workmanlike, methodical presentation of the issues.3/

Each side is allowed 30 minutes, but additional time may be granted for good reason upon application in advance to the Commission. Presentation should be carefully planned for completion within the time allowed, and it

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** The opinions herein expressed are those of the speaker and do not necessarily reflect official views of the Federal Trade Commission.

1/Federal Trade Commission Rules of Practice, Rule XXIV.

2/Id., Rule XXIII.

3/Justice Jackson on various occasions has expressed practical and penetrating observations on the art of appellate advocacy. See his "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 Am. Bar Jour. 801 (Nov., 1951).

should be remembered that some of the time may be taken up with questions from the commissioners. Such questions often afford an opportunity of sharpening counsel's position, as well as resolving doubts in the commissioners' minds. They are a sure indication that the Commission is concentrating upon counsel's case. A lively dialogue may be a more certain means to understanding than an uninterrupted monologue.

Adjudication and Shaping of the Remedy

In an appeal from a hearing examiner's initial decision, the Commission considers, of course, the initial decision, the exceptions, the briefs, and the entire record in the case. But it concentrates upon the parts of the record which are cited in the exceptions and which are necessary to resolve the issues.

After the oral argument, the case is assigned to an individual commissioner for review and formulation of a decision. In this work the commissioners are aided by legal advisers in their offices and, upon request, by assistants to the general counsel. These men are qualified experts in all phases of the Commission's work. When the decision has been drafted to the satisfaction of the commissioner to whom it is assigned, it is presented to the entire membership of the Commission in meeting, for discussion and possible modification, and the resulting draft is voted upon by the entire Commission. No officer, employee, or agent, engaged in the performance of investigative or prosecuting functions for the Commission, nor any party respondent in any case, or his agent or counsel, is permitted to participate or advise in the Commission's decision in that or any factually related case, except as a witness or counsel in public proceedings.1/

An initial decision of a hearing examiner to which no exceptions have been filed usually becomes the final order of the Commission, but the Commission may stay the effective date of such decision or, on its own motion, place the case on the docket for review. In such an event, as on appeal, the Commission may exercise all powers that it would have exercised if it had made the initial decision.2/

The shaping of the remedy, after the facts have been found and their significance determined, calls for the most serious study and concentration, for upon the result rests the success of the entire proceeding and, incidentally, the Commission's reputation as a body of experts.

Please notice that I have been referring to a remedy, not a penalty. The Federal Trade Commission does not impose criminal punishment or exact compensatory damages for past acts -- it has no power to do so. Indeed, the very breadth of the language of Section 5 (a) of the Federal Trade Commission Act, by which "unfair methods of competition in commerce and unfair or deceptive

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1/Id., Rule XXV. See also Section 5 (c) of the Administrative Procedure Act, "Separation of Functions."

2/Id., Rule XXII.

acts or practices in commerce" are made unlawful, would render the Act unsuitable as a criminal statute. The fact that Commission proceedings are remedial, not punitive, reflects a basic aim of the authors of the Federal Trade Commission Act. Unfair practices were to be stopped in their incipient stages before they had attained the proportions of Sherman Act violations.1/ The purpose was correction, not punishment.

It was the need for specialization and expertness (or expertise) that justified the establishment of this and other administrative tribunals. The Commission was to be staffed with lawyers, economists, accountants, statisticians, and other business experts. It was contemplated that members of such a staff would become specialists in the prevention of predatory business practices which interfere with freedom of competition.

The Federal Trade Commission Act makes provision, too, for utilizing the expert facilities of the Commission for implementing the antitrust work of the Department of Justice. Thus the Commission is empowered to investigate, either on its own initiative or at the request of the Attorney General, the manner in which any final antitrust decree has been carried out, reporting its findings to the Attorney General and, in its discretion, making them public.2/ The Act further authorizes the Commission, on the Attorney General's application, "to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law."3/ And in any civil suit brought by the Attorney General under the antitrust laws the court is authorized to refer the suit to the Commission, as a master in chancery, "to ascertain and report an appropriate form of decree."4/

In formulating orders to cease and desist, the Commission must try to correct abuses of the competitive system, while disturbing the legitimate course of business as little as possible. This means that any wide-swinging, "meat-axe" approach is out of the question. The fashioning of a remedy that will end an abuse without harmfully affecting legitimate competition is obviously difficult: it involves a fusing of legal and economic concepts with the facts of business life. The type of "protection" which would in the end destroy competition is contrary to the spirit and purpose of the Federal Trade Commission Act.

1/FTC v. Cement Institute, 333 U. S. 683 (1948).
2/Federal Trade Commission Act, Sec. 6 (c); 38 Stat. 721; 15 U.S.C. 46.
3/Id., Sec. 6 (e).
4/Id., Sec. 7; 38 Stat. 722; 15 U.S.C. 47.

Significantly, the most important party to an antimonopoly proceeding never comes before the bar. I speak of the consuming public. An order that safeguards the interest of all parties yet keeps the public interest paramount calls for a practical, down-to-earth expertness rather than the ivory-tower aloofness which has characterized some Commission decisions in the past.

Future decisions of the Commission will, I believe, reflect the necessary practical approach to business problems. They will clearly tell the parties and the public exactly what is an unfair trade practice and why it is unfair.

Making the Remedy Work -- Compliance

The Commission's task is not completed when the corrective action has been decided upon and embodied in an order to cease and desist. The order is not an end in itself. It is but one important step toward attainment of the Commission's ultimate objective. The next step after issuance of the order is the respondent's report of compliance.

Within 60 days after service of the order the respondent is required to file a report setting forth the manner and form in which he is complying with the order. In cases involving products likely to be injurious to health or advertisements made with intent to defraud, interim reports may be required within 10 days after the order to cease and desist has been served. If the respondent files a petition for review in a circuit court of appeals within the 60-day period, then the time for filing the report of compliance starts to run de novo from the final judicial determination.1/

No special form of report is required, but the report must contain a full statement of the manner and form in which the order has been or is being obeyed. A mere assertion that the respondent is not violating the order is not acceptable. The Commission would hardly protect the public interest or merit the respect of the legal profession if it accepted a report which simply stated, "We have stopped that practice and furthermore we never engaged in that practice." A factual showing is required, sufficient to enable the Commission to determine independently whether the proscribed practices have been terminated.2/ Reports should be submitted in duplicate and should be signed by the respondents themselves rather than their counsel.3/

Each report of compliance is reviewed in the Division of Compliance of the Office of the General Counsel. If the report is considered satisfactory it is submitted to the Commission, after review by the general counsel, and if the Commission is in accord, the report is received and filed. You can appreciate that it is often impossible, on the basis of facts submitted in a report, to determine positively that an order is in fact being obeyed. Consequently, the receipt and filing of a report should not be taken as indicating

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1/Rules of Practice, Rule XXVI.

2/Federal Trade Commission "Organization, Procedures and Functions," Section 12 (a).

3/Rules of Practice, Rule XXVI.

that the Commission has adjudged a respondent to be in compliance with an order. It often means merely that the Commission believes that respondent has, by his words and actions, evinced an intent to comply with the order. At its discretion the Commission may require the respondent to file further reports describing the manner of his compliance.1/

Every Federal Trade Commission antimonopoly proceeding involves the investment of a substantial sum of public money. The anticipated dividends of such an investment are the promotion of healthy competition, savings to consumers, and the protection of commerce from unfair practices. Unfortunately these dividends have not always been realized.

Before 1947, the Commission had no formal compliance program, and the Commission's knowledge of the manner and extent of compliance with its orders was extremely limited. A separate Division of Compliance was formed in 1947, but with a staff too small for dealing effectively with the more than 4,000 then outstanding cease-and-desist orders covering almost every segment of American business, from thumbtacks to automobiles. With hundreds of lawyers and economists working to obtain effective orders in the public interest, the Commission employed fewer than a dozen to see that the orders were being obeyed. This failure to enforce compliance has been criticized by representatives of small business and by members of Congress.2/

The lack of proper enforcement of orders has been most striking in antimonopoly cases. In the entire 39 years of the Commission only 3 successful actions have been brought for violation of cease-and-desist orders in the antimonopoly field3/ and one of the 3 actions would not, under present law, have resulted in a penalty.4/

To give you an idea of what may be expected from the present Commission in the handling of compliance matters I quote from an address made by the Chairman of the Commission last September:

> It is useless, I submit, for the Commission to enter orders unless it sees that they are obeyed, either voluntarily or through appropriate enforcement proceedings against those who deliberately or willfully

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1/United States v. Morton Salt Company, 338 U. S. 632 (1950).

2/". . . they have such a large backlog of cases that they have to spend all of their time swatting new flies and do not have time to find out whether they have effectively disposed of the old ones." United States versus Economic Concentration and Monopoly, Staff Report, Committee on Small Business, House of Representatives, 79th Congress, page 26.

3/FTC v. Pacific States Paper Trade Assn., 88 F. 2d 1009 (9th Cir., 1937); FTC v. Biddle Purchasing Co., not officially reported, 3 Statutes and Decisions 391 (2d Cir., 1941); and United States v. American Steel and Wire Co. of New Jersey, et al., not officially reported, 3 Statutes and Decisions (Federal Trade Commission) 822 (S.D.N.Y. 1947).

4/The order in the Biddle case, n. 15, supra, had been affirmed but not enforced.

ignore them. Failure to obtain compliance constitutes a waste of money, has a demoralizing effect on competitors and members of the public who have been injured, and tends to encourage a general disregard by the business community of antitrust and trade regulation laws.

This past softness of the Commission in its program of compliance is contrary to my purpose to bring about a vigorous and fair enforcement of antitrust and related statutes. One of my primary aims, as Chairman, will be to correct this situation.1/

In the same address, the Chairman announced the appointment of a committee to study the problems of compliance. That committee has made its report and, as a result, the Commission during the past several months has expanded its compliance staff in the interest of obtaining fuller compliance with the laws administered by the Commission. Thorough compliance studies are in progress in a number of important cases.

Personal conferences between respondents and Commission attorneys to discuss methods of effecting compliance are encouraged. Experience has shown such conferences to be helpful to both sides. The Commission, naturally, prefers voluntary compliance. All of its processes are designed to promote self-correction, but where the public interest cannot be adequately protected through voluntary means, the Commission proposes to deal firmly with respondents.

Court Review, Finality, and Enforcement of Orders

A party subject to a cease-and-desist order issued under the Federal Trade Commission Act may have a review of the order in the United States court of appeals in the circuit where the practice in question was used or where he resides or carries on business. Such a review is obtained by filing in the court within 60 days from the date of service of the order a petition praying that the order be set aside. After service of the copy of the petition on the Commission, the Commission files with the court a certified transcript of the record.2/ The court then has the power to affirm, modify, or set aside the Commission's order. The court's judgment is final, except that it is subject to review by the Supreme Court upon certiorari as provided in the judicial code (formerly Section 240; now Section 1254, Title 28, U.S.C.).3/ As for

1/"Compliance with Commission Orders," an address by the Hon. Edward F. Howrey before the American Institute of Wholesale Plumbing and Heating Supply Association, September 21, 1953.

2/During the past year the Commission adopted the practice, where the courts of appeals would permit and the other parties would agree, of filing briefs prior to the printing of the record. The President's Conference on Administrative Procedure has recommended that the several United States courts of appeals adopt a uniform rule in this respect as a means of eliminating unnecessary expense and volume of records (First Report of the Conference, Recommendation B-3).

3/Federal Trade Commission Act, Section 5 (c); 52 Stat. 111; 15 U.S.C. 45 (c).

Clayton Act orders, there is no time limit within which petitions for review must be filed, but in other respects the review procedure is the same as under the Federal Trade Commission Act.1/

Orders issued under the Federal Trade Commission Act, unless appealed, become final and legally binding 60 days after service upon the respondents.2/ Clayton Act orders do not automatically become final upon the expiration of any fixed period of time. Before such orders are legally binding they must be enforced in court. The Clayton Act empowers the Commission to proceed for enforcement in a United States court of appeals when a respondent fails or neglects to obey the order to cease and desist.3/ This means that the Commission, in applying for enforcement, must show that violation of the order has occurred or is imminent. In cases where it has reason to believe that a Clayton Act order is being disobeyed, the Commission usually schedules investigational hearings to develop facts upon which to determine whether violation has taken place.

When a Federal Trade Commission Act order has been reviewed by a court, that Act requires that the court enforce the order insofar as the order is affirmed.4/ In the review of Clayton Act orders, however, the court is not required to enforce an order to the extent affirmed.5/

A long conflict as to the propriety of enforcement in such cases6/ was resolved by the Supreme Court in 1952 when it held that the statutory prerequisite to enforcement, i.e., violation, applies when the Commission seeks enforcement by cross-petition after review has been set in motion by the respondent as well as when the Commission makes the original application.7/

Violation of a final order issued under the Federal Trade Commission Act subjects the respondent to a civil penalty of not more than $5,000 for each violation. In the case of a violation through continuing failure or neglect to obey a final order, each day of continuance of such failure or neglect is deemed a separate offense.

1/Clayton Act, Section 11; 38 Stat. 734; 15 U.S.C. 21.

2/Federal Trade Commission Act, Section 5 (g); 52 Stat. 111; 15 U.S.C. 45 (g).

3/Clayton Act, Section 11; 38 Stat. 734; 15 U.S.C. 21.

4/Federal Trade Commission Act, Section 5 (c); 52 Stat. 111; 15 U.S.C. 45 (c).

5/Clayton Act, Section 11; 38 Stat. 734; 15 U.S.C. 21.

6/E.g., FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945); Judson L. Thomson Mfg. Co. v. FTC, 150 F. 2d 952 (1st Cir., 1945), cert. den. 326 U.S. 776 (1945); Elizabeth Arden, Inc. v. FTC, 156 F. 2d 132 (2d Cir., 1946), cert. den. 331 U.S. 806 (1947); Southgate Brokerage Co. v. FTC, 150 F. 2d 607 (4th Cir., 1945), cert. den. 326 U.S. 774 (1945); E. B. Muller & Co. v. FTC, 142 F. 2d 511 (6th Cir., 1944); FTC v. Whitney & Co., 192 F. 2d 746 (9th Cir., 1951); FTC v. Standard Brands, Inc., 189 F. 2d 510 (2d Cir., 1951); FTC v. Herzog, 150 F. 2d 450 (2d Cir., 1945); and FTC v. Fairyfoot Products Co., 94 F. 2d 844 (7th Cir., 1938).

7/FTC v. Ruberoid Co., 343 U.S. 470, 479 (1952).

Where the Commission has reason to believe that violation has occurred, it certifies the facts concerning the violation to the Attorney General, who may institute a suit in a United States district court for the recovery of the civil penalty.1/ There is no civil penalty provision in the Clayton Act. The only remedy available to the Government under that statute is a proceeding for contempt.

The Federal Trade Commission Lawyer

In the introduction to a book recently published under the auspices of the American Bar Association, The Lawyer from Antiquity to Modern Times, a leading member of our Association stated: "The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens."2/

With those words I heartily agree. But if it is true that all lawyers are public servants, how much more should this be true of the lawyers on the staff of the Federal Trade Commission! No figure of speech is required to illustrate their relationship to the public, whose direct employees they are.

As the chief law officer of the Commission I want to take friendly issue with a statement in the concluding chapter of the same recent book.

> "It cannot be insisted too strongly that the idea of a profession is inconsistent with performance of its function, exercise of its art, by or under the supervision of a government bureau. A profession presupposes individuals free to pursue a learned art so as to make for the highest development of human powers. The individual servant of a government exercising under supervision of his official superiors a calling managed by a government bureau can be no substitute for the scientist, the philosopher, the teacher, each freely applying his chosen field of learning and exercising his inventive faculties and trained imagination in his own way, not as a subordinate in an administrative hierarchy, not as a hired seeker for what he is told to find by his superiors, but as a free seeker for the truth for its own sake, impelled by the spirit of public service inculcated in his profession."3/

Tocqueville, the French statesman and astute observer of the American Republic after the turn of the Nineteenth Century, expressed a different view of the role of lawyers both in and out of Government when he wrote:

> "I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."4/

1/Federal Trade Commission Act, Section 5 (1); 52 Stat. 111; 15 U.S.C. 45 (1).

2/Reginald Heber Smith, Introduction, February, 1953.

3/Roscoe Pound, The Lawyer from Antiquity to Modern Times, p. 361. I agree, of course, with Dean Pound's opposition to any tendency toward socialization of the bar.

4/"Democracy in America" (1835), Vol. 1, Ch. 16. Contra: William Shakespeare, "The first thing we do, let's kill all the lawyers." (King Henry VI, Pt. 2, Act IV, Sc. 2, Line 86, Dick the Butcher).

Surely it is basic that if this nation is to continue to preserve the political and economic ideals expressed in its Constitution, lawyers in all branches of the Government, whether they are elected, appointed or employed, must be encouraged to apply the same measure of professional responsibility as their fellows outside of Government. They are no less heir to the traditions of our profession because they are employees of the people.

The Federal Trade Commission, whose personnel total approximately 600, is one of the smallest agencies of the Federal Government. But it is significant that of that number, nearly 250 are qualified attorneys.

Where a proceeding has been conducted with logic and attention to factual detail, the same qualities will appear in the ultimate decision. The Commission has learned that it can expect logic and attention to the facts -- and, I might add, proper respect for the constitutional rights of the parties -- from men trained in the law. That is why its investigators are attorneys; that is the reason for the preponderance of lawyers on the Commission's staff. This is not to minimize the role of economists and others. Their functions are vital. The Commission fully recognizes that its decision can be no better than the quality of the proceeding which has led to the decision.

I speak for all the law trained men on the staff when I say that we are dedicated to the public interest. For the truth of the proposition that public service is not consistent with the highest ideals of the legal profession, I point with pride to the many highly competent attorneys now on the Commission's staff and with equal pride to the many who have similarly served and now are prominent in our splendid Association and in the profession at large.

For myself, I wish to say that I have deep convictions regarding the consultive responsibilities of the office of the general counsel of the Federal Trade Commission -- including responsibilities to which I have referred in my discussion of the Compliance work.

In some governmental agencies, the general counsel is the chief prosecutor. At the National Labor Relations Board, for example, all actions are brought by the general counsel. This is not the case at the Federal Trade Commission, where the general counsel has no responsibility for the investigative and prosecuting functions. Rather he is legal adviser and consultant to the Commission and its staff.

As I see it, this duty of consulting and advising extends equally to the public and to the bar. If we can be of service in this respect, please call on us.