

no. 6

REMARKS OF EARL W. KINTNER, GENERAL COUNSEL,  
FEDERAL TRADE COMMISSION, BEFORE  
FEDERAL WHOLESALE DRUGGISTS' ASSOCIATION,  
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I

It is a real pleasure--and a challenge--to appear before you today.\* Your industry is not just a vigorous and enterprising one, it is an indispensable foundation stone of our national prosperity and, indeed, of our national well-being. Moreover, from Government's vantage point, you represent a dynamic and aggressive industry whose influence and ideas pervade the whole field of trade regulation. The voice of the drug industry is strong and articulate and no man can purport to be informed in this often-confused, always complex field unless he listens with care to your conscientious views.

Therefore, a speaker on the subject of trade regulation must recognize, lest he look a little foolish, that he faces a most knowledgeable and sophisticated audience. I don't expect there is anyone in this group like my old friend Clem Feffendorffer back in Indiana who thought fair trade was when he swapped the local druggist two bushels of feed corn for a year's supply of mustard plaster.

My topic "Current Developments in Trade Regulation" is broad enough for me to begin by hedging just a bit.

"Trade regulation," as I am sure you know, is fairly synonymous with "antitrust" and the terms are for the most part used interchangeably. With the exception of certain specialized industries--communications, transportation, aviation, for instance--our trade regulation laws and antitrust laws are administered by the Antitrust Division of the Department of Justice and by the Federal Trade Commission. The two agencies bring to trade regulation complementary methods of attacking restraints of trade: the Department of Justice via the courts, the Federal Trade Commission via the more flexible administrative process, by which I mean a self-contained procedure for investigation, trial and adjudication of charges before a single administrative tribunal with the defendant, or respondent as we call him, guaranteed the safeguard of full court review of the administrative agency's action.

With your permission, I am arbitrarily going to limit myself today, largely, though not entirely, to recent developments involving the Federal Trade Commission. I would add, however, that to the extent that there have been significant recent developments in the policies of trade regulation at the Federal Trade Commission similar policy developments have occurred at the Department of Justice.

Let me start with a few basic definitions. I have found that with large segments of industry, the Federal Trade Commission is variously thought of as a set of anonymous bureaucratic initials, an undefined nemesis, or a necessary but largely mystifying nuisance.

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\*The opinions expressed here are personal thoughts of the speaker and do not necessarily represent official views of the Commission.

Without pausing to inquire into which of these categories you fit us, let me say briefly that the Commission is an independent administrative agency, similar in status to the FCC, FPC, CAB, SEC, ICC, although unlike the particularized authority of those agencies, the FTC's jurisdiction extends to commercial activities common to many industries. By Big Government standards we are physically one of the smallest agencies in Government (we have approximately 600 employees and an annual budget of less than six million dollars). The Commission administers all or portions of a number of antitrust and regulatory statutes: the Federal Trade Commission Act, the Clayton Act, the Webb-Pomerene Act, the McCarran Insurance Act, the Wool Products Labeling Act, the Fur Products Labeling Act, the Flammable Fabrics Act, and the Lanham Trade-Mark Act. Violations of these Acts are investigated by a Bureau of Investigation, tried by a separate Bureau of Litigation, and ultimately decided by the Federal Trade Commission itself, a five-man bipartisan commission, members of which are appointed by the President for seven-year terms. Proven violations are subject to Commission cease and desist orders which may be appealed by respondents to the courts, or, when final, enforced by the Commission in the courts. Violators, depending on the statute violated, are subject to civil penalties up to \$5,000 a day or to contempt of court citations.

The Federal Trade Commission was established in 1914 to deal with the problems of unfair competition and particularly with those incipient practices which had not yet developed into the type of full-blown monopolistic activity banned by the Sherman Act.

To accomplish its task, the Commission was staffed with experts--lawyers, economists, accountants, statisticians--qualified to deal with the enormous complexities of the business and economic conditions within the Commission's jurisdiction.

It is a matter of historical record that despite the bold purposes which Congress intended for the Commission, the Commission's performance over the years fell considerably short of the ideal. Thus, although the Supreme Court has endorsed the character of the Federal Trade Commission as an expert body and often deferred to its expertness, the Court on a number of occasions has found need to overrule the Commission's specialized judgment. And so far as critical fire is concerned, the Commission traditionally has been one of the most embattled agencies in Washington.

## II

Since 1953, there has been much talk of a "new" Federal Trade Commission, some loud in its praise, some derisive. As an unabashed partisan of the "new" Commission, I will make no effort to mask my approval of the basic developments of the past several years.

Fundamental to any analysis of current developments in trade regulation is an understanding of the shift in Government's state of mind.

First, understand this. There is no principle more firmly rooted in our democratic philosophy than the efficacy of antitrust as a prime guardian of our competitive free enterprise system. Antitrust is a vital contributor to the realization of a free society's most productive capabilities. Vigorous antitrust enforcement enhances our competitive economy's capacity for satisfying the desires of all citizens.

But antitrust and competition are partners in progress. Hostility between Government and business, no less than restraints of trade, corrodes the finest workings of our economy. I think it no secret that at times in our history precisely that sort of unnatural tension between public and private forces has inhibited the fullest expression of our competitive potential.

And so I would say that the dissipation of any vestige of this hostile state of mind in favor of a genuine, yet never naive, respect for business, has been the benchmark and inspiration of recent developments in trade regulation.

At the Federal Trade Commission, this new state of mind has meant many things. A new Bureau of Consultation with rank equal to other basic components of the Commission, has been established to aid businessmen voluntarily to comply with the law. Somewhere in its long history the Commission had lost sight of Woodrow Wilson's wise counsel that "businessmen desire something more than that the menace of legal process be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body."

Through the Bureau of Consultation, the Commission offers business real, and we hope, sound advice, not grudgingly given as if these were trade secrets spilled to some future opponent but rather with the sincere intent of forestalling unnecessary and perhaps unwitting violation of the antitrust laws.

This emphasis on voluntary consultation has taken particularly compelling form in the establishing of an entirely new Division of Small Business, to counsel the small businessman in what some contend are the inscrutable ways of the Commission and to advise him in matters relating to the laws administered by the Commission.

Parenthetically I might add, the work of the Small Business Division is in harmony with an over-all, continuing effort on the part of the Commission and this Administration to encourage and stimulate the growth of small business. The Commission recognizes fully the indispensable contribution of small business to the vigor and imagination of our competitive system. As the President's Cabinet Committee on Small Business has only recently stated: "The vitality of the American economy has depended in the past, and may be expected to depend in the future, upon the continuous infusion of new firms, new entrepreneurs, and new ideas." The conscious policy of the Commission is to sustain this ideal.

But this new spur to the Commission's lagging program of voluntary counsel and comfort has been combined as well with a toughening of its involuntary law enforcement.

The Commission's internal structure has been reorganized from head to foot, procedures streamlined, overlap and delays eliminated, basic authority realigned. The effects have been dramatic.

More cases have been started, tried, and completed with, we like to think, better and fairer results than during any equivalent period in the Commission's history. An invigorated follow-up or compliance program has put teeth in Commission orders and replaced the near-contempt in which Commission's orders were formerly held by many with a healthy and salutary respect. Respondents, who in the past were required at enormous expense and over interminable length

of time to try their cases to the bitter end once they had decided to contest Commission charges, can now toss in the towel at any point and offer to take a consent order having the full force of a contested order, but effecting obvious saving in time and expense both to the respondent and to the Government.

Over all, I believe, this new state of mind in Washington--the healthy balance, of hard-hitting enforcement with sincere encouragement of voluntary law compliance--has raised the Federal Trade Commission and its mission of trade regulation to a new high in public acceptance and in effective regulation.

### III

And now, if I may, I should like to switch from these abiding institutional generalities to a few of the specific matters which I know are of particular interest and concern to the drug industry.

I suspect there is no more pressing or complicated problem in your industry, and particularly among wholesale druggists, than the many questions currently surrounding the future of fair trade.

Now I am not intrepid enough to lecture to so knowledgeable a group on the subject of fair trade. In fact, since counsel for the drug industry are among the great legal experts on fair trade, I am reluctant to speak at all. On the other hand, fair trade is a field of the law which in the past has involved, intrigued and at times embarrassed us at the Federal Trade Commission and which, not inconceivably, will do so again. To that extent, I suppose, we are all interested parties.

Let me note in passing that I purposely express no judgment on the ultimate validity of fair trade in our competitive economy. I suspect that as businessmen you are far less interested in speculative excursions into economic philosophy than in frank discussion of the present-day realities of fair trade. For better or worse fair trade remains a highly significant--and uncertain--fact of commercial life.

For a moment let me retrace some recent history. As you know, fair trade is generally exempt under the McGuire Act from the prohibitions of the Federal antitrust laws if it is legal under State law. At the Federal Trade Commission--and the Department of Justice--authority over fair trade matters is sharply circumscribed by the McGuire Act. The Act does not impose upon the Commission or on the Department any affirmative regulatory duties. It does not by its terms prohibit anything nor require us affirmatively to do anything. The Act is what we call a permissive one. It specifies the conditions under which fair trade and the rights created by State fair trade laws are exempted from the antitrust laws.

The Federal Trade Commission has consistently taken the position that it is not the Commission's province to interfere with fair trade agreements where they are lawful under applicable State law.

But the McGuire Act is not a blanket exemption and Federal antitrust authorities have not withdrawn completely from the field. The McGuire Act sets its own explicit limits as to how far its exemptions go. The Act does not permit so-called "horizontal" fair trade agreements "between manufacturers,

or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

And so, although we say as a general rule that fair trading is exempt under the antitrust laws, it is fairly evident that in certain competitive contexts, for instance where it amounts to horizontal price fixing, it may and will be attacked under the antitrust laws.

This is precisely what happened in the McKesson & Robbins case last June. There the Supreme Court read the horizontal price-fixing provision of the McGuire Act to bar fair trade agreements between a manufacturer-wholesaler and independent wholesalers on the ground that they amounted to price-fixing agreements between competitors, that is between the manufacturer in his alter ego as a wholesaler and the independents.

The Supreme Court's decision, I know, has had a fairly explosive impact on the wholesale drug industry. It is my understanding that you are still trying to grope your way out of the crater which it left.

Though it is only of academic interest now, I might point out to you as a kind of solace that the Federal Trade Commission treated pretty-much the same problem only two years ago and arrived at an opposite conclusion. In separate cases involving Eastman Kodak Company and Doubleday Company, the Commission ruled that retail fair trade by a manufacturer owning retail outlets was not barred by the McGuire Act since Congress did not intend to penalize such integrated operations. In effect, the Commission held that Eastman and Doubleday entered into these fair trade agreements not in their identity as retailers but as manufacturers. Thus there was no price fixing between competitors. These rulings, of course, are little more than historical curios in the light of the McKesson & Robbins decision.

Well, what is the outlook for wholesale fair trade since McKesson-Robbins? On the whole I would say bleak, but you may find a few bright spots.

Is wholesale fair trade now by the boards completely as some observers suggest? This prediction may be a bit doleful.

Must all manufacturers with separate wholesale organizations abandon wholesale fair trade? In practice, the answer will probably be yes--but there may be qualifications.

Must manufacturers who diversify their sales through direct and indirect channels abandon fair trade on all indirect sales, that is to independent wholesalers? Possibly yes, although here too there may be pockets of legitimate resistance.

It is worthwhile, I think, to study closely what the Supreme Court said--and what it left unsaid. First, what was the Court's precise holding? This is essentially it: A drug manufacturer who is also a drug wholesaler cannot fair trade his products on sales to independent wholesalers who are in competition with his own wholesale outlets. This condition--that the seller and independent wholesalers must be "in competition with each other" is a critical one and one which was stressed by the Supreme Court. The Court did not say that wholesale fair trade was out the window without more. Nor did it even say that every manufacturer-wholesaler was barred from fair trading at

the wholesale level. The Court's bar was on fair trade contracts with independent wholesalers in competition with the manufacturer.

In practice, I suppose, this will knock out much if not most of the wholesale fair trade by such manufacturers in your industry. (Indeed the elimination of wholesale fair trade by McKesson & Robbins alone will succeed in doing this.) Yet, I submit that a manufacturer, wholesaling only in selected markets or on a selected regional basis, may still enter into wholesale fair trade contracts in other areas competitively insulated from his own wholesale operations. This was frankly conceded by the Department of Justice in its brief to the Supreme Court where it stated, "the only manufacturers that would be affected by a decision invalidating such agreements are those who distribute their products both through their own selling organization and through independent outlets, and even then only to the extent that the manufacturers' own selling organization is in competition with the independent outlets." (Emphasis added.)

Now, what about wholesale fair trade by direct-indirect selling manufacturers (by which I mean manufacturers who have no formalized wholesale operations as does McKesson & Robbins but who sell directly to specified retail accounts while at the same time continuing to do some and probably the bulk of their distribution through independent wholesale outlets). It is my understanding that a number of direct-selling drug manufacturers have interpreted the Supreme Court's decision to bar their fair trading at wholesale and are now in the process of jettisoning their wholesale fair trade programs with all deliberate speed. I would not characterize such cautious retrenchment as either unwarranted or unwise. Yet even here I would suggest there are limits to the breadth of the Supreme Court's ruling.

In its argument before the Supreme Court, the Government squarely challenged the propriety of wholesale fair trading by direct-selling manufacturers--and the Court refused to pass on the question. Noting that the Government had claimed wholesale fair trade permitted the manufacturer (I am quoting now) "to undersell the independent wholesalers when dealing with large retailers directly through its manufacturing division," the Court stated, "we need not concern ourselves with such speculation." Now as the lawyers well know, this kind of language can mean something--or nothing. But so long as the Court has not spoken the question is technically open. Here are a few additional thoughts.

Certainly so far as wholesale operations competitively remove from the manufacturer's own direct sales are concerned, the Supreme Court's decision would seem to OK fair trade, since the Court, as I have noted, required that wholesalers be in competition with the manufacturer before fair trade was barred. Thus, if a West Coast manufacturer wishes to sell direct in his own area but wants to sell through independent wholesale outlets on the East Coast, and there are no overlapping markets, there would seem nothing in the Supreme Court's decision to challenge the propriety of fair trading the East Coast wholesalers.

In other markets, however, where the manufacturer's direct sales are in competition with his wholesalers, the Supreme Court's strong language would suggest that any kind of wholesale fair trade is a risky business. I suppose it can be argued that there is a legal distinction between selling through formal wholesale divisions and direct selling, yet I fear that in this case, this may be one of those distinctions without a difference.

With all of this, there may be some direct selling manufacturers who are still willing to risk wholesale fair trade. I can only wish them good luck, and suggest that they had better be like Caesar's wife in running their fair trade program. The manufacturer who fair trades independent wholesalers and then, in his direct selling zeal, undercuts them is courting trouble. Not only are his fair trade contracts probably unenforceable but he practically invites antitrust attack. A fair trade system which forecloses wholesalers from the retail market the manufacturer himself covets has a brief life expectancy these days.

#### IV

Beyond fair trade, other problems of trade regulation, I know, concern you. For a moment longer, let me discuss some of these, again with particular reference to the work of the Federal Trade Commission.

As you well know, a primary responsibility of the Commission is administration of the anti-price discrimination provisions of the Robinson-Patman Act. This is one of the most turbulent areas of antitrust, and lest you have some illusion that a calm of certainty and predictability is just around the corner, let me assure you that there will be no such fortune. In our lifetime, and probably down to that of our children's children, the Robinson-Patman Act or like successors will continue relentlessly to pose a variety of trade regulation problems, for the Act is now deeply rooted in our antitrust philosophy.

With this cheerful introduction, I will get down to cases.

I have noted increasingly in trade journals, yours included, references to a new (I quote) "anti-chain crusade" by the FTC. This is a journalistic label, not ours. The only crusade we will admit to is an antitrust crusade. This is not to say that some chains and their sellers are not in for trouble. That fact should be fairly apparent from a glance at our roster of pending cases and from those we have announced are in preparation.

But an anti-chain crusade, to me, connotes a kind of vengeful attack on a particular segment of our distributional economy. At the FTC we have neither the manpower nor the funds nor the inclination for such a drive. We have no stomach for guerrilla warfare, for setting off one segment of our economy against another. Large - medium - small business, manufacturer - distributor - retailer, and a hundred other variations, have legitimate and necessary places in the workings of a free and growing economy. It is only when the fetters of artificial restraints take hold that antitrust enforcement authorities move to restore the balance.

If we proceed against what appears to be an unusually large number of chains or against their suppliers--as we are frankly doing now--it is not an institution or a business form we lash out against. We act because consumer complaints, competitor complaints, and our own independent investigations have shown that certain unfairnesses have entered in the orderly give and take of business to provide what we consider an unnatural advantage to some buyers and an unnatural disadvantage to others.

Thus in a number of recent proceedings, some against drug suppliers and drug chains, we have charged that discriminatory price concessions or promotional allowances have been granted to certain buyers to the detriment of others. We are not trying to eliminate either the allowances or the favored buyers. We are trying to spread the benefits to all buyers.

In other proceedings, again involving some drug companies, we have sought to equalize the bargaining power of large purchasers as against small purchasers by insuring that quantity discounts were justified by reduced costs and not offered simply as a premium for an accumulation of purchases unrelated to costs.

In another area of interest to you, we are probing deeply into the high cost of antibiotics to the consumer. Here, too we proceed neither vindictively nor with any preconceived victim in mind. The sole criterion for our inquiry is the public interest in fair prices and fair business practices.

In the field of corporate mergers, our program for preventing mergers which substantially lessen competition or tend to monopoly has quickened in the past year and will fairly explode next year with the availability of substantial new appropriations from Congress. We are attempting to evaluate each merger for possible anticompetitive effect, yet we contemplate no head-long condemnation of all mergers. Antimerger sanctions, energetically and intelligently applied, can protect competition without oppressing it. This is the balance we seek.

All of this case-work, antiprice discrimination, antiprice-fixing, antimerger, etc., we lump together in the category of antimonopoly work. Beyond this, we have, as always, our antideceptive practices work, the drive against false and misleading advertising. Here, too, from time to time we snare a drug victim, most recently for a series of over-enthusiastic claims for arthritis and rheumatism relief. Yet, on the whole, I believe, the drug industry understands the burdens and requirements of truthful, undeceptive advertising. The occasional drug malefactor charged with false advertising is clearly aberrational. This, I think, is a sure tribute to your alertness and to your conscious efforts to apply the high ethical standards of the drug industry to this vital aspect of your operations.

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I have perhaps dwelt too long on these current developments without, I know, offering you any great aid or comfort. Yet, I think they point up some basic considerations for businessmen today.

In 1956 antitrust enforcement is vigorous but it is not vindictive nor entirely unpredictable. There are plenty of traditional hard-core antitrust violations for us to sink our enforcement teeth into without having to resort to quixotic campaigns against every technically questionable but competitively innocuous practice.

You are probably aware that antitrust violations first come to the attention of antitrust authorities through complaints - from competitors, from customers, from the general public. What does this suggest? Simply this: If there is no cause for complaint there is little stimulus to antitrust inquiry. This places the responsibility squarely where it belongs and where I think you want it--on yourselves. In our society, we have not yet fallen prey to the Big-Brother-is-Looking-At-You mentality. You don't want--and we don't want--any paternalistic Government agency dictating your ordinary business decisions. It is only when business decisions become, in antitrust terms, extraordinary--when, through collusion, or avarice or shortsightedness, or just plain ignorance, they produce competition-harming consequences--that Government steps in.



Perhaps what I have said comes down to this:

The channels of legitimate business conduct are infinite. The mind of men cannot begin to comprehend the variety, the swift changes of pace with which American businessmen have produced a better mouse trap--and a better way of life. In this scheme of ever-growing productivity, Government properly functions not to interfere irresponsibly, nor to impose its arbitrary judgment, but to protect against obstacles in the free fair workings of the system. If the grit of unfairness of discrimination, of deception, of collusion, does not clog the works, then Government, not unhappily, is out of Business.

Modern competition is no unexact science. The day is past when carefree inspiration could substitute for efficient organization, for precision management, for thoughtful planning. This means business as a modern science requires planning for antitrust as well as for other more traditional contingencies.

The law holds a businessman to normal consequences of his actions. In 1956 no businessman can afford to ignore an informed intelligent prediction of the competitive effect of what he does. Unwitting adherence to the instincts of the moment is the surest way to stumble. Reduced to specifics, this means, basically, look before you leap.

When you fair trade, fair trade within the legitimate bounds set out in recent court decisions, not within the wishful limits of ten years ago. When you set up a pricing schedule let the differentials reflect legal justification, cost differences, grade differences, disparate buyer functions, not frivolous commercial preferences. When you work out special promotional allowances to selected customers don't be haphazard. Make them available on proportionally equal terms to all customers. When you contemplate merging with a competitor, acquiring a supplier, buying up distributional outlets, evaluate any adverse competitive consequences realistically and ahead of time in light of existing law.

For years, the finest legal minds have been available to counsel your industry. Use them. Get antitrust advice before, not after, you adopt any practice charged with antitrust implications. We are at the point where antitrust is too expensive to be an after-thought. Defense against an anti-trust charge can be a crippling burden for any business. The proverbial ounce of prevention brings a profitable return.

I had not intended to turn this report into a sermon, and lest I begin to sound too much the missionary I shall desist with one final thought. If Government today has succeeded in establishing a sane balance of trust and watchfulness towards business, then business must continue to warrant that treatment. This requires neither the hobbling do-nothingness of over-caution nor the frustration of stand-pattism. It does require intelligent planning, honest appraisal and flexible bending to changing competitive conditions.

The restrictions of the antitrust laws have been tempered and proven in almost 70 years of our nation's greatest growth. They restrict only competitive abuses. Freedom of fair, just, honest enterprise is still unlimited. Keep it that way.