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"EQUITABLE TREATMENT OF COMPETITORS"

Remarks By

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SECTION ON ANTITRUST LAW

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"Why pick on me?" is a common query heard at the Federal Trade Commission. As you listen you try to place this person and his remark in the proper setting. A businessman has just been caught violating the law. Sometimes you feel he must have known that he was doing so. Is he a seller or buyer caught in the intricate web of the Robinson-Patman Act or is he an advertiser squeezing more sales from an alluring but cleverly deceptive innuendo? Putting aside sympathy, or lack of it, you remember a pigeon-holing phrase of our profession, "competition not competitors."

Respondents frequently say that their competitors are engaged in the same alleged illegal practices. They further claim that if the Commission issues a cease and desist order against themselves alone, they will be at a serious competitive disadvantage. Recently the Commission issued simultaneous complaints against one large company and several small ones. The large company was heard to complain at the very outset, "Why were we the only large company to be sued?"

I know you and your clients are very much interested in the competitive effects of the Commission's law enforcement. I shall not discuss the Trade Practice Conference Procedure. It is well understood as an effort to gain industry-wide voluntary compliance with the law through what one might call the educational process. I shall refer only briefly to the Stipulation and Guides procedures.

My remarks this afternoon are directed primarily to those situations wherein the Commission determines that it is necessary to issue formal complaints. This brings us to the heart of my topic--the equitable treatment of competitors in formal proceedings. Francis Bacon once said that the best armor is to keep out of gunshot. I could heed that advice by presenting a paper condemning the sale of lottery devices. Such a paper would be safe and probably of no interest to you. Bear in mind, however, that I am discussing the equitable treatment problem in general terms and advancing a general theme for purposes of information and illustration. I am not attempting to promulgate rules of procedure.

As a practical matter the Commission has neither sufficient funds nor manpower to investigate all competitors allegedly engaged in identical malpractices, issue complaints, try the various cases separately and issue orders to cease and desist simultaneously. This raises the first question: Does the Commission have discretion in the selection and prosecution of cases? Or, can the Commission issue an order to cease and desist against only a few of the competing firms who allegedly are committing the same illegal offenses?

In the Niehoff (C. E. Niehoff & Co. v. F.T.C., 241 F. 2d 37 [1957]) and the Moog (F.T.C. v. Moog Industries, Inc., 238 F. 2d 43 [1956]) cases, the Courts of Appeal in the Seventh and Eighth Circuits were urged to stay the enforcement of the Commission's orders to cease and desist until similar complaints and orders were issued against their competitors. In Niehoff, the Seventh Circuit did stay the enforcement of the order to cease and desist "in the light of equitable principles" and depending upon "the future course of the Commission's proceedings against Niehoff's competitors." In Moog, the Eighth Circuit affirmed the Commission's order without granting a stay.

These cases thus directly presented the issue. On certiorari, the Supreme Court clearly answered this question in the affirmative as follows (Moog Industries, Inc., v. F.T.C., 355 U.S. 411 [1958]):

> "* * * Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an

> industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

It is therefore clearly established that the Commission can issue an order against one of several competitors, all of whom allegedly are violating the law. It logically follows that the selection of cases is also within the discretion of the Commission.

In the exercise of this discretion is the Commission alert to reality, i.e., to the competitive disadvantage which may at times exist should an order issue against but one or few of many offenders. I assure you we are keenly aware of it. Indeed, you constantly remind us. Further, on our part, and on the part of some respondents who exhibit initiative, there is and has been a continued effort to provide workable solutions within the statutory framework. This is demonstrated by some specific cases to which I shall refer later.

In our processing of cases one factor--public interest--is at all times paramount. Although it is highly desirable that competitors be treated alike, the lodestar is the protection of the public interest. Where one dovetails with the other we can use shortened, flexible procedures to avoid competitive advantage or disadvantage.

Several procedures have been used and used successfully. And I should add that the cases include both antimonopoly and antideceptive practices. Therefore, I am not confronted with a situation

similar to that faced by Rufus Choate who, when asked by the court to cite a precedent, replied, "I will look, your Honor, for a precedent, although it would be a pity that the court should lose the honor of being the first to establish so just a rule."

Where all respondents desire to terminate the challenged practice at the same time, they can accept orders to cease and desist simultaneously. The orders may or may not vary in some detail, depending upon the particular facts. The Commission issued complaints against the Bulova Watch Company, Inc. (D. 5830), the Gruen Watch Company (D. 5836), and the Elgin National Watch Company (D. 5837), charging each of them with granting advertising allowances to customers on disproportional terms in violation of Section 2 (d) of the amended Clayton Act. It is a probability of business life that if sellers are competing for the business of preferred buyers by granting them disproportional advertising allowances and that if one of the sellers is required to discontinue the practice first, then he will lose business.

Counsel for one of the respondents in the watch cases readily agreed that a cease and desist order could be issued against his client provided that such an order was simultaneously issued against the other two respondents. Subsequently, counsel for the two remaining respondents made similar proposals. The result was that orders were issued at the same time against the three competitors.

In effect, the Commission determined in the above cases that the public interest would be well protected by such agreements. Most certainly there was no delay in obtaining ultimate compliance with the law. In fact, compliance in all three cases was hastened. In addition, competitive advantage, or disadvantage, was eliminated. And it is readily apparent that the taxpayers' and the respondents' money was conserved.

In another series of cases the Commission issued complaints against Sperry Rand Corporation (D. 6701), Schick Incorporated (D. 6892), North American Philips Company, Inc. (D. 6900), and Ronson Corporation (D. 7066). The several complaints contained various charges of price discrimination in violation of

Section 2 (a) of the amended Clayton Act, the use of disproportional advertising allowances in violation of Section 2 (d), the furnishing of services and facilities on disproportional terms in violation of Section 2 (e), and illegal resale price maintenance in violation of Section 5 of the Federal Trade Commission Act.

The various respondents separately filed consent agreements providing that the effective date of the orders would be stayed until the Commission issued orders against the other respondents. Respondents' counsel, in submitting their separate proposals, insisted that the orders be issued simultaneously. The consent agreements were accepted.

These razor cases again illustrate that compliance with the law and equality of treatment for competitors can go hand-in-hand. It is noteworthy that the procedure was used successfully notwithstanding the multiplicity of charges in the various complaints. It was not necessary to litigate questions of law. The respondents, apparently, were primarily interested in obtaining equality of treatment both in substance and in the timing of the orders.

Another procedure has been used where all respondents wish to terminate the practice if it is found to be illegal. Under these circumstances, where there is a bona fide desire to litigate the issues, respondents may agree with the Commission that one case will be selected by the Commission for trial, all respondents to abide by the final determination in the selected test case. Respondents would further agree that should a cease and desist order issue in the test case, then such an order is to issue against each of them without further proceedings.

In the reprocessed oil cases it was necessary to litigate the illegality of the challenged practice. The Commission had issued a complaint against the Mohawk Refining Corporation (D. 6588), charging it with violation of the Federal Trade Commission Act through failure to disclose the prior use of certain oil products. While hearings were in progress, five respondents similarly charged in other complaints

(Dockets 6581, 6682, 6717, 6709 and 6579) filed separate agreements that cease and desist orders could be issued against them provided that the orders be stayed until final decision in the Mohawk case. The Commission accepted these five agreements.

In the reprocessed oil cases, all of the sellers did not compete with each other but all of them competed with another. Counsel for five respondents agreed to abide by the decision in a case other than the case against their clients. The Commission had reason to believe that the failure to label the oil as used oil was illegal, but there was no direct court precedent in Commission cases. Since litigation to determine the question of legality was apparently necessary, it was obvious that it was more efficient for the Commission to determine this point in the trial of one case. Compliance with the law by all respondents was thus obtained and the procedure saved the expense of extended litigation, including several appeals to the courts. At the same time, no respondent was placed at a competitive disadvantage.

A somewhat different procedure was used in two other groups of antideceptive practice cases. The first proceeding was in May 1957, and involved six manufacturers of wool interliners (Dockets 6796, 6797, 6798, 6799, 6800 and 6801); the second was in June 1958, and involved eight manufacturers of woolen waste (Dockets 7227, 7228, 7229, 7230, 7231, 7232, 7233 and 7234).

Both groups were handled in the same way. After it was ascertained that the several proposed respondents were willing to consider agreements for consent orders, drafts of complaints were prepared for each case by the Bureau of Litigation and submitted to the proposed respondents informally, with explanation that this was the form of complaint which would be presented to the Commission with recommendation for issuance. At the same time an agreement containing a consent order was also submitted to each proposed respondent for signature. The agreement contained a provision that they waived service of the complaint. This agreement was signed, the date and docket number being left blank so that they could be filled in after issuance of complaint. Accompanying the agreement was a separate waiver for their signatures, whereby they waived

service of the hearing examiner's initial decision and the thirty-day period within which the initial decision may become the decision of the Commission under its Rules. These negotiations were carried on with each proposed respondent with the understanding that the same procedure would be used as to all other proposed respondents involved, and that such action as would be taken would be simultaneous.

After the agreements and the waivers were signed by proposed respondents, the complaint drafts were then submitted to the Commission. Upon issuance of the complaints by the Commission (minus the usual notice form), the consent order agreements were transmitted to the hearing examiner. Upon issuance of his initial decisions based on the consent agreements, the initial decisions and the waivers mentioned above were filed with the Commission. The initial decisions as to all respondents were forthwith adopted as the decisions of the Commission and the attending cease and desist orders were issued simultaneously.

The novelty of the procedure used in the interliner and woolen waste cases was that the discussion and agreement among counsel occurred prior to the issuance of the complaints. Usually, of course, the discussions among counsel occur after the issuance of complaints. These cases were also unusual in that the two groups comprise practically the entire industries. Each group was highly competitive and anxious to avoid any competitive disadvantages.

With variations to accord with the particular circumstances, procedures substantially similar to those used in the reprocessed oil cases were quite recently used in the so-called "cigarette vending machine" cases which involved alleged violations of Section 2 (d) of the amended Clayton Act: Brown & Williamson Tobacco Corp. (D. 6908); R. J. Reynolds Tobacco Co. (D. 6848); Philip Morris, Inc. (D. 6750); American Tobacco Co. (D. 6830), and Liggett & Myers Tobacco Company, Inc. (D. 6642). The foregoing cases demonstrate what can be accomplished to dovetail the public interest and competitive equality.

A factor common to each group of cases was that no respondent claimed that his particular situation deserved treatment different from his competitors.

All wanted only to be treated alike. Insofar as it is possible we, too, desire to treat all who are alike, alike. In each of the cases, compliance with the law was obtained more quickly, efficiently, and economically than would otherwise be possible.

Generally speaking, what are some of the more basic considerations as to the availability of conditional consent agreements to alleviate competitive disadvantage? What atmosphere must prevail if their use is to be contemplated? Are subjective as well as objective factors involved?

The goal itself suggests one of the basic questions, namely, must a competitive situation exist among the various alleged offenders? Or, leaving aside the question of competitive disadvantage for a moment, assume the Commission files complaints against three fur retailers, none of whom competes with the others. If all three fur retailers want to litigate common, bona fide questions of law, is there any reason for the Commission to resist use of the test case procedure? Obviously, more reasons exist for the use of conditional consent agreements where competitive disadvantage is a factor. But competitive disadvantage should not be our only consideration. In a larger sense, as administrators we are striving in every instance to achieve greater degrees of flexibility in law enforcement through approaches geared to reasonableness, to practicality, and to the dictates of experience. 1/

What is the effect of the existence of an enforceable order against a competitor of the respondent who seeks equitable treatment? If a respondent's competitor is already subject to such an order, respondent may have no valid claim to equitable relief. All the more, perhaps, is an enforceable order against him justified. Some equity lies with his restricted competitor. Recently the Commission rejected a respondent's conditional consent agreement for this and other reasons. But this reason, too, should not be the only consideration. For example, assume that the Commission issues similar complaints against twelve competitors. Further

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1/ See Groveton Paper Company, et al., D. 6592-6600.

assume that one immediately accepts a consent order while the other eleven assert an intention to litigate a common, bona fide question of law. It might well be that the eleven should be permitted to use the test case procedure, as in the reprocessed oil cases. Depending upon the impact of the particular practice on the public, the compliance of the one restricted competitor might be stayed to await the outcome of the test case.

An atmosphere conducive to use of these procedures is present only if there is a full measure of cooperation, good faith and understanding among the attorneys on the Commission's staff and counsel for the various respondents. I emphasize the good faith element because, in its absence, any attempt to use equitable procedures may but serve to delay final action. In short, equitable procedures are not available to sell the public interest "down the river."

Subjectively, there must sometimes be the willingness by attorneys for the various competing respondents to risk the outcome of a case tried by another lawyer representing a respondent who is not their client. This not only involves the relative abilities of lawyers to try cases but also, perhaps, other more mundane considerations. The clients, no doubt, will also have definite views on this strategy.

Objectively, there is the question whether the facts and the law of various cases are suitable and appropriate for group handling. This decision is within the discretion of the Commission. As stated by the Supreme Court in the Moog case, supra, among a variety of factors for consideration is the extent of the relevant industry. Especially pertinent, of course, is the area of competitive impact. What is the nature of the offense? What is the nature of the competition? Another factor, and a very practical one, is whether the resources of the Commission will permit the investigation of a large number of concerns within a reasonable time. The Commission is not authorized under existing law to issue complaints unless there is reason to believe that the particular respondent has violated a law administered by the Commission.

Counsel for respondents can be of substantial assistance in developing the facts and the background

data for the particular industry. Counsel may be able to obtain data from their clients as to the extent of the use of an illegal practice in the industry and the identity of the offenders. If the Commission receives this data early in the investigation, a tentative decision can then be made as to whether the practice might be appropriate for group handling. No respondent should complain of being singled out and not accorded equitable treatment unless he has exerted himself to the best of his ability to assist the Commission in bringing about the cessation of the same practices on the part of his competitors.

There are many situations where this group procedure may not be appropriate. For example, sellers of medicinal preparations containing different ingredients may recommend their products for the same general purpose. The alleged false advertisements may vary in considerable detail. Obviously, any orders to cease and desist might well vary with the facts in each case. Again, for example, if a number of sellers were charged with price discrimination in violation of Section 2 (a) of the amended Clayton Act, and if the defense to such charge were cost justification or the meeting of competition in good faith, then the several matters might have to be considered separately. These defenses, too, would vary with the facts in each case.

These same basic considerations with respect to the handling of formal complaint proceedings are applicable as well to those matters which initially are determined by the Commission to be the proper subject of stipulations to cease and desist under Section 1.51 of the Commission's Rules of Practice. Assuming that the various requisites are all present, competing members in an industry can have assurance of equality of treatment by entering into separate voluntary stipulations with the Commission to cease and desist their practices at one and the same time.

In the context of today's discussion a brief reference to the Commission's Guides program is equally fitting. Thus far the Commission has issued guides in carefully selected fields dealing, e.g., with tire and cigarette advertising, with fictitious pricing practices, and with bait advertising in general. These guides constitute another step taken by the

Commission to place competitors upon a more even basis at the very outset insofar as knowledge of malpractices is concerned. For those in business and industry who sincerely wish to travel the straight and narrow, the guides serve as pathways. General voluntary compliance with the guides will tend to eliminate competitive disadvantages resulting at times from case-by-case enforcement of the law. Along with the Trade Practice Rules, the guides therefore are another of the first lines of approach to the problem of equal impact of law enforcement upon competing members of an industry.

Litigation before both the courts and the administrative agencies is steadily increasing. We must be ever alert to improve legal procedures. At this time we are considering possible revision of the Commission's Rules to clarify the complaint and consent order procedure so it will be known to all. If adopted, one press release would cover the complaint and the order.

We have also referred to a staff group the problem of recommending new procedures for enforcing the Robinson-Patman Act. It is desirable that the Commission find better and more equitable enforcement procedures in this area without lessening the vigorous enforcement of the Act. Some of the ideas considered to date are ingenius and even revolutionary; for example, can the Commission make greater use of Section 6 of the Federal Trade Commission Act to detect violations of the law? It is too early, however, to predict what the Commission will adopt.

In preparing for our meeting today I failed to find any prior extensive discussion of what I call equitable treatment of competitors. One who does not hold public office could, perhaps, rephrase some of my questions as answers. Personally, in the light of the relevant factors mentioned, I prefer to handle these problems on a case-by-case or an industry-by-industry basis. Through time and experience we may be able to adopt more definitive criteria.

Some legal procedures can be misapplied and misused to the detriment of public or private rights or both. The wise law enforcement official, I believe, is one who has the courage to be prudently flexible and the wisdom to realize that precedent is the guidepost of the law.

Today I have concentrated upon procedures at the Commission which perhaps are not sufficiently well known to the Bar. There will be, of course, differences of opinion as to whether or not these procedures should be used in particular situations. However, such procedures in appropriate cases can be quite effective in giving flexibility and reasonableness to law enforcement.