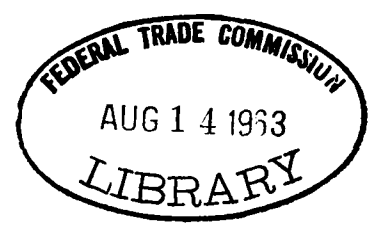


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STATEMENT BY
A. LEON HIGGINBOTHAM, JR.
COMMISSIONER, FEDERAL TRADE COMMISSION
BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
WASHINGTON, D. C.
FRIDAY, MAY 3, 1963

ON
FEDERAL TRADE COMMISSION ADVISORY OPINION CONCERNING
JOINT ADVERTISING BY RETAIL DRUGGISTS

Mr. Chairman and Members of the Committee:

I appreciate and welcome this opportunity to explain to you my personal views as to the implications and scope of the Commission's recent advisory opinion on cooperative advertising, dated March 28, 1963.

The Federal Trade Commission, within the permissibility of the statutes, must always be sensitive to the problems of small businessmen; thus I share with you your concern that "small and independent retailers have been waging an up-hill day-to-day fight to stay in business". I also recognize the necessity as well as the desirability of small businesses remaining an increasingly vibrant segment of our economy - with the capacity to survive and be successful in the market place, despite the fact that their larger competitors have greater financial resources. However, as members of a quasi-judicial agency, we are all obligated, by our oath, to honor the applicable statutes and controlling precedents and not legislate our personal views. Thus, it is within this context that the instant advisory opinion must be construed.

In my opinion, the comments and pronouncements subsequent to the advisory opinion have gone far beyond the holding of the opinion and thus beyond my personal intent in joining with the majority.

Much of the misunderstanding is attributable to the following:

(1) A failure to recognize the purpose of an advisory opinion; and

(2) A failure to appreciate that the advisory opinion in issue was limited to a specific plan submitted, and accordingly was not a blanket prohibition against all joint cooperative advertising of small businessmen.

The major plan considered by the Commission in rendering its opinion included a mock-up of a proposed advertisement, noting the following:

(1) A list of "member druggists" with the single price for the specific item advertised; and

(2) A statement that "all prices shown will prevail Thursday, Friday and Saturday of this week in the stores listed on this page." */

Our opinion, and particularly my concurring statement, did not purport to discuss abstract issues.

Instead, it was carefully directed towards the noted details of the specific proposal submitted to us. Until the instant matter, without exception, the Commission has not published advisory opinions; in many instances, applicants would object to a public disclosure of the plans submitted to the Commission since such premature publicity might deprive them of the competitive advantage of ingenuity inherent in the proposals submitted. Publication of the advisory opinions would give to competitors ideas and plans on which the applicant may have spent thousands of dollars to develop in anticipation of a proposed program. Thus a piracy of ideas would be abetted by publication of such plans. Accordingly, since the applicant knows the facts he submitted, advisory opinions, and particularly a concurring statement, would not include the factual specificity expected in adjudicatory opinions; in contrast adjudicatory opinions are neces-

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While the N.A.R.D. submitted a plan somewhat different from the above, it is our understanding that their representative indicated that their actual advertisements would be as described above.

sarily read by many persons not knowledgeable of the factual basis for the conclusions pronounced and thus should often require detailed reference to the relevant facts. In fairness, the Commission's instant advisory opinion cannot be construed, as a pronouncement of "general principles which go far beyond the facts of the case submitted"; but instead the principles were exclusively limited to the specific plan submitted and thus not dispositive of any aspects of different or unrelated cooperative advertising programs. **/

The Commission's N.A.R.D. advisory opinion was finally released to the public only after it had been fully published by the applicants and noted in the newspapers.

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For more than 140 years, the Supreme Court has repeatedly emphasized that the general principles to be deduced from decided cases should be limited by the facts before the Court. Thus, in Cohens v. Virginia, 6 Wheat. 264, 399, 5 Sup. Ct. Law Ed. 262, 398 (1821), the court stated:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Again, on April 22, 1963, the Supreme Court stated:

"...courts must examine closely the facts of each case..." Marlon D. Green v. Continental Airlines, Inc., See 31 U.S. L. Week, 4372, 4373 (April 23, 1963).

Within the context of an advisory opinion approving a proposed course of conduct, I think a higher and different standard is required than when one decides the separate issue as to whether in fact a possible violation will be prosecuted. A commitment to prosecute must take into consideration problems of priority, its economic importance, competitive and economic significance, public interest, and availability of sufficient personnel to effectively prosecute the matter. For the latter reasons, I would often recommend not prosecuting a case in which the public or economic interests are of minor importance; yet, at the same time, I do not think in an advisory opinion the Commission should publicly disclose that it approves those practices which inferentially could constitute violations of the applicable statutes.

Any advisory opinion which notes that a plan will not contravene the applicable antitrust laws carries with it an imprimatur of approval — which would make any subsequent prosecution have an inference of bad faith, even if a different governmental agency prosecutes, rather than the agency which issued the advisory opinion.

In closing, let me say, that I appreciate the opportunity to appear before this distinguished Committee and to explain to you my personal views on this matter. It is of obvious significance to all those concerned with the proper and effective administration of the antitrust laws.