

PRACTICE IN FORMAL CASES
before the
FEDERAL TRADE COMMISSION

Remarks by
HONORABLE ROBERT ELLIOT FREER
Commissioner, Federal Trade Commission
before the
Essex County Bar Association

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The statutes defining the Commission's jurisdiction and quasi-judicial powers are of two types. One group outlines broad standards of illegal conduct pursuant to a general policy expressed by Congress and the other proscribes specified practices. Prime examples of each are, respectively, the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson-Patman Act. Hence, it is the practice and procedure in cases arising under these Acts which is specifically treated herein. In passing, it should be stated that a number of other types of administrative proceedings have been authorized by Congress for the handling of various matters some authority over which vests in the Commission.^{1/}

I

GENERAL JURISDICTION

Federal Trade Commission Act. Section 5 of the Federal Trade Commission Act ^{2/} declares unfair methods of competition and unfair or deceptive acts and practices in commerce to be unlawful. When the Commission has reason to believe that any person, partnership, or corporation has engaged in unfair acts, practices or methods in commerce, it is empowered and, moreover, directed to issue and serve a formal complaint setting out wherein it believes the law to have been violated if a proceeding in respect thereto appears to the Commission to be in the interest of the public. The Federal Trade Commission, exercising the broad jurisdiction granted by this enactment, has held numerous practices and methods to be unlawful and more than a majority of its orders

^{1/}Investigation and hearing under sec. 2(a) of the Clayton Act to fix and determine quantity discount limits.

Investigations under sec. 6 of the Federal Trade Commission Act into the activities of corporations, foreign trade, and the manner in which antitrust decrees are being carried out. Recommendations to the Attorney General for the readjustment of the business of any corporation allegedly violating the antitrust acts.

Functions as Master in Chancery in equity proceedings under the antitrust acts under sec. 7, Federal Trade Commission Act.

Functions with respect to Export Trade Association under the Webb-Pomerene Export Trade Act, 40 Stat. 517.

Application for preliminary injunctions under sec. 13 of the Federal Trade Commission Act to restrain false advertising of food, drugs, devices and cosmetics. (cf. also secs. 14, 16)

Investigation and hearings under sec. 6 of the Wool Products Labeling Act of 1939 in the prevention of the sale, transportation and introduction into interstate commerce of misbranded wool products. Condemnation proceedings under sec. 7 of the same statute before the District Court of the United States for the district in which misbranded wool products are discovered.

^{2/}52 Stat. 111 (as amended by Wheeler-Lea Act of 1938).

which were appealed have been sustained by the court.^{3/} Practices and methods, to name a few, which are now generally regarded to be within the prohibitions of section 5 are combination or conspiracy to fix or control prices or to hamper, boycott or obstruct business rivals; misrepresentation as to composition, origin, quality or source of commodity; false and misleading advertising; sale of products by means of lottery or chance devices; commercial bribery; disparagement or misrepresentation concerning a competitor; and failure to warn or caution in the advertising with respect to injurious consequences which may result from the customary or otherwise directed use of a drug, cosmetic, food, or therapeutic device.^{4/}

Clayton Act. Section 11 of the Clayton Act 5/ vests authority to enforce compliance with the prospective provisions of this legislation. In language not dissimilar to that of section 5 of the Federal Trade Commission Act, the Commission is directed to issue and serve a complaint stating its charges whenever it shall have reason to believe that any person is violating or has violated other provisions of the Act. One of the other provisions, section 2,^{6/} in substance makes it unlawful to discriminate in price in the course of interstate commerce when the effect is to suppress competition, create a monopoly or injure, prevent or destroy competition; to pay or receive anything of value as brokerage or in lieu of brokerage when the recipient is acting in behalf of, or under the control of, anyone other than the person by whom the brokerage or allowance is granted; to pay customers for services or facilities furnished by the customer unless such payments are available to all competing customers on proportionally equal terms; to furnish services or facilities to a purchaser which are not accorded to all other purchasers on proportionally equal terms; or knowingly to induce or receive a discrimination in price prohibited by the section.

Section 3 refers to so-called "full line forcing" and "exclusive dealing" contracts, making it unlawful for a seller or a lessor to require that a purchaser or lessee shall not use or deal in the goods of a competitor of such seller or lessor where the effect of the arrangement may be substantially to lessen competition or tend to create a monopoly.

Section 7 deals with the acquisition of stock of one corporation engaged in interstate commerce, or of stock of two or more such corporations, by another so engaged and makes it unlawful where the effect of the acquisition may be substantially to lessen competition between the acquiring and the acquired corporations, or between the two or more

^{3/}Since January 1, 1933, to May 16, 1945, a period of nearly twelve and a half years, 269 Commission cases (under Federal Trade Commission and Clayton Acts) have been disposed of by the Federal courts. In 256 or over 95% of these cases, results favorable to the Commission were obtained. Of the remaining 13 cases, 9 were out-and-out reversals, 3 were contempt proceedings in cases in which the Commission's orders had been previously affirmed, and one was without prejudice to the Commission's right to reopen the proceeding and offer additional evidence. Of the reversals, three were upon the question of jurisdiction rather than the merits; a fourth was decided on the issue of *res judicata*.

The Commission has been reversed by the Supreme Court of the United States but twice in fourteen years, in both cases by a divided court (5-4 and 5-3). During this period, the Supreme Court has decided 10 cases in favor of the Commission. Petitions by the Commission for certiorari were granted in 8 cases and denied in one; similar petitions by respondents were granted in 4 cases and denied in 38.

^{4/}See list, Federal Trade Commission Annual Report for 1944, pp. 38-44.

^{5/}38 Stat. 734 (in all cases except those specifically committed to other agencies).

^{6/}As amended June 19, 1936, by the Robinson-Patman Act, Pub. Law 692, 74th Congress, 49 Stat. 1526.

acquired corporations, or to restrain commerce in any section or community or tend to create a monopoly in any line of commerce.

Under section 8 of the Clayton Act it is unlawful for a person at the same time to be a director in two or more corporations where either has capital, surplus and undivided profits aggregating more than \$1,000,000 and is engaged in commerce, if such corporations are or shall have been theretofore competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.

II

INVESTIGATIONAL PROCEDURE

"The procedure in the Federal Trade Commission Act is prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons."^{7/} Although jurisdiction may extend to some practices which might also involve causes of action at common law, the scope thereof is not bounded by common law principles nor even in such cases does the Commission's corrective action directly settle the rights of adverse parties.^{8/}

While a large proportion of its cases originate through informal complaints directed to the Commission by competitors or members of the consuming public calling attention to advertisements or practices deemed by them to be violations of the statutes administered by the Commission, the Commission itself may originate investigations on its own motion. No formality is required in calling the Commission's attention to an alleged violation of law. It may be done by means of a letter or a visit to one of the Commission's offices.

When an application for complaint is received it may be referred to the Legal Investigation Division which is in charge of the chief examiner, where it is scrutinized by an attorney on the staff. Preliminary inquiry is usually made, often by correspondence, to obtain sufficient information to be sure that the Commission has jurisdiction and that the matter is sufficiently important to warrant further investigation. Assuming that it does appear to present a sufficiently important matter within the Commission's jurisdiction, it will be assigned to an attorney-examiner to ascertain the facts. Usually the attorney-examiner will call upon the proposed respondent for information, in which event the latter is fully apprised of the nature of the Commission's investigation and afforded every opportunity of submitting all the facts, including those in mitigation or defense of any wrongful practices. Complete reports of all interviews in the field are prepared by the attorney-examiners, and necessary documents and exhibits are secured and attached to these reports.^{9/} When the attorney-examiner feels that all the necessary facts have been secured, he prepares a report setting them out and submitting his conclusions and recommendations. In his report he may conclude that no violation of the statutes administered by the Commission appear and recommend that the files be closed. On the other hand, if he is of the opinion that unlawful practices have been

^{7/}Pep Boys--Manny, Moe & Jack, Inc. v. F.T.C., 122 F. (2d) 158 (C.C.A. 3rd. 1941).

^{8/}See Federal Trade Commission Rules, Policy and Acts, p. 28.

^{9/}F.T.C. Act, sec. 9, provides that Commission agents shall have access to proposed respondent's records and may make copies thereof.

engaged in respecting which action appears warranted in the public interest, he recommends that their correction be required either through formal proceedings (issuance and service of complaint) or through the Commission's informal procedure by a formal agreement or stipulation. His report is then reviewed by at least one more attorney in the office of the chief examiner, and if, in the opinion of the reviewer, no further investigation is necessary, he will prepare a summary memorandum to the Commission with conclusions and recommendations for the approval of the chief examiner. The recommendations of both the attorney-examiner and the chief examiner are set forth in the file for the Commission's subsequent consideration. All such reports are assigned to and reviewed by one of the five Commissioners who reports his review thereof to the Commission which after discussion takes appropriate action.

The Commission's Radio and Periodical Division is designed to provide direct, inexpensive and expeditious handling of certain cases of false and misleading advertising violative of the Federal Trade Commission Act. This Division continues a constant survey of a sample cross section of magazine, newspaper, mail order catalogue, almanac and radio advertising. Questionable advertisements noted in these surveys form the basis of prospective cases not previously investigated and also provide a means of determining whether advertisers who have been ordered by or have entered into a written stipulation with the Commission to discontinue false and misleading representations are complying. When such advertising is noted, a questionnaire is sent to the advertiser requesting information about his operations, principally to ascertain whether he is engaged in interstate commerce and to secure complete information respecting the nature of his product and advertising practices. The questioned claims are submitted to the advertiser together with the Division's contentions (sometimes based upon opinions of the Commission's Medical Advisory Division) as to their possible falsity and with request that any evidence in support of the claims be presented. When there are disagreements over the facts between the Division and the advertiser, an informal conference is held and he is free to submit the statements of experts in support of his claims. At this time there is free discussion but this proceeding does not resemble in any way a formal hearing since the advertiser has not been formally charged with any violation of law and the sole purpose is to preliminarily arrive at the basic facts.

If the Division is still of the opinion after conference that the advertising in question is false and misleading and that the Commission has jurisdiction, its director makes a report to the Commission of the facts and his conclusions and recommendations. These reports, like those of the chief examiner, are reviewed by an individual Commissioner before action by the Commission.

III

STIPULATIONS

Just twenty years ago the Commission inaugurated a procedure for settling applications for complaint by means of stipulations or formal agreements to cease and desist in lieu of resorting to the full-dress or statutory procedure through issuance of complaint and orders. The form of agreement contains an admission by the proposed respondent that

the advertising in question has been disseminated or that the practices and methods have been engaged in and that the true facts or fair conduct are thus and so (showing the claims theretofore made or the methods theretofore used to be erroneous) and an agreement to discontinue the claims or conduct forthwith. Furthermore, it is agreed that if the practices are resumed or continued, the Commission may use the agreement as evidence in a formal proceeding which may be instituted subsequently directed to the same claims, methods, acts or practices.

The purpose of inaugurating this procedure was twofold. It provides a much less expensive means of law enforcement and it usually results in effective cessation of the practices involved more rapidly than would be the case under the formal procedure.

The opportunity to execute a stipulation as a basis for settling an application for complaint under section 5 is usually extended to proposed respondents but in no case is it extended in those matters arising under the Clayton Act. Moreover, it is not extended when the practices involve fraud, false advertising of inherently dangerous or probably injurious foods, drugs, devices or cosmetics; matters involving restraint or suppression of competition or price fixing or those matters arising under the Wool Products Labeling Act of 1939 or if the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act or practice.^{10/}

The Commission is mindful of the fact that it not only is empowered by Congress to prevent unfair or deceptive acts and practices, including false advertising, but also that it is directed to do so. However, effective termination of such acts and practices coupled with the assurance that they will not be resumed fulfills the purpose of the mandate of Congress, and it is the Commission's theory that if no resumption thereof can come about without breach of the agreement "a proceeding by it in respect thereof" would not then be "to the interest of the public."^{11/} The intent of the Act is injunctive and preventive, not penal.

Applications for complaint considered by the Commission to be eligible for treatment by stipulation and which have come to the Commission as a result of field investigation are referred to the associate chief trial examiner for preparation of the stipulation and submission thereof to respondent. Such stipulations are prepared by a group of trial examiners who engage only in drafting these agreements. As previously stated, if respondent signs and tenders his said agreement, the application for complaint is "closed" upon acceptance and approval of such stipulation by the Commission. However, respondent is required to submit a report within sixty days respecting the manner and form in which he is complying with his agreement.^{12/}

The director of the Radio and Periodical Division, in reporting his recommendations for corrective action to the Commission in matters handled in his Division, attaches, if the matter is eligible for treatment by stipulation, to such report a draft of stipulation which he requests authority to use as a basis for his negotiations with the respondent. If the drafts are signed and tendered in settlement, they are thereupon

^{10/}Federal Trade Commission Rules, Policy and Acts, pp. 28-29.

^{11/}Printers' Ink, Vol. 209, No. 2, Oct. 13, 1944, pp. 20-21, 86.

^{12/}Rule XXV, Federal Trade Commission Rules of Practice.

returned to the Commission for approval and acceptance. If continued negotiations with a proposed respondent, in the nature of a continuing investigation, bring to light facts which make modification of the draft appropriate, modified drafts, if signed by proposed respondent, are submitted to the Commission for approval. As in those matters handled by the associate chief trial examiner, respondent is required to submit within sixty days a report respecting the form and manner of his compliance with the agreement.

Investigation Files Confidential. Information coming within the knowledge of the Commission or any of its officers or employees in the discharge of official duties is confidential.^{13/} The identity of the applicant or complaining party is not divulged.^{14/} and the contents of the investigational files containing documents, correspondence and memoranda are considered confidential except as divulged in testimony or evidence in proceedings instituted by issuance of formal complaint. The record of a formal case is available for inspection and copying by the public, as are reports of general investigations,^{15/} all stipulations to cease and desist, certain trade practice conference records, and certain papers filed with the Commission under the Wool Products Labeling Act.

On good cause shown, the Commission, if it deems such action expedient in the public interest, may direct that confidential records or information be disclosed to a particular applicant providing his application affirms under oath the purposes for which they will be used and his interest in the subject matter and providing his application affords a specific description of the information desired. Where an agency of the Federal or a State Government makes a request for access or use, it should be in writing, signed by the administrative head of such agency, and should set out the relevancy of the material to the work and function of the agency together with a statement as to the use intended to be made thereof. The Commission considers and acts upon such applications and requests having due regard to the public interest and questions of expediency.

IV

FORMAL PROCEDURE

Complaints. In those cases not eligible for treatment by stipulation as well as in those wherein the respondent declines or neglects to enter into an agreement, the Commission directs that a complaint issue setting forth the charges or relevant facts respecting the practices or methods which therein are alleged to constitute a violation of law. Up to this point the ex parte aspects have predominated -- here they end. Prepared in the office of the assistant chief counsel, usually by the attorney who will later appear in support of the complaint before the trial examiner and the Commission, drafts of complaints are usually not submitted to the Commission before service except in unusual circumstances when a question of policy may be involved upon which the assistant chief counsel wishes to secure the further direction of the Commission. Ordinarily, however, the Commission will not consider the form

^{13/}Sec. 10, F.T.C. Act; see Rule XXVIII for implementation of the statutory provision.

^{14/}Statement of Policy, F.T.C. Rules, Policy and Acts, p. 28.

^{15/}Sec. 6(f), F.T.C. Act.

of complaint until it is formally presented either on a motion, on the pleadings or for final determination on the merits.

Answers. As provided by Rule IX of the Commission's Rules of Practice,^{16/} respondents are required to make answer thereto within twenty days unless an extension of time for good cause shown has been granted. An answer may be submitted by the respondents jointly or by each one individually and should specifically admit, deny or explain each of the facts alleged in the complaint (unless the respondent is without knowledge, in which case it shall be so stated) and should contain a clear and concise statement of the facts which constitute the grounds of defense. Even though a respondent fails to answer, the Commission's procedure is to set the case down for hearing. If the respondent appears,^{17/} the hearing proceeds as if he had answered denying the material allegations of the complaint and if he does not appear, the hearing is closed after the taking of evidence in support of the complaint. The answer, however, may admit all the material allegations of fact charged in the complaint to be true, in which event the respondent is deemed to have waived hearing before a trial examiner on the allegations of fact and to have authorized the Commission without further evidence or other intervening procedure to find such facts to be true. Upon admitting such facts the respondent may contemporaneously request the opportunity of filing briefs and arguing orally to the Commission the question of law presented, namely, whether the facts alleged constitute a violation of law and one within the Commission's jurisdiction.

Motions. The Commission's Rules permit motions and by entertaining motions to dismiss the complaint prior to the taking of testimony the Commission affords an opportunity to raise questions of law. Such motions may go to the question of the Commission's jurisdiction, whether a proceeding is in the public interest or whether a method of competition, act or practice is in fact unfair. Where substantial merit appears, the Commission permits the filing of briefs and occasionally grants oral argument. Those motions relating to the introduction or striking of evidence and to the conduct of hearings are required to be made before the trial examiner and are ruled upon by him.^{18/}

Hearings. The trial examiner designated to preside over the hearings has no connection whatever with any other feature of the Commission's work. He is a member of the Chief Trial Examiner's Division set up in 1925, whose members are selected with a view to securing attorneys possessing attributes of temperament and fairness rendering them suitable for conducting hearings as well as for ability to see that a record is properly made. These trial examiners are of mature years and are separated completely from both the trial counsel staff and the legal investigating staff. They are responsible solely to the Commission for whom they act in the conduct of the hearings.

^{16/}Paragraph (g) of sec. 6 of the Federal Trade Commission Act authorizes the Commission to make rules and regulations for the purpose of carrying out the provisions of the Act. Pursuant thereto twenty-eight Rules of Practice, as well as five Statements of Policy, have been promulgated.

^{17/}Rule IV provides that a party may also appear by an attorney at law possessing the requisite qualifications, if admitted to practice before the Supreme Court of the United States or the highest court of any State or Territory of the United States. No application for admission to practice before the Commission is required, no register of attorneys maintained.

^{18/}Rule X.

Witnesses are called first by the Commission's trial attorney who has the burden of proceeding in support of the allegations of the complaint and adherence as closely as possible to the rules of evidence as established by equity courts is required. However, no adherence to the strict letter of the rules of evidence is required when the result would be to defeat substantial justice. The courts have upheld the Commission's right to receive evidence or testimony which is "of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs"^{19/} although perhaps technically incompetent. Departure from the fundamental principles governing the admission of evidence in equity proceedings is very rare. The fact that there are numerous rulings on admissibility of evidence in the course of the hearings in almost every proceeding and that the rulings of the Commission in this regard are almost never at issue on appeals to the courts from Commission orders is an indication of the degree of fairness which the trial examiners have attained in this regard.

Subpoenas ad testificandum may be issued by any member of the Commission upon application either to the Secretary or to the trial examiner presiding. Applications for subpoenas duces tecum must be in writing and verified by oath or affirmation, must set forth the nature of the documents desired, and it is required that some showing as to their relevancy, competency and materiality be made.^{20/} The reason for this is twofold: (a) to protect respondent's competitors and witnesses generally from unreasonable and burdensome demands whereunder disclosure of their documents would work injury at the hands of their commercial rivals, and (b) to insure that the requirement is lawful inasmuch as the lawfulness thereof will be in issue and will be passed on by a United States Court whose aid in the premises the Commission is empowered to invoke in the event of disobedience thereto.^{21/} The trial attorney for the Commission is required in applying for a subpoena duces tecum to set forth the same type of information as to identity of the documents, together with an expression as to competency, relevancy or materiality as is required of respondent's counsel, except that the former, as an officer of the Government, is not required to make verification under oath.

Trial Examiner's Report. At the conclusion of the testimony, and upon the receipt of stenographic transcript thereof, the trial examiner prepares and files with the Commission his report, copies of which are served upon the attorney for the Commission and upon respondents or their attorneys if represented by counsel.^{22/} As a basis for preparation thereof the trial examiner is empowered to request of both counsel a statement in writing setting forth in concise outline the contentions of each respecting the facts proved in the proceeding, each of which outlines, if so requested, are furnished opposing counsel.^{23/} The trial examiner's report contains his findings of fact, conclusions of fact and of law, and his recommendation for action to be taken by the Commission. The trial examiner's report is advisory only. It is not a report or finding of the Commission.

^{19/}John H. Bene & Son, Inc. v. F.T.C., 299 Fed. (C.C.A. 2d, 1924). See to the same effect Arkansas Wholesale Grocers Ass'n v. F.T.C., 18 F. (2d) 866 (C.C.A. 8th, 1927); F.T.C. v. Good-Grape Co., 45 F. (2d) 70 (C.C.A. 6th, 1930); Phelps Dodge Refining Corp. v. F.T.C., 139 F. (2d) 393 (C.C.A. 2nd, 1943).

^{20/}Rule XV.

^{21/}Sec. 9, F.T.C. Act.

^{22/}Rule XX.

^{23/}Rule XXII.

Exceptions. Counsel within ten days may file exceptions to such parts of the report as they elect to challenge, which exceptions may also be directed to omission or failure to find certain facts.^{24/}

Briefs. Under the Commission's Rules, opening brief of the Commission in support of the complaint shall be filed within twenty days after service upon him of the trial examiner's report; and brief on behalf of respondents shall be filed within twenty days after service of said opening brief in support of the complaint. Material objections to the trial examiner's rulings and exceptions taken by counsel to the trial examiner's report are among the subjects to be argued in the brief.^{25/}

Since many of the Commission's complaints challenge not one but several practices as being unlawful, the trial examiner's report, providing it does not recommend to the Commission that the complaint be dismissed, includes recommendations as to the scope of the order to cease and desist to be issued. The trial attorney's brief in support of the complaint may argue that the evidence warrants a broader order than the one recommended by the trial examiner. Since also respondent's counsel may have offered testimony in opposition to some of the allegations of the complaint only relying on the proposition that the proof adduced does not sustain others of the charges, the respondent's brief may take issue with both the recommendations of the trial examiner and the contentions of the trial attorney. Oral argument in such cases may deal largely with the weight of the evidence on the several points involved.

Oral Argument. Unless the case has been before it previously upon a motion, the oral argument is the first contact of the Commission itself with the case since it directed the preparation and service of the complaint.^{26/}

Decision by the Commission. Following oral argument the entire record in the case is assigned to a single Commissioner ^{27/} for examination and for the preparation of a memorandum report designed to aid the discussion and consideration of the case by the Commission in conference. Each Commissioner has a conference folder containing a copy of the complaint, answer, trial examiner's report, exceptions, and the briefs, to aid his preparation for such discussion of the memorandum report on the case in conference. The Commission's decision may be either to dismiss the complaint, sometimes without prejudice, or to issue an order directing the respondent to cease and desist from such of its practices as are found to violate the law. In the event the Commission decides to issue an order to cease and desist, it so directs and transmits the entire record in the case (together with the Commissioner's memorandum and a minute of its decision) to one of three special legal assistants to the Commission for preparation of initial drafts of findings and order. Unless the case has been previously considered by the Commission on a motion, the special legal assistant who

^{24/}Rule XXI.

^{25/}Rule XXIII.

^{26/}Oral argument is a highly important part of the case and attorneys can render a real service to their clients and facilitate decision by the Commission by so presenting argument as to reduce the number of controverted issues of fact and law requiring decision.

^{27/}While theoretically there is available to each Commissioner an "attorney to a Commissioner" to assist in his examination and study of such records and briefs, not all F.T.C. Commissioners presently have such an assistant.

prepares the drafts under the Commission's supervision and direction has had no previous contact with the case either in its informal or formal stages other than having listened to any oral argument of the case before the Commission. The Commissioner who previously considered the record carefully considers the drafts of findings and order and leads the Commission discussion. The Commission then makes such revisions as are necessary and thereafter directs issuance and service of its findings and order upon the respondent.

V

JUDICIAL REVIEW AND ENFORCEMENT OF ORDERS

The function of the order to cease and desist is not to punish but to declare a rule of future conduct which will avoid and obviate further violation of law. Its terms should go no further than to require respondent to abandon and refrain in the future from the unlawful methods, acts or practices in which he has engaged in the past.

The jurisdiction to initially review Commission orders to cease and desist is vested in the Circuit Courts of Appeals. Prime questions presented on review of orders under section 5 are whether the findings as to the facts are supported by the evidence (if so, the Commission's findings are conclusive), whether the practice engaged in is in violation of law and whether the scope of the order is appropriate. The court may modify, affirm or set aside the order and direct obedience thereto to the extent to which it is affirmed. In section 5 cases whether the respondent's use of the deceptive language appearing in the advertisements, the misleading emblems or pictorial material, or the unfair practices engaged in, as the case may be, has the capacity and tendency to mislead the public presents to the review court a question of fact respecting which the Commission's judgment, if not arbitrary, is to be accepted. The measure of necessary relief, that is, the general scope of the conduct to be required in the future, has been held by courts to be peculiarly within the competence of the Commission.

Orders issued under section 5 of the Federal Trade Commission Act become final sixty days from date of service unless petition for review is filed within such period in the appropriate United States Circuit Court of Appeals. After the order becomes final either through failure to appeal or following affirmation on review, a violation thereof renders a respondent liable to forfeiture of a civil penalty of not more than \$5,000 for each violation, recoverable in a civil action brought by the United States (the Attorney General) in the Federal District Courts.

No similar provisions apply to orders issued under the Clayton Act. Such an order may reach the courts either through petition for review to the Circuit Court of Appeals by the respondent, or, if respondent does not seek review, through application by the Commission to one of the United States Circuit Courts for a decree affirming the order and directing compliance therewith. In some circuits, if the Commission is the petitioner, evidence of violation of the Commission's

order must be submitted to the court before it will affirm 28/ such order and decree the enforcement thereof. If the court affirms the Commission's order and thereupon adopts it as its own and decrees enforcement thereof, violations by respondent, upon proper application to the court and proof of such violations, are punishable by the court itself for and as a contempt of the court's own order. It will thus be noted that ultimate enforcement of the Commission's orders to cease and desist and punishment for violation thereof are vested not in the Commission but in the Federal Courts, the District Courts or the Circuit Courts of Appeals depending on the statutory basis of the Commission's order to cease and desist.

CONCLUSION

The Commission believes that the foregoing procedures, 29/ evolved from its thirty years of experience in administering its two principal statutes, are fair and in conformity with the basic principles inherent in due process of law. In their application it seeks not only to adhere to the letter of law but also to observe the spirit of justice. The Commission is proud of its affirmance record in the courts 30/ and its reputation for fairness and it seeks by eternal vigilance to maintain both.

28/A peculiar situation exists with reference to petitions for enforcement of Commission orders under the Clayton Act. (The Federal Trade Commission Act before its amendment in 1938 was similar.) In *F.T.C. v. Balme*, 23 F. (2d) 615 (C.C.A. 2d, 1928), the Second Circuit held that a petition for enforcement required the court first to inquire into the validity of the Commission's order and then to determine whether the order had been violated. The court proceeded to affirm the Commission's order but refused to try the issue of fact and remanded the case back to the Commission for the purpose of taking testimony and making further findings of fact with reference to a violation. This decision was followed in *F.T.C. v. Baltimore Paint and Color Works, Inc.*, 41 F. (2d) 474 (C.C.A. 4th, 1930), by the Fourth Circuit. To the contrary, the Seventh Circuit in *F.T.C. v. Standard Education Society*, and in *F.T.C. v. Morrissey*, 47 F. (2d) 101 (C.C.A. 7th, 1931), held that where a violation of the order is alleged in the petition for enforcement, the court must first ascertain by the taking of testimony the facts as to violation before passing on the merits of the petition. However, the Second Circuit appears to have disposed of issues of fact in subsequent contempt proceedings, without remanding them to the Commission. See note 3, p. 582, 1, *Statutes and Decisions of the Federal Trade Commission*; II *id.*, p. 334.

29/ Commission Rules of Practice have been revised on a number of occasions, principally since 1936. A most complete revision was made in 1938 after passage of the Wheeler-Lea Act. Most recent revisions were adopted about June 1, 1945, and a new pamphlet of the Commission's Rules, Policy and Acts is presently being prepared by the Government Printing Office.

30/ See footnote 3 supra.

June 1, 1945