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THE CRITERIA FOR APPLYING INDUSTRYWIDE ENFORCEMENT MEASURES UNDER THE ROBINSON-PATMAN ACT



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The question of where and how industrywide enforcement measures should be applied under the Robinson-Patman Act<sup>1</sup> is one of the most difficult issues presently facing the Federal Trade Commission. It has been argued, and possibly with some logic, that to be completely fair the Commission should proceed simultaneously against all industry members suspected of violating the price discrimination act. Obviously, this is not possible in all cases where litigation is employed simply because of the Commission's restricted budgetary and manpower resources. The Commission must weigh the desirability of proceeding against all violators simultaneously in the light of its limited resources, taking into consideration the need for proceeding at least against obvious abuses on the part of the more prominent members of the industry concerned. The solution of where the balance is to be placed is not an easy one. In fact, this dilemma brings to mind Mr. Justice Frankfurter's aphorism in another context that "no confident answer cannot be given; some answer must be given."<sup>2</sup>

The Commission has considerable discretion in this area, as the Seventh Circuit remarked recently:

... The Commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected. . . .<sup>3</sup>

The very latitude given the Commission in this connection, however, makes mandatory that such discretion be exercised wisely.

The variables facing the Commission in determining whether a situation is ripe for industrywide enforcement measures include the structure of the industry, the nature of the alleged unfair trade practice and the enforcement resources available to the Commission. Before turning to these, however, it might be helpful to set the mood, so to speak, by referring to the testimony of the Chairman of the FTC before the Senate Subcommittee of the Committee on Appropriations in the spring of this year. A few references to that testimony should make it clear that the FTC now has the desire to turn to industrywide enforcement measures as opposed to individual case-by-case enforcement through litigation whenever possible. For example, the Chairman, speaking for the Commission, advised that it has now "turned a difficult corner in veering from relentless hit-and-miss law enforcement to a guidance role that invites, en-

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<sup>1</sup> 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

<sup>2</sup> *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 78 (1953).

<sup>3</sup> *United Biscuit Co. of America v. FTC*, 350 F.2d 615, 624 (7th Cir. 1965).

courages, and backstops efforts of American business to police itself,"<sup>4</sup> and that over a three-year period this agency has attempted to change its emphasis in enforcement procedures by minimizing reliance on the case-by-case approach. Significantly, the enforcement bureaus have been instructed that they are no longer to report any recommendations on single complaints without further advising the Commission as to whether the alleged unfair practice is general in the industry. If the alleged law violation is widespread, then the staff is expected to recommend some program or plan for dealing with the industrywide problem.

Before dealing with industrywide discriminatory practices, the Commission must be in a position to ascertain the extent of the alleged violation of law. Accordingly, the manner in which Robinson-Patman Act proceedings are initiated deserves some consideration. Price discriminations are generally not a matter of public record; rather, they are hidden from view. Under the Robinson-Patman Act, unlike section 7 of the Clayton Act, the staff is generally not in a position to spot troublesome areas merely from a reading of available publications. Usually, the first indication of illegal price discriminations comes to the Commission by way of complaint from aggrieved industry members. The result in the past has been the issuance of a complaint with a view toward putting an end to the individual violation found. Frequently, the investigation directed toward an individual respondent or group of respondents developed other cases, and in that manner many proceedings over a period of time developed industrywide impact. Of necessity, many of the proceedings were not undertaken concurrently, giving rise to a cry of unfairness. In view of current policy, the Commission will emphasize industrywide enforcement proceedings more than in the past. This dictates that it be furnished with more complete economic data with respect to the pricing practices of those industries under consideration in order to put administration of the act on a more rational basis. Effective industrywide proceedings under the Robinson-Patman Act require planning. Planning, which is essentially another label for research, is an obvious prerequisite to the effective discharge of the regulatory duties of any administrative agency.<sup>7</sup> In short, it may be necessary to integrate the activities of the Commission's professional legal and economic staffs further in order to facilitate industrywide proceedings under the Robinson-Patman Act and in other areas. In some proceedings this has already occurred, and I hope to see more of it in the future. I think the administration of the Robinson-Patman Act deserves no less. While the structure of an industry will undoubtedly influence competitive behavior, unfair practices such as discriminatory pricing will inevitably influence both the structure of an industry and the viability of competition within that industry. For that reason, if no other, the Commission should actively seek out the area

4 *Hearings Before the Subcommittee on 1966 Independent Offices Appropriations of the Senate Committee on Appropriations*, 89th Cong., 1st Sess. 323 (1965) (testimony of Paul Rand Dixon, Chairman, Federal Trade Commission).

5 *Id.* at 827.

6 *Id.* at 828.

7 See FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES — THE NEED FOR BETTER DEFINITION OF STANDARDS* 162 (1962), citing OPPENHEIM, *THE NATIONAL TRANSPORTATION POLICY AND INTERCARRIER COMPETITIVE RATES* 123-24 (1945).

where broad-scale rulemaking or adjudicatory proceedings will have the widest impact.

Before turning to current and recent industrywide proceedings under the Robinson-Patman Act and possible future developments along these lines, it may be in order to delineate the investigative, policy making and law enforcement procedures available to the Commission. Industrywide proceedings under the Robinson-Patman Act and the other statutes entrusted to the Commission or administration may come under three broad categories, namely, investigation or factfinding, rulemaking, and adjudication. Basic to everything the Commission does, of course, is factfinding. It is the prerequisite for determining whether the Commission should proceed at all and, if so, whether the problems posed are best resolved by rulemaking, litigation or informal settlement.

In those instances where a preliminary investigation shows that discriminatory practices are widespread, the Commission, in order to investigate the particular industry effectively on a broad scale without dissipating its investigative resources, may require the industry members concerned to file special reports under section 6(b) of the Federal Trade Commission Act<sup>8</sup> with respect to the alleged violations of law. Where a broad-scale investigation of an industry composed of many smaller units is to be conducted, conservation of the Commission's investigative resources almost makes the utilization of the section 6(b) process mandatory. The special reports lend themselves particularly to the investigation of alleged Robinson-Patman Act violations. Especially notable in the exercise of the Commission's powers under this statute have been the Commission's investigation relating to section 2(c) of the Robinson-Patman Act in the citrus fruit industry<sup>9</sup> and relating to section 2(d) of the statute in the wearing apparel industry,<sup>10</sup> which involved several hundred respondents.

<sup>8</sup> Section 6(b) provides that the FTC shall have the power:

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

Stat. 721 (1914), 15 U.S.C. § 46(b) (1964).

<sup>9</sup> In April, 1962, orders to file special reports were sent to approximately 92 fresh fruit grower-shippers in Florida and some 32 in Arizona and California. Information supplied by the Department of Agriculture indicated that the 124 order recipients shipped approximately 95% of the fruit consumed fresh in the nation.

The reports provided enough information for the filing of some 84 grower-shipper complaints. In each case the respondent executed a consent agreement. Their acquiescence apparently was brought about by the fact that illegal brokerage payments had further reduced profit margins which had declined sharply because of rising labor costs. The growers could not have stood among themselves to cease making such payments, because of Sherman Act implications.

The special reports also furnished enough information regarding the receipt of brokerage payments by buyers to enable the issuance of some 40 buyers' complaints. Most of those matters were also resolved by consent.

<sup>10</sup> The Commission opinion in *Abby-Kent Co.* recites the following statistics with respect to the § 6(b) investigation pursued in that industry:

In early 1961, following the receipt of many complaints from small apparel retailers, small manufacturers and apparel salesmen, the Commission addressed Orders

These proceedings, which laid the foundation for numerous cease and desist orders in these industries, are classic examples of the Commission's use of the power to insure maximum investigative coverage in the case of a particular industry while insuring that the Commission's investigative manpower would not become bogged down in that proceeding but remain available for other projects.<sup>11</sup>

The liberal use of the rulemaking powers of the FTC at first glance seem to be the ideal vehicle for securing industrywide compliance with the law. Rulemaking "is the best procedure we have for allowing large numbers of parties to express what they want with respect to law or policy that will affect them."<sup>12</sup> It is undoubtedly the ideal proceeding for dealing with the conflict between important industry segments over the interpretation of the law.

The Commission's most significant procedures in the rulemaking category are the trade practice and trade regulation rules.<sup>13</sup> Trade practice rules are designed to eliminate and prevent unlawful trade practices on a voluntary industrywide basis<sup>14</sup> and were utilized by the Commission as early as 1919.<sup>15</sup> These rules, generally promulgated at the request of a particular industry, seek to interpret and inform businessmen of the legal requirements applicable to certain practices widespread in the industry and to provide a basis for voluntary and simultaneous abandonment of illegal conduct by industry members.

The newest rulemaking procedure at the Commission and possibly the most promising vehicle for securing industrywide compliance with the law is the trade regulation rule procedure adopted in 1962. In the case of both the trade regulation rule and trade practice conference procedures, the Commission

to File Special Reports to some 232 of the nation's leading buying offices and chain department and specialty store complexes. The orders required the buyers to submit among other things, the names of apparel suppliers who had granted advertising and promotional allowances during a given twelve-month period, together with the amounts and purposes of the payments. . . .

A tabular sheet for each supplier was prepared from the buyer's [*sic*] Special Reports. They indicated the customers each favored and the amounts paid. In February 1962 the Commission unanimously decided to address Orders to File Special Reports to the 250 sellers who granted the largest amounts of allowances to the greatest number of buyers. Later that year when it was discovered that certain significant sellers had been omitted, some 60 additional orders were transmitted.

A majority of the Special Reports filed provided sufficient documentation to give the Commission reason to believe that violations of Section 2(d) of the amended Clayton Act existed. . . .

Abby-Kent Co., 3 TRADE REG. REP. ¶ 17310, at 22464 (F.T.C. Aug. 9, 1965).

11 Further examples of the Commission's effort to utilize new methods in order to insure maximum effect from its limited resources in industrywide proceedings have been factfinding hearings at which industry members appear before the full Commission, as, for example, in the gasoline hearings. See text accompanying note 24 *infra*.

12 1 DAVIS, ADMINISTRATIVE LAW § 6.13, at 147 (Supp. 1965).

13 Allied to the FTC's rulemaking procedures are its administrative interpretations of the law, entitled "Guides." Of the guides currently in effect, only one has application to the Robinson-Patman Act, namely, the Guides for Advertising Allowances and Other Merchandise Payments, adopted May 19, 1960. 1 TRADE REG. REP. ¶ 3980 (F.T.C. May 19, 1960). These guides, however, do not focus on the specific problems of a particular industry. As a result, they do not have the same potential for achieving compliance with the law on an industrywide basis as do trade practice or trade regulation rules drafted to deal with concrete problems.

14 An example of one of the more exhaustive recent attempts to codify the requirements of the Robinson-Patman Act for the benefit of an entire industry is the Trade Practice Rules for the Phonograph Records Industry. 16 C.F.R. § 67 (Supp. 1965).

15 For a discussion of the early development of the trade practice conference procedure, see BLAISDELL, THE FEDERAL TRADE COMMISSION 92 (1932).

Commission's rules of practice make ample provision for affording the interested parties an opportunity to be heard prior to promulgation of the rule.<sup>16</sup>

The significant difference between the two types of rulemaking procedures, which are both expressions of Commission policy, is simply that the trade regulation rule is accompanied by findings of fact.<sup>17</sup> Accordingly, in an adjudicative proceeding for violation of a trade regulation rule, the Commission may rely not only upon the proposition of law or policy contained in the rule, but also on the underlying factual matters determined in the rulemaking proceeding.<sup>18</sup>

The use of the rulemaking power in the Robinson-Patman area, however, requires particular caution on the part of the Commission. Too often in the past have rules purporting to interpret the act in effect debased the process by merely paraphrasing the words of the statute. On the other hand, the Robinson-Patman Act, unlike the Federal Trade Commission Act, is a fairly specific statute. Accordingly, the Commission must exercise considerable care that by its interpretation of the statute it does not, in effect, amend the act.

The rulemaking approach will not be applicable in all instances of price discrimination whether or not they are industrywide. The value of a rule in a settled area of the law is debatable. In addition, the issues to which a rule addresses itself should be fairly narrow and capable of specific definition in the context of the industry to which it is addressed. As Professor Davis has noted, the attempt "to clarify a whole area through a rule or policy statement would often be foolhardy."<sup>19</sup> In short, a rule purporting to deal with every conceivable problem under the act might raise as many problems as it seeks to dispel. Accordingly, while the rulemaking process has a great deal to recommend it when the Commission is faced with widespread practices violative of the price discrimination act, it is a procedure which must be used with discretion.

One approach to industrywide law enforcement through litigation may be characterized by the attempt to prosecute industry leaders — or at least the most flagrant practitioners of price discrimination — and to secure industrywide compliance as a result of the example made. On the other hand, the Commission may proceed against all or at least a majority of the industry members involved in the alleged violation of law. The Commission has utilized both approaches, and both alternatives have their disadvantages. In the first case, the Commission may be criticized for singling out certain industry members, leaving them at a disadvantage vis-à-vis their competitors. In the second case it has sometimes been argued that the Commission is harassing business as well as

16 FTC Rules of Practice, 16 C.F.R. § 1.67 (Supp. 1965).

17 The difference between trade regulation rules and trade practice conference procedures is difference in degree. "As a practical matter, then, trade practice rules are not merely voluntary and advisory; they are, in many instances, enforceable and enforced." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Accompanying Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8370 (1964).

18 The Commission is not obliged to prove disputed issues of fact anew in an adjudicative proceeding against those industry members allegedly violating the rule if findings on such facts had been previously made in the proceeding promulgating the rule. *Id.* at 8371.

19 DAVIS, *op. cit. supra* note 12, § 6.13, at 145.

forcing a price uniformity which is at variance with the general purpose of the antitrust laws.

As in certain other periods of its development, the Commission's enforcement pattern is at present in a transitional stage. Therefore, no hard and fast rules can be laid down as to the industries or types of law violations which will be dealt with in an industrywide fashion or as to the investigational or law enforcement measures which will be applied in a particular instance. However, a cursory examination of three recent proceedings of industrywide impact, namely, the Trade Practice Conference Rules for the Fresh Fruit and Vegetable Industry, the gasoline marketing inquiry and the so-called wearing apparel cases, may foreshadow future trends in Commission application of law enforcement techniques on an industrywide basis in the price discrimination area. My discussion here, of course, is not an exhaustive citation of all current industrywide proceedings relating to discriminatory pricing.

The Trade Practice Rules for the Fresh Fruit and Vegetable Industry, promulgated April 15, 1965,<sup>20</sup> are noteworthy recent examples of the Commission's exercise of its rulemaking power in the area of price discrimination. This rulemaking proceeding had its genesis in the investigation and subsequent adjudicatory proceedings brought in the citrus fruits industry. These, of course, resulted in numerous cease and desist orders against growers and buyers, involving more than one hundred complaints and orders.<sup>21</sup> As a result, those industry members not under order and the related fresh fruit and vegetable industry desired guidance.

Another factor compelling the citrus and fresh fruit and vegetable industries to request a trade practice conference were certain Commission decisions, namely, *Flotill*<sup>22</sup> and *Hruby*,<sup>23</sup> which to some extent had unsettled previous judicial construction of the "except for services rendered" proviso in section 2(c) of the Robinson-Patman Act. This issue, among others troubling the industry, posed the question of whether buyers or their agents could be compensated for brokerage services performed by the buyer. Other important questions relating to the interpretation of section 2(c) also were involved.

This rulemaking proceeding is noteworthy because it shows the potential of rulemaking for settling questions in an uncertain area of the law where important segments of the industry are at odds on the proper interpretation of a statute.<sup>24</sup>

20 30 Fed. Reg. 5331 (1965).

21 *E.g.*, Exchange Distrib. Co., 61 F.T.C. 1 (1962); Hruby Distrib. Co., 61 F.T.C. 1437 (1962); Eidson Produce Co., 60 F.T.C. 1 (1962); Florida Citrus Exch., 53 F.T.C. 493 (1956).

22 *Flotill Prods. Inc.*, 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

23 *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962).

24 On the one side of the issue, the proponents of the proposed rules, namely, the United Fresh Fruit and Vegetable Association and the Florida Fresh Citrus Shippers Association, among others, contended that, on the basis of recent Commission decisions, brokerage should not be forbidden unless no services were rendered by the other party. They argued that if services are performed by a businessman purchasing the goods, he is entitled to be recompensed and § 2(c) does not apply. On the other side, demonstrating the wide impact which the rules were thought to have, was, among others, the National Association of Retail Grocers, whose interests are not limited to fresh fruits and vegetables alone, as well as the National Food Brokers Association. Both contended that permitting brokerage payments for services performed by the buyer or his agent would give powerful buyers considerable leverage, helping them to receive unearned

Significantly, the hearing on the proposed rules in October, 1964, was held before the full Commission. The increasing number of hearings in which the full Commission hears the views of different industry segments on unfair trade practices and the law enforcement problems facing them is a salutary development. As a result of such hearings, the Commission as a whole is forced to acquaint itself with the problems of an industry being regulated in a manner not possible merely from the reading of a cold record or the report of a single commissioner or a staff member designated to hold hearings.

In many ways the fresh fruit and vegetable rules present a textbook example of the Commission's use of its rulemaking power to secure compliance with the law on the part of an industry constituted of many businessmen. Furthermore, the central problems dealt with, although of considerable importance, were narrow and readily defined. In short, the issues presented were of the type that lend themselves to the rulemaking process.

Conceivably, the most significant current industrywide proceeding connected with Robinson-Patman Act problems is the broad inquiry into gasoline marketing announced on December 30, 1964. To my regret, in launching this venture the Commission coupled the inquiry with the dismissal, on administrative grounds, of those adjudicative cases in the gasoline marketing field then awaiting Commission decision. Findings of fact in those proceedings might well have given us a head start in the current industrywide proceeding.<sup>25</sup> Nevertheless, the current inquiry is an important proceeding and I hope that its outcome will benefit both the industry and the consumers it serves.

The broad inquiry into gasoline marketing and the adjudicative cases preceding it had their genesis in the price wars recurring throughout the nation. This situation impelled the Mid-Continent Independent Refiners Association (MIRA) to petition the Commission for a trade regulation rule under the Robinson-Patman and Federal Trade Commission Acts, apparently with the primary purpose of preventing major gasoline companies from using the financial advantage derived from their integrated activities and geographic diversity for the purpose of subsidizing price discriminations and sales below cost to their independent competitors' alleged disadvantage. In effect, MIRA has asked the Commission, under the Robinson-Patman Act, to embody in the rule a presumption that brand names would not affect the determination of like grade and quality in the case of gasoline. Furthermore, MIRA has requested that the Commission promulgate a rule that it should be prima facie evidence of injury when a territorial price discrimination results in a reduction of customary retail price differentials between the seller's gasoline and those gasolines normally selling at a lower price.<sup>26</sup>

The MIRA proposals, on the surface at least, lend themselves to an

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price advantages and would in fact have the potential of jeopardizing the whole price discrimination act. In addition, a considerable number of individuals and representatives of associations in the food industry also argued on this issue pro and con.

<sup>25</sup> See *Pure Oil Co.* 3 TRADE REG. REP. ¶ 17175, at 22250 (F.T.C. Dec. 28, 1964) (MacIntyre, Comm'r, dissenting).

<sup>26</sup> Under the Federal Trade Commission Act MIRA has requested a rule prohibiting sales below cost where the effect may be to lessen or injure competition and setting standards for computing the cost of gasoline.



industrywide rulemaking proceeding. The issues presented by the proposed rule are defined in terms of the oil or gasoline industry. In addition, the proposed rule deals with sufficiently narrow issues so that if enacted it would be a meaningful guide and not an amorphous paraphrase of the generalized language of the statute, which itself would later require construction. This is not to say that an evaluation of all the facts brought to light during this hearing will necessarily support the promulgation of MIRA's proposed rules.

The suggested rules at the hearing before the Commission were the subject of spirited debate on the part of industry members participating in the hearings held in May. The clash of views visibly illustrated the varied structure of the industry and the complexities of the problems involved in regulatory efforts to resolve the problems of gasoline price wars.<sup>27</sup> In short, the proceeding evidences the Commission's concern to utilize the industrywide proceeding as a vehicle to deal equitably with the problems of industry members, ranging from the largest corporations in the nation to the service station operator in your own neighborhood. It shows a willingness to engage in industrywide proceedings on a very ambitious scale.

As in other industrywide proceedings dealing with the price discrimination problem, the Commission is again faced with the issue of whether an industrywide regulatory effort might have the opposite result of that intended. Certainly, one of the crucial arguments in opposition to the rules proposed by MIRA seems to be the objection raised in almost all broad-scale proceedings dealing with the Robinson-Patman Act — that they would have the tendency to stifle competition and, in effect, foster a price uniformity at variance with the other antitrust laws. One memorandum in opposition even suggested that mere participation in a trade regulation rule proceeding, looking toward these rules, might violate the Sherman Act.<sup>28</sup>

In view of the complexity of the problem posed, the Commission will have to mobilize the best of its resources. In this connection, the broad marketing inquiry is significant for having integrated the efforts of the economic and legal staffs in a proceeding involving enforcement of the price discrimination act to an extent unprecedented in recent years.

Finally, it should be noted that the Commission, in initiating this proceeding, bound itself only to conduct the hearings. It did not undertake to issue rules but left the result of the proceeding flexible. As a result, other alternatives are: no action, or the issuance of a factfinding report by either the staff or the Commission. In the latter eventuality, the Commission, in addition to its investigative function, may have engaged at least in a form of embryonic rulemaking.

My final example of a current industrywide proceeding has been cast in

27 For the purpose of discussion here, the gasoline marketing industry may be classified into three categories: (1) the twenty major oil companies which are fully integrated, engaged in production of crude oil and refining and own and/or operate wholesale and retail distribution facilities; (2) the 140 smaller integrated, partially integrated and nonintegrated independent refining companies; and (3) 5000 companies and firms engaged in distribution at the wholesale level. *Petition for Trade Regulation Rules for Gasoline Marketing*, National Congress of Petroleum Retailers, Inc., p. 4. Representatives of service station operators, whose number is legion, also testified.

28 Cited in *Amended Petition for Trade Regulation Rules for the Marketing of Gasoline* Mid-Continent Independent Refiners Association, filed July 16, 1965, p. 4, n.1.

more traditional mold — the so-called wearing apparel cases.<sup>29</sup> In the period from May, 1963, to August, 1965, the Commission accepted a total of 298 consent orders from wearing apparel manufacturers prohibiting violation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Aside from the number of wearing apparel manufacturers put under order, the case is notable since it was the first Commission decision or public pronouncement delineating the criteria for choosing between the various adjudicatory and rulemaking procedures available for dealing with discriminatory practices on an industrywide basis. The rulemaking approach was rejected in this instance since various trade practice conference rules issued for the industry had failed to reduce the payment of discriminatory advertising allowances significantly. A trade regulation rule was not promulgated since that procedure has been impractical when the discriminations involved were sporadic and secretive. Selective litigation against certain suppliers and the Commission's guides had also failed to visibly improve the situation. In short, there was no practical alternative to seeking enforceable cease and desist orders running against all significant industry members engaged in the alleged violations of law.

In summary, the advisory and rulemaking approach is obviously the ideal medium for dealing with Robinson-Patman Act problems on an expeditious and equitable industrywide basis if the conditions are right. But if it wishes to enforce the law effectively either in individual cases or as to entire industries, the Commission must resort to the issuance of complaints and cease and desist orders when the facts indicate that it is the only viable method in that particular situation. From its earliest years and continuing to the present, litigation on the part of the Commission has been denounced with varying degrees of emotion as wasteful, a source of harassment to business and even as an instrument of oppression.<sup>30</sup> The Commission should, of course, be alert to possible abuses. On the other hand, the Commission should not be forgetful of the statutory scheme which places the cease and desist order at the heart of its enforcement measures. In certain instances, industrywide problems simply will not respond to the rulemaking advisory procedures, and litigation, at least as a last resort, must remain among the law enforcement measures available to the Commission when the facts dictate this approach.

<sup>29</sup> *Abby-Kent Co.*, 3 TRADE REG. REP. ¶ 17310 (F.T.C. Aug. 9, 1965).

<sup>30</sup> For example, Commissioner Humphrey, in one of the more extravagant attacks in this line, stated in an address on January 6, 1931, that:

Under the old policy of litigation it became an instrument of oppression and disturbance and injury instead of a help to business. It harassed and annoyed business instead of assisting it. Business soon regarded the commission with distrust and fear and suspicion — as an enemy. There was no cooperation between the commission and business. Business wanted the commission abolished and the commission regarded business as generally dishonest. [Footnote omitted.]

Quoted in HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 125 (1936).