
Address

on

THE FEDERAL TRADE COMMISSION'S

PROBLEMS OF ENFORCEMENT

Before the 64th Annual Convention of the
National Wholesale Druggist's Association,
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By

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Chairman, Federal Trade Commission.

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Mr. President, Members of the National Wholesale Druggist's Association, Ladies and Gentlemen:

I appreciate very much your invitation to be present at your annual convention, and the opportunity to speak to you on the subject assigned to me, "The Federal Trade Commission's Problems of Enforcement" -

The principal laws with the enforcement of which the Commission is charged are the Federal Trade Commission Act and certain sections of the Clayton Act. There are problems of enforcement common to both laws and each presents its own problems. I shall notice first some that are common to both.

The first that is presented--that is, the first in the order of our procedure, is that of securing the cooperation of the public in bringing violations of the law to the attention of the Commission. There is usually a reluctance on the part of a person having knowledge of a violation to be known as an informer unless he be directly interested, and even then there may exist a fear of retaliation by the one in regard to whom the information is given. The Commission seeks to solve this problem by its policy of treating the identity of the complainant as confidential.

Next is the problem of accomplishing the purposes of the law with as little resulting injury as possible to legitimate business. This is done by making a thorough preliminary investigation of all facts and circumstances to establish a probable violation of the law before a complaint is issued.

Then, there is the question of carrying out the purpose of the law with economy of money and time, economy of time particularly in the sense of bringing about conformity to the law as promptly as possible.

Particular reference is here made to situations where the use of an unlawful method or practice is prevalent in an industry. To issue separate complaints against individual offenders under such circumstances would consume a great amount of both money and time. This problem is largely solved by the Commission in proper cases by the members of such an industry in a Trade Practice

Conference, at which the probably unlawful methods and practices are identified and discussed and such rules of conduct adopted by a majority of the industry as will correct the situation. It remains only, then, for the Commission to proceed against a minority which fails or refuses to conform to the law.

In the past 19 years, during which this policy has been in operation, some 200 industries have met with the Commission in Trade Practice Conferences, industries whose membership ranged from several hundred to many thousands.

Methods of competition constituting a violation of the Federal Trade Commission Act divide into two general classes: first, those "opposed to good morals because characterized by deception, bad faith, fraud or oppression;" and second, those "against public policy because of their dangerous tendency to injure competition or create monopoly." The recent Wheeler-Lea Amendatory Act broadened the powers of the Commission in the first class, to prevent methods or practices prejudicial primarily to the consumer, rather than to competitors of the trader adopting them. The Wheeler-Lea Act also singled out for special treatment certain "acts or practices" that fall within the first class, that is, false advertisements of food, drugs, devices and cosmetics. The special treatment referred to consists, first, in empowering the Commission to petition a United States District Court for a temporary injunction to halt the dissemination of the false advertisement pending the Commission's determination of proceedings by complaint; and second, making criminal the dissemination of such false advertisements where the public health is endangered or where intent to defraud the public is shown. An important provision is the definition of falsity to include an advertisement that suppresses facts that should be revealed to make the advertisement speak the full truth.

Another provision of the Wheeler-Lea Act which should be mentioned in a statement of enforcement problems is the assessment of a civil penalty for a violation of the Commission's order to cease and desist after the order shall have become final, either by failure of the respondent to apply to the court for review within a reasonable, fixed time or by an affirmance of the order by a court of last resort. This provision removed a serious obstacle to an effective enforcement of the act. Theretofore, a respondent was not required to obey the order until it had been affirmed by and made an order of the Circuit Court of Appeals; the time within which he could apply to the court for review was not limited; and the Commission could not appeal to the court to enforce the order until it could show to the court that it was not being obeyed. This enabled the respondent to play fast and loose, neither obeying the order nor testing its validity, but violating it with impunity until

the Commission had discovered the violation and had secured an enforcement order. No penalty was incurred until he had thereafter violated the order.

No unsolved serious problem remains in the enforcement of the act with regard to the first class of unfair methods of competition or unfair acts or practices heretofore mentioned. But the same cannot be said concerning the second class involving mutual or voluntary restraints of competition. In this class of cases the sole consideration is to secure to the public the benefits of free competition. In many cases coming to the attention of the Commission no price competition among members of an industry is apparent. There are indications, amounting to a moral certainty, that the uniformity of bids and prices has been brought about by understanding and collusion, yet, if so, it has been accomplished by such devious ways as to make proof difficult.

If competitors, occupying a dominant position in industry so as to possess power, acting together, to control the market, enter into an agreement, understanding or combination to eliminate competition in the sale of their products, such conduct is, per se, in violation of the common law of this country and, if interstate commerce is involved, in violation of the Federal anti-trust laws. It is considered that the control of the market--the power to enhance prices or restrict output, is sufficient to render such conduct unlawful without proof of actual evil results.

However, where the elimination of competition is brought about not by agreement or understanding between competitors who remain in business but by combination taking the form of a merger or consolidation of competing properties, such a combination is lawful notwithstanding the fact that the combination possesses power to fix and enhance prices unless there be shown an intent to achieve the evil results of monopoly, or unless actual evil results ensue. It would seem that power to control the market or to enhance prices should be enough to condemn such a combination without proof of the enhancement of unreasonably high prices. The solution of these problems lies with the Congress.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, forbids a manufacturer or other distributor to discriminate in price among his customers where the effect may be to lessen competition or tend to monopoly, but permitting differentials in price which make only due allowances for differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in which the commodity is sold or delivered.

The problem of enforcement here is the amount of work necessary to discover costs of manufacture and sale, and difference of opinion among economists and among accountants as to how total costs should

be apportioned and allocated. Suitable methods of cost apportionment and allocation which accord with sound accounting principles must be evolved from experience. Such accounting methods must not only reveal whether differences in costs justify differences in price, but they must at the same time be practicable for the everyday use of the individual business concern. The business man must not only know that his price differentials are justified under the statute but he must be able to show that fact when the question arises. What additional legislation is necessary remains to be seen, but the end sought is clearly desirable in aid of fostering fair competition, the placing of competitors upon a fair competitive footing as regards their purchase cost.

Other provisions of this section are directed toward a similar end by requiring the seller, when he offers benefits or facilities or services to one customer in aid of resale, to make the same available to other customers on "proportionally equal terms." The problem of enforcement here is the meaning of the expression "proportionally equal terms." There is room for differences of opinion that will have to be settled by decisions. Such questions arise as, whether a service or facility offered, in terms, to all who reach a certain standard or meet certain conditions or fulfill certain requirements is made available to all on "proportionally equal terms," where many of the offerer's customers cannot measure up to the standards or meet the conditions, or from a lack of capital or physical facilities cannot fulfill the requirements.

Section 7 of the Clayton Act prohibits one corporation from purchasing the stock of another corporation, or the purchase by one corporation of the stock of two or more competing corporations, where the effect may be to substantially lessen competition between the acquiring and the acquired corporation, in the one case, or between the two acquired corporations in the other case.

The principal problem in the enforcement of this section arises from the Supreme Court's decision that the Commission lacks power to require divesture of assets by a corporation which has acquired the assets of a competitor, thereby suppressing all competition between them, even though the assets were acquired through and by reason of an unlawful acquisition of stock. Again, an obstacle to the effective enforcement of this section arises by reason of the lack of any method by which the Commission may discover such an unlawful acquisition and issue a complaint terminating in an order to cease and desist, before the acquiring corporation has had time to transfer its assets to a subsidiary, or otherwise eliminate it from the competitive field. Additional legislation will be necessary to correct this situation.

In the time available for a discussion of the problems of enforcement encountered by the Commission. I have been able to

touch only the high places. Some of the problems the Commission has been able to solve, but others are yet to be solved and probably can be solved only by the aid of additional legislation. The Commission, of course, does not enact the laws; it is only charged with their enforcement.

It may be that some of you do not approve all of these laws--but I do believe that all of you realize, and concur in, the soundness of their common objective. Such laws were called forth by conditions which cried out for a remedy. Future circumstances and conditions may call forth other remedies, remedies to be found and applied by the fair and impartial hand of your Government--not to be found in a laissez faire attitude encouraging the law of the jungle. That these laws may be improved upon, no one will deny. But he who prophesies that the principles which underlie them will be abandoned is a bolder prophet than I. I believe that rules of fair play established by your Government are necessary to the continued existence of fair competition, and that your Government is firm in its purpose to see that fair competition is not extinguished. Without the protection of such rules many of you would find it impossible to operate your business upon the high ethical standards which characterize the activities of most business men, and some of you would find it impossible to operate at all. Without these laws the public welfare would suffer serious and recurrent injury, and the unrest and discontent inevitably bred by monopoly and excessive concentration of economic power would manifest itself in no uncertain manner.

The enforcement of laws designed to foster fair competition should receive your sympathetic cooperation. You should respect and obey them, and insist that your competitors do likewise. If such laws are not to your liking, do not attempt personal nullification of them. Make your views known to those who represent you in framing our laws--for the laws designed to foster fair competition were enacted not to oppress you, but for your benefit and your protection. Upon your success and your progress the economic welfare of the public is dependent and in your success and your progress your State and your Nation are interested and vitally concerned.

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