

(By: Robert E. Freer, Member of the Commission)

I once talked with a famous judge who had visited a leading law school in this country and chanced to hear a decision of his court, written by himself, analyzed and explained in class, and who confessed to me that he was astonished at the depth of erudition and nicety of judicial discrimination attributed to the opinion in its reconciliation with other decisions to which he had given no attention in writing the opinion.

In view of my knowledge of the academic habit of synthesis, you may wonder at my temerity in appearing here today to talk to you about the operation of a law. I hope you will put it down to two things: I have myself taught law at night since 1922, and at the last session of Congress I served as counsel to a Senate committee numbering among its members some of the ablest lawyers in the United States Senate.

The Commission and its Functions

I am honored by your invitation and gratified at the opportunity to talk to you about the work of the Federal Trade Commission. Most of you, of course know that the Federal Trade Commission is an independent agency of the Federal Government, in fact, the oldest independent agency, with the exception of the Civil Service Commission and the Interstate Commerce Commission. It is an administrative body exercising quasi-judicial functions, created during the administration of President Woodrow Wilson, under authority of an act of Congress approved September 26, 1914.

While the Commission has certain other powers and duties, its principal functions are: (1) To prevent unfair methods of competition in commerce; (2) To make investigations at the direction of the President, the Congress, upon the request of the Attorney General, or upon its own initiative.

It will, therefore, be apparent to you that one of the prime objectives of the act was the elimination of unfair practices in commerce for the protection of honest business and the consuming public. In so many words, Congress gave to the Commission, in the act creating it, a mandate to prevent those subject to the act "from using unfair methods of competition in commerce" and to proceed against such persons, firms, or corporations as are engaged in unfair methods of competition whenever "it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public."

It is very clear, therefore, that in preventing unfair methods of competition, the Commission has in a very broad sense a dual function, first to protect the general public interest, and, second, to protect members of business and industry from unfair and unlawful practices of their competitors.

Historical Development

The Federal Trade Commission Act is one of the anti-trust acts. The history and development of these acts from the old common law rules against unfair competition is extremely interesting. I shall mention only one or two mile-posts in the advance.

As early as 1803 in England, Lord Eldon (Hogg v. Kirby, 8 Besey, Jr., 215), used the term "fair competition." In that case the court ruled that

"A court of equity in these cases is not content with an action for damages; for it is nearly impossible to know the extent of the damage; and therefore the remedy here, though not compensating the pecuniary damage except by an account of the profits, is the best: the remedy by an injunction and account."

After the industrial revolution in this country, the attention of thoughtful men was directed to the need for some legislation to prevent concentrated economic power from interfering with the freedom of commerce.

Enactment of the Sherman anti-trust law in 1890 was a definite forward step in the direction of equality of opportunity for all honest competitors and of freedom of competition for all. But experience during ensuing years under the Sherman Act showed that something more was needed. Demand for enactments supplementing the anti-trust laws came from all classes of business and industrial interests, as well as from the general public.

By 1912 this sentiment had grown to such proportions that the platforms of the three major political parties of that year included planks declaring that the anti-trust laws should be made more specific, and that legislation supplementary thereto should be enacted. As a result, the Federal Trade Commission Act was approved on September 26, 1914, and in the following month the Clayton Act, further amending the anti-trust laws, was enacted. The latter act relates to and prohibits--

1. Price discrimination;
2. Exclusive arrangements and tying contracts;
3. Acquisition by one corporation of the stock of another where the effect is to eliminate or lessen competition; and
4. Interlocking directorates.

The vast majority of matters coming before the Commission, however, arise under Section 5 of the Commission's organic act, which says "that unfair methods of competition in commerce are hereby declared unlawful."

Please note the breadth of the language adopted by the Congress. It does not say that this or that trade practice is unlawful, but that all "unfair methods of competition" are unlawful. The Congress purposely made the language broad because it recognized that changing conditions make for changing trade practices, and that to attempt to define every unlawful practice that human ingenuity might devise would be an endless, if not impossible, task.

The Congress therefore determined to grant the Commission it was creating the authority to determine what practices are unlawful, and whether they should be proscribed. This was definitely stated in the report on the bill made by the Senate Committee on Interstate Commerce on June 13, 1914. The Committee said:

"The Commission gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce, and to forbid their continuance, or whether it would by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define."

In a case arising from the Commission, the United States Circuit Court of Appeals once said on this subject:

"In the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in a final analysis it became a question of law after the facts were ascertained whether such facts constituted unfair competition in business."

If there remained any doubt as to the breadth of the Commission's authority, or of the purpose of the Congress to keep it free from political influence and thus guarantee its independence, the last vestige of such doubt was cleared away when the Supreme Court, in deciding a celebrated case, recently used this language:

"The Commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"

It is in the spirit of its act and of the judicial decisions from which I have quoted that the Commission has conducted nearly one hundred major investigations and fact-finding studies, and has proceeded in thousands upon thousands of cases that have arisen under its jurisdiction within the twenty-one years of its existence.

It has been the purpose of the Commission to correct and to prevent, so far as it has been possible to do within its means and authority, those practices in commerce which injure or harass honest competitors and which are detrimental to the consuming public.

Benefit to the Public

It has been said that matters coming to the attention of the Federal Trade Commission affect the interests of probably more individuals than those handled by any other department or agency of the Federal Government. Many of the cases arising before the Commission affect indirectly substantially every household in the land, because they have to do with almost everything the American public eats, drinks, wears, or consumes in any way.

The objective of the Commission being to protect honest members of business and industry from the unlawful practices of their competitors, it naturally follows that when the Commission is able to eliminate the unfair practices of the dishonest members of an industry, all of the honest members of that industry are benefited.

Of course, too, the public interest is served by the same process. I could cite hundreds of cases which have come to the Commission's attention where it has been perfectly clear that the public was being defrauded of many millions of dollars. When the Commission has been able to stop these sharp practices, as it has done in thousands of cases, it naturally has saved the consuming public the sums of which it was being defrauded.

Commission Procedure

Procedure by and before the Commission is both simple and effective. A case may arise in any one of several ways. The most common origin is through complaint of an unfair trade practice made by a competitor or a consumer, who claims to have suffered injury because of the practice in question. No formality whatever is required to bring a matter to the Commission's attention. It may be done by letter, with a simple statement of the facts, or it may be done by personal call. The Commission treats all such matters in confidence, and in no case is the identity of the complainant made public. The reason for this is obvious.

When complaint of an alleged unfair or unlawful trade practice is thus made to the Commission, it directs an investigation to be made by its staff. The person, or firm, against whom such complaint is lodged is, of course, put on notice and given full opportunity to present his side of the story.

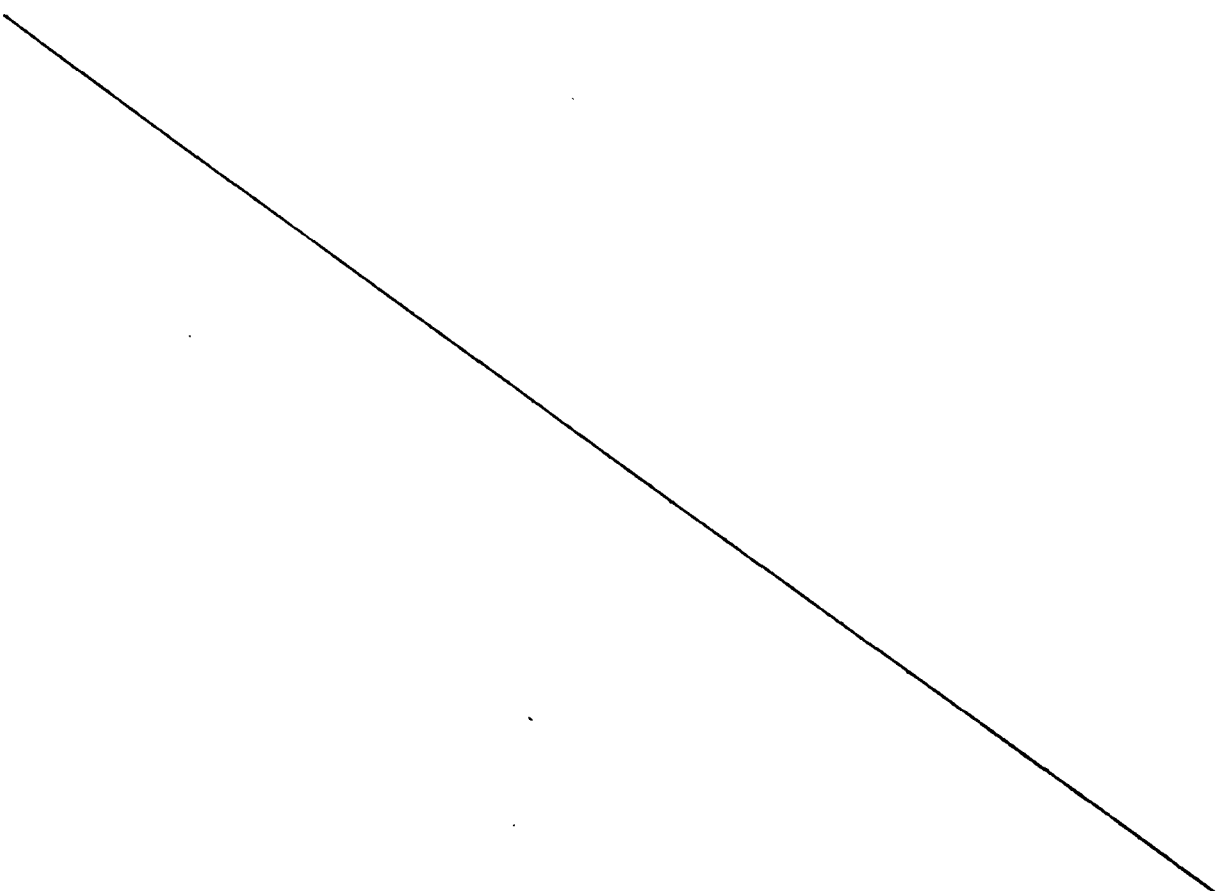
After assembling the facts, the Commission determines whether or not there is prima facie a basis for formal action. If it decides that the law probably is being violated, it directs the issuance of a formal complaint setting forth the charges, and this is served upon the alleged offender who thereafter is known as the respondent. He is given a reasonable time within which to make answer. If he decides to contest the proceeding, hearings are ordered, testimony is taken, and a report of all the facts made to the Commission, which then weighs the case and renders its decision. If it finds that the law has been violated, it issues what is called a cease and desist order, requiring the respondent to cease and desist from the unlawful practices in question. No penalty is imposed, and may not be under authority of the Commission.

Judicial Review

If the respondent feels that the Commission's order is not justified, he has the right of appeal to the Circuit Court of Appeals of appropriate jurisdiction. That court passes not only upon the validity of the conclusions, but also upon the sufficiency of facts to support the order. If it finds the conclusions to be valid and warranted by the facts, it directs the respondent to obey the Commission's order. Should he then fail to do so, the court may then proceed as in a case of any other contempt of Court.

There is, too, the right of petition for certiorari by either the Commission or the respondent to the United States Supreme Court, and during its history, a good many of the Commission's cases have been carried to that tribunal.

It is to its credit that a reversal of a Commission order by the Courts is an extremely rare occurrence. In fact, it may be of interest to know that the Commission has been reversed by the Supreme Court but once in over seven years, and that by a 5 to 4 decision in a Section 7 Clayton Act case; also that during the twelve months ending with February of this year the Commission had nineteen orders affirmed by various Circuit Courts of Appeals and suffered no reversals.



Stipulations

What I have described to you is the Commission's formal procedure. We have a somewhat informal procedure by which the Commission has been able to expedite its work and save a great deal of time and expense both to the Commission and to persons charged with violations of Section 5 of the Federal Trade Commission Act.

This is known as the stipulation procedure. It frequently happens that a merchant or a manufacturer commits an offense against the Federal Trade Commission Act through ignorance of the law, and that if he knew he were violating the law, he would stop. The Commission has learned this from experience. It therefore has developed a procedure whereby, when complaint of an unlawful trade practice is lodged with it, and such complaint is supported by the facts, it calls the attention of the violator to the matter, and offers him opportunity to sign a written stipulation of the facts and an agreement to cease and desist from the practices involved. If he does so, action is suspended and his signed stipulation filed. If he refuses, the matter is handled under the formal procedure which I have previously outlined. If he keeps his agreement, no further procedure is had, but should he resume the unlawful practices complained of, formal complaint is issued and the signed stipulation which has been executed may be used against him in the hearing to follow.

The Commission believes this procedure protects the honest competitor and the consuming public from a great many unfair practices, and by reason of its simplicity and economy, reaches a far larger number of business abuses than would be possible under the longer and more complicated formal procedure involving trial, argument, formal decision, etc.

It should be borne in mind, however, that the stipulation procedure is a privilege and not a right. Whether an offender shall be permitted to sign a stipulation is a matter entirely within the discretion of the Commission. Such privilege is never permitted where the Commission is convinced that the practices which have been engaged in are of such character as to be of serious injury to competitors and to the public.

Trade Practice Conferences

After a good many years of experience under its organic act, the Commission developed still a third method of bringing to an end a great many unfair trade practices. This is the Commission's trade practice conference procedure, which calls for active and voluntary cooperation on the part of business and industry. Under this procedure, members of a given business or industry gather at a conference sponsored by the Commission, and with members of the Commission's staff as advisors, consider the problems of their particular business. Under this procedure, members of a business or an industry establish a degree of self-government by setting up a code of business ethics, and by defining unfair trade practices.

These conferences adopt rules known as "trade practice rules", in which unfair trade practices which may have been prevalent in the industry are

described and defined, and agreement reached to abandon them. Rules so adopted by an industry are referred to the Commission, which is asked to approve them. If the Commission finds that they are in conformity with the law, it gives its approval.

A prerequisite to holding such conferences is that a preponderant majority of the members of a given business or industry shall request it. When such majority agrees to abide by such rules as may be adopted, it usually results that most of the unfair practices which have been prevalent in that industry are abandoned without the necessity of proceedings by the Commission against any individual members.

The Commission has sponsored approximately 175 such conferences. Some of them have been held by very large industries, with capital and investments amounting to hundreds of millions of dollars, and employing a great many thousand workers. It is a pleasure to report that it is the rule rather than the exception that where an industry holds such a conference and agrees to be bound by such rules as are adopted, those rules are observed by an overwhelming majority of the members of the industry concerned. The moral effect of such agreement has been found to be extremely helpful in bringing about law observance. The spirit of cooperation and of willingness to play fair with one another shown by members of business and industry at these conferences, has been most inspiring, and has aided the Commission most materially in its efforts to bring about general law observance.

That this spirit of cooperation and of law observance is spreading is established by the fact that there has recently been a substantial increase in the number of applications made to the Commission to sponsor trade practice conferences. Approximately 40 requests for such conferences are now pending with the Commission, and representatives of approximately 200 other industries have already requested information of the Commission as to the necessary preliminary steps for holding such conferences. I am sure that a great deal more will be heard about trade practice conferences in the future than has been in the past.

Pending Amendments to the
Federal Trade Commission Act.

You have, no doubt, read recently a good deal of misinformation about the nature and purpose of certain amendments to the Federal Trade Commission Act, now pending before the Congress. There are some who would have you believe that the Commission is seeking a very wide expansion of its authority, both in respect of unfair practices and of its investigatory powers. As a matter of fact, the amendments which the Commission recommended in its last annual report, and which are in substance the amendments now pending in Congress, are more clarifying and relate more to procedure than to expansion or broadening of the Commission's power. This has been made quite clear in the report which the Interstate Commerce Committee of the Senate filed with the Senate only a few days ago, when it favorably reported the proposed amendments to the Senate.

The most important of the pending amendments, and the one in which the Commission itself is most interested, is that to Section 5 of its organic act, which would insert the words "and unfair or deceptive acts and practices" into the language of the present act. If that amendment be adopted, that part of the section would read: "That unfair methods of competition in commerce and unfair or deceptive acts and practices in commerce are hereby declared unlawful."

To explain the purpose of this amendment to you, and so that you may know that such explanation is impersonal and unbiased, I shall paraphrase the report which the Senate Interstate Commerce Committee made to the Senate on that proposed amendment.

This report said, in effect, that under the existing language, court decisions have intimated that the Commission may lose jurisdiction of a case of deceptive or similar unfair practice if it is developed in the proceeding that there was no competition or that all of the competitors in that business practiced the same unfair methods, no matter how much the consuming public might be in need of protection from such deceptive or unfair acts or practices. Much time and money must be expended to establish competition and to show injury to competitors, in order that the Commission shall have or retain jurisdiction to inquire into and stop the unfair practices.

Under the proposed amendment, should the Commission have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is to the public interest to stop them, it could issue its cease and desist order without being put to the necessity and the expense of time and money to prove the existence of competition and injury to competitors.

In one case, an order to cease and desist was set aside for the reason that the Supreme Court held that all the competitors in that business mentioned in the record had been equally guilty with the respondent, and that it was not the business of the government to protect one knave from another. The proposed amendment to Section 5 would remove doubt of the Commission's jurisdiction and permit it to act in all cases involving unfair or deceptive practices where the public interest would be served by such action, regardless of whether there was any honest competition, or whether the respondent enjoyed a monopoly.

The other proposed amendments are either clarifying or procedural. They would make for expedition and save expense as well.

Conclusion

American business and the American public are imposed upon, due to unfair and deceptive acts and practices in commerce, to the extent of millions of dollars annually. These practices, whether or not they involve competition, certainly are violative of the spirit of the Federal Trade Commission Act. They ought to be stopped; the vast majority of business men wish them to be stopped. Unquestionably there are cases where men who are inherently honest feel that they are compelled to resort to some unfair or deceptive practices to preserve themselves from dishonest or unscrupulous competitors.

In the spirit of fairness, such persons ought to be protected in their right to remain honest. That was the spirit in which the Federal Trade Commission Act was passed, and that is the spirit in which the Commission, in the light of 21 years of experience, has recommended to the Congress the amendments to that Act which are pending on Capitol Hill.