Address

on

THE FEDERAL TRADE COMMISSION
AND THE CONSUMER

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By

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THE FEDERAL TRADE COMMISSION

AND THE CONSUMER

May I express my pleasure in speaking to the Boston Conference on Distribution? As we have all become more aware of the importance of distribution and of the difficult problems it presents, the value of meetings such as this has become increasingly evident. This conference makes annually a rich contribution to the thinking of those who must deal with these problems.

The Federal Trade Commission has long been an agency whose work is of peculiar importance to the consumer. When the Commission was organized in 1914, it was conceived as part of a broad program to protect the public interest, and particularly the consumer's interest, against the development of monopoly. Two acts were passed. One, the Clayton Act, undertook to define and make unlawful practices which had been conspicuous in the development of monopoly during the previous two decades: such practices as price discrimination, exclusive dealing arrangements, interlocking directorates, and acquisition of the stock of competing corporations.1/ The other, the Federal Trade Commission Act,2/ provided for sweeping investigations of monopolistic and unfair trade practices, and for the prevention of unfair methods of competition. The Commission was given important duties under both of these acts. Thus, it became both an instrument for preventing many of the practices leading to monopoly and an agency through which the plane of competition could be gradually raised to a higher level.

The interest of consumers in the accomplishment of these purposes is so great that the Commission has always been, in a sense, a consumers' agency. Indeed, it was not the intent of Congress that the Commission's work against unfair methods of competition should consist in settling private trade disputes. The statute authorized the Commission to proceed only after finding that action would be "to the interest of the public".

On the other hand, the Commission was not conceived as a consumers' agency in a sense which would make it antagonistic to business. The Congress believed, and the Commission believes, that the consumer and the great body of business men have a common interest in preserving competition and in ending unfair competitive tactics.

Last spring, the Commission's duty to protect the consumer was re-emphasized, and its opportunity to do so was broadened, by the first amendments which have been made to the Federal Trade Commission Act in twenty-four years.3/

In 1930, the Commission had asked the courts to enforce an order of peculiar interest to the consumer. A concern which sold a dangerous product of thyroid gland was claiming that this product could be safely used without medical direction to reduce fat. Both the Circuit and Supreme Courts rejected the Commission's plea for enforcement of its order against

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1/ 38 Stat. 730
see Sections 2, 3, 7, 8, 11.
2/ 38 Stat. 717.
3/ 52 Stat. 111.

this concern.4/ In an opinion which was focussed upon the competitors rather than the customers of the seller, the Supreme Court declared:5/

> "It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market.....Something more substantial than that is required as a basis for the exercise of the authority of the Commission."

This decision was an obstacle to the Commission's efforts to protect the consumer in cases in which the seller was not in direct competition with other sellers; or in which the practice did not affect these others. Indeed, the Court raised, without deciding, a question as to whether Congress intended to protect one knave against the competition of another. Even where the injury to consumers was plain, much of the Commission's available time and money was spent proving the existence of injury to competition.6/

The recent amendments require the Commission to prevent not only *unfair methods of competition in commerce*, but also *unfair or deceptive acts or practices in commerce*.7/ Now the Commission may proceed against acts which are inherently unfair or deceptive without emphasizing their effect upon competitors. This amounts to a direct authorization to protect the consumer as well as the business man.

The Commission was also given new authority over the advertising of food, drugs, curative devices, and cosmetics.8/ It had long proceeded against false advertisement of these products where it could show that such advertising amounted to an unfair method of competition. Now, however, the law forbids false advertising as such. It defines false advertisement to specifically include misrepresentation or deception, not only directly but also through failure to reveal material facts. It establishes the explicit duty of the advertiser to give adequate information.9/

It also strengthens the enforcement provisions. In proper cases, the Commission may apply for an injunction against false advertising pending the outcome of formal proceedings. If the advertiser intends to defraud or mislead, or if the advertisement may lead to a use of the commodity injurious to health, the violator is guilty of a misdemeanor and the

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4/ F.T.C. vs. Raladam, 42 Fed. (2nd) 430, 283 U. S. 643.
5/ Supra, p. 653.
6/ See Hearings before Senate Committee on Interstate Commerce on S. 1077, 75th Congress, 1st Session; and Senate Report 221, 75th Congress.
7/ Sec. 5(b).
8/ Secs. 12, 13, 14, 15, 16.
9/ Sec. 14(b).

Commission is required to certify the facts to the Attorney General. Thus, it becomes possible to act with speed where the violation is serious, and with severity where it is deliberate.10/

The amendments are also designed to strengthen the Commission's orders. These orders now become final, unless appealed, within sixty days, and violation of a final order is subject to a civil penalty of not more than five thousand dollars.11/ Under the previous statute, a violator of the law could not be punished until violations had been proved in three separate proceedings; one before the Commission prior to its order, one before a court to secure an affirmance and an order commanding obedience, and a third before the court to prove a violation of the court's order. The Commission's greater opportunity to protect the consumer is accompanied by a shorter procedure and a quicker penalty, which should make its administration of the law more effective.

It is too early to say to what extent the balance of the Commission's work will change under the amended statute. The work will not cease, however, to include two types of cases of peculiar interest to consumers.

One is effort to stop price fixing. Since 1935, price fixing cases have kept the Commission unusually busy. Collusive restraints of trade are unfair methods of competition within the meaning of the Federal Trade Commission Act. In the last year or two, the Commission has proceeded against such restraints in the sale of many commodities important to the consumer. It has found price fixing upon the food he eats. In March, it ordered the California rice industry to stop fixing prices on rice both in interstate sales and in shipments to the Hawaiian Islands.12/ In June, 1936, it ordered various confectionery associations in New York State to cease conspiring to fix prices and to cut off supplies from competitors.13/ In December, 1936, it ordered wholesale grocers in Fall River to cease their efforts to prevent the direct distribution of groceries by manufacturers to retailers.14/

The Commission has also found price fixing upon the clothes the consumer wears. Two years ago, it ordered eight companies to cease agreeing upon the price at which they would sell flannel skirts.15/ In 1937, it ordered makers of covered buttons and buckles to terminate a price fixing conspiracy which they were carrying on under the pretense that it had been sanctioned by the Commission,16/ and ordered the makers of rubber heels and rubber soles to cease their efforts to boycott manufacturers who sell such products to five and ten cent stores.17/ It ordered large rayon companies to end their agreement fixing uniform prices for rayon yarn.18/

10/ Sec. 14(a).
11/ Sec. 5(1).
12/ D. 3090, California Rice Industry, et al.
13/ D. 2613, New York State Wholesale Confectionery Assns., Inc., et al.
14/ D. 2677, Fall River Wholesale Grocers' Ass'n., et al.
15/ D. 2755, Boston Sportswear Co., et al.
16/ D. 3186, Covered Button & Buckle Creators, Inc., et al.
17/ D. 2802, I.T.S. Co., et al.
18/ D. 2161, Viscose Co., et al.

It required the Millinery Quality Guild to stop making agreements with retailers which sought to prevent the distribution of hats copied from high-priced models.19/

The Commission has acted against efforts to fix the prices of materials which go into the houses consumers live in. It found that manufacturers of metal windows were fixing prices and discounts and were clearing their bids upon building contracts through a central agency.20/ It found that window glass manufacturers and distributors were in agreement to control the channels through which glass was distributed and the amount of mark-up which the distributor added to the manufacturer's price.21/ It found that members of the National Electrical Manufacturers Association were conspiring to fix the price of rubber covered building wire.22/ It found that various associations of building material dealers united in a national federation were attempting to confine the distribution of building materials to so-called regular channels, to prevent sales to irregular dealers or direct to consumers, and to fix uniform prices.23/ It found that the Retail Furniture Dealers Association in St. Louis was attempting to fix charges for deferred payments, and to prevent the direct sale of furniture to consumers, institutions, hospitals, industrial plants, and the like.24/

In other cases, the Commission has proceeded or is proceeding against price fixing upon products as varied as automobile parts, cement, lumber, steel office furniture, surgical dressings, sponges, and crayons and school supplies.25/ In June, it ordered five large liquor distributors to cease making contracts for resale price maintenance in the District of Columbia.26/

The elimination of competitors and the concentration of output in a few hands have often established the conditions in which such price fixing activities can take place. The Commission has had little success in forestalling such developments by the use of section 7 of the Clayton Act. This section forbids the acquisition of stock in a competing concern where the effect would be to substantially lessen competition between the competitors or to restrain commerce or tend toward monopoly. Its effect has been primarily to substitute merger for stockholding as the means by which competitors unite. The weakness of the statute has been increased by judicial interpretations. The courts have held that a lessening of competition between two competing concerns did not make a stock purchase unlawful if competition in the entire industry was not substantially lessened.27/ Moreover, in the Arrow-Hart and Hegeman case the Supreme Court held that a respondent which has unlawfully acquired stock may still

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19/ D. 2812, Millinery Quality Guild, Inc., et al.
20/ D. 2978, Metal Window Institute, et al.
21/ D. 3154, Pittsburgh Plate Glass Co., et al.
22/ D. 2565, National Electrical Manufacturers Ass'n., et al.
23/ D. 2191, Building Material Dealers' Alliance, et al.
24/ D. 2757, Retail Furniture Dealers' Ass'n. of St. Louis, et al.
25/ D. 2942, D. 3167, D. 2898, D. 3319, D. 3025, D. 3393 and D. 2967.
26/ D. 2988, D. 2989, D. 2990, D. 2991 and D. 2992.
27/ International Shoe Co. v. Federal Trade Commission, 279 U. S. 832.

escape the Commission's jurisdiction by acquiring the assets of the competing corporation and then disposing of its stock, even after the Commission's proceeding has begun.28/ These developments, taken together, have made section 7 almost a nullity. They have led the Commission to recommend repeatedly in its annual reports and after its studies of mergers in particular industries that the section be amended to prevent the union of large competitors by the acquisition of assets as well as of stock.

The second type of case involves misrepresentation of products. Such misrepresentations are of particular interest to consumer groups, which in the last few years have been working for better buying information. It has long been clear that deliberate misrepresentation of product, prices, or the character of the seller is unfair competition. The many cases in which the Commission proceeds each year against such misrepresentations may be illustrated by one in which a maker of carbon steel cutlery represented it as stainless;29/ one in which a maker of radios imitated the trade marks of large, well-known concerns;30/ and one in which a concern selling direct to the consumer pretended to be a retailer offering goods at wholesale prices.31/ The Commission handles many such cases in response to direct complaints. In addition, it examines every year substantially all radio continuities and a large sample of magazine advertising, in order to check misrepresentations which can be detected by a mere reading of the statements made.

Recently, the Commission has been much concerned about a more subtle type of deception in which the seller makes no false statements, but relies on the appearance of the goods, the circumstances under which they are sold, and the confusion of the buying public about the meaning of trade terms to bring about an actual deception. When the circumstances are such that silence deceives, there is a duty upon the seller to disclose the facts. In February, 1938, for example, the Commission issued an order to cease and desist against a mattress maker who covered secondhand materials with new ticking but did not label them in any way to indicate that their contents had been previously used.32/

Closely allied with the Commission's orders against unfair competition, are its trade practice conferences, in which it attempts to stop unfair competition by cooperative means. These conferences were begun more than ten years ago as informal ways of bringing members of any industry to abandon unfair trade practices simultaneously. By the use of the conferences, voluntary compliance with the law has often taken the place of compulsory proceedings. Recently, the conferences have proved particularly useful in preventing misrepresentations by developing an

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28/ Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission, 291 U. S. 587.
29/ D. 2111, National Silver Co.
30/ D. 2214, Marconi Radio Corp., et al.
31/ D. 2038, L. & C. Mayers Co. Inc. Order affirmed by C.C.A. 2nd Circuit, June 6, 1938.
32/ D. 3199, Sohn Bros., et al.

understanding of the meaning of trade terms and of the circumstances under which a seller has a duty to avoid deception by disclosing the facts concerning his product.

The rules promulgated after a trade practice conference are divided into two groups. One group sets forth the meaning of the law as applied to conditions in a particular industry, specifying as unfair those practices which fall within the scope of statutory inhibitions. The second expresses further standards of business conduct which are accepted by the Commission as desirable. Concerns engaged in unfair practices in violation of rules in the first group are subject to formal proceedings by the Commission. The effectiveness of rules in the second group usually depends upon voluntary compliance.

The use of the trade practice conference to protect the consumer against misrepresentation by silence is illustrated by the rules adopted last June for the fur industry. These rules require that the seller disclose the true name of dyed furs and the presence of furs which come from cross-bred rather than pure-bred animals or furs which have been tipped, blended, pointed, or dyed. They also require disclosure of the facts if a garment is made of pieces, tails, paws, throats, and similar scraps, rather than of full skins.

Similarly, the rules approved in July for the macaroni industry require the disclosure of any unusual ingredients in macaroni and noodles, and forbid the use of a yellow color or a yellow wrapper in a way which falsely implies the presence of more eggs than are actually there. The rules for the wholesale jewelry industry, approved last March, prohibit the sale of rebuilt watches without disclosing that they are not new, as well as various other forms of misrepresentation, express or implied. The rules for the rayon industry, approved a year ago, require the disclosure of the fiber content of fabrics containing rayon, and prohibit the description of rayon fabrics by such silk terms as "chiffon", "taffeta", "crepe", unless these terms are qualified by the word "rayon".

The meaning of trade terms is also made clear by trade practice conference rules. The term "rayon" is defined in the rules for the rayon industry. "Macaroni", "egg macaroni", "plain noodles" and "egg noodles" are defined in the rules for the macaroni industry. In rules concerning the shrinkage of woven cotton yard goods, approved last June, the meaning of terms such as "pre-shrunk" is made clear. The possibility of deception in the use of such terms lies in the fact that a fabric which has been shrunk may be capable of shrinking still further. These rules make clear that when a term such as pre-shrunk is used without qualification it means that there is no residual shrinkage and that if further shrinkage is possible the term should be accompanied by a statement to that effect.

By the development of such rules, the honest merchant and the buyer are informed as to the meaning of terms which they use in their dealings with each other, and the concern which seeks to benefit from the consumer's ignorance is put on warning as to what it must not do.

Group II rules of the trade practice conference are being used to develop information for the consumer greater than that which is clearly

required by law. Thus, the rules for the rayon industry approve the practice of disclosing not only the presence of fibers in mixed goods but the percentage of each. The rules for the house dress and wash frock manufacturing industry recommend that the manufacturer label his garments to warn the public against such deodorants and depilatories as will injure the fabric, and that he give accurate descriptions of the washability, colorfastness, and shrinkage properties of the fabric. Within the last few weeks, the Commission authorized a trade practice conference for the linen industry. It is our hope that these conferences can be made increasingly useful as instruments by which consumers and business men may jointly reach an understanding as to the information needed in the market place.

Beyond its enforcement of specific statutes about business practices, the Commission has a duty of research and publicity which is important to the consumer. In establishing the Commission, Congress believed that many abuses could be corrected by public report of the facts, and that the need for further legislation could be discovered in the same way.

For twenty-four years, the Commission has been continuously engaged in economic investigation, as a result of which it has submitted many reports to the Congress and the President.33/ When prices have increased sharply, or when the margin between the cost of raw materials and the price of finished products has seemed too wide, the Commission has often been called upon to find the explanation. It called a conference on the high cost of living in 1917. From time to time, it has investigated the prices of bread and flour, coal, meat, fruits and vegetables, raisins, sugar, peanuts, milk, tobacco, shoes, house furnishings, textiles, and gasoline. It has reported upon the operations of particular types of business enterprise, such as chain stores and utility holding companies, and upon particular practices such as resale price maintenance, price filing, and basing point systems. As a result of recommendations included in its reports, legislation of major significance to the consumer has been enacted. Thus, the meat investigation was directly responsible for the Packers and Stockyards Act which brought the great meat packers under Federal regulation. Similarly, the utility investigation played a major part in the development of Federal policy toward the rates and financial practices of electrical utility companies.

The significance of these reports to the consumer is illustrated by those made in the last two or three years. Between June, 1934, and January, 1937, the Commission submitted to Congress a series of reports on the milk industry in which it showed that in certain areas dealers and producing organizations had united to fix milk prices to the consumer; that the price of cheese is determined by a few pseudo-independent transactions in the Wisconsin Cheese Exchange, and that this price in turn becomes a part of the formula determining the prices of milk used in evaporated milk plants; that the large milk companies have been substantially lessening competition by acquiring independent milk distributors; and that changes in milk prices have usually been at the expense of the producer or the consumer rather than the distributing company. It recommended legislation to authorize a Federal agency to assist in the working

33/ See page 149 of 1937 Annual Report for a complete list of these reports.

out of compacts among states about the milk trade. A bill for this purpose was introduced in the last Congress.34/

In the spring and summer of 1937, the Commission submitted to Congress reports concerning the marketing of the major farm products and of fruits and vegetables. These reports showed a very high degree of concentration of control over the processing of many of the major products, and showed that this control had been acquired largely by the merger of competing corporations. They indicated the existence of rackets at terminal markets; the payment of excessive loss and damage claims upon fresh vegetables; and the continuance of conditions, already described in previous reports, which permit grain speculators to create squeezes in the wheat market. The proposals of these reports were partly responsible for amendment of the Perishable Agricultural Commodities Act by the last Congress. The reports also recommended amendment of the Clayton Act to prevent the growth of large enterprises by union of competing concerns. A bill for this purpose was introduced during the last Congress.35/

In June of this year, the Commission finished a study of farm machinery which, though not a consumers' good, is a product of immediate concern to the whole rural population. A study of the distribution of automobiles is now in progress. The Commission is also taking part in the broad study of monopoly now being conducted by a joint committee of members of Congress and representatives of executive agencies.

The development of an economic system which will function smoothly in the interest of the entire commonwealth is a slow and laborious process. It calls for the energy and initiative of a population engaged in industry, for the shaping of many statutes, for the refinement of administrative processes, and for general adoption of the best elements of trade customs. The Government's part in this development is the joint contribution of many agencies. Among the essentials will always be fearless and impartial research into industrial conditions and practices such as the Commission has undertaken under the general investigatory powers of its act; the preservation of the maximum freedom of initiative which is consistent with the protection of the public, such as the Commission has sought in its administrative procedures against restraint of trade; and the improvement of standards of business honesty and informative candor, such as the Commission has furthered by its work against misrepresentation and deception. The performance of these tasks is fundamental in making the economic system serve the consumer and the public interest.

34/ H. J. Res. 170, 75th Congress.
35/ H. R. 7371 and S. 2549, 75th Congress.