REMARKS OF HON. R. E. FREER, MEMBER,
FEDERAL TRADE COMMISSION
BEFORE THE
BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 12, 1940, 8:00 P. M.

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Since I intend to occupy no more than twenty minutes of your time, it will not be possible to do more than "hit the high spots" of the Commission's jurisdiction and procedure.

I suppose that the chief interest of any group of lawyers in Federal Trade Commission practice is how to obtain it. Since I can not make any helpful suggestions along that line, I will endeavor to comment on what to do with Commission practice if and when you get it. And in this connection, I might suggest that the Commission maintains no register of attorneys authorized to practice before it. Any attorney admitted to practice before the highest court of any State, or territory, or the District of Columbia, and having a client, may appear before the Commission by filing a form of appearance, setting forth his eligibility and the name of the respondent for whom he appears. 1/

The Federal Trade Commission is an independent administrative agency of the Federal Government, created by Act of Congress in 1914 2/ to perform a number of duties involving trade and commerce and, principally, to prevent "unfair methods of competition in commerce." "Commerce" is defined in the act to include commerce in the District of Columbia, and a considerable number of its proceedings have involved practices in the District. 3/

In March, 1938, the Wheeler-Lea Act was approved, 4/ embodying the first direct amendments to the Federal Trade Commission Act since 1914, enlarging the Commission's basic jurisdiction to include prevention of unfair or deceptive acts or practices in commerce, as well as unfair methods of competition.

The Commission's work under Section 5 of the Federal Trade Commission Act in preventing unfair methods of competition and — since 1938, unfair and deceptive acts and practices — is perhaps the most interesting phase of its activities to lawyers and the one to which I shall devote the greater part of my time this evening.

1/ Rules of Practice, Rule IV.
2/ 38 Stat. 717.
3/ F.T.C. v. Klesner, 274 U.S. 145; Milton S. Kronheim, 30 F.T.C. (Docket 3400); A. & N. Trading Co., 88 F. (2d) 776; Washington Laundry, 30 F.T.C. (Docket 3930)
4/ 52 Stat. 111.

First of all, let me dwell briefly on the type of matter the Commission handles so that a later description of the machinery and procedure will be more understandable. The Commission is definitely not a court of industrial relations where one trader may seek redress from the practices of another. One who complains to the Commission has no standing as a party, and Congress deliberately avoided using the expression "unfair competition" in Section 5 so that the Commission would not be circumscribed by the common law concepts of that term. 5/ The standard of legality set up in Section 5 was, as the Supreme Court said in the Schechter case, 6/ an expression new to the law. It is one flexible enough to permit the Commission to keep up with and to eradicate new unfair and deceptive practices developed with the changing pace of business and industrial relations, although at the same time, possessing a sufficient definiteness to satisfy Constitutional requirements.

Thus a great many different practices, which could hardly have been foreseen and reduced to specific statutory prohibitions at the time the act was drafted have been determined by the Commission and the courts in proceedings arising under Section 5 to be unfair methods of competition in commerce. Of course, the United States Circuit Courts of Appeals have complete jurisdiction to review the Commission's determinations in this respect, since in final analysis, what is unfair in the light of the circumstances is a question of law. 7/ The Supreme Court has characterized this case by case process of "filling in" the broad legislative standard as one of "judicial inclusion and exclusion." 8/

I will attempt a rough classification of the business practices determined to be unfair methods of competition. This is by no means all-inclusive, and each classification could be considerably elaborated. 9/ They are:

(a) Combination or conspiracy to fix or control prices.

(b) Combination or conspiracy between competitors to hamper or obstruct business of rivals.

(c) Concerted refusal to sell or refusal to buy where the effect is to suppress competition.

(d) Monopolization of trade channels.

(e) Combination and conspiracy to obstruct a competitor's source of supply, by white-listing, black-listing, or other forms of concerted boycotting.

5/ U. S. v. Schechter, 295 U.S. 495.
6/ Supra, note 5.
7/ F.T.C. v. Gratz, 253 U.S. 421.
8/ F.T.C. v. Raladam, 283 U.S. 643.
9/ For an amplified list see F.T.C. 1939 Annual Report, pp. 82-90.

(f) Misbranding, mislabeling, or misrepresenting products as to composition, origin, quality or source.

(g) False and misleading advertising.

(h) Passing off one's goods as those of another.

(i) Sale of products by means of lottery or chance devices.

(j) Commercial bribery.

(k) Threats of litigation not in good faith.

(l) Disparagement or misrepresentation concerning a competitor.

(m) Inducing breach of contract between competitor and customers.

(n) Secret control of supposed competitor; or "bogus independent."

(o) Unfair use of patent rights.

(p) Full-line forcing.

Proceedings by the Commission under Section 5 involve a wide variety of practices and products, both in subject matter and importance; they range from cases involving the collusive selling practices of an entire industry to those seeking to curb the too enthusiastic advertising often found in pulp magazines.

Even in this enlightened day the Commission finds it necessary on occasion to disturb a thriving mail order business in divining rods for locating buried treasure; or crystal balls guaranteed to disclose the mysteries of the future; in genuine Mojos for dice and policy players; or in such exotic products as "Holy Oil with Live Lodestone" or "High John the Conqueror Root." Although I doubt that you will represent many clients in this sort of enterprise, this does not mean that many modern advertisers are less ingenious now than they were in the days of Barnum or that the modern field of credulity is basically any less fruitful.

But seriously speaking, you can see that the Commission takes jurisdiction over a good many practices which are not comprehended in the common law doctrines of unfair competition and its functions are in no wise intended to supplant those of the courts in that field.

The Commission is directed, when it has reason to believe that there has been a violation of the law and that a proceeding would be to the interest of the public, to issue and serve a complaint stating its charges.

These complaints are prepared in the office of the Chief Counsel, usually by the trial attorney who will appear later in support of the complaint, and ordinarily the Commission itself does not consider the draft of a complaint until it is formally presented upon one or more of the issues raised.

While it is beyond the scope of what I have undertaken to discuss tonight, I wish in passing to mention that before the Commission directs issuance of a complaint, the matter has been thoroughly investigated by the legal investigating staff; and that in the course of such investigation the proposed respondent has been afforded the opportunity of presenting his side of the matter in an informal manner.

Answers to complaints shall be filed within twenty days after service and shall consist of a concise statement of the facts which constitute the ground of defense, specifically admitting or denying or explaining each of the allegations of the complaint. By far the greater number of answers to Commission complaints are in the form of admissions of all the material facts alleged, in which event, if any issue remains, it is a legal one challenging the Commission's jurisdiction or the sufficiency of the allegations to constitute a violation of law.

In the event any issue of fact is raised, the matter is set down for hearing before a Trial Examiner for the taking of testimony. Witnesses may be introduced by the Commission's Trial Attorney in support of the complaint and by the respondent or his counsel in defense. The Commission's powers of subpoena are made available to both alike, and the testimony is reduced to writing. At the conclusion of the hearings, the Trial Examiner presents to the Commission a report upon the evidence, and copies are served upon the Commission's attorney and upon attorneys for the respondents. Both then are permitted to present exceptions in writing to the report of the Trial Examiner, and may, upon motion, challenge any of the rulings made by the Trial Examiner during the course of the hearings. Briefs are entertained both in support of and in opposition to the complaint.

Oral argument to the Commission sitting en banc is granted upon request.

The Commission considers the transcript of testimony, the exceptions, briefs, motions and oral argument, and if it concludes that any of the charges of violation of law are made out, findings of fact and an order to cease and desist from the unlawful practices, are served upon the respondent.

Prior to the amendments of the Wheeler-Lea Act in March, 1938, Commission orders under Section 5 did not become final until one of the Circuit Courts of Appeals of the United States had ordered their enforcement, either upon petition for review of the Commission's order by the respondent, or upon petition for enforcement by the Commission in the event no appeal was taken. Subsequent violations of orders of the Circuit Courts commanding obedience to the orders of the Commission were then punishable in the Circuit Courts by way of contempt proceedings. 10/

By the amendments of March, 1938, Commission orders under Section 5 now become final at the expiration of sixty days, in the event they are not appealed by the respondent. If they are appealed and affirmed, they become

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10/ F.T.C. v. Hoboken White Lead & Color Works, Inc., 67 F. (2d) 551.

final upon the expiration of the time allowed for filing a petition for certiorari; or upon the denial of a petition for certiorari; or, whether or not the order has been affirmed by the Circuit Court, upon the expiration of thirty days from the issuance of the mandate of the Supreme Court of the United States in the event the Commission's order is upheld by that Court.

The Act now provides a civil penalty of not more than $5,000 for each violation of a final order of the Commission, which is recoverable in a civil action initiated by the Attorney General in Federal District Courts.

I suppose that many of you will be particularly interested in the nature of appeals which may be taken to the courts from Commission orders and the extent to which the courts may review the Commission's proceeding. The Wheeler-Lea Act did not change this situation in the least.

Any respondent may obtain a review of the Commission's order in any circuit where the method of competition or practice was used or where the respondent resides or carries on business, by filing in the court within sixty days from date or service of the Commission's order a written petition praying that the order be set aside. A copy of this petition is served upon the Commission and the Commission is required thereupon to certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. The court then has full jurisdiction of the proceeding and the power to enter a decree affirming, modifying or setting aside the order of the Commission, and to issue such ancillary writs as are necessary in its judgment to prevent injury to the public or to competitors pendente lite.

The findings of the Commission as to the facts are conclusive of the court if supported by evidence, but the entire record of testimony is before the court for its examination and review, and if either party shall apply to the court for leave to adduce additional evidence and show to the courts satisfaction that such additional evidence is material and that there are reasonable grounds for failure to adduce it in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission.

I have described to you in detail the work of the Commission under Section 5 of its act. This is but a part of the whole picture and before I close I want briefly to mention certain of the other activities of the Commission.

The Commission found early in its work that a great deal of good could be accomplished if the members of an industry could be assembled for a conference to discuss trade practices and problems and to work out a voluntary elimination of trade abuses. 11/ A procedure has been developed through which any industry may request a trade practice conference, 12/ whereby after informal discussion between members of the industry and the Commission's staff, and after public hearings trade practice rules are

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11/ Cf. 1920 Annual Report, P. 43.
12/ Rules of Practice, Rule XXVII.

approved by the Commission and accepted by the industry. These rules are intended to more or less codify the rulings of the Commission and courts and to so word these paraphrases of decisions as to make them specifically applicable to the industry requesting the conference. In addition to the rules which "fill in" the broad provisions of Section 5 of the Federal Trade Commission Act, as well as the requirements of the Clayton Act, the Commission receives what are known as Group II rules concerning ethical standards of business practices which may not necessarily be required by the law.

The trade practice conference procedure has been found to be extremely useful both to businessmen and to the Commission since it is based on thorough discussion and cooperative understanding.

The fact that the trade practice conference procedure permits of wholesale and simultaneous abandonment of unfair practices is one of its greatest advantages. Often the Commission will find on investigating an application for complaint against a single concern that a number of its competitors are likewise engaged in the same unfair practice. Usually in such situations the concern investigated is only too glad to abandon the unfair practice if some assurance can be given that its competitors will also be bound to cease; and if the Commission proceeds to serve a formal complaint against only one concern engaged in such a widely used unfair practice, others so engaged may derive an unfair competitive advantage, unless formal proceedings can be instituted against them also within a reasonably short period of time. When, on the other hand, a trade practice conference is held in such an industry, all those engaged in unfair practices may voluntarily abandon them at the same time and without the necessity of numerous formal cases.

Another very important part of the Commission's work is its investigational activity. The Bureau of Corporations, the Commission's immediate predecessor, was an agency created to investigate corporations and their practices and to report upon them to the President. It was established upon the premise that adequate publicity would so activate public opinion that undesirable corporate practices would be eliminated. The powers of investigation of the Bureau were amplified and retained by the Commission, which maintains a staff of economists and accountants continuously engaged in general economic investigation. Many of you are no doubt familiar with reports which have been published by the Commission of its investigations of various types of business practices and into almost every major industry in the country. 13/ During the World War the Commission maintained a large and expert staff engaged in ascertaining costs of production for the War Industries Board, the Food Administrator and the Fuel Administrator, as well as the Army and the Navy. These costs as ascertained by the Commission were made the basis of cost-plus contracts as well as the fixing of prices of certain materials by the Federal Government. 14/

13/ A cumulative list of these investigations forms an appendix to each year's annual report of the Commission.

14/ See F.T.C. Annual Reports, 1918, 1919, 1920.

The Commission also administers the provisions of the Export Trade Act 15/ which permits the formation of combinations and associations for the purpose of engaging solely in export trade. At the end of the fiscal year 1939 forty-three associations organized under the Export Trade Act were registered with the Commission. 16/

While the Congress in Section 5 of the Federal Trade Commission Act directed the Commission generally to prevent unfair methods of competition in commerce, in several sections of the Clayton Act 17/ specific practices were enumerated and made unlawful. Thus the Commission is directed in the Clayton Act to prevent certain types of price discrimination, 18/ exclusive dealing or tying contracts, 19/ acquisition of capital stock of competing corporations 20/ and interlocking directorates among competitors. 21/ Procedure in Clayton Act cases 22/ varies only slightly from that in cases under Section 5 of the Federal Trade Commission Act.

I want to conclude by stating that while the procedure of the Commission varies in some instances from that encountered in the courts, the average practitioner appearing before the Commission for the first time will not find himself in a foreign atmosphere. The Commission is constantly improving its procedure to the end that every citizen having business before it shall not only obtain due process and fair hearing but shall be certain that the facts have been fully ascertained and justice done in every case. Not the least of those things to which the Commission points with pride is its record in the courts. The Commission has lost but one case in the Supreme Court since January 1, 1933, and that was a Section 7 Clayton Act case in which the court divided 5 to 4. 23/ The record in the Circuit Courts is in proportion. However its greatest pride is that in no case has it ever been held that the Commission failed to accord any respondent a full and fair hearing.

15/ 40 Stat. 516.
16/ See F.T.C. Annual Report, 1939.
17/ 38 Stat. 730.
18/ Section 2.
19/ Section 3.
20/ Section 7.
21/ Section 8.
22/ See Section 11.
23/ Arrow-Hart & Hegeman Electric Co. v. F. T. C., 291 U. S. 587.