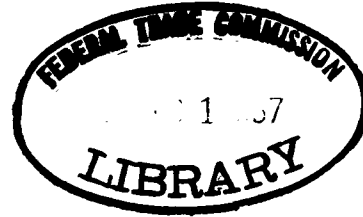


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SOME CURRENT FEDERAL PROBLEMS  
OF THE RETAIL DRUGGIST

Statement of Earl W. Kintner  
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Washington, D. C.  
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before the  
86th Annual Convention,  
Virginia Pharmaceutical Association,  
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Ladies and gentlemen of Virginia pharmacy, I am delighted to be here today at the invitation of your Managing Director, Jim Hubbard, and your President, Carl Bain. I realize that it can be a dangerous thing for a program chairman to invite a lawyer as a speaker. Back in the days when the West was really the West, a Washington lawyer was invited to address a meeting in a cattle town. The speech was a complete failure, and at its conclusion the lawyer was alarmed to see three grim-faced cattlemen, equipped with guns and lassos headed for the speaker's table. An elderly man, seated nearby, tapped the lawyer on the shoulder. "Jest set still, son. They ain't nobody gonna harm you. Them fellas is a-comin' fer the program chairman."

Willard Simmons of the National Association of Retail Druggists has asked me to convey to you his warm greetings and best wishes. It is in this spirit of NARD's longstanding policy of cooperation with state associations to promote the interest of the retail druggist as a dual professional -- pharmacist and business executive -- that I will be discussing some major issues facing pharmacy in 1967. I might add that my many contacts with your very capable leadership over the years underscore this attitude of concern and responsibility on the part of the Virginia pharmacy.

At the turn of the century, there were those in this country who felt that man's knowledge of the world around him and his inventive capacities had reached their zenith. This belief that the American genius had been exhausted because nothing remained to be discovered or invented has been repeatedly shattered in the intervening years by the emergence of a wealth of technological innovations including the incredible strides in pharmaceutical research which persist even to the present day. In the case of pharmacy, the retail druggist has long played a key role as an indispensable member of the community health team. But who would have believed at the beginning of this 20th century that emerging pharmaceutical technology, distribution techniques, and massive regulation

would place today's responsibilities on the community pharmacist to function as the drug industry's first line of dedicated service to the American public ?

These are days of great activity involving the retail druggists of America. Problems and issues barely dreamed of a scant ten years ago are today discussed with easy familiarity. Such terminology as "Medicare, " "Medicaid, " "Prepaid Prescriptions, " and "Drug Abuse Control" are now solidly ensconced in the pharmacist's lexicon. Indeed, the most significant development in the last decade has probably been the expansion of the federal government in regulating the drug industry. It is this issue that we will be exploring today.

## I

During January and February of this year, the Senate Subcommittee on Antitrust and Monopoly conducted extensive hearings on Senator Hart's Medical Restraint of Trade Bill, S. 260. This legislation is aimed at prohibiting physicians from engaging in the general practice of pharmacy and otherwise profiting through the practice of dispensing prescription drugs, except in cases of overriding public interest. On behalf of NARD, I vigorously supported this legislation at the Subcommittee hearings. I was accompanied

by your Ralph Rooke, Chairman of NARD's Subcommittee on National Legislation, and a great national leader in pharmacy. I might mention that this legislation is awaiting action in the Senate Subcommittee, and that opposition surely exists from predictable circles. Your active support as well as the active support of organized pharmacy everywhere is, I assure you, absolutely necessary.

NARD is hopeful that Congress will recognize the grave abuses which arise from a physician being motivated by securing a direct profit from the nature and extent of prescription drug treatment which he prescribes for his patients. We are aware of the fact that Virginia is one of the few states in the country having legislation on the books which is aimed at this general problem of physician dispensing. We are also aware of the enforcement problems. In this connection, I can only assure you that the Medical Restraint of Trade Bill has sufficient teeth in it to allow pharmacies injured by this practice to secure meaningful relief.

## II

In April of this year, the House Small Business Committee launched an extensive investigation into the price-discrimination problems arising under the Robinson-Patman Act, when a seller grants institutional buyers

preferred discounts for prescription drugs. The marketing context giving rise to the question of whether a drug supplier violates Section 2(a) of the Robinson-Patman Act and the purchaser "knowingly induces" an unlawful price concession in violation of Section 2(f) exists in its clearest form where the supplier, satisfying jurisdictional requirements, grants price discounts to non-governmental institutional purchasers, such as hospitals, clinics, nursing homes, whether organized for profit or non-profit. <sup>1/</sup> To the extent that these institutional purchasers resell the drugs to non-patients in the community in direct competition with disfavored retail druggists, we find a situation which is squarely in the Section 2(a) thicket.

During the 1960's NARD has been in the forefront of efforts to urge enforcement of existing laws to curb unlawful pricing practices

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<sup>1/</sup> For a discussion of the Robinson-Patman exemption accorded to federal government institutional purchasers, see Rowe, Price Discrimination Under the Robinson-Patman Act, p. 84 (1962); for state and municipal institutions, Rowe, id. at 84-85. The Non-Profit Institutions Act of 1938, 15 U.S.C. § 13 (c) exempts non-profit institutional purchasers from the Robinson-Patman Act for drugs purchased for the institution's "own use", which exemption minimally would not reach drugs resold to non-patients. Students Book Co. v. Washington Law Book Co., 232 F. 2d 49 (D.C. Cir. 1955), cert. denied, 350 U.S. 988 (1956).

by drug suppliers. Our hope is that these congressional hearings will prompt vigorous action by the Federal Trade Commission in the public interest.

But again, it is your individual responsibility, and the individual responsibility of state and local association members throughout the country to bring these suspected price discrimination practices to the direct attention of those who enforce the law. Too often, I have seen situations arise where there is a reluctance to stand up and be counted -- a reluctance to take initiative when it is clearly in the public interest to do so.

Very recently, the Internal Revenue Service proposed a regulation which will require tax exempt hospitals and related institutions selling drugs to non-patients to pay federal taxes on the income from such sales. This regulation, if enacted, will be an important milestone in restoring a measure of competitive equality to retail pharmacy. <sup>2/</sup>

### III

Turning now to other recent developments, it is interesting to note that the Federal Trade Commission in its budget report to Congress included the following cryptic statement in its outline of 1968 activities which will require an increased FTC budget:

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<sup>2/</sup> See Vol. 32 Fed. Reg. No. 72, April 14, 1967, amending § 1.513-1(b), Income Tax Regs.

"The contemplated proceedings in the prescription drug field involve the manufacturers' use of an arbitrary system by which they select direct accounts, usually the large drug chains, thus enabling these accounts to purchase drugs at substantially lower prices than those paid by independent retailers who are precluded from buying direct on the same price basis. It is anticipated that these proceedings will involve many prescription drug manufacturers and distributors." 3/

This late development was perhaps presaged by the William H. Rorer case decided by the FTC last year. 4/ In the Rorer case, the Commission held that a 5% discount advantage which Rorer granted to its chain-drug store customers over independent and other nonqualifying druggists on Maalox sales, was a price discrimination in violation of Section 2(a) of the Robinson-Patman Act. In this case, the Commission noted that the retail drug industry is characterized by "intense competition" and "low profit margins", so that even a 5% Maalox pricing differential could have a deleterious effect on competition, irrespective of whether the favored

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3/ Hearings before a Subcommittee of the House Committee on Appropriations, 90th Cong. 1st Session, Part I (p.1000).

4/ William H. Rorer, Inc., FTC Dkt. No. 8599;(May 9, 1966), affirmed and modified, \_\_\_ F.2d \_\_\_ (2nd Cir. 1967)

chains resold the product involved at suggested list price or at discount. In order to qualify as a chain under the supplier's discount program, which would thereby entitle the customer to the extra 5 percent discount over the normal 15 percent allowance given to independent drug stores, the customer was required to have five or more registered pharmacies under a single ownership, a buying office and a warehouse. However, no minimum order requirements were exacted and any one of the five units of the chain could serve as either or both the buying office and the warehouse, without having to redistribute to each of the other units. This selling practice was regarded by the Commission as unlawful. Last month, the major part of the Commission's order in the Rorer decision was upheld by the Second Circuit Court of Appeals.

I might also mention some recent Commission activity in the area of promotional allowances. Sections 2(d) and 2(e) of the Robinson-Patman Act provide that a supplier offering advertising allowances or merchandising payments or services to one customer must make such an offer available to all competing customers on proportionally equal terms.

In the Clairol case and several late advisory opinions <sup>5/</sup>, the FTC has required that promotional allowances given to such retailing outlets as newsstands, beauty shops, grocery stores, notion stores and department stores must also be offered to drugstores where the latter are competing in the sale of the product involved in the promotion.

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<sup>5/</sup> Clairol, Inc., FTC Dkt. No. 8647 (June 24, 1966) (appeal pending).



In a related vein, the Fred Meyer case <sup>6/</sup> awaiting decision in the United States Supreme Court has the potential for being an historic landmark case for insuring competitive equality of independent retail druggists versus their larger chain-store competitors. The issue in Fred Meyer is this : Does the proportional equality standard of the Robinson-Patman Act require that a manufacturer granting promotional benefits to direct-buying chain stores also be required to grant proportionally equal benefits to wholesalers whose retail customers compete with the direct-buying chain stores? Over the years the FTC had held such requirement not to exist. It was only in 1963 that the FTC reversed its position and squarely ruled that the wholesalers reselling to the competing retailers were entitled to promotional benefits proportionally equal to benefits granted to direct-buying chain-store competitors of their customers. While it is usually hazardous to try to anticipate what the Supreme Court will rule next Fall, I am hopeful that the Court will recognize the merits of the FTC position on behalf of independent retailers throughout the United States.

#### IV

Congress, the Federal Trade Commission, and the courts have time and again indicated their support of independent retail pharmacy

<sup>6/</sup> Fred Meyer, Inc., FTC Dkt. No. 7492 ( July 9, 1963), reversed in part, 359 F. 2d 351 (9th Cir. 1966), certiorari pending.

in the economic fabric of this great country of ours. We have seen that action is being taken to deal with many problems you face every day.

Each of you, however, must continue, your dialogue with the federal government, individually and through local, state and national associations. Each of you also realizes, I am sure, that the increased federal role of the sixties in regulating the drug industry is not a complete panacea. In the last analysis, the ultimate card will be played when it is recognized that the resolution of these problems rests squarely on the shoulders of each member of the health-care team -- individual pharmacists, individual drug supply executives, individual health-care administrators, and individual physicians. As to each of these individuals, the formula for solving problems is not any mysterious innovation. On the contrary, it is simply a basic philosophy which is as valid today as it was when the drug industry first saw the light of day: vigorous competition and professional service dedicated to the public interest, tempered with self-regulation and willing compliance with the law.

Retail pharmacy has deep roots in the heritage of America. Retail pharmacy in the 20th century has been put to the test of fire in terms of its very survival. New forms of competition, changing patterns of distribution, technological innovations and educational demands, government

regulation -- with all of these social forces, retail pharmacy has survived. It has demonstrated a degree of flexibility and resourcefulness which is a credit to our American system of private enterprise. To be sure, this survival must be guarded with imagination, vigor, and resourcefulness. But I am confident that this will be done, and that in this great state of Virginia, your association will be the leader in this battle.