The Anti-Trust Laws and the Federal Trade Commission

L. A. Lecher
THE ANTI-TRUST LAWS AND THE FEDERAL TRADE COMMISSION

L. A. LECHER*

THE Federal Trade Commission was created by the Federal Trade Commission Act, which was approved by the President on September 26, 1914. It consists of five members, appointed by the President, with the approval of the Senate, for terms of seven years each, with a salary of $10,000 a year. The present members of the Commission are Vernon W. Van Fleet, chairman, Houston Thompson, John F. Nugent, Charles W. Hunt and William E. Humphrey.

The Federal Trade Commission, besides possessing numerous administrative and visitorial powers, such as the right to investigate the business conduct and management of corporations engaged in interstate commerce and the examination of their private records and papers (with certain limitations imposed by the court from time to time) is empowered to enforce Sections 2, 3, 7 and 8 of the Clayton Act (approved October 15, 1914) and Section 5 of the Federal Trade Commission Act, which declares that "unfair methods of competition in commerce are hereby declared unlawful."

The Clayton Act and the Federal Trade Commission Act were enacted to supplement, but not to limit, the Sherman Anti-Trust Act (approved July 2, 1890). The Sherman Act was enacted for the purpose of dealing with combinations or trusts, unlawful under the common law, engaged in interstate commerce. It is a penal statute and provides that every person violating it shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both. It also authorizes suits for treble damages by injured parties.

The Sherman Act deals with the accomplished fact and provides a punishment for the unlawful conduct. The Clayton Act and the Federal Trade Commission Act, which logically should have been combined in a single law, are remedial in their nature and provide for no penalties or criminal prosecutions for violation of the sections which the Federal Trade Commission is given jurisdiction to deal with and are intended to locate and cut out the cancerous growth before it has a chance to do much damage.

THE CLAYTON ACT

The provisions of the Clayton Act, over which the Federal Trade Commission has jurisdiction, relate to the following matters:

* Member of the Milwaukee Bar.
Section 2 of the Clayton Act prohibits price discriminations to different purchasers for reasons other than on account of quantity or quality of goods, cost of sales or transportation or discrimination made necessary by competitive conditions; provided, however, in each case that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of interstate commerce.

Section 3 prohibits so-called "tying contracts" by making it unlawful to lease, sell or contract for the sale of commodities, whether patented or unpatented, in the course of interstate commerce, on the condition that the lessee or purchaser shall not deal in commodities of a competitor of the seller or lessor, provided that the effect thereof may be to substantially lessen competition or tend to create a monopoly in interstate commerce.

Section 7 prohibits any corporation engaged in interstate commerce from acquiring the whole, or any part, of the stock of another corporation engaged in interstate commerce where the effect of such acquisition may be to substantially lessen competition between the two corporations or to restrain interstate commerce in any section or community or tend to create a monopoly. Section 7 further prohibits a corporation from acquiring the whole, or any part, of the stock of two or more corporations, engaged in commerce, where the effect of such acquisition may be to substantially lessen competition between such corporations, or any of them, or to restrain such commerce in any section or community or tend to create a monopoly. It does not apply to a corporation purchasing such stock solely for investment and not using the same to bring about, or in attempting to bring about, the substantial lessening of competition nor to the formation of subsidiary companies for legitimate extension of business where the effect thereof is not to substantially lessen competition. This section is not retroactive.

Section 8 prohibits interlocking directorships by prohibiting a person from at the same time being a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than one million dollars, engaged in whole, or in part, in commerce, other than banks, banking associations, trust companies and common carriers, if such corporations are or shall have been theretofore competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

Three equitable remedies are the only remedies provided in the Clayton Act for the enforcement of the sections above mentioned. One of these remedies is a suit for injunctive and equitable relief in the federal courts, brought by the Department of Justice. A second remedy
is suit, by any outside party, for injunctive relief in the federal courts against threatened loss or damage by reason of a violation of Sections 2, 3, 7 or 8 of the Clayton Act, or violation of the Sherman Anti-Trust Act. The third equitable remedy is provided in Section 11 of the Clayton Act, which authorizes the Federal Trade Commissions to issue complaints against violators of the four sections of the Clayton Act above mentioned, giving to the party complained against the right to appear at the time and place fixed in the notice of hearing (at least thirty days after service of the complaint) to show cause why an order should not be entered by the Commission requiring such person to cease and desist from the violation of the law, so charged in the complaint. (This same procedure, terminating in an order by the Commission to cease and desist, is also followed in case of violation of Section 5 of the Federal Trade Commission Act, which provides that "unfair methods of competition in commerce are hereby declared unlawful.")

While the Federal Trade Commission is authorized, in case, upon hearing, it decides that a violation of any of the sections above mentioned has occurred, to enter an order against such violator to cease and desist, it has itself no authority to enforce its orders, such enforcement being left to the courts, as hereinafter pointed out.

Federal Trade Commission Practice

One of the most serious objections to the Federal Trade Commission Act is that it makes the Commission the complainant, the prosecutor and the judge. This is probably the reason why it is given no authority to enforce its own orders. The intention of Congress, in creating the Federal Trade Commission, was that it should act as an aid to business, co-operating with business institutions and organizations in eliminating unlawful and unfair trade practices and in elevating business standards. In the opinion of the writer, it is a fair statement to say that in actual operation the Commission has not carried out this purpose. It has issued, to date, approximately 1,300 complaints for claimed violation of the sections of the law, over which it has jurisdiction. Until a very recent change in the rules, the party proceeded against has had no advance notice that a complaint would be filed against him, and has been given no opportunity to avoid the filing of a complaint by satisfying the Commission that no violation of law had taken place and the fact that a complaint had been issued by the Commission and the nature of the complaint, has, until the recent change in the rules, been published immediately upon the issuance of the complaint. This practice has resulted in much unpleasant notoriety and serious damage to persons proceeded against, for which they had no remedy in case the complaint was sub-
sequently dismissed as unfounded and the fact that a complaint was subsequently so dismissed has never, in actual practice, been given the same publicity as the fact that a complaint had been issued. The new rules give to a respondent the right to a hearing before the complaint is published and if he can satisfy the Commission that no violation has occurred the matter is dropped without publicity.

Strange to say, two of the present members of the Commission, Messrs. Thompson and Nugent, dissented from the adoption of this new rule.

Procedure Before the Commission

The Commission may proceed either on its own initiative or pursuant to a complaint filed with it. In either case, it causes an investigation to be made and, if the Commission, after this investigation, concludes that a violation of any of the prohibitions above referred to has occurred, it causes a complaint to issue. The writer is informed that the practice of the Commission is to refer the investigator's report to some one member of the Commission and if that one member recommends that a complaint issue the Commission thereupon directs the complaint to issue, without further investigation or consideration by its other members. The complaint is served upon the respondent by mail, together with a notice setting the time for hearing and the respondent is given thirty days to answer the complaint. The Commission itself is the plaintiff in the action, regardless of whether it initiates the proceeding or acts upon complaint filed with it. The Commission can, but is not obliged to, permit outsiders to intervene in the action which must, however, be commenced in the name of the Commission as complainant.

The Commission never discloses what private individual made the original complaint against the respondent to the Commission, and does not permit any witness to answer a question directed to that end. The legality of a rule directing a witness not to answer whether he filed the original complaint against the respondent with the Commission, in cases where the answer to such question would ordinarily be material as tending to show interest, bias or prejudice of the witness, has never been tested in the courts, so far as the writer is aware.

After issue has been joined, the matter is set for hearing and the evidence is taken before a Special Examiner, appointed by the Commission, the Commission being represented by regular counsel in its employ, on the taking of the evidence and the argument of the cause. The testimony is sometimes taken in Washington and sometimes in various sections of the country, being governed largely by the residence and convenience of witnesses, although it is within the power of the Commission to require that the entire evidence be taken in Washington.
While the law provides that, upon the service of the complaint, the respondent shall have the right, at the time and place fixed, to show cause why an order should not be entered by the Commission requiring the respondent to cease and desist, it is the practice of the Commission to assume the burden of proof by first putting in its evidence and then giving the respondent an opportunity to present his case.

After the taking of testimony is completed, the Examiner prepares his report containing his proposed findings of fact; copies of this report are served upon the respondent's attorneys and upon the attorney representing the Commission. Either side may, within ten days after receipt of the report, file written exceptions to the proposed findings. At the conclusion of the evidence, the examiner fixes a time within which briefs must be filed, which time limit is usually thirty days for the Commission's attorney and forty days for respondent's attorneys, the time beginning to run from the date of receipt of the examiner's report. The Commission may or may not permit an oral argument. It usually does permit oral argument, when requested, and some time on its own motion, and allows both sides ample time for argument. Thereafter, the Commission considers the case and either dismisses the complaint or makes its own findings of fact and conclusions of law and enters an order to cease and desist.

The Commission has no authority to enforce its order to cease and desist. It serves a copy of the order on the respondent and requires the respondent to notify it within a specified time whether it has complied with the order and, if so, in what respect, or whether it has not complied with the order. If the respondent does not wish to comply with the order, he may adopt one of two courses; he may either ignore the order, in which case the Commission may file application, praying the court to enforce its order, in the United States Circuit Court of Appeals of the circuit within which the violation complained of occurred or where the respondent resides or carries on business; or the respondent may himself file a petition in that court, praying the court to set aside the order. Such a petition is in the nature of a petition in an original action and is not a petition in error. The practice is informal and merely requires a written petition praying that the order of the Commission be set aside. A copy of the petition is forthwith served upon the Commission and the entire record of the case is then certified and filed with the court by the Commission.

The law provides that such proceedings for review of a Federal Trade Commission order shall be given precedence over other cases, pending in the court, and shall be in every way expedited.

The findings of the Commission, as to facts, if supported by testimony, are conclusive before the Circuit Court of Appeals. This rule
does not apply to mixed questions of fact and law nor to the conclusions of the Commission from the facts. The rule is limited also to facts supported by testimony admitted in accordance with legal rules of evidence, whereas, the Commission apparently does not consider itself bound by the technical rules of evidence.

The remedy of obtaining a review of the judgment of the Circuit Court of Appeals is by certiorari to the Supreme Court of the United States.

Field Covered by Commission's Complaints

It is impossible, within the limits of this article, to refer, except in the most general way, to the many questions which have arisen under the complaints heretofore issued by the Commission and its decisions thereon. They have covered a vast variety of subjects and have been directed against a great number of different industries, both large and small.

It has issued a number of complaints against price discriminations alleged to be in violation of Section 2 of the Clayton Act and has issued some orders to cease and desist in cases of this nature. Some complaints for violation of Section 2 have been based upon the giving of different prices to different classes of customers, as, for example, refusal to give the same price to retailers as that given to wholesalers buying in the same quantities. Recently such complaints have been limited to cases where the discrimination is made as between different customers of the same class.

A number of complaints and "desist" orders have also been issued for violation of Section 3 of the Clayton Act, prohibiting so-called "tying contracts," which applies to both patented and unpatented articles where there is a concession in price based on the condition that the lessee or purchaser shall not deal in commodities of a competitor of the seller or lessor. The writer now has a case pending before the Commission involving a claimed violation of Sections 2 and 3 of the Clayton Act, the claimed violation consisting in giving a special discount to customers of the respondent who agreed to purchase all of their requirements (of the line of products manufactured by the respondent) for a period of one year, except in cases where the customer's customer specifies apparatus of another manufacturer. This case involves the questions of (1) whether the restraint of competition condemned by these sections of the Clayton Act is limited to competition between the respondent and its competitors or covers also competition between respondents' customers among themselves in the resale of respondent's product; (2) whether a contract which gives to a customer the right to purchase competing apparatus whenever his, the customer's, customer specifies competing apparatus in his order (even though competing apparatus is specified in
only a small percentage of cases) can be construed to be a contract or agreement that the customer shall not use or deal in the goods of a competitor or competitors of the respondent; and (3) whether an exclusive dealing contract, for as short a period as one year (even if it be 100 per cent exclusive during that period), constitutes a violation of Section 3. None of these questions have as yet been decided by the courts.

It is well settled, by decisions of the Supreme Court, that Section 2 of the Clayton Act applies only to sales and that Section 3 applies only to sales or leases. The Commission had ruled that it applied also to agency contracts, but the Supreme Court, in the case of Curtis Publishing Co. v. The Federal Trade Commission, 260 U. S. 568, held otherwise.

Most of the complaints issued by the Commission have charged violation of Section 5 of the Federal Trade Commission Act, prohibiting unfair methods of competition. The Commission at first believed that its powers, in dealing with what is considered violations of this section, were almost unlimited. In its annual report, for the fiscal year ending June 30, 1919 (p. 45), it says:

"Previous to the creation of the Commission the courts had ruled upon the various forms of unfair practices. Their decisions are designated as cases arising under the common law. But, upon the creation of the Commission, it was empowered to leave the shores defined by it, to embark upon an uncharted sea, using common sense plus the common law for its compass."

With this idea as to its powers and duties, the Commission proceeded, for a time, upon the paternalistic policy of regulating the conduct of interstate business in all of its refinements and originated many fine-spun distinctions between fair and unfair methods of competition, going so far, in one case, as to charge that, for a merchant to sell anything, at any time, at less than cost constituted an unfair method of competition.

In the very first case of violation of Section 5 of the Federal Trade Commission Act which came before it, the Supreme Court (Federal Trade Commission v. Gratz, 253 U. S. 421) saved the Commission from shipwreck upon this uncharted sea (whether the court regarded the Commission’s compass of its common sense plus the common law as unreliable, does not appear), the court holding:

"The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of
their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition, as commonly understood and practiced by honorable opponents in trade."

To the same effect, see \textit{Federal Trade Commission v. Beech-Nut Packing Co.}, 257 U. S. 441.

The Commission has instituted a large number of complaints based on resale price maintenance of patented or trade-marked articles, charging that it constituted an unfair method of competition. In the \textit{Beech-Nut case}, cited above, the Commission's finding, that the practices of the Beech-Nut Company constituted a violation of Section 5 of the Federal Trade Commission Act, was sustained, but the "desist" order was modified so as to limit it only to the use of co-operative methods in enforcing the resale price maintenance policy. It will be noted that, in the \textit{Gratz case} (which is cited with approval in the Beech-Nut case), resale price maintenance constitutes an unfair method of competition only if it has a \textit{dangerous} tendency \textit{unduly} to hinder competition or create monopoly.

The writer has a case now pending before the Commission (recently argued, but not yet decided) involving resale price maintenance of a trademarked article. It developed on the argument of that case, in spite of the fact that the Commission has instituted a large number of cases charging resale price maintenance to be an unfair method of competition and has issued a number of "desist" orders in such cases, that the Commission has always considered it to be the law that it is not necessary that the co-operative methods condemned in the \textit{Beech-Nut case}, with respect to resale price maintenance, must be carried on to such an extent as to have a "dangerous tendency unduly to hinder competition or create monopoly," but that a few cases, or even a single case of such co-operation is sufficient to justify a "desist" order.

The Commission has, in the past, gone so far as to contend that it has authority to enjoin a practice prohibited by the Act, even if no restraint of trade has yet resulted, if, in its judgment, as an economic proposition, the practice contains a germ of restraint or monopoly, whereas, the court has always taken the position, on this germ theory, in harmony with our medical brethren, that the body politic, like the human body, is not injured by germs, so long as the body continues in a sufficiently healthy condition to successfully combat the enemy germ; that we cannot destroy all of the germs and that, so long as they do not get so numerous or so virulent as to make an impression upon the body attacked, they can be safely disregarded.

The Court of Appeals, in \textit{re Canfield Oil Co. v. Federal Trade Commission}, 274 Fed. 571, said:
"It may be admitted that one function of the Trade Commission is
to discern and suppress such practices in their beginning, but a thing
exists from its beginning, and it is not a conclusion of law, from any
facts here found, that a system, which at present is keenly competitive,
extremely advantageous to the public, and, in the opinion of a majority
of competent witnesses, economical, is at present unfair to any one or
unfair because tending to monopoly. A tendency is an inference from
proven facts and an inference from the facts as found by the Commis-
sion is a question of law for the court."

**Should the Commission be Abolished?**

Judged by its "desist" orders which have been taken to the courts, the
Commission's "batting average" is very low indeed. It has instituted
a large number of complaints, some based upon very trivial violations;
it has condemned many business practices heretofore always regarded
as legitimate and ethical. Almost invariably, when it has "embarked
on a uncharted sea," it has aimlessly tossed about, causing much damage
to the well piloted vessels of trade which it happened to strike in its
uncontrolled rocking, and for which damage there is no remedy at law.
It has caused the Government and the respondents a great deal of ex-
 pense. In one case handled by the writer, almost one hundred witnesses
were examined, testimony being taken all the way from New York to
California. In the personnel of its membership and of the examiners
and attorneys employed by it, the Commission has been uniformly
courteous and considerate, but the one inherent defect, which cannot be
cured by the personnel of the Commission, however exalted their char-
acter and ability may be, is the fact that, under the law, the Commission
is, at the same time, investigator, complainant, prosecutor and judge,
and, while its decisions are subject to review by the courts, its findings
of fact, when supported by competent evidence, are binding upon the
court, and, when we consider that the examiner, who hears the testi-
mony and makes his recommended findings of fact, is an appointee of
the Commission, who is the complainant in the action, instituting the
proceeding after an investigation of its own, it would be embarrassing,
to put it mildly, for an examiner so appointed, to report, with any great
frequency, that the Commission's complaint was unfounded, and the
examiner is, therefore, subject to the constant temptation to resolve all
conflicts of evidence in favor of the Commission. A servant who too
frequently asserts that his master is wrong is likely to lose his job.

The revised rules recently promulgated by the Commission (Com-
missioners Thompson and Nugent dissenting), which provide for a pri-
ivate hearing before a formal complaint is issued, with the view of
ascertaining, with greater certainty, whether valid cause for complaint
exists, and the withholding of publicity as to complaints and their contents until after such private hearing has resulted adversely to the respondent, providing for the settlement of cases by stipulation, except where the public interest demands otherwise, and providing that complaints shall hereafter issue only where the public interest is substantially involved, will go far to remove the objections heretofore obtaining, but, in the writer's opinion, there can be no real relief until there is a separation between the complainant and the judge. The same evil has been recognized and cured in the administration of the Federal Income Tax Law by the creation of the Board of Tax Appeals. A similar remedy ought to be applied here.