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Federal Trade Commission

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Significant New Commission Developments

By Paul Rand Dixon*

It is always a pleasure to appear before a group of antitrust lawyers. First of all, good dining makes for a pleasant lawyer, and I have it on judicial authority that you are a well-fed group indeed—in a recent case it was held that a reasonable fee for your time is $50 per hour.1 After counting noses in the audience, and doing the appropriate arithmetic, it occurred to me that I'm about to blow quite a wad with these remarks of mine. The only thing that persuaded me to continue beyond three minutes was a second thought that occurred to me—maybe the $50 rate only applies when you're standing up.

In addition, however, it could be persuasively argued that I'm something of a contributor to your affluence, and therefore entitled to some sort of dispensation. After all, as Mr. Rowe recently remarked,2 a factor that should not be overlooked is the contribution of the Robinson-Patman Act to—and I quote—"the conservation of the antitrust bar." I might add that, if enforcement of the Robinson-Patman Act is all that is required, the Commission's going to do its best to see that you continue to prosper.

But aside from any claims I might have upon you as a benefactor, I'd like to say in all seriousness that I enjoy these sessions immensely and that I believe they are very valuable to both sides of the fence. From where I stand, the opportunity of giving you my views is virtually priceless. Whether considered singly or collectively, you wield an influence that reaches throughout the length and breadth of the economy I am sworn to serve. There are few

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* Chairman of the Federal Trade Commission. Chairman Dixon presented this address before the Section of Antitrust Law, American Bar Association, August 6, 1962.
2 Rowe, Antitrust and New Controls for Competitive Pricing, 1962 N. Y. State Bar Ass'n Antitrust Law Symposium 64.
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audiences that, when they leave the assembly hall, could go out and do as much for the cause of antitrust as you. I think it is quite clear that, to no small degree, the work that the Federal Trade Commission does tomorrow will depend upon the advice you give your clients today.

Since I am not an evangelist, I do not expect, however, to be able to convert you to all of my views on antitrust in this one session—it will take several. In the meantime, of course, those of us at the Federal Trade Commission will be trying our best to communicate our views to your clients through the various legal remedies at our disposal. Appeals to patriotism and other high sentiments are uncertain methods of reaching antitrust violators. The service of process, on the other hand, comes through loud and clear. It is thus our intention to do everything we can to take the uncertainty out of such violations—that is, to secure justice for the public so swiftly and certainly that it will come to be regarded as poor business to violate the antitrust laws.

Please note that infringements of the law are the activities we wish to take the lucre out of, not business itself. In a recent address I spoke at some length on my conviction that, when a businessman competes vigorously and fairly, the profits that he makes, regardless of the amount, are fully sanctioned by our law and morality, and are a proper object of pride and self-satisfaction. I illustrated this point with a little quotation that gives, I must admit, a somewhat romantic view of the matter:

How very much he must have done for society before society could have been prevailed upon to give him so much money

Money is the symbol of duty; it is the sacrament of having done for mankind that which mankind wanted. Mankind may not be a very good judge, but there is no better.

But I have no sympathy for the position that, if competition proves unprofitable, the solution is to eliminate the competition. The lack of profits in the face of competition is merely a symptom of the real illness and not the underlying cause. As Mr. Kaapcke, a member of the local San Francisco bar recently put it, the only essentials of successful business are, and I quote: "a quality product,

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a competitive price, a strong merchandising and advertising program, and a well-trained sales organization."

Mr. Kaapcke made another observation that I believe to be excellent advice to lawyers who give advice to businessmen. He said:

Even an ace salesman may feel on occasion that he ought to take something to relieve the anxieties of repeat selling. As a tranquilizer he may suggest some kind of preclusive arrangement that will ‘sew up’ the business. Frequently his counselor can serve him best, not by prescribing some carefully mixed legal compound, but by talking him out of it and sending him out again with restored confidence in the business merits of what he has to sell.

Mr. Kaapcke went on to a specific illustration:

As for resale price maintenance, I have no words of wisdom to impart. Putting aside fair trading in the dwindling number of states where fair trade agreements can still practicably be enforced, I do not know of any way in which the marketer can control the retail price of his product unless he makes the direct retail sales himself. Our marketer may with entire propriety suggest resale prices, but unless he likes litigation he ought to content himself with suggestions alone and forego the effort to ‘do something’ about customers who do not follow them.

To this it might be added that Mr. Kaapcke has turned out to be a prophet indeed as far as resale price maintenance is concerned. A district court in Delaware, in a carefully reasoned opinion, has recently held that a conspiracy to maintain resale prices can properly be inferred where a manufacturer continues to sell to retailers who do observe his “suggested” retail prices, while cutting off those who do not. In that case, by the way, the “observing” retailers were held liable as co-conspirators, a fact which is likely to dampen somewhat the enthusiasm of retailers for price maintenance schemes.

Now I am well aware that your clients do not hire you to perform only the negative task of telling them what they can’t do—they want you to tell them also what they can do. And some-

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times they've already decided what they're going to do, and merely want you to tell them how to make it legal. At this point, of course, we come to "antitrust brinkmanship," a practice which can prove very expensive to a client. Mr. Kaapcke, whose words I am relying upon so heavily this evening, suggests that the businessman should "walk very wide" around the antitrust laws. One thing I am very sure of: as Judge Taft said many years ago, it is a dangerous business to attempt the task of deciding how much "men ought to be allowed to restrain competition." The sooner the antitrust bar realizes that there are certain practices that are illegal, and starts to tell its clients this fact in so many words, the quicker we can get on with the task of preserving the free-enterprise system and the other values that depend upon it.

There is one more general remark that I would like to make before having to descend to the specific: in antitrust, there is a sort of tide that ebbs and flows. In one period, interest in it drops to a low but steady glow, and then, all of a sudden, it starts to burn at a high flame. As I think all of you can easily sense, the concept of competition as the touchstone of prosperity is now experiencing a renaissance, a quickening of life, throughout the world. Senator Kefauver, speaking before the antitrust bar in New York recently, noted that—and I use his words—"the bracing wind of competition is the most effective device for stimulating growth." In Europe, the Common Market countries have plunged into the waters of competition with a vengeance, abandoning the centuries-old tradition of cartels. So long as each was dealing with "furners," it was all right to fix the prices and otherwise give them the short end of the stick—but now that it's become a family affair, the monkey-shines have to go!

Article 85 of the 1958 Treaty of Rome provides in part:

1. There shall be prohibited, as incompatible with the Common Market, all agreements between enterprises, all decisions by associations of enterprises and all concerted practices which can affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition with the Common Market, in particular:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
(b) the limitation or control of production, markets, technical developments or investment;
(c) market-sharing or the sharing of sources of supply;
(d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a commercial disadvantage.

And, for violating these and other prohibitions, there is provided a penalty or fine ranging from $1,000 to $1,000,000, or 10 percent of turnover during the preceding year, whichever is higher.

There can be no doubt but that the "bracing winds of competition" are blowing across all national boundaries and, if I may wax poetic, are riding the tide of history itself. The other nations of the world seem to have suddenly seen the folly of their state (and privately-owned) cartels and monopolies, and the merits of the free-enterprise system we in America have enjoyed for so long. The irony of it all, of course, is the fact that just as Europe began to see the light, commentators in America, especially our brothers in the field of economics, were declaring that competition is nothing but a "myth," that real competition (in the only meaningful sense, i.e., competition in price and/or quality) has long ceased to exist in as much as two-thirds of our manufacturing industry, and that, in the exact words of one such critic, "the entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance. It is the product: (1) of a gross misinterpretation of history and (2) of the application of rather naive, and certainly unrealistic, economic concepts."

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10 Id., §§16, p. 50.
11 "Competition with hundreds of firms competing against each other has been replaced by oligopoly with but a handful of large corporations sharing the market. In what is probably the most comprehensive, up-to-date study of the subject, Professor Carl Kaysen of Harvard University discovered that of 191 major manufacturing industries, only 75—or 38 percent—conform to the competitive model. With but a handful of firms in an industry, prices no longer are determined by the impersonal forces of the market. It's too easy for the few remaining giants to get together and decide among themselves what the price shall be." Eichner, Trial by Myth, Second Coming Magazine, p. 47 (March 1962).
12 Ibid., see also Means, Pricing Power and the Public Interest 165, 166 (1962).
13 Greenspan, Barron s, February 5, 1962, p. 8, at 19.
We would be the first to agree that the economy in the country, at least in certain areas, is far from being as competitive as it should be. But that is not to say that we regard this either as a good thing or as something that, being inevitable, we must accept. Quite the contrary—we believe that the death of competition in an industry is a tragic loss to that industry in particular and to the country at large.

While it may be true that industry concentration can make a quick initial showing of so-called "efficiency,"\(^{14}\) it seems plain to me that, in the long run, this proves to be illusory. We are all familiar with the fact that, when a big firm moves in for the kill on a small one, it can soften him up with a price bombardment that gives the housewife in the area of the "price war" a lower price that appears for the moment to be a bargain. But the experienced observer knows that her bubble will surely burst as soon as the predator crushes or buys out his local competition. The first thing he does is restore the higher price, with maybe a slight additional increase to sweeten the pot and make up for his out-of-pocket expenses in the skirmish.

So, too, I believe that the temporary increase in "efficiency" that concentration brings is short-lived. Without the spur of competition—and by competition I don't mean the gentlemanly sort that carefully refrains from lowering the price, while running up a big advertising bill to add to the price the consumer pays\(^ {15}\)—the necessity for reducing costs is gone and the hot wire that carries the dynamism of economic progress has been cut.

Interestingly enough, it seems that the courts here have caught something of the new spirit of competition that I have mentioned. By that I don't mean, of course, that every judge in the land is vying with every other to see which can give the Commission the most favorable decision. Far from it! As you know, we've taken our lumps in the courts recently. But by and large the antitrust


\(^{15}\) "Every act of nonprice competition may be used as a sign directed towards competitors, telling them, as it were: 'You see, I will not cut prices; I confine myself to those more civilized ways of competing! I trust you will do likewise.' In other words, oligopolistic nonprice competition may be more in the nature of a manoeuvre to avoid price competition than a manoeuvre to compete for customers and increase sales at the expense of competitors." Machlup, The Economics of Sellers Competition 459 (1952).
decisions are beginning to reflect a full understanding of the national policy favoring competition, even if it means a temporary sacrifice of so-called "efficiency" to other values that we deem even more valuable. I think Monday, June 25, 1962, a red-letter day for antitrust in the Supreme Court, gives some inkling of this. The Court vacated and remanded an appellate court decision adverse to a treble damage claimant;\textsuperscript{16} held that corporate officers are criminally liable under the Sherman Act;\textsuperscript{17} reversed and remanded a case involving a purported cost justification under the Robinson-Patman Act;\textsuperscript{18} affirmed a trial court's condemnation of a merger under the Celler-Kefauver Antimerger Act;\textsuperscript{19} and denied certiorari from an appellate court's affirmance of one of our own merger cases.\textsuperscript{20}

There is no way of knowing, of course, whether or not this quickening of the antitrust pulse in the courts is related to the tang in the air brought here from Europe's Common Market. But one thing is certain: the European experiment plainly represents a vote of confidence for the competitive free-enterprise system. And, since the nations who signed the Treaty of Rome in 1958 did so after a most thorough experience with cartels, and after having observed the American experiment with competition, they can hardly be charged with having conceived the antitrust features of their rules in a state of 19th Century "economic irrationality and ignorance." What is more, there is the interesting coincidence of phenomenal economic growth occurring at the particular time when trade barriers were replaced by free competition. There's no quarreling with success!

I believe, in short, that our collective economic and political life depends upon the performance that our economy can deliver in the next few decades, and that the quality of that national performance, in turn, depends upon creating and maintaining the sharpest degree of competition in all of our vital industries.

\textsuperscript{16} Continental Ore Co. v. Union Carbide & Carbon Corp., CCH 1962 Trade Cas. \$70361.
\textsuperscript{17} United States v. Wise, CCH 1962 Trade Cas. \$70362; United States v. Knuss, CCH 1962 Trade Cas. \$70363; United States v. Staley, CCH 1962 Trade Cas. \$70364.
\textsuperscript{18} United States v. Borden Co., CCH 1962 Trade Cas. \$70365.
\textsuperscript{19} Brown Shoe Co. v. United States, CCH 1962 Trade Cas. \$70366.
\textsuperscript{20} Crown Zellerbach Corp. v. FTC, CCH 1961 Trade Cas. \$70038, cert. denied, 82 Sup. Ct. 1581 (June 25, 1962).
This, then, is my concept of the "public interest" that the Federal Trade Commission is charged with protecting.

THE CASE FOR THE "SMALL" CASE

The antitrust agencies are frequently criticized for peering so intently into mice-holes that they don't notice when an elephant rumbles by them. The first answer is that some of the so-called "little" cases involve a principle that must be protected for its own sake. As the Supreme Court said in one false advertising case: "To fail to prohibit such evil business practices would be to elevate deception in business and to give to it the standing of dignity and truth."

The second answer is that certain types of "little" offenses are, when first perceived, just beginning to grow. To illustrate what I mean, let me use a more helpful analogy than the one of the mice and the elephants: one of our staff attorneys characterizes the two classes of offenses dealt with by the Commission as "cubs" and "tigers." His point, of course, is that tiger cubs grow up to be tigers, not pussy-cats. Now, the cubs are cute little things, fuzzy-wuzzy, and all that—but the fact remains that they're still tigers, and that one of these days they're going to be full-grown.

We all agree that the Sherman Act is big artillery, and useful chiefly when hunting big game. The Federal Trade Commission Act, on the other hand, has two barrels: one is for reaching the more obvious types of restraints upon trade, while the other is to be used for "incipient" restraints.

It is the latter principle that I would like to emphasize here. We were created for the major purpose of seeing that tiger cubs never get a chance to grow up to be tigers. The great flaw in the Sherman Act—the thing that caused Congress to reconsider the problem of the trusts in 1914 and pass both the Federal Trade Commission and the Clayton Acts—was that the courts wouldn't let the Sherman Act be used until the tiger was full-grown and, indeed, had drawn his first blood. At that point, of course, it takes no philosopher to see the stripes and know that this is indeed a dangerous creature.

With the passage of the Federal Trade Commission Act, the Congress expressed the will of the people that there be created an office of national zoology, to be staffed with experts who, by reason of their training and experience, could recognize the tiger before its stripes began to show or its claws became red. A cub is not a kitten, and the tendency to confuse the two, merely because they both belong to the cat family, can be disastrous for competition.

It is of course a valid observation that, so long as the performance of the antitrust agencies is measured by the number of proceedings brought or completed, the smaller cases and the consent order procedure "could encourage a type of numbers game."23 At the Federal Trade Commission we realize fully that there has to be some yardstick for determining how well we are doing our jobs. But we do not believe that numbers are the sole criterion. If numbers were all we were after, I can tell you for a fact that, with the new procedures and tools recently fashioned, the Commission could have racked up quite a score in the past twelve months.

Let me illustrate: recently we sent section 6(b)24 special report orders to several hundred department stores requiring data as to their dealings with suppliers of wearing apparel. The answers, all under oath by the responding companies, provided us with all the evidence necessary for the filing of more than a hundred per se cases under the Robinson-Patman Act. We have held these on suspense, however, pending further investigation so that, to the extent compatible with the public interest, the various competitors in the industry shall be treated fairly. It should be noted that fair treatment, in our view, does not mean that the ones who are caught go free, but that we broaden the sweep of our net to bring the others to the bar as well. Another illustration of this principle is the recent action of the Commission in suspending adjudication on four cases (charging misrepresentation in the sale of analgesic

23 "Because of the ease in writing consent orders and decrees, they could encourage a type of numbers game. Over the years, the most important factors used to judge the work of the Antitrust Division or the Federal Trade Commission have been the number of cases they have instituted and the number of their wins. Obviously, the consent procedure enables an administrator to exhibit a highly successful statistical record, even if the program has little effect on competition. Consent procedures invite an administrator to build a good record by filing cases against small companies in unimportant industries." Massel, Competition and Monopoly 151 (1962).

preparations) pending the conclusion of an investigation to determine whether or not others in the industry are engaging in the same practices. This will permit, as our order reads,\textsuperscript{25} “simultaneous action where deemed warranted.”

Another answer to the criticism of our moving against the so-called minor violations is the simple fact that, in most cases, the victim complains. When a citizen points a public law officer to a plain violation of law, shows that he is being hurt by it, and correctly states that he has no other legal recourse in any other forum, simple justice requires that the officer do more than tell the citizen that, although a wrong, it is beneath the law’s notice.

The solution, of course, is to devise a way to handle these smaller and more obvious cases with, so to speak, the agency’s left hand—leaving the real muscle free to handle the larger ones. They must be dealt with, but the time and effort devoted to them should be scaled down to their true significance, so that our energies are not diverted from the rumbling herd of elephants.

Then, too, there is the problem of dealing with that large number of cases where the law is settled and the facts are clear. In many of these cases it is obvious to everyone concerned that the respondent is merely buying time in which to continue an illegal but lucrative practice. The story is told—a somewhat apocryphal one, I trust—of the client who told his counsel that he needed two more years to finish “milking” the profitability out of a practice that was patently deceptive. At the end of that time, he would be happy to move on to greener pastures. In the meantime, however, he wanted to know if counsel could delay the inevitable cease-and-desist order for two years. Counsel could, and did!

Congress has not yet provided us with the authority to issue a temporary cease-and-desist order in a situation of this kind. I am still hopeful it will. We believe, however, that we can and should make better use of our accumulated experience and knowledge—our expertise, if you please—in the handling of many of these cases. This we are doing by more extensive use of “official notice” and by promulgation of “trade regulation rules.”

Official Notice. I invite your attention to our recent decision in the matter of Manco Watch Strap Co., where we took "official notice" of two facts that have been long established over the years by our experience. One of the facts was that a substantial portion of the American public believes a product is of domestic origin if it is not marked to the contrary, and the other was that they prefer a domestic over a foreign product. These are facts which have been proven time and time again in other Commission proceedings. We recognize, of course, that there are well-known exceptions to these presumptions—perfumes, caviar, champagne, etc. But, as we said: "[W]e are not barred from taking official notice of a general fact merely because it is not a universal fact." The law and the Commission's Rules of Practice provide ample opportunity for a respondent to show that an "officially noted fact" is not true in his particular case.

Trade Regulation Rules. This past June we announced the adoption of procedures for the promulgation of what we chose to term "Trade Regulation Rules." These rules "express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers."

The procedures provide for the publication of proposed rules in the Federal Register; the giving of notice as to when interested parties may present written data, views, and argument; the holding of hearings; and all other procedural safeguards. Additionally, when the Commission relies upon such a rule in a proceeding, the respondent will be "given a fair hearing on the legality and propriety of applying the rule to the particular case."

There has been considerable discussion of these new procedures,
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both pro\textsuperscript{32} and con.\textsuperscript{33} You can be assured, however, that they will be applied with the utmost fairness and in full accord with all procedural and constitutional safeguards. One of our purposes is simply to let it be known that, in our considered judgment, the practices involved are condemned by established law. The rules, in short, will constitute fair warning to the business community that indulgence in those practices is an invitation to litigation with the Federal Trade Commission. In publishing such a clear warning we are but fulfilling a desire for clarity that is older than our statute itself. President Woodrow Wilson stated in 1914:

Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item-by-item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.\textsuperscript{34}

Advisory Opinions. Another procedure we have recently adopted provides for advisory opinions by the Commission with respect to proposed courses of action.\textsuperscript{35} This procedure was adopted to afford businessmen assistance in determining, in advance whether a proposed course of action, if pursued, may violate any of the laws administered by the Commission. Any person, partnership or corporation may request advice from the Commission concerning the applicability of laws administered by it to a particular course of action by addressing a request to the Secretary and submitting full and complete information. On the basis of the facts submitted, as well as other information available, the Commission will, where practicable, advise the requesting party whether or not the proposed course of action, if pursued, would be likely to result in further action by the Commission. Any such advice, necessarily will be without prejudice to the right of the Commission to reconsider

\textsuperscript{32} See Addresses of Commissioner MacIntyre of December 28, 1961 (See, 5 CCH Trade Reg. Rep. 85511, for summary); March 13, 1962; and May 16, 1962.
\textsuperscript{33} Rowe, Antitrust and New Controls for Competitive Pricing, 1962 N. Y. State Bar Ass'n Antitrust Law Symposium 69.
\textsuperscript{34} Quoted in MacIntyre's Address, Exchange of Views—Government and Business, National Account Managers Ass'n, March 13, 1962.
\textsuperscript{35} FTC Rules of Practice, Procedure and Organization, 16 C.F.R. §§1.91-.93 (1960).
the questions and, where the public interest requires, to rescind or revoke the advice. But the information submitted will not be used as a basis for a proceeding against a requesting party without prior notice and opportunity to discontinue the course of action pursued in good faith in reliance upon the Commission's advice.

The announcement of this new procedure has elicited widespread interest on the part of businessmen, the bar and certain trade publications. So far I have not heard, nor do I expect to hear an accusation from the American Bar Association that, in giving this kind of advice, we are depriving lawyers of a source of income. We think we are moving towards the fulfillment of one of the most important roles for which the Commission was created, that is, to assist businessmen in securing a better understanding of their responsibilities under the law.

THE CASES

Since the members of this group read the antitrust decisions before the ink is dry, I'll try to limit my remarks to only a few of the cases that I believe are significant.

Special Reports Under 6(b) of the Federal Trade Commission Act. From the standpoint of the Commission, one of the most important cases of the past year was the St. Regis decision of the Supreme Court. As the Court had said in an earlier decision similarly involving 6(b) reports—the Morton Salt case—the power of investigation is one "without which all others would be vain." St. Regis had, in the words of the Court, "defied large parts of the orders." For this defiance it paid penalties totalling $57,700, representing the statutory rate of $100 per day for the refusal to respond. In addition, the Court sustained our right to St. Regis' retained copy of its census report.

As a result of this decision, the Commission's efforts to get at the facts have been much more productive. At one time, there was the complaint that the Commission was being unfair if it proceeded against one company engaged in an unlawful practice without simultaneously proceeding against all other members of the industry. Now, when we oblige the critics by doing equal justice to all, we hear the versatile 6(b) special report characterized as a "mail-

36 St. Regis Paper Co. v. FTC, CCH 1961 Trade Cas. ¶70167.
order investigation kit.” But be all that as it may, the report is undoubtedly one of the fairest and most useful investigative tools the Commission has. With it, we can in fact make a quick, industry-wide investigation that would be physically impossible if attempted by shoe-leather. I have already referred to our department store inquiries. In addition, this technique is being used in several other areas, including: Robinson-Patman Act inquiries in the publishing, drug, and bread industries; advertising probes in regard to certain weight-reducing devices, cold remedies, pain remedies, and air purifiers; and in market-measurement surveys in merger cases.

In the latter connection, the Commission may ultimately use its Bureau of Economics and the 6(b) special report power to study selected areas of the economy to determine which are most likely to have antitrust “elephants” running amuck in them. With this information we believe we can more intelligently select the targets for our adjudicative proceedings.

Investigational Hearings. As you all know, the Commission continued its inquiries of the St. Regis Company in public investigational hearings, these being held before the Commission sitting en banc. Similar hearings have been and are now being conducted by the staff in an investigation of the milk industry. Despite the outcry against these proceedings, there is no doubt in our mind that they are fully sanctioned by precedent and constitutional principles.

Subpoenas Duces Tecum. I hear a rumor that the corporate form of doing business is being abandoned in favor of the partnership and individual proprietorship since the decision in the Harrell case. There is was held that the Commission’s subpoena power is limited to corporations, and that accordingly we had no authority to subpoena “individuals doing business as individuals and not as a corporation.” It goes without saying that this case is being appealed.

In FTC v. St. Regis Paper Co., the Seventh Circuit sustained our subpoena against the claim of accountant-client privilege; in
FTC v Standard American, Inc.,\textsuperscript{42} it was held that we had the right to take the documents to Washington for examination and copying; in FTC v Ace Books, Inc.,\textsuperscript{43} the court ordered the return on the subpoena at the company's own offices, and denied a claim for the advancement of the cost of production; and in Adams v FTC,\textsuperscript{44} and FTC v Cooper,\textsuperscript{45} the subpoenas were generally sustained over claims of irrelevance.

Access to Evidence. Although not involving our own investigative powers, the International Nickel case\textsuperscript{46} posed an interesting issue. The Commission, now in the course of investigating to determine whether or not defendants in fifty-six Antitrust Division cases are complying with those judgments, called on the International Nickel firms in New York and claimed "access" to various papers pursuant to a provision in the decree giving such a right to representatives of the Department of Justice. (Our attorneys had been appointed agents of the Department.) The defendants claimed the right to select the papers to be seen by our attorneys, and we asserted the right to at least be present at the file cabinets while the selection was going on. The Court held adversely to the Commission, basing its decision on the fact that the word "access" in the consent decree was qualified by the phrase "relating to any matters contained in the judgment." Our own "access" powers under section 9 of the Federal Trade Commission Act were not involved.

Mergers. Turning to the substantive law, I'm sure we can all agree that the most significant merger case during the year was Brown Shoe.\textsuperscript{47} I won't attempt to trespass on Judge Loevinger's territory.

In our own bailiwick, the Supreme Court denied certiorari in Crown Zellerbach Corp. v FTC.\textsuperscript{48} (The Ninth Circuit had affirmed our order requiring Crown to divest itself of the stock and assets acquired from St. Helena Pulp & Paper Company in 1953. That opinion is particularly significant for its extensive discussion.

\textsuperscript{43}CCH 1961 Trade Cas. p70184 (S.D.N.Y. 1961).
\textsuperscript{44}CCH 1961 Trade Cas. p70159 (8th Cir. 1961), cert. denied, 369 U.S. 864 (April 30, 1962).
\textsuperscript{45}CCH 1962 Trade Cas. p70355 (S.D.N.Y. 1962).
\textsuperscript{46}CCH 1962 Trade Cas. p70279 (S.D.N.Y. 1962).
\textsuperscript{47}Brown Shoe Co. v. United States, CCH 1962 Trade Cas. p70368.
of the proper standards for establishing the relevant lines of commerce and sections of the country.

On September 25, 1962, the Commission, in the Union Carbide case, ordered that company to divest itself of Visking, a customer that used polyethylene resin in producing polyethylene film. The acquiring company was permitted to retain a newly constructed film-producing plant, thus adding a new competitor to the field.

On April 30, 1962, in the Foremost Dairies case, that company was ordered to divest itself of ten dairy companies it had acquired.

In Procter & Gamble, the first "conglomerate" merger case, the hearing examiner has once again ruled that section 7 was violated by the acquisition of Chlorox. This case is now pending before the Commission for final decision on a petition for review.

One of the most recent complaints filed by the Commission under section 7 is that against Grand Union, charging that the big grocery firm violated the statute by acquiring two competing chain stores. This case, by the way, was tried under our new rules and comes very close to illustrating the kind of expedition we like in the big case. Hearings were held daily for four weeks, during which eighty-two witnesses testified.

Price Discrimination and Exclusive Dealing. The Robinson-Patman Act continues to be a prolific source of litigation and controversy. Perhaps the most hotly disputed issue during the past year has been the "meeting competition" defense under 2(b). And it is here that the Commission has taken its worst drubbing in the courts. In the Exquisite Form case we had held that, under the express wording of the statute itself, the defense of "meeting competition" was not available in a 2(d) case. The Court of Appeals for the District of Columbia reversed us, and the Supreme Court denied certiorari. The Seventh Circuit, relying upon Exquisite Form, reached a similar conclusion in the Shulton case.

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54 Exquisite Form Brassiere, Inc. v. FTC, CCH 1961 Trade Cas. ¶70157 (D.C. Cir. 1961).
56 Shulton, Inc. v. FTC, CCH Trade Cas. ¶70321 (7th Cir. 1962).
The second development in the 2(b) area was the Seventh Circuit’s reversal of our holding in *Sunshine Biscuits*\(^{57}\) that the “meeting competition” defense is available only as a defensive shield to retain old customers, and not as an offensive weapon to take customers away from a competitor.

Another feature of the “meeting competition” defense—granting a lower price to a customer so he can meet *his* competition—has been before us again. Our earlier ruling in *Sun Oil*, set aside by the Fifth Circuit,\(^{58}\) is now pending before the Supreme Court on certiorari. In the meantime, in *American Oil Co.*,\(^{59}\) the Commission has again rejected the defense in this situation.

The other Robinson-Patman defense, cost justification, has been greatly clarified by the Supreme Court’s June 25th decision in *Borden*.\(^{60}\) Again I won’t dwell in Judge Loevinger’s province, except to say that the Court remanded the case on the point that the trial court, in sustaining the defense, had permitted too broad an averaging of group costs, without an adequate showing that there was a reasonable correlation between those average cost figures and the cost of doing business with the individual members who composed the group.

**Section 5—Restraint of Trade.** During the past year the Commission has dealt with a host of traditional restraints of trade under section 5 of the Federal Trade Commission Act. Two of its opinions involved somewhat similar practices: resale price fixing between a supplier and its customers, and restricting the customers, in the resale of the goods, to specific geographical territories. In *Sandura*,\(^{61}\) both of these practices were condemned by the Commission. In *Snap-On Tools*,\(^{62}\) the hearing examiner had concluded that these restrictions were lawful because their purpose was to prevent buyers from playing off one dealer against another in the hope of obtaining a lower price. The Commission, speaking through Commissioner Elman, answered that novel proposition in these words:

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58  *Sun Oil Co.* v. FTC, 294 F.2d 465 (5th Cir. 1961).
But we think that precisely the converse is true. 'Playing-off' one dealer against another in the hope of obtaining a lower price is the essence of competition.

In addition to the traditional types of restraints of trade involved in the cases just mentioned, the Commission has of course provoked considerable controversy with its use of section 5 to reach restraints within the—and I quote—“spirit” of some of the specific statutory provisions enforced by it. The most notable matters in this area are the companion cases of Grand Union63 and American News.64 There, on February 7, 1962, the Second Circuit sustained our holdings that it is an unfair method of competition in violation of section 5 of the Federal Trade Commission Act to knowingly induce discriminatory advertising allowances. The argument that we were “legislating” new law was rejected. As the Court said in Grand Union:

Jurisdiction, perhaps, has been expanded from the technical confines of Section 2(d), but only fully to realize the basic policy of the Robinson-Patman Act.

The raising of money for promotional purposes by passing the hat among one’s suppliers was also condemned as a violation of section 5 by a court of appeals in our Giant Food case,65 and by the Commission itself again in the Macy case.66

Some of you will recall that at your meeting in St. Louis last year I discussed our then recent staff reorganization and revisions of our rules of practice. We anticipated that these actions would cause some unrest, or turmoil, among our staff and some criticisms from members of the bar and others, and they did. I am pleased to report now that the shake-down period appears to be over and that, for the most part, both the reorganization and the new rules are working well. We still have problems and we are still being criticized. So long as the criticisms are directed at things we are doing, or trying to do, rather than at things we are not doing, I am not too worried.

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63 Grand Union Co. v. FTC, CCH 1962 Trade Cas. ¶70224 (2d Cir. 1962).
64 American News Co. v. FTC, CCH 1962 Trade Cas. ¶70225 (2d Cir. 1962).
65 Giant Food, Inc. v. FTC, CCH 1962 Trade Cas. ¶70351 (D.C. Cir. 1962).