



STATEMENT BY
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BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
WASHINGTON, D. C.
FRIDAY, MAY 3, 1963

ON
FEDERAL TRADE COMMISSION ADVISORY OPINION CONCERNING
JOINT ADVERTISING BY RETAIL DRUGGISTS

Mr. Chairman and Members of the Committee:

It is a distinct privilege to present this statement to you on this occasion for inclusion in your record of this hearing.

In your announcement you made it clear that the subject of this hearing would be the formal advisory opinion of the Federal Trade Commission issued March 29, 1963 to representatives of associations of retail druggists concerning the legality of proposed cooperative advertising they plan to use. Also, it appears that you desire information about the action the Commission took in the matter.

The Chairman of the Federal Trade Commission has presented to you the Commission's statement on this subject. I concur in the statement he has presented. However, I believe that as a member of the Federal Trade Commission I should supplement that statement with this statement explaining my view regarding (1) the significance of and (2) the justification for what the Commission did in issuing

its formal advisory opinion on this subject March 29, 1963.

First, let us consider the significance of the act of the Commission in the issuance of the advisory opinion. A number of statements have appeared in one or two newspapers commenting on the significance of the Federal Trade Commission advisory opinion. One was to the effect that the Federal Trade Commission does not want joint ads to list prices and "FTC Aims Blow at Cooperative Advertising." Another described the advisory opinion as "pesky interference." A third news item relating to the subject was headlined with the words "Justice Denies Backing FTC on Co-Op Ad Prices."

What are the facts about the significance of the Federal Trade Commission advisory opinion? First, it is nothing more and nothing less than a statement of the Commission's view on the question of whether a proposed plan of action could be questioned as being in violation of the Federal law entrusted to the Commission for administration. In thus expressing its views the Commission did not state that it would proceed against the proposed course of action. Therefore, the advice the Commission gave in the mentioned opinion should be regarded in the same light as an opinion of a

lawyer rendering advice to his client on whether his client's proposed course of action could lead to legal proceedings against the client. Viewed in that light, it is not right for one to say that advice on the legal status of a proposed course of action is the aiming of a blow at that course of action, or that the giving of the advice is "pesky interference", especially when the advice had been requested by those who received it.

It is recognized that one who desires to follow a course of action and seeks advice as to the legality of such course of action expects and is entitled to receive a forthright and honest statement of opinion giving the advice requested. This is true even though the recipient is advised that the proposed course of action, if followed, would raise serious questions under the law.

In the case we are considering here, the Federal Trade Commission is not responsible for the state of the law to which it addressed its advisory opinion. It has done nothing more than express its view about the legal status of a course of action under the law.

What justification was there for the Commission to have expressed the views it did in its advisory opinion of March 29, 1963? Any worthwhile answer to that question should take into account answers to two other questions:

- (1) What is the legal status of price-fixing agreements between and among competitors under existing Federal law, and
- (2) Could the proposed course of action to which the Commission directed its advisory opinion of March 29, 1963 seriously be questioned as involving a price-fixing arrangement between and among competitors?

The first of these two questions is one of law; the second is one of fact.

On the question of law, few among the many who have any knowledge of Federal antitrust law would disagree with the proposition that price-fixing agreements among competitors are illegal, per se. (See U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-224). Thus, in further considering this matter, the sole remaining question is whether a jury could find as a matter of fact that the proposed course of action involved here added up to a price-fixing agreement among competitors. It is recognized that it is more troublesome to find a satisfactory answer to this question than the one relating to the legal status of price-fixing agreements. It is acknowledged that it is possible for two different juries to arrive at entirely opposite verdicts from precisely the same set of facts. These possibilities highlight the great danger in speculating on how some jury would view the course of action if some case should arise in the future under Federal laws which

would put into question the course of action under consideration here. The Federal Trade Commission was requested to so speculate. In responding, it drew on its experience and training in these matters to do its best in expressing an honest opinion regarding the dangers possible for small businessmen to encounter should they follow the course of action they proposed. In my commentary on the Commission's opinion, I stated that we would have rendered small business a disservice if we should have advised them otherwise regarding the state of existing law and its possible application to their proposed course of action.

In providing its advice, the Commission was compelled to recognize that it does not stand alone in controlling possible application of Federal law to the proposed course of action in the future. Different plans and courses of action of businessmen are far more likely to be made the subject of legal proceedings brought by the Department of Justice under charges that they are price-fixing agreements in violation of Section 1 of the Sherman Act than they are to be charged by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act. Moreover, in no instance could the Commission have anything to do with a proceeding under Section 1 of the Sherman Act. That is solely under the authority and responsibility of the

Department of Justice and the United States attorneys of the various United States District Courts. Whether they would in the future decide to proceed against the proposed plan of action on charges that it would be in violation of Section 1 of the Sherman Act and in that connection bring charges of a criminal nature, the Commission did not and does not now know the answer. The answer to any such question would be provided by those holding office at the time. We do not have any idea who the future Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice will be, much less do we have any idea what his position will be on this question. The best indication the Commission had of the possible answer to that question was in the form of a statement submitted to the Federal Trade Commission from the present Assistant Attorney General, Antitrust Division, United States Department of Justice, Washington, D.C., under date of January 15, 1963, in which it was stated:

"Pursuant to my letter to you dated October 25, 1962, we have reviewed your attached proposed memorandum to the Commission concerning the legality of a proposed cooperative advertising program in retail drugs.

"On the basis of the information submitted to the Department of Justice and to the Commission we agree that the granting of clearance in this matter would be inconsistent with the antitrust laws."

It must be kept in mind that the Commission's total evaluation of this matter as stated in its advisory opinion was based upon and directed to the information submitted to the Department of Justice and to the Commission by those who requested the Commission's advisory opinion in this matter.