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riend of advertiser?

t certainly is, writes Chairman, and also an help in reconversion process

y Robert E. Freer
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HE STIPULATION PROCEDURE which as adopted in 1925, and which has ecome increasingly the method by hich the Commission disposes of a ajority of its cases with regard to advertising, is not to be found in the Fed·al Trade Commission Act either as nacted by Congress in 1914 or as nended in 1938.

The language of the Act with regard procedure appears in Section 5 (b). part, it reads:

Whenever the Commission shall have ason to believe that any person ° ° ° s been or is using any unfair method of mpetition or unfair or deceptive act or actice in commerce and it shall appear the Commission that a proceeding by ° ° ° would be to the interest of the iblic, it *shall* ° ° ° serve upon such person ° ° ° a *complaint* stating its charges ° ° and ° ° ° a notice of a *hearing* upon day and at a place therein fixed ° ° °. ie person ° ° ° so complained of *shall ive the right to appear* at the place and e so fixed *and show cause why an or- should not be entered* by the Commission requiring such person ° ° ° to ase and desist ° ° °. if upon such aring the Commission shall be of the inion that the method of competition the act or practice ° ° ° is prohibited ° ° it *shall* ° ° ° *state its findings as the facts and shall issue* ° ° ° *an order* ° ° *to cease and desist* ° ° °. (Italics pplied.)

The only change made by the 1938 nendment in the language above oted was that bringing in "unfair or ceptive acts or practices," as well as nfair methods of competition. The 938 amendment, however, strengthed the effectiveness of all cease and sist orders by providing that they beme "final" in 60 days unless appealed to the Courts, and that any person violating a final cease and desist order shall forfeit a civil penalty up to $5,000 for each violation.

With recognition of the hardship of this statutory procedure upon those who through lack of legal guidance or misunderstanding of the law had unknowingly violated it, the Commission adopted the stipulation method of settling certain cases. This policy now has become permanent. For a short time after its adoption, around 1925-1930, even the names of respondents agreeing to stipulations were not made public. This aroused a number of prominent newspapers which declared that the Commission, was bending too far backward in its desire to protect business men who had violated the law.

One Washington newspaper, for example, said:

"Truthful advertising has one of its greatest allies and servants in the Federal Trade Commission.

"That's the modest verdict of the Commission about itself.

"It is apparently arrived at by stipulating the large number of moral victories the Commission is winning over purveyors of false advertisements.

"These victories are of a very amusing type. The circulator of false advertising agrees not to do it any more. The Commission agrees not to disclose its identity if he will be good in the future. There's hand shaking all around, and the score keeper chalks up a victory for righteousness ° ° °.

"Such an arrangement would be what the Federal Trade Commission calls a 'stipulation'."

The Commission's permanent policy as to stipulations is expressed presently in its rules of practice as follows:

"Whenever the Commission shall have reason to believe that any person has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce, and that the interest of the public will be served by so doing, *it may withhold service of complaint and extend to the person opportunity to execute a stipulation satisfactory to the Commission,* in which the person, after admitting the material facts, promises and agrees to cease and desist from and not to resume such unfair methods of competition, or unfair or deceptive acts or practices.

"All such stipulations shall be matters of public record, and shall be admissible as evidence of prior use of the unfair methods of competition or deceptive acts or practices involved in any subsequent proceeding against such person before the Commission.

"It is not the policy of the Commission to thus dispose of matters involving intent to defraud or mislead; false advertisement of foods, drugs, devices, or cosmetics which may be injurious to health; suppression or restraint of competition through conspiracy or monopolistic practices; violations of the Clayton Act; violations of the Wool Products Labeling Act of 1939 or the rules promulgated thereunder; or where the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act, or practice.

"The Commission reserves the right in all cases, for any reasons which it regards as sufficient, to withhold this privilege." (Italics supplied.)

The names of all respondents in stipulation agreements now are a matter of public record.

It is important to remember that the Federal Trade Commission is the agency established by Congress in 1914 to administer a statute enacted by Congress which made unfair competitive methods unlawful, the general character of which (by reason of thirty years of judicial inclusion and exclusion by the Federal courts) industry and business the legal profession and the Commission can now identify. Practices which have been held to be unfair or deceptive are false or misleading advertising of commodities with respect to the materials of which they are composed, their quality, purity, origin, source, attributes, and selling them under such names and circumstances as to deceive the public.

Outstanding among these are advertising misrepresentations of the therapeutic and corrective properties of medicinal preparations, cosmetics and foods. Other practices condemned by the courts as violative of the statute are commercial bribery, disparagement through false statements respecting a competitor's product or business, widespread threats to the trade of suits for patent infringement not in good faith, trade boycotts or combination of traders to prevent certain classes of dealers or wholesalers from procuring goods, combinations to fix prices, and merchandising schemes based on lottery or chance or pretended contests of skill.

Under the 1938 amendment to which I referred, it is not only unlawful to advertise falsely the efficacy of medicines, curative devices and home treatments; if use of the preparation or device under these conditions may be injurious, it is made mandatory for the advertiser affirmatively to warn the purchaser to that effect.

It has been aptly stated that the unfair and deceptive acts and practices declared to be unlawful in the general policy as expressed by Congress are those which "are unfair plays in the game for business profits and consumer good will." The Commission is the umpire of the game, and its job is to keep the contest fair and honest for all consumers as well as to preserve business itself from that minority which would compete under different rules or none at all.

A stipulation is a simple agreement and resembles the ritual of confession only to the extent that its subject matter relates to past acts and future conduct. The respondent admits that the advertising in question has been disseminated or that the practices and methods have been engaged in, and that the true facts or fair conduct are thus and so (showing the claims theretofore made or the methods theretofore used to be erroneous), and he agrees to discontinue the claims or conduct forthwith. Furthermore, he agrees that if he continues or resumes such practices, the Commission may use his agreement as evidence in a formal proceeding which may be instituted subsequently directed to the same subject matter, that is, to similar claims, methods, acts or practices.

The Commission is not only empowered by the Congress to *prevent* unfair or deceptive acts and practices, including false advertising; it is *directed* to do so. If the Commission can prevent such practices in commerce, as commerce is defined in the statutes, without resort to the full-dress or statutory procedure, the consumer purse and health are effectively protected and served.

Effective termination of such acts and practices, coupled with the assurance that they will not be resumed, fulfills the purpose of the mandate of Congress. The Commission's theory in this respect that if the unfair acts are so terminated and if no resumption thereof can come about without breach of the agreement, "a proceeding by it in respect thereof" would not then be "to the interest of the public." Especially is this true when it is understood that the Commission's powers are corrective and directed to future conduct—that they are injunctive or preventive rather than penal.

As of June 30, 1944, a total of 6,213 stipulations have been accepted by the Commission. The first stipulation case was entered in April 1925. Since then 3,629 stipulations have been negotiated through the office of the Chief Trial Examiner and 2,584 through the Radio and Periodical Division. The first cease and desist order of the Commission was entered August 19, 1916, and since that date but 3,606 have been entered as against the stipulations total of 6,213. This represents an enormous saving in time and money for the respondents and the Government.

The Commission's experience is that instances of violations of such agreements are few. On those occasions when an allegation of violation is brought to the Commission's attention (and supplemental investigation by the Commission establishes the fact), the Commission's settlement of the matter is reconsidered and service of formal complaint is directed.

In my opinion, it is a tribute to the inherent honesty of the business men of our country that these instances are regarded by the staff as unusual.