Notre Dame Law Review

Volume 41 | Issue 3 Article 13

2-1-1966

Compliance Procedures and Industrywide Projects

Edwin S. Rockefeller

COMPLIANCE PROCEDURES AND INDUSTRYWIDE PROJECTS

*Edwin S. Rockefeller**

It is important to grasp three fundamentals. First, there is no ethical content in any of the matters with which we are here concerned. It has been my good fortune to spend the past nine years working on these matters — about half that time on the FTC staff and the other half in private practice. Two things which seem clear to me are: (1) you can't learn what it is like to be on the other side, government or private, without being on it for a while, and (2) an emotional or evangelistic approach toward compliance, relying on some kind of ethical considerations, is a mistake on either side. Whether you are the government attorney whose duty it is to enforce the laws in the best interest of the public (with due regard to the demands of practical politics) or the private attorney whose duty it is to counsel the businessman on compliance with the laws (with due regard for the profit and loss statement), you should make no quick or general assumptions about who are the good guys and who are the bad guys.

Second, I want to be counted among those who would emphasize that the Robinson-Patman Act is not as complicated as a lot of those with a heavy investment in complexity might have you think. On the other hand, there are situations where the law, which we might think of as one or even two dimensional, must be applied to evolving business situations of three and four dimensions. This demands something more than an evangelistic tone and an admonition to the businessman to devote his ingenuity toward developing techniques for compliance rather than presenting his lawyer and the FTC with difficult situations. Such an approach often leads to an overabundance of caution, a tendency to inaction and a likelihood of missing the competitive opportunity. If all a businessman wants to do is to comply with the Robinson-Patman Act he can sell to all comers at one price and pay no brokerage, no promotional allowances and grant no services. But if it is competition that should regulate the economy, that approach is wrong.

Third, it is counsel's duty as an officer of the court to encourage compliance with the law. Nevertheless, it is his role as a counselor of private business not only to state the law where it is clear and try to where it is not but also to assist the business client to evaluate the *risks* of alternative courses of action in order that the businessman may make an informed judgment as to what to do next. Consider a situation in which the current Commission interpretation of a particular section is not realistic in the business context in which an attorney finds himself. For example, suppose the only court which has dealt with the question has overruled the Commission,[1] but the Commission has in effect rejected the court's decision.[2] As an officer of the court surely one can be

* Member, Connecticut Bar, District of Columbia Bar; A.B., Yale University, 1948; LL.B., Yale Law School, 1951; Chairman, Advisory Board, Bureau of National Affairs *Antitrust and Trade Regulation Report;* former Assistant to General Counsel, former Executive Assistant to Chairman, Federal Trade Commission; partner, *Wald, Harkrader & Rockefeller,* Washington, D. C.

1 Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).

2 FTC News Release, November 23, 1962.

justified in relying on the court's view of the law. But what one must also take into account are the risks of (1) detection and (2) possible enforcement action. I will omit discussion of the techniques for minimizing the likelihood of detection. Evaluation of the risk of enforcement action combines a mixture of psychology, politics, timing, and luck.

With these three fundamentals in mind, I proceed to my subject which is the method of enforcement open to the Commission. Whether we view enforcement as industrywide or otherwise, there are two kinds of compliance — (1) voluntary compliance without threat of penalty and (2) compliance which results from Commission action to restrain violations of the law.

The Commission may assist voluntary compliance efforts by focusing publicity on unlawful practices and by educational and guidance efforts. In the past, most industrywide projects were of this sort. In many instances a great deal was accomplished. In other situations, failure to follow up the educational program with serious enforcement proceedings resulted in an erosion of industry resolve to comply. Mr. MacIntyre's discussion of the gasoline marketing inquiry, the fresh fruit and vegetable trade practice conference rules and the package of garment industry orders provides a complete spectrum of possible methods for encouraging compliance.[3] Ultimately, there is really only *one method* available to the Commission for the effective insistence upon compliance, and that is the complaint and order proceeding provided in the statute. A trade practice conference, a trade regulation rule proceeding or a general Commission inquiry may or may not result in rules of greater or lesser substance. Such procedures may or may not result in findings of fact. These rules and these findings may be used to shorten a subsequent individual proceeding for a cease and desist order. But the enforcement proceeding remains basically the same.

Section 11 of the Clayton Act,[4] like section 5 of the Federal Trade Commission Act,[5] provides that whenever the Commission shall have reason to believe that any person is violating or has violated any of the provisions of, among others, section 2 (which contains the Robinson-Patman Act amendments), the Commission shall issue and serve upon the respondent a complaint stating its charges with a notice setting a time and place for hearing at least 30 days after service of the complaint. According to the statute, the person so complained of has the right to appear at the hearing and "show cause why an order should not be entered by the Commission"[6] requiring the respondent to cease and desist from the violation of law charged in the complaint. The Commission still includes this wording in its notice but does not expect the respondent to carry the burden of showing such cause.[7] The statute directs that the testimony taken in the proceeding shall be reduced to writing and filed in the Commission's office. The statute further provides that if upon such hearing the Commission

3 See, MacIntyre, *Some Criteria for Applying Industrywide Enforcement Measures Under the Robinson-Patman Act*, 41 NOTRE DAME LAWYER 389 (1966).
4 38 Stat. 734 (1914), 15 U.S.C. § 21 (1964).
5 38 Stat. 719 (1914), 15 U.S.C. § 45 (1964).
6 38 Stat. 734 (1914), 15 U.S.C. § 21 (1964).
7 It has never been clear to me how or why the statutory scheme has been subverted on this point, but perhaps the Administrative Procedure Act has in effect amended these provisions by implication.

shall be of opinion that any of the provisions of law have been or are being violated "it shall make a report in writing, in which it shall state *its findings as to the facts,*" and it shall issue and serve on the respondent an order "requiring such person to cease and desist *from such violations.*" (Emphasis added.)[8]

Prior to 1959, the Clayton Act provided for the enforcement of Commission orders by application of the Commission to an appropriate United States Court of Appeals with a showing that the order had been violated. This ordinarily required a prior investigational hearing with findings by the Commission of facts of violation. The court could affirm, modify or set aside the Commission's order. Following affirmation in whole or in part, the court could then issue an order of enforcement which, as the court's own order, would subject a violator to possible punishment for contempt.

The pre-1959 statute also provided that the respondent might petition an appropriate court to review the Commission's order. Before 1952 this sometimes resulted in orders of enforcement where the order reviewed was affirmed, but in that year the Supreme Court held that the courts of appeals were without authority to issue an order commanding obedience to an order of the Commission until the Commission had first established violations of its order.[9]

In 1959 Congress amended section 11 of the Clayton Act "to provide for the more expeditious enforcement of cease and desist orders."[10] The amending law contained two sections. The first section amended section 11 by providing finality for the Commission's Clayton Act orders similar to that already provided in 1938 by the Wheeler-Lea amendments of the Federal Trade Commission Act. Under these provisions, if the respondent does not petition for review within 60 days of service of a Commission cease-and-desist order, the order becomes final and violations of the order are subject to civil penalties of up to 5,000 dollars for each violation, recoverable in a civil action brought by the United States. Section 2 of the amending law stated that section 1 should have "no application to any proceeding initiated before the date of enactment of this Act."[11] It was explicitly provided that each such proceeding was to be governed by the provisions of section 11 as they existed previously. Under the new provisions, there is also a method for review by the court of appeals upon respondent's petition and a provision that "to the extent that the order of the Commission is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission."[12]

There arose the question of possible enforcement of orders issued by the Commission under section 11 of the Clayton Act prior to the amendment as to which *no* enforcement proceeding had been initiated at the time of the amending act's passage. No provision was made for enforcement of such orders; the amending statute simply substituted the new provisions for the old, and provided explicitly only for those old orders as to which enforcement proceedings had already been initiated.

The Commission sought to close what it regarded as a gap by the issuance

8 38 Stat. 734 (1914), 15 U.S.C. § 21(b) (1964).
9 FTC v. Ruberoid Co., 343 U.S. 470 (1952).
10 73 Stat. 243 (1959).
11 73 Stat. 245 (1959).
12 73 Stat. 244 (1959).

of a press release stating that unless a petition to review an old order was filed within 60 days, it would regard the old order as final in the same manner as orders issued since the amendment. I say "what it regarded as a gap" because there may indeed have been none. Congress may very well have felt that, where the Commission could find a violation of a pre-1959 Clayton Act order, it could on the same facts proceed for a new order, which would carry with it the finality provisions and that this would provide more expeditious enforcement in any case than retention of the former method which the Commission itself had long regarded as cumbersome and ineffectual. Several firms against which Clayton Act orders had been issued prior to the 1959 amendment, not wishing to run the risk that the Commission's press release view might prevail and civil penalties later be assessed, sought immediate relief through declaratory judgment actions. The Court of Appeals for the District of Columbia sustained these efforts and overruled the Commission's press release.[13] In these proceedings, the Commission argued that, unless the old orders could be blanketed in and made subject to the new-type enforcement, they would be lost forever as having any enforceability. However, the Commission is now seeking to enforce one such order through application to the Ninth Circuit as though the old provisions were still in effect.[14]

Since 1954, public complaints apparently initiating the sort of proceeding described in section 11 of the Clayton Act have been disposed of without hearings, without findings, and even without respondent's admission or denial of the facts alleged, upon respondent's signing an agreement accepting the issuance of an order prohibiting future violations and waiving any further review. It was long debated at the Commission whether, in view of the wording of section 11, orders to cease and desist issued without findings would be enforceable under the procedures provided in the statute for properly issued orders. In 1954 the view that they would be enforceable finally prevailed, and the Commission's procedure has continued substantially in its present form since that time. The validity of the Commission's present view has never been directly challenged in court except for that proceeding in the Ninth Circuit referred to above, where the Commission is seeking to enforce an order issued under its consent procedure.

There is a lot of talk these days about "industrywide" enforcement of the Robinson-Patman Act. The reason that industrywide treatment has currently become a matter of such concern may be that violations of the act are so industrywide. If most firms are complying and only a few are in violation, then a handful of cease-and-desist order proceedings is all that is called for, and there is no need for elaborate industry projects. Unfortunately, as the Commission has increasingly recognized, such is not now the case. The present Commission has shown flexibility and imagination in trying to deal with the problem. The Commission has been able to turn the current state of widespread violation of a law, for the enforcement of which *it* has been responsible for nearly thirty years, into cause for praise for the Commission. This is a triumph in the public relations art which certainly has my admiration.

13 Sperry-Rand Corp. v. FTC, 288 F.2d 403 (D.C. Cir. 1961).
14 FTC v. Jantzen, Inc., No. 20021, 9th Cir. application filed, April 23, 1965.