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An Antitrust Primer, by Earl W. Kintner

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AN ANTITRUST PRIMER. By Earl W. Kintner. New York: The Macmillan Company. 1964. Pp. vii, 301. $7.95.

As General Counsel and then Chairman of the Federal Trade Commission and now as a practitioner, Earl W. Kintner has evidenced a confidence in the American businessman. Tell him the law, Mr. Kintner seems to say, and he will obey it.[1] There must be sanctions to bring the few recalcitrants into compliance. The majority need only education.

More than words have marked the optimism of the vigorous Mr. Kintner. From his position as Chairman of the Federal Trade Commission he caused the agency to intensify its program for voluntary compliance. For the first time the FTC went to the businessman, not for the purpose of prosecuting but rather of educating. In language drafted for lay understanding this independent agency, charged with preventing unfair methods of competition and unfair or deceptive acts or practices in commerce, endeavored to draw from its then nearly fifty years of experience guidelines for compliance. In rapid order there came from the Commission guides ranging from those against deceptive pricing to deceptive advertising of guarantees to affirmative suggestions for meeting the sometimes complex requirements of the Robinson-Patman Act's advertising allowance provisions.[2]

The "revitalized"[3] FTC did not rest here. It was not enough simply to have business and consumer groups copy the published guides

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1. In this regard it is interesting to remember that which President Wilson urged and cautioned in the establishment of the Federal Trade Commission. "Businessmen," said the President, "desire the advice, the definitive guidance, and information which can be supplied by an administrative body, an interstate trade commission . . . [but] I would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business as if the government made itself responsible." 51 CONG. REC. 8840 (1914).

2. Education as a means for obtaining voluntary compliance is discussed in Baum & Baker, *Enforcement, Voluntary Compliance, and The Federal Trade Commission,* 38 IND. L.J. 332, 325-337 (1963); Comment, *Voluntary Compliance: An Adjunct to The Mandatory Processes,* 38 IND. L.J. 377 (1963).

3. Just when this "revitalized" commission came into being is a question. Perhaps, however, the shape of things to come was evidenced while Mr. Kintner was still General Counsel of the Federal Trade Commission. See, Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation,* 30 N.Y.U. L. REV. 1143, 1152-53 (1955).

by the thousands. The agency took to the field. Staff members began informally to enforce the guides. Areas were selected, sometimes cities and sometimes the sale of particular lines within a given city, such as furniture.[4] At the initiative of the agency, businessmen were called together in groups and their problems discussed, and more importantly, decisions reached and enforced. Such was the voluntary compliance program of the then Chairman Kintner. It was a program soon abandoned after he left office.[5]

Despite the Commission's retreat from a program of voluntary compliance, Mr. Kintner, as a practitioner, continued to hold to education as an effective tool for antitrust enforcement. This is illustrated in his role as counsel for the National Association of Retail Druggists. While he was quite capable of engaging the FTC in formal combat,[6] he was more often engaged in speaking and writing to the individual druggist, explaining the import of the antitrust laws.[7] His message was not one of ridicule but rather of patient definition of the reasons for statutes which, at times, seem to constrict business activity. Unlike some, Mr. Kintner attempted to harmonize the Robinson-Patman Act with the competitive ethic. He told the Kansas Pharmaceutical Association in 1962:

> The purpose animating the Nation's antitrust and trade regulation laws is clear. However, it would be futile to deny that controversy exists over the propriety of the means selected to achieve that purpose. And most of this controversy has raged over the Robinson-Patman Act. To my knowledge no one has doubted that Congress, in passing this Act 24 years ago, intended to protect the small and struggling entrepreneur. But some have doubted whether the means selected were properly

4. See, Baum, *Memorandum to The Federal Trade Commission,* 8 ANTITRUST BULL. 948, 957-60 (1963).

5. Two reasons were articulated for scuttling the program. From the Commission came the rationale that jurisdiction frequently was questionable in area-wide voluntary compliance projects. Baum, *Programs of Enforcement: Comment and Correspondence Between Congressman Roush and The Federal Trade Commission,* 16 AD. L. REV. 42, 49 (1963). And from some segments of the bar came the cry that continuation of "voluntary enforcement" was an activity in excess of the Commission's statutory power. See Austern, Antitrust in Action, Lectures Before the New York University School of Law, at pp. 17-19, April 1, 1960 (mimeo).

6. As an advocate Mr. Kintner has evidenced an awareness that the lawyer's function sometimes includes appealing a Commission ruling to the Congress as well as the courts. This was effectively demonstrated recently. See, *Hearings on Federal Trade Commission Advisory Opinion on Joint Ads before the House Select Committee on Small Business,* 88th Cong., 1st Sess. (1963); and H.R. REP. No. 295, 88th Cong., 1st Sess., at 19, 21 (1963).

7. See, Statement by Earl W. Kintner, "Self-Governed Man and Government Regulation of Business," before the Spring Convention of the Kansas Pharmaceutical Association, Topeka, Kan., March 19, 1962 (mimeo.).

> designed to achieve that purpose. Many have noted that the terms of the statute are sometimes confusing and inprecise. Some have said that the statute is unreasonable. Some have said that this statute as enacted is, at bottom, anticompetitive in effect.
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> [I]n my considered judgment, this statute is not anticompetitive in effect when fairly and effectively administered. No unfairness can result from coupling the privilege to compete with the duty to compete fairly. Congress, in assigning a high value to the protection of small entrepreneurs, cannot be said to have violated any basic tenet of American economic philosophy.[8]

An Antitrust Primer is but a further development of Mr. Kintner's approach to the law of trade regulation. It is a book designed not so much for the bar as the businessman charged with making management decisions. It is a work designed to sensitize the businessman to react favorably to the antitrust ethic. Toward that end the author has presented a capsule description of the law, beginning with a statement of statutory purpose, then a delineation of all that within the antitrust ambit, including deceptive practices,[9] and, finally, the methods of enforcement.

Simplicity, not detail, characterizes Mr. Kintner's presentation. He is concerned with having the businessman understand, not necessarily with enhancing the knowledge of the attorney. There are few footnotes to impede the reader. But even more important than form is the substance of that communicated. Mr. Kintner asks of the businessman active compliance with each of the many statutes that go to form the base of the law of trade regulation.

In doing this Mr. Kintner has made the same assumptions that marked his administration as Chairman of the Federal Trade Commission. He has assumed a basic validity of the antitrust laws, that they can be made to play a vital part in our economy as it has evolved. He has assumed that free men, acting in their own best interests, will want to comply with the law regardless of the level of agency or judicial enforcement at any particular point in time. And, finally, perhaps, he has assumed that counsel will instruct their clients in the law as it is defined by statute.[10] To the extent that these assumptions prove themselves true

8. *Id.* at 6.

9. Too often the courts, enforcing agencies, bar, and scholars forget the relationship between deceptive advertising and antitrust. This Mr. Kintner has not done.

Mr. Kintner will see his goal of meaningful compliance with the antitrust ethic fulfilled.

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THE LAW OF MOBILE HOMES. By Barnet Hodes and G. Gale Roberson. Chicago: Commerce Clearing House, Inc. Second edition, 1964. Pp. xxiv, 623. $17.50.

When, in the twenties, automobile trailers made their first appearance, most people viewed them as minor and presumably short-lived recreational contrivances. In the thirties and forties, these appraisals faded and trailers began to claim serious recognition. In or out of special parks, they became both a new way of life and a source of social and legal headaches. What began as mere camping equipment ultimately became a significant form of everyday housing.

Since World War II, this obstreperous prodigy has become two. Much the bigger and more problem-ridden is the "mobile home," a permanent dwelling in a semi-permanent location. The other is the "travel trailer," a sophisticated descendant of the original camper. Beyond the obvious factor of complexity, the practical differences lie in size and weight, both of which affect maneuverability. With widths up to ten or twelve feet, the typical modern mobile home is too large and too cumbersome to be moved routinely on the highway. Branded "oversize," the larger mobile homes are usually moved by professionals who are engaged for the particular occasion and who operate under special license.

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10. Mr. Kintner also is a realist. So it is that he wrote:
I would be less than candid, however, in expressing my views if I did not suggest that another source of the troubles of antitrust may well be the attitude that has prevailed toward the antitrust laws in some portions of the Bar. In their contacts with their business clients and with other lawyers, some members of the antitrust bar have been too disposed to expend their energies to discredit the antitrust laws or their enforcement. They have been too little disposed to accept the philosophy of the antitrust statutes and, in turn to help their business clients to understand those laws and to develop meaningful programs of compliance.

The ever-continuing controversy over the Robinson-Patman Act serves as a case in point. At Bar Association meeting after Bar Association meeting, the alleged "anticompetitiveness," the internal inconsistencies, and the tortuous intricacies of the statute have been debated *ad infinitum*, if not *ad nauseam*. It seems to me that some of the debaters are doing their utmost to create the very situation which they deplore. They encourage disrespect for the clear-cut requirements of the law. They confuse the unsophisticated, maintaining them in a state of continued ignorance of the Robinson-Patman Act. AN ANTITRUST PRIMER, pp. 230-31 (1964).

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