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"EQUITABLE TREATMENT OF COMPETITORS"



Remarks By

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Before the
SECTION ON ANTITRUST LAW
NEW YORK STATE BAR ASSOCIATION

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"Why pick on me?" is a common query heard at

the Federal Trade Commission. As you listen, you

As a practical matter the Commission has neither sufficient funds nor manpower to investigate all competitors allegedly engaged in identical malpractice issue complaints. try the various cases

simultaneously. This raises the first question: Does the Commission have discretion in the selection and prosecution of cases? Or, can the Commission

industry, whether such appearances reflect
fact and whether all firms in the industry

similar to that faced by Rufus Choate who, when asked by the court to cite a precedent, replied, "~~There is no precedent for a precedent although~~"

rule."

Where all respondents desire to terminate the challenged practice at the same time, they can accept orders to cease and desist simultaneously. The orders may or may not vary in some detail, depending upon the particular facts. The Commission issued complaints against the Bulova Watch Company, Inc. (D. 5830), the Gruen Watch Company (D. 5836), and the Elgin National Watch Company (D. 5837) charging each of them with

Section 2 (a) of the amended Clayton Act, the use
of disproportional advertising allowances to

(Dockets 6581, 6682, 6717, 6709 and 6579) filed separate agreements that cease and desist orders could be issued against them provided that the orders be stayed until final decision in the Mohawk case. The Commission accepted these five agreements.

In the reprocessed oil cases, all of the sellers did not compete with each other but all of them competed with another. Counsel for five respondents

service of the hearing examiner's initial decision and the thirty-day period within which the initial decision may become the decision of the Commission under its Rules. These negotiations were carried on with each process independent of the other

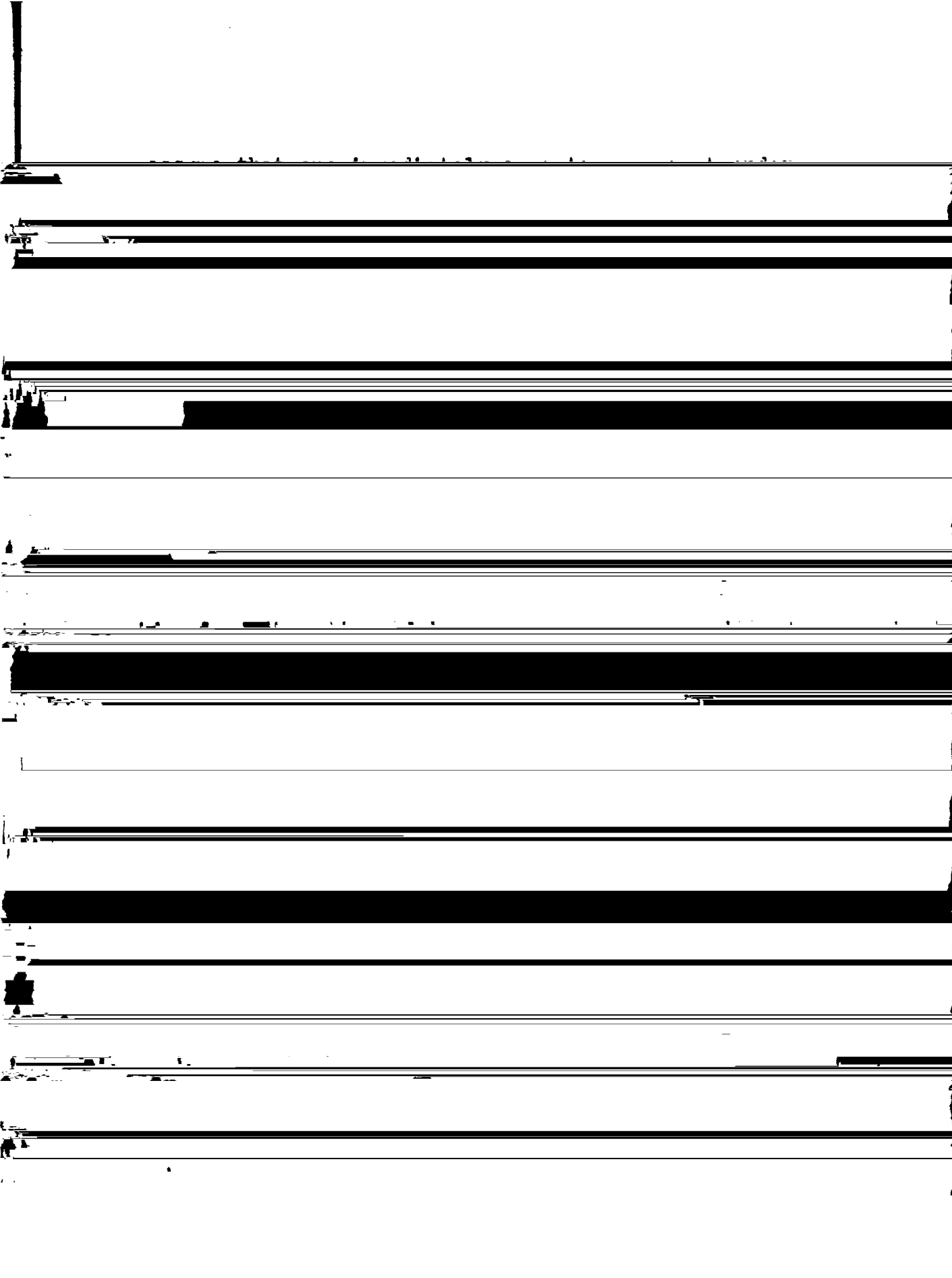
All wanted only to be treated alike. Insofar as it
is possible we too desire to treat all who are

the law was obtained more quickly, efficiently, and
economically than would otherwise be possible.

Generally speaking, what are some of the more
basic considerations as to the availability of condi-
tional consent agreements to alleviate competitive
disadvantage? What atmosphere must prevail if their
use is to be contemplated? Are subjective as well as
objective factors involved?

The goal itself suggests one of the basic ques-

tion: When must a competitive situation exist



data for the particular industry. Counsel may be

extent of the use of an illegal practice in the industry and the identity of the offenders. If the Commission receives this data early in the investigation, a tentative decision can then be made as to whether the practice might be appropriate for group handling. No respondent should complain of being singled out and not accorded equitable treatment unless he has exerted himself to the best of his ability to assist the

Commission in bringing about the cessation of the same practices on the part of his competitors.

There are many situations where this group procedure may not be appropriate. For example, sellers of medicinal preparations containing different ingredients may recommend their products for the same general purpose. The alleged false advertisements may vary in considerable detail. Obviously, any orders to cease and desist might well vary with the facts in each case. Again, for example, if a number of sellers were charged with price discrimination in violation of Section 2 (a) of the amended Clayton Act, and if the defense to such charge were cost justification or the meeting of competition in good faith, then the several matters might have to be considered separately. Where defenses are available

Competition to place competitors under a more even

Today I have concentrated upon procedures at the Commission which perhaps are not sufficiently well known to the Bar. There will be, of course

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differences of opinion as to whether or not these procedures should be used in particular situations. However, such procedures in appropriate cases can be quite effective in giving flexibility and reasonableness to law enforcement.