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FTC v. Jantzen: Blessing, Disaster, or Tempest in a Teapot?

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FTC V. JANTZEN: BLESSING, DISASTER, OR TEMPEST IN A TEAPOT?

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DURING the presentation of its case in *FTC v. Jantzen, Inc.*,[1] the Commission asserted that unless its arguments on the jurisdictional issue prevailed, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist would be wiped from the books."[2] Such a result, the Commission suggested, would be tantamount to a grant of "amnesty to the almost 400 law violators under order."[3] When despite these dire forecasts the court rejected its contentions, a Commission spokesman stated that the resulting situation was "a real mess."[4]

The issue provoking these assertions was simply whether the court of appeals had jurisdiction to entertain the Commission's petition for judicial enforcement of a consent cease-and-desist order entered against Jantzen in January, 1959, under section 2(d) of the Clayton Act.[5] Violations of the order were admitted by Jantzen. The enforcement petition was filed in 1964 in accordance with the statutory procedure embodied in section 11 of the Clayton Act as it existed prior to July 23, 1959.[6] However, on the latter date, the revisions of section 11, which were enacted in the Finality Act of 1959,[7] became effective. Under the revised procedure, petitions for enforcement are eliminated, cease-and-desist orders are given automatic finality, and violations are to be punished by civil penalty suit in a federal district court.[8] The resulting question, then, was whether the "old" procedure could be applied to orders entered prior to July 23, 1959, where no enforcement proceedings had been initiated until after that date.

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1. 356 F.2d 253 (9th Cir. 1966).

2. *Id.* at 259. The orders involved are based upon violations of §§ 2 (Robinson-Patman), 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964), 3 (exclusive dealing), 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964), 7 (acquisitions), 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), and 8 (interlocking directorates), 38 Stat. 732 (1914), as amended, 15 U.S.C. § 19 (1964), of the Clayton Act.

3. *Ibid.*

4. The Wall Street Journal, Feb. 16, 1966, p. 28.

5. See Jantzen, Inc., 55 F.T.C. 1065 (1959). The order was slightly modified by Commission order in March 1959.

6. See Clayton Act § 11, 38 Stat. 734 (1914).

7. 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

8. For a more detailed discussion of the original and revised procedures, see text accompanying notes 74-75 *infra*.

The court concluded that the Finality Act, by repealing the existing provisions for judicial enforcement proceedings in the courts of appeals, deprived it of jurisdiction to act upon the FTC's petition. It also approved earlier decisions holding that the Finality Act procedures were not applicable to orders issued prior to the act's effective date.[9] These two rulings, in combination, indicate that there is *no* enforcement machinery now applicable to orders issued under the Clayton Act prior to July 23, 1959.[10]

The question remains, however, whether enforcement of the Clayton Act has really been hampered, and, if so, whether the pre-1959 orders[11] are of sufficient import to warrant seeking judicial reversal or legislative relief. The Commission is clearly of the belief that it has suffered a major setback. The court, on the other hand, felt that the violations which the Commission had to prove under the old procedure to obtain an enforcement order can now be used as the basis for entry by the Commission of a new order which will be automatically final and subject to immediate sanction. An analysis of the "old" and "new" procedures suggests that the truth lies somewhere between these two extremes.

I. The Background

As originally enacted, the Federal Trade Commission Act and the Clayton Act contained virtually identical provisions for the enforcement of Commission cease-and-desist orders.[12] Both statutes provided that if a person against whom an order has been issued "fails

9. Schick, Inc. v. FTC, 288 F.2d 407 (D.C. Cir. 1961); FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961); Sperry Rand Co. v. FTC, 288 F.2d 403 (D.C. Cir. 1961). See also FTC v. Henry Broch & Co., 368 U.S. 360, 365 n.5 (1962).

10. The Finality Act expressly provides that orders entered prior to July 23, 1959, with respect to which review or enforcement proceedings in the courts of appeals had been initiated prior to that date would remain subject to the pre-existing procedure. See note 19 *infra* and accompanying text. Thus the Commission may still seek enforcement of orders which have been affirmed by the courts of appeals on respondents' petitions for review.

Orders entered after July 23, 1959, on the basis of Clayton Act violations occurring before that date have been enforced in accord with the revised procedures of the Finality Act. MacFadden Publications, Inc., 3 Trade Reg. Rep. (1965 Trade Cas.) ¶ 9701 (S.D.N.Y. 1965) (civil penalties of $32,500 assessed); see, *e.g.*, Hearst Corp., 3 Trade Reg. Rep. (1962 Trade Cas.) ¶ 9701 (S.D.N.Y. 1962) (civil penalties of $40,000 assessed). In all of these cases the complaints were issued in February 1959, with consent cease-and-desist orders entered in 1960. See also United States v. Time, Inc., 1962 Trade Cas. ¶ 70415 (S.D.N.Y. 1962), permitting the government to take a deposition in a civil penalty action alleging violation of an order entered in 1960 upon a complaint issued in February 1959. The action was ultimately settled by payment of $30,030 in penalties. Time, Inc., Dkt. 7384 (S.D.N.Y. 1964).

11. For convenience, orders entered prior to July 23, 1959, will be referred to herein as "pre-1959 orders."

12. Federal Trade Commission Act § 5, 38 Stat. 717 (1914); Clayton Act § 11, 38 Stat. 730 (1914).

or neglects to obey such order," the Commission could apply to a United States circuit court of appeals "for the enforcement of its order." A violation of the court's order could then be treated as contempt. Significantly, the provisions relating to enforcement of orders issued under sections 2, 3, 7, and 8 of the Clayton Act were contained only in section 11 of that act. Conversely, the enforcement provisions in section 5 of the FTC Act related exclusively to orders entered for violations of that section. This division of procedural provisions between two different statutes, while not wholly illogical at the time of enactment,[13] is in part responsible for the issue in *Jantzen*.

The enforcement machinery established in section 5 of the FTC Act was changed by the Wheeler-Lea Act of 1938, which substituted a revised section 5 for the existing provisions.[14] The Wheeler-Lea Act provided that cease-and-desist orders entered under section 5 would become final upon expiration of the sixty days allowed for filing a petition for review, or at defined times thereafter if such a petition were filed, and that persons violating such a final order would be subject to a civil penalty suit in a federal district court. The existing provisions authorizing the Commission to seek judicial enforcement orders and giving the courts of appeals power to entertain enforcement petitions were not retained. Wheeler-Lea contained no savings clause. It did, however, expressly provide that as to outstanding orders, the sixty-day period for seeking review of the Commission's order would commence on the act's effective date, thereby subjecting such orders to the revised enforcement procedures.[15]

From 1938 until the enactment of the Finality Act in 1959, FTC Act orders were enforced pursuant to the Wheeler-Lea civil penalty procedures while Clayton Act orders remained subject to the old procedure. During this period the Commission repeatedly sought legislation making the Wheeler-Lea procedures applicable to Clayton Act orders.[16] A number of bills to this effect were introduced,[17] but the Commission was not successful until 1959.

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13. The provisions of the FTC Act were enforceable solely by the FTC; the Clayton Act, however, conferred authority to enforce compliance not only on the FTC but on the Interstate Commerce Commission and Federal Reserve Board in appropriate cases as well.

14. Act of March 21, 1938, § 3, 52 Stat. 111 (amended by 64 Stat. 1125 (1950), as amended, 15 U.S.C. § 45 (1964)).

15. Act of March 21, 1938, § 5(a), 52 Stat. 111: "In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this act, shall begin on the date of enactment of this Act."

16. 1958 FTC ANN. REP. 7; 1952 *id.* 3; 1951 *id.* 7-8; 1948 *id.* 12; 1947 *id.* 13; 1946 *id.* 12. See also Kelley, *Should the Law of Section 2 Be Revised?*, in N.Y. STATE BAR ASS'N ROBINSON-PATMAN ACT SYMPOSIUM 114, 118-19 (1948).

The Finality Act of 1959 in essence substitutes the enforcement provisions of Wheeler-Lea for those of the original Clayton Act. Like Wheeler-Lea, the Finality Act makes no reference to petitions for enforcement. However, there are two significant differences between these two revisory statutes. First, the 1959 legislation contains no provision making the sixty-day period for filing a petition for review, on the expiration of which the Commission order becomes final, applicable to pre-1959 orders.[18] Second, the Finality Act expressly provides that the revised procedures are inapplicable to "any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of Section 11" of the original Clayton Act, and that such proceedings are governed by the pre-existing procedure.[19] The third and fourth paragraphs provide for judicial proceedings on petitions for enforcement or for review.

Despite the absence from the Finality Act of any provision making its procedures applicable to pre-1959 orders, the Commission, just five days after the act's effective date, issued a press release stating that the act was applicable to all outstanding orders, and that respondents would have sixty days from the date of enactment in which to file petitions for review.[20] This release, of course, embodied the express provision of Wheeler-Lea which was *not* included in the 1959 legislation. This interpretation of the legislation was quickly challenged, with the result that in *Sperry Rand Corp. v. FTC*[21] the new procedures were held inapplicable to pre-1959 orders. Until *Jantzen*, however, it seemed to be generally assumed that such orders could be enforced through the "old" procedures.[22]

The Commission increased its campaign after the decision in FTC v. Ruberoid Co., 343 U.S. 470 (1952), which held that the courts of appeals could not enter an enforcement order on the Commission's cross petition when the case was before the court on a petition for review, in the absence of a showing that the order had been violated. The legislative reports accompanying S. 726 (the Finality Act) stress the hardship allegedly created by *Ruberoid*. H.R. REP. No. 580, 86th Cong., 1st Sess. 5 (1959); S. REP. No. 83, 86th Cong., 1st Sess. 2 (1959).

17. The histories and contents of these bills are discussed in detail in Simon, *The Retroactivity of Amended Section 11 of the Clayton Act*, in N.Y. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 85 (1960).

18. Such provisions were contained in a number of the bills which were introduced but not enacted. H.R. 10199, 85th Cong., 2d Sess. (1958); H.R. 8682, 85th Cong., 1st Sess. (1957); H.R. 6748, 84th Cong., 1st Sess. (1955); H.R. 3402, 81st Cong., 1st Sess. (1949).

19. Finality Act of 1959 § 2, 73 Stat. 243 (1959).

20. See Sperry Rand Corp. v. FTC, 288 F.2d 403, 404 (D.C. Cir. 1961).

21. *Ibid.*

22. See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 515 (1962). There is a dictum reflecting this same assumption in Sperry Rand Corp. v. FTC, 288 F.2d 403, 406 (D.C. Cir. 1961), where the FTC had contended that the Finality Act procedures should be applied to pre-1959 orders *because otherwise no enforcement machinery would be available for such orders* (a contention which was duly noted by the court in Jantzen, 356 F.2d at 257 n.4, where the Commission was arguing for the

II. Jantzen and Its Effect

Jantzen rests on three basic propositions. First, by substituting revised procedures which make no provision for judicial enforcement at the Commission's behest for the original procedures which did provide for such enforcement, the Finality Act repealed the provisions upon which the court's jurisdiction rested.[23] Second, the only savings clause in the act was expressly limited to pre-1959 orders with respect to which *judicial* proceedings had been initiated, either by a Commission enforcement petition or by a petition for review.[24] The very presence of this limited savings clause suggested that the "old" procedure was *not* intended to apply to pre-1959 orders. Third, the enforcement procedure which the Commission sought to retain was not a "penalty, liability, or forfeiture" within the meaning of the General Savings Statute.[25]

A. *Repeal and the General Savings Statute*

It is difficult to find fault with the court's interpretation of the Finality Act, irrespective of what one's intuition tells him Congress actually intended. Not only did Congress delete the provisions in question when it revised section 11, but it also put in an express, but very limited, savings clause which would be surplusage unless the

contrary position). See also Simon, *supra* note 17, at 91-92 where the author states:

> It has been suggested that since [the Finality Act] superseded old Clayton Section 11, if the new law is not applicable to old orders then there is no statute providing for enforcement of old orders. I do not believe, however, that anyone would seriously urge such contention. The short answer to the view is the general savings statute. . . .

Mr. Simon was counsel for Nash-Finch Co. in FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961).

23. The relevant enacting language of the Finality Act provides that "The third, fourth, fifth, sixth and seventh paragraphs of such section are amended to read as follows . . . ." The provisions dealing with petitions for enforcement were contained in the third paragraph of § 11, as originally enacted. 38 Stat. 734, 735 (1914). As a general rule, when amending legislation sets forth the amended section in its revised form, all portions of the original section not contained in the section as amended are considered repealed. For most purposes, such "repeal by amendment" is equivalent to an express repeal, although if it is clear that no repeal was intended none will be found. See 1 Sutherland, Statutory Construction 2017 (3d ed. Horack 1943); Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 Texas L. Rev. 285, 290 (1955).

24. See text accompanying note 19 *supra*.

25. 61 Stat. 635 (1947), 1 U.S.C. § 109 (1964). The statute provides in part: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." The savings statute was originally enacted in 1871, 16 Stat. 432. The legislative history of the original enactment is discussed in MacKenzie, *Hamm v. City of Rock Hill and the Federal Savings Statute*, 54 Geo. L.J. 173 (1965). On savings statutes generally, see Ruud, *supra* note 23.

existing procedural provisions were in fact repealed. The Commission's contention that the old procedures were repealed only to the extent that they were in conflict with the revisions, and that the old procedures therefore were applicable to pre-1959 orders because the revised provisions did not deal with such orders, rests on the fallacious assumption that the repeal, if any, was only by implication. Moreover, the Commission's theory ignores the presence of the limited savings clause.[26]

Initially, however, it might appear that *Jantzen* presents the kind of situation with respect to which the General Savings Statute was intended to apply. The issue, as the court in *Jantzen* saw it, was whether the effect of the repeal of the enforcement provisions of original section 11 of the Clayton Act was to "release or extinguish any penalty, forfeiture, or liability incurred under such statute."[27] Even resolution of this issue in the Commission's favor, however, would not be determinative, for the inclusion of the limited savings clause in the Finality Act could be interpreted as an express provision that the "old" procedure was to be retained only in the specific situations set forth in that clause.

The General Savings Statute has most frequently been applied to retain liabilities created by substantive statutes which were in effect when the liability-creating acts occurred but which were repealed before suit was brought.[28] *Jantzen* presents no such classic case. The Finality Act repealed neither any substantive provisions of the Clayton Act nor any statutory remedies for violations of those substantive provisions. Even after passage of the Finality Act, pre-enactment conduct violating the Clayton Act could be made the subject of a Federal Trade Commission proceeding, a civil suit brought by the Department of Justice, or a private treble damage action.[29]

26. The Commission, for example, relied upon Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), and United States v. Borden Co., 308 U.S. 188 (1939), both of which deal with the implied effect on one statute of the subsequent enactment of another.

27. 356 F.2d at 261.

28. The statute was initially directed toward elimination of so-called technical abatement in criminal cases, reversing the common-law rule that repeal of a criminal statute abates any prosecution under the statute. Hamm v. City of Rock Hill, 379 U.S. 306, 314 (1964). It has been extended to civil and administrative proceedings. See, *e.g.*, Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954) (administrative proceeding); De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953) (civil action on War Risk Insurance policy); Hertz v. Woodman, 218 U.S. 205 (1910) (civil tax action).

29. Both the Department of Justice and the FTC have statutory authority to enforce compliance with the substantive provisions of the Clayton Act. 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964); 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1964). While private treble damage actions under § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964), have long been common in connection with Robinson-Patman violations, there has been doubt about the validity of such actions for violations of §§ 3 (exclusive dealings) and 7 (acquisitions). It now seems quite clear

In this sense, the repeal of the judicial enforcement provisions did not remove any substantive liability for pre-1959 Clayton Act violations. Instead, the repeal affected persons whose violations had already been established and against whom orders had been entered. The Commission had *already* taken all the steps it was empowered to take in connection with those violations *before* the Finality Act became effective. Thus the repeal affected only the nature of the liability incurred by conduct *after* the date of repeal by persons whose conduct *before* repeal had already resulted in the entry of an order. In order to apply the General Savings Statute, the sanction for violations of the order which had not yet occurred must be regarded as a "liability" incurred *before* repeal.

Such an approach is not wholly unreasonable. In a broad sense, the "liability" resulting from any given conduct encompasses all changes in legal relationships which result. A pre-1959 Clayton Act violation subjected the violator to the entry of a cease-and-desist order, which, if in turn violated, resulted in a petition for judicial enforcement. Thus, as part of the change in relationships incurred by the pre-repeal violation, the judicial enforcement procedure could be regarded as at least part of the "liability incurred." However, it is unlikely that the General Savings Statute could be so broadly interpreted.

Irrespective of any jurisprudential interpretation of "liability" that may seem appropriate, the fact remains that the immediate conduct bringing enforcement procedures into operation is conduct occurring *after* repeal. However, the statute has generally been applied only where the immediate liability-producing conduct has occurred *before* repeal.[30] Moreover, the dichotomy between "substantive rights" and "procedural" and "remedial" matters, which is still common in the discussion of so many legal issues, has become ingrained in the construction of the General Savings Statute. The early decisions indicating that the statute had no relevance to the repeal of procedural and remedial provisions[31] have been modified to some

that treble damage actions may be brought for violations of § 3. See Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671, 688 (1966). The situation concerning § 7 remains in doubt. *Compare* Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D.C. Hawaii 1964), *and* Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510 (E.D. Mo. 1965), *with* Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y 1965). See Note, 64 COLUM. L. REV. 597 (1964); Note, 51 VA. L. REV. 1379 (1965).

30. See United States v. Fortier, 342 U.S. 160 (1951); Deal v. FHA, 260 F.2d 793 (8th Cir. 1958); Sagastivelza v. Puerto Rico Housing Authority, 195 F.2d 289 (1st Cir. 1952). This issue might not be presented in the unlikely event the Commission seeks enforcement predicated on a violation of its order which occurred before the enactment of the Finality Act.

31. Hallowell v. Commons, 239 U.S. 506 (1916); Hertz v. Woodman, 218 U.S. 205

extent by recognition of both the inseparability of such provisions from "substantive rights," and the purely conclusory nature of these labels.[32] Nevertheless, enough of the reasoning underlying these early decisions remains to suggest that where the repealed statute relates solely to a procedural or remedial aspect of a basic substantive liability incurred as a result of pre-repeal conduct, and the statute creating the substantive liability has not in itself been repealed, the General Savings Statute will be held inapplicable. Thus the Supreme Court, relying on the simple statement that the statute "has been regarded as not applicable to matters of remedy and procedure," has indicated that statutes of limitations which are repealed are not "saved" for application to cases where the conduct giving rise to the cause of action occurred before repeal.[33] Even where the Court has made inroads on the procedural-substantive distinction, it has carefully indicated that the General Savings Statute is not applicable to "the repeal of statutes solely jurisdictional in scope," and that when "the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved."[34] It was into this class of statutes that the court in *Jantzen* placed the Finality Act.

Even if the language of the Savings Statute could be extended to cover the procedures repealed by the Finality Act, however, the implications of the express, but limited, savings clause contained in the act itself must be dealt with. If Congress has expressly or by neces-

(1910); Great Northern Ry. Co. v. United States, 208 U.S. 452 (1908). The court in *Jantzen* relied on United States v. Obermeier, 186 F.2d 243 (2d Cir. 1950), *cert. denied*, 340 U.S. 951 (1951). In *Obermeier*, the court held that the General Savings Statute did not save a five-year statute of limitations which had been repealed and replaced by a three-year statute. The substantive statute was not repealed. The defendant had been indicted more than three but less than five years after the commission of the offense. The court recognized that the distinction between "right" and "remedy" was not always meaningful, but rested its decision on the fact that statutes of limitation were traditionally regarded as going only to "remedy."

32. De La Rama S.S. Co. v. United States, 344 U.S. 386, 388-90 (1953). Plaintiff filed a libel in admiralty in 1944 to recover on a War Risk Insurance Policy. The War Risk Insurance Act was repealed in 1947. When the case reached trial in 1950 the Government conceded that its liability on the policy continued, but contended that because of the repeal of the act, which conferred jurisdiction on admiralty courts, the suit had to be brought in the Court of Claims. The court of appeals accepted this argument, relying in part on United States v. Obermeier, 198 F.2d 182 (2d Cir. 1952). The Supreme Court reversed, pointing out that the saving of the substantive liability meant that the statute itself, including its procedural incidents, was saved. It emphasized that where the repealed statute created both rights and means of enforcement, such procedural provisions must be regarded as having "a special relation to the accrued right." 344 U.S. at 390.

33. Bridges v. United States, 346 U.S. 209, 227 n.25 (1953), approving United States v. Obermeier, 198 F.2d 182 (2d Cir. 1952).

34. De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953); *cf.* Bruner v. United States, 343 U.S. 112 (1952); Hallowell v. Commons, 239 U.S. 506 (1916). See also Schneer's Atlanta v. United States, 229 F.2d 612 (5th Cir. 1956), *rev'd on other grounds*, 352 U.S. 978 (1957).

sary implication indicated that previously incurred "liabilities" are to be extinguished, the Savings Statute does not override that intent.[35] In the Finality Act, Congress did provide that the "old" procedures should be retained where judicial proceedings involving such procedures had been initiated prior to the act's effective date. This provision of course suggests that Congress did not intend that the "old" procedures should apply in any other instance. While this type of argument has generally not been successful,[36] it is more persuasive in this instance, since the statute is narrow, since the repeal of these specific existing provisions and the substitution of new provisions in their stead was Congress' sole concern, and since the issue of retroactivity and preservation of existing procedures was clearly presented by virtue of the language of the Wheeler-Lea Act, which provided a model for the Finality Act. Thus, it seems unlikely that the Supreme Court will overturn the position taken in *Jantzen*, or that other courts of appeals can be induced to reject it. Moreover, preservation of the cumbersome and ineffective enforcement procedures originally contained in section 11 is surely not what the Commission wants, and would not be worth the effort involved unless no other resolution of the *Jantzen* dilemma can be found.

B. *Sperry Rand and Retroactivity*

There is another judicial solution of the problem which could be sought and which the Commission would undoubtedly prefer. If *Sperry Rand* and its progeny, holding that the procedures set out in the Finality Act cannot be applied to pre-1959 orders, could be overturned, the Commission would have the best of all worlds. But *Sperry Rand* seems virtually impregnable. The Supreme Court itself has stated that the "procedures enacted by the 1959 amendments . . . do not apply" to a 1957 order, relying on *Sperry Rand*.[37] Moreover, even if there were any chance of overturning *Sperry Rand*, it would take a good deal of time and effort properly to present the issue to the Supreme Court—time and effort which might better be spent in seeking congressional action.[38]

35. The statute provides that pre-existing rights shall not be extinguished unless the repealing statute shall "so expressly provide." See note 25 *supra*. The Supreme Court has pointed out, however, that the Savings Statute is simply legislation which cannot override the subsequent intention of Congress, so that if Congress' intent to extinguish such rights is clear, even if by implication, that intention is controlling. Great Northern Ry. Co. v. United States, 208 U.S. 452 (1908).

36. See, *e.g.*, United States v. Clayton, 198 F. Supp. 18 (W.D. La. 1961), and authorities there cited. *But cf.* Hertz v. Woodman, 218 U.S. 205 (1910). See generally Ruud, *supra* note 23.

37. FTC v. Henry Broch & Co., 368 U.S. 360, 365 n.5 (1962).

38. The issue could not properly be presented by the Commission on review of

The issue in *Sperry Rand* has been described as one of retroactivity.[39] In one sense this is accurate, for application of the Finality Act procedures to orders outstanding at its enactment would change one element in the chain of consequences initiated by pre-enactment conduct. Nevertheless, since the ultimate question is one of sanctions for conduct *after* the enactment date which violates the order, the issue is not one of retroactivity in the usual sense. The court in *Sperry Rand* was careful to avoid such a description of the issue, stating that the only question was whether Congress intended that the new procedures should apply to outstanding orders.[40]

However the issue is stated, its resolution seems clear. Congress patterned the Finality Act almost word for word after Wheeler-Lea, yet it omitted from the Finality Act the provision in Wheeler-Lea making outstanding orders subject to the new procedures. Similarly omitted was any provision for judicial review of outstanding orders, an omission raising constitutional issues if the Finality Act, as written, is to be applied to such orders.[41] Moreover, as pointed out in *Sperry Rand,* the new procedures apply only to "final" orders, and no provision is made for the "finality" of outstanding orders.

It therefore appears that resolution of the *Jantzen-Sperry Rand* dilemma is not likely to be forthcoming from the courts. The criticism of this result, however, must be directed at the Commission and at Congress. The Commission tried for a number of years to secure legislation establishing the procedures ultimately set forth in the Finality Act. During that entire period both the Commission and Congress had the Wheeler-Lea Act before them. Several of the bills introduced did deal, as had Wheeler-Lea, with the application of the revised procedures to outstanding orders. Yet as finally enacted, the statute was silent on this question. No explanation of this result may be found in the congressional reports, hearings, or debates.[42] One commentator has suggested that the failure to indicate

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Jantzen, since such an argument would of course result in a ruling for Jantzen. Moreover, in light of the constitutional questions raised by the application of the Finality Act to pre-1959 orders it is unlikely that the Court would consider the issue in this posture.

39. See Simon, *supra* note 17, wherein the arguments against application of the Finality Act to pre-1959 orders are set forth in detail.

40. Sperry Rand Co. v. FTC, 288 F.2d 403, 405 n.6 (D.C. Cir. 1961); see FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958), discussed *infra* note 96.

41. See text accompanying notes 93-94 *infra.*

42. S. 721, 85th Cong., 2d Sess. (1958), virtually identical to the bill finally enacted, passed the Senate but died in the House. See *Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958); S. REP. No. 1808, 85th Cong., 2d Sess. (1958). In connection with S. 726, 86th Cong., 1st Sess. (1959), the bill finally enacted, see *Hearings on Finality of Clayton Act Orders*

what procedures are to be applied to outstanding orders was "incredible inadvertence."[43] Indeed, such "inadvertence" seems so "incredible" that that explanation is itself hard to believe. It was viewed with skepticism by the court in *Jantzen*, which suggested that Congress had acted deliberately, believing that the best resolution of the matter was to require the Commission to initiate new proceedings and enter new orders, which in turn would be subject to the new procedures. Even if the explanation is simply inadvertence, the fact remains that Congress did not indicate which of several possible results it desired. For this reason, Congress must accept the responsibility, and to it the Commission should now turn, if any further action is deemed necessary.

C. *Effect on Enforcement and Compliance*

The question remains, however, whether *Jantzen* has seriously prejudiced Commission enforcement and the effectiveness of pre-1959 orders. Prior to *Jantzen*, the Commission apparently believed that enforcement of such orders through pre-1959 procedures was an adequate, although obviously not ideal, means of assuring compliance; it did not seek judicial or legislative reversal of *Sperry Rand*. There may of course still be reason to do so. However, if as a practical matter the Commission is in no different position after *Jantzen* than it would have been in had the court resolved the issue in its favor and held that the pre-1959 procedures were available, it is obvious that it is the ineffectiveness of those procedures, and not their repeal, which is the real concern.

The court in *Jantzen* indicated that the Commission's burden in seeking to ensure compliance with the prohibitions of the Clayton Act was not changed in any substantial way by its decision, explaining that "the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method."[44] Indeed, it is on this same basis that the court suggested that Congress deliberately made no provision in the Finality Act for enforcement

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Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. (1959), and the House and Senate reports cited *supra* note 16.

43. Austern, *Five Thousand Dollars a Day*, in 21 A.B.A. SECTION ON ANTITRUST LAW PROCEEDINGS 285, 295 (1962).

44. 356 F.2d at 261. The court also stated that the Commission could enter a new cease-and-desist order "where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order." *Id.* at 260. The court did not consider the violation of an old order which was *not* a violation of the act.

of outstanding orders. This suggestion seems to indicate acceptance of the argument that:

> 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.[45]

One implication to be drawn from this explanation of Congress' conduct is that the repeal of the pre-1959 procedures, without any proviso making those procedures applicable to orders then outstanding, was necessary if the Commission is to enter new orders, based upon post-1959 violations of the same nature as those supporting the earlier orders, against the same offenders. Thus relieved of the burden of the old procedure, the Commission would be free to enter new orders, which are based upon new violations and which are enforceable under the new, more adequate procedures. On the basis of this theory, it appears that the repeal *strengthened* the Commission's enforcement powers.

The difficulty with such an analysis is that as a practical matter the Commission could have entered new orders predicated upon post-1959 Clayton Act violations against persons already subject to orders, whether the 1959 enforcement procedures were repealed or not. It has generally been recognized that the Commission may proceed on a complaint even though an earlier complaint based upon virtually identical facts during a different time period has been dismissed by the Commission or a reviewing court.[46] The simple fact that the complaints involve different periods of time has been thought sufficient justification to permit the Commission to proceed on the second complaint.[47] Similarly, while the few cases where a second Commission complaint and order were permitted even though an order covering similar conduct and based upon similar facts was al-

45. Rockefeller, *Compliance Procedures and Industrywide Projects*, 41 NOTRE DAME LAW. 398, 401 (1966). Mr. Rockefeller was counsel for Jantzen.

46. FTC v. Raladam Co., 316 U.S. 149, 150-51 (1942); Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); J. C. Martin Corp., TRADE REG. REP. (Transfer Binder, FTC Complaints, Orders, Stipulations 1963-1965) ¶ 16976 (1964), *aff'd*, 346 F.2d 147 (3d Cir. 1965); Manco Watch Strap Co., TRADE REG. REP. (Transfer Binder, FTC Complaints, Orders, Stipulations 1961-1963) ¶ 15781 (1962). See also Hastings Mfg. Co. v. FTC, 153 F.2d 653 (6th Cir. 1946). The issues are fully discussed in 2 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 18.01-.04 (1958).

47. Exposition Press, Inc. v. FTC, *supra* note 46; J. C. Martin Corp., *supra* note 46; Manco Watch Strap Co., *supra* note 46; see FTC v. Raladam Corp., *supra* note 46; 2 DAVIS, *op. cit. supra* note 46, § 18.04 at 570-71; *cf.* Commissioner v. Sunnen, 333 U.S. 591 (1948).

ready outstanding have emphasized factual differences in the allegations and matters at issue,[48] there is no reason to believe that anything more than a difference in time periods must be shown in order to justify the second proceeding. Moreover, a change in the law, such as a change in enforcement procedures, may provide an additional reason, in the public interest, for a second proceeding. Such a procedure cannot be regarded as unfair to respondents, for slight variations of fact or changes in industry structure occurring through the lapse of time may call for the entry of an order markedly different from the order entered at an earlier time on similar facts.[49] Thus the Commission could have entered new orders, based upon post-1959 violations of the Clayton Act, irrespective of the fact that orders were already outstanding. Congress by its repeal therefore did not enable the Commission to obtain a new order, enforceable under the new and better procedure; the Commission could have done that in any event. What Congress actually did was to remove an alternative which the Commission might have preferred to use in a given case, thereby compelling the Commission to initiate new proceedings upon proof of violation, even where the use of the old procedures might be more effective.

Contrary to the suggestion of the court in *Jantzen*, enforcement through the old procedures may be more effective than the initiation of new proceedings. Indeed, there may be occasions where an enforcement order could be obtained, but nevertheless a new cease-and-desist order could not be entered. The court's conclusions that in any case where the Commission could establish the violation neces-

48. FTC v. Motion Picture Adv. Co., 344 U.S. 392 (1953); Rock v. FTC, 117 F.2d 680 (7th Cir. 1941) (initial proceeding resulted in stipulation).

49. The FTC might normally accomplish this end through its statutory power to modify the order. Under § 11 as originally enacted, the FTC could modify an outstanding order until the transcript of its proceeding was filed in a court of appeals. Clayton Act § 11, 38 Stat. 730 (1914). Under the Finality Act amendments, the FTC has unlimited power to modify the order until the record is filed in a court of appeals, or until expiration of the time for filing a petition for review. The Finality Act also provides that an order which becomes final by expiration of the review period may be modified after notice and opportunity for hearing "whenever in the opinion of the Commission . . . conditions of fact or law have so changed as to require such action or if the public interest shall so require." 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964). See FTC Rules of Practice, 16 C.F.R. § 3.28 (Supp. 1965).

It might be urged that the FTC can resolve the *Jantzen* dilemma simply by slightly modifying the outstanding orders, thereby making them essentially "new" orders subject to the revised procedures without proof of any additional violation. It seems unlikely that such a subterfuge could succeed. Initially, it defies common sense to hold that there is no enforcement machinery applicable and then permit such a result. Moreover, the language of the Finality Act deals only with modification of cease-and-desist orders which themselves can become final pursuant to that act. Hence, even if the modification provisions of the orginal § 11 were not repealed by the Finality Act, which substantially reenacts them, there is no basis for attributing finality to the modified orders.

sary to obtain a judicial enforcement order under the old procedure it can now enter a new order, and that the Commission by entering a new order is in the same or a better position than it would have been by having secured a judicial enforcement order are unwarranted, as an examination of the pre-1959 procedures will demonstrate.

1. *Pre-1959 Enforcement Procedures*

The procedures under both section 11 of the Clayton Act prior to 1959 and section 5 of the Federal Trade Commission Act prior to 1938 were often described as permitting the violator "three bites at the apple."[50] First, a violation of the statute had to be established before a cease-and-desist order could be entered. Second, if the party subject to the order failed to obey the order, the Commission could apply to an appropriate court of appeals for a court order directing compliance with the Commission's order. Third, if the court's order were violated, the violator could be held in contempt, the first real sanction to which he could be subjected. Thus in order to hold a violator in contempt, three violations had to be shown: one to justify issuance of the Commission's order, one to secure judicial enforcement, and one to support the contempt charge. However, the "three bites at the apple" description is somewhat misleading, for it suggests that the violator must have violated the *statute* three separate times before any real penalty could be imposed. The procedure might, in a given case, have produced that result, but the procedure might better be described as one which permitted "one bite at each of three separate apples," for what are loosely described as the "violations"[51] which had to be shown at each stage were not violations of the same substantive provisions. In order to issue its cease-and-desist order, the Commission must establish a violation of the *statute*. To secure a judicial enforcement order under the old procedure, a violation of the *Commission's order* had to be established, and the violator could be held in contempt only for violation of the *court's order*. The distinction between the violation of the statute necessary to support the Commission's order and the violation of that order necessary to obtain judicial enforcement is of significance in assessing the impact of *Jantzen*.

As a procedural matter, presentation to a court of appeals of proof that the Commission's order had been violated created obvious difficulties, since these courts were not prepared or equipped to conduct hearings and take evidence on this preliminary issue. If the

50. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 515 (1962); Austern, *supra* note 43, at 289.

51. See Kelley, *supra* note 16, at 119.

Commission's allegation that the order had been violated was not contested, or if the violations were admitted, the court could proceed directly to consideration of the question whether the Commission's order should be enforced, modified and enforced, or set aside.[52] On the other hand, where the Commission's allegations of violation of the order were contested, that issue was referred by the court to a master or referee, or more commonly to the Commission itself as special master.[53] A hearing was then conducted, and findings were reported to the court. The Commission could not avoid the necessity for a hearing on the violation issue by filing supporting affidavits with its petition for enforcement.[54] However, if the compliance report filed by a respondent after entry of the order itself revealed a failure to comply with the order, a finding of violation could be made without reference to a master or the Commission on that basis alone.[55] Similarly, if facts establishing a violation could be stipulated, the reference was unnecessary.[56]

A divergence of opinion developed among the circuits as to how and when this reference, when necessary, was to be made. The Seventh Circuit took the position that proof of violation of the order was an essential prerequisite to its jurisdiction, and that it could not proceed to consider the order on its merits until that issue was resolved.[57] The Second and Fourth Circuits, however, considered the validity of the order first, even where the allegation of violation was denied; upon affirmance of the order, and only then, was the question of violation referred to the Commission.[58] No enforcement order was entered, however, until the Commission made its report to the court and the court was satisfied that the Commission's order had not been complied with. It was felt that unless the Commission's order was affirmed, there was nothing to be gained by conducting a hearing on the violation issue.

Despite these rulings, however, a number of courts prior to 1951 had entered enforcement orders after affirming Commission orders upon petitions for review by respondents, without any showing that

52. FTC v. Wallace, 75 F.2d 733, 738 (8th Cir. 1935).

53. *E.g.*, FTC v. Standard Educ. Soc'y, 14 F.2d 947 (7th Cir. 1926).

54. *E.g.*, FTC v. Balme, 23 F.2d 615, 621 (2d Cir.), *cert. denied*, 277 U.S. 598 (1928).

55. FTC v. Morrissey, 47 F.2d 101, 102 (7th Cir. 1931).

56. FTC v. Standard Educ. Soc'y, 14 F.2d 947 (7th Cir. 1926).

57. FTC v. Standard Educ. Soc'y, *supra* note 56; FTC v. Morrissey, 47 F.2d 101 (7th Cir. 1931).

58. FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945); FTC v. Baltimore Paint & Color Works, 41 F.2d 474 (4th Cir. 1930); FTC v. Balme, 23 F.2d 615 (2d Cir. 1928). The Ninth Circuit ultimately followed suit. FTC v. Whitney & Co., 192 F.2d 746 (9th Cir. 1951). See also *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959), holding respondent guilty of contempt.

the order had been violated. Thus in *Ruberoid Co. v. FTC*[59] the court considered the validity of the Commission's order on respondent's petition for review, rather than upon a Commission petition for enforcement. The court's mandate simply provided: "Order affirmed; enforcement granted."[60] When the inclusion of the enforcement order was attacked, the court agreed that its mandate was in error and held that whether the case arose at the petition of the Commission or respondent, no enforcement order could be granted.[61] This holding, subsequently affirmed by the Supreme Court,[62] again makes it clear that the Commission must establish a violation of the order if enforcement is to be obtained.

In recent years, the Commission initiated the practice of conducting investigational hearings on the question of violation before seeking judicial enforcement. The party subject to the order is given the right to appear, to be heard, and to present evidence. The Commission's findings then accompanied the petition for enforcement, enabling the court to resolve the violation question without a further hearing. This practice was approved in *FTC v. Standard Brands, Inc.*,[63] over the objection that under established procedures in the Second Circuit the order must be affirmed before such a hearing could be conducted by the Commission. The procedure approved in *Standard Brands* has become highly formalized and cumbersome, as two relatively recent examples will demonstrate.

In 1946 the Commission entered an order against the Washington Fish and Oyster Company under section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. In 1957 the Commission initiated an investigational hearing, pursuant to its Rules of Practice,[64] for the purpose of determining whether its order had been violated. After a hearing before a hearing examiner in which the alleged violator was given the right to introduce evidence, cross-examine witnesses, and examine documents, a report was prepared by the Commission. The report, together with the entire record of the investigation and the Commission's petition for enforcement, was filed with the court. This procedure was approved in *FTC v. Washington Fish & Oyster Co.*,[65] despite the contention that there

59. 189 F.2d 893 (2d Cir. 1951).
60. *Id.* at 897.
61. FTC v. Ruberoid Co., 191 F.2d 294 (2d Cir. 1951).
62. FTC v. Ruberoid Co., 343 U.S. 470, 479 (1952).
63. 189 F.2d 510 (2d Cir. 1951). The court pointed out that a respondent who believed the order invalid could avoid the expense of the investigational hearing by filing a petition for review. *Id.* at 512.
64. Now § 1.35 of the FTC Rules of Practice, 16 C.F.R. § 1.35 (Supp. 1965).
65. 271 F.2d 39 (9th Cir. 1959).

was no statutory authority for such an investigational hearing or for the filing of the record of the investigational proceeding.

The second illustration presents an even more striking example of the formalization of these procedures. In 1941 a complaint alleging violations of section 2(c) of the Clayton Act was issued by the Commission against the Nash-Finch Company. A cease-and-desist order was entered in 1947. In 1957, the Commission ordered that a public investigational hearing be conducted to determine whether its order had been violated, but the latter proceeding was terminated in September 1959 because of the Commission's belief that the procedures of the Finality Act were applicable to the order. Nash-Finch then instituted a declaratory judgment action, seeking a ruling that the new procedures were inapplicable. The district court ruled in favor of Nash-Finch, and its decision was affirmed on the basis of *Sperry Rand.*[66] In 1963 the Commission again ordered that a "public investigational hearing" be held, its order further stating that the hearing would be conducted in accord with the rules for "adjudicative hearings."[67] A hearing examiner was appointed, motions to quash subpoenas were heard, and Nash-Finch then moved for dismissal of the hearings on the ground that the Commission lacked the authority for such proceedings. In the alternative, Nash-Finch asked that the Commission's order be "clarified" to indicate whether the hearing was "investigational" or "adjudicative," and to state more clearly the governing procedural rules. After these motions were denied by the Commission, Nash-Finch instituted a second declaratory judgment action, asking that the Commission be enjoined from proceeding until it stated whether the hearing was "investigative" or "adjudicative," stated the purpose of the hearing and the duties of the hearing examiner, and promulgated rules for such proceedings. In *Nash-Finch Co. v. FTC*[68] the court refused to grant the injunction, and the proceedings before the Commission continued. The Commission now has been required to rule on several other procedural matters,[69] and the proceedings are currently pending. The decision in *Jantzen* may, of course, bring about their termination.

These two illustrations undoubtedly overemphasize the cumbersomeness of the pre-1959 enforcement procedures originally contained in section 11, for the procedural issues in which these two matters became enmeshed were in large part of the Commission's

66. FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961).
67. See FTC Rules of Practice §§ 3.15-.20, 16 C.F.R. §§ 3.15-.20 (Supp. 1965).
68. 233 F. Supp. 910 (D.C. Minn. 1964).
69. See 3 TRADE REG. REP. ¶ 17247 (1965) (memorandum of Commissioner MacIntyre with respect to Disqualification Motion); 3 TRADE REG. REP. ¶ 17416 (1966) (opinion of Commission denying motion for production of documents).

own making. The elaborate procedures followed in *Nash-Finch* seem neither necessary nor wise. Initially, the Commission may have imposed an undue burden on itself by conducting a formal hearing *before* filing its petition for enforcement. In the past the courts have been willing to proceed if the Commission's allegation of violation was not denied, or if a respondent's compliance reports showed that the order had not been fully complied with. In such cases, no hearing would be necessary. Some courts were even willing to consider the order on the merits first, avoiding a hearing on the violation issue if the order were set aside. Moreover, if the court did decide that a hearing was necessary, it could specify how the hearing was to be conducted and what issues were to be considered.

However, quite apart from the problem of when the Commission should conduct a hearing is the more basic question whether such a formal hearing is necessary at all. This is not a situation where the Administrative Procedure Act calls for an adjudicatory hearing, for that act expressly exempts "cases in which an agency is acting as an agent for a court."[70] The theory of the Commission's proceedings from the beginning has been that it is acting as the court's fact-finder. While due process requires that the respondent have an opportunity to be heard and present evidence, the Commission's application of its adjudicative proceeding rules in all their particulars seems unnecessary. The confusion could be eliminated in part by having the court refer the matter to the Commission, with an appropriate definition at that time of the applicable rules.[71]

2. *Enforcement Under "Old" Section 11 and Entry of New Order Compared*

Whether the procedural issues in *Washington Fish & Oyster* and *Nash-Finch* are attributable to the statute or the Commission's embellishments upon it, it is clear that the pre-1959 procedures were indeed inadequate. As one observer has put it, under those procedures the entry of a cease-and-desist order simply signalled the end

70. Administrative Procedure Act § 5, 60 Stat. 239, ch. 324, § 5 (1946), 5 U.S.C. § 1005 (1964).

71. Commissioner MacIntyre has severely criticized the use of adjudicatory procedures for this purpose. C. H. Robinson Co. & Nash Finch Co., 3 TRADE REG. REP. ¶ 17247 (1965). Professor Jaffe, dealing with these same procedures, has stated:

> The violation finding, however, would not seem to be a necessary part of the "administrative" stage in the sense of its determining the remedy. It is simply a condition of the entry of the enforcing decree. . . . It would seem, therefore, that in such a situation it is entirely up to the court how to supply the finding; and the procedure would be dictated as much by convenience as any other consideration.

Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 905 n.130 (1963).

of a "preliminary skirmish."[72] If the violator was willing to comply with the order, as many undoubtedly were, that "skirmish" might end the war. On the other hand, if non-compliance followed, and the violator was inclined to fight, it took many man-hours and the passage of a great deal of time before anything could be done about it.[73]

The procedures contained in the Finality Act stand in sharp contrast to those described above. Orders entered by the Commission automatically become final sixty days from the date on which the order is served, unless a petition for review is filed with an appropriate court of appeals within that time, in which case the order, if sustained on appeal, becomes final at the termination of the review proceedings. Violations of final orders subject the offender to a civil penalty suit brought in federal district court by the Department of Justice.[74] The maximum recovery in such a suit is five thousand dollars for each violation. In the case of "continuing failure or neglect to obey a final order," each day of the continuing violation is a separate offense. The Commission is no longer dependent upon the contempt sanction in the courts of appeals,[75] and the step which formerly existed between entry of the order and the availability of direct sanctions—the petition for enforcement—has been eliminated.

It is because of the elimination of this step that the court in *Jantzen* concluded that the Commission's position *before* the entry of any order under the Finality Act procedures was not markedly different from its position *after* the entry of an order under the old procedures. It therefore felt its own decision was no cause for alarm.

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72. Testimony of Commissioner Anderson in *Hearings on Finality of Clayton Act Orders Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 86th Cong., 1st Sess. 18 (1959).

73. See the description of the Commission's efforts to secure enforcement of its order entered in American Crayon Co., 32 F.T.C. 306 (1940), set forth in *Hearings*, *supra* note 72, at 37-38.

74. The Finality Act contains no requirement that the FTC certify the facts to the Attorney General before a civil penalty action is brought. Such a provision appears in the Wheeler-Lea Act, 52 Stat. 111, 116-17 (1938), 15 U.S.C. § 56 (1964). Under the latter provision, a penalty suit brought without such certification has been dismissed. United States v. St. Regis Paper Co., 355 F.2d 688 (2d Cir. 1966).

75. The contempt sanction may still become available in two ways. First, the Finality Act expressly provides that where a petition for review is filed and the order is affirmed, "the court shall issue its own order commanding obedience to the terms of such order." 73 Stat. 243, 244 (1959), 15 U.S.C. § 21(c) (1964). This provision, which expressly deals with the issue presented in *Ruberoid* (see text accompanying note 61 *supra*) at a time when that issue is no longer of major significance, provides the party seeking review with a "bonus" for doing so, since if he loses a second sanction may be used to assure compliance. Second, some district courts have entered their own injunctions against violations as part of the relief in civil penalty suits. See 3 TRADE REG. REP. ¶ 9711.40 (1965). A subsequent violation might then be treated as contempt.

However, there are several significant respects in which these positions do differ. The differences are great enough to indicate that with respect to at least some cases the possibility of entering a new order on the basis of new violations does not adequately compensate for the inability to enforce pre-1959 orders under the "old" procedure, ineffective as that procedure may have been. Only a survey of all the orders will indicate whether these differences are more theoretical than real.

First, the court of appeals under the "old" procedure could enter its enforcement order only after reviewing the Commission's proceedings and order on the merits. Thus, once the enforcement order had been entered, review at the court of appeals level had been accomplished. Under the new procedure, however, the entry of an order by the Commission is still subject to review by the court of appeals. Therefore, even if the Commission could enter a new order on the basis of the same violation which was necessary under the "old" procedure before an enforcement order could be secured, the result would be somewhat different. In both cases further violation would be penalized, but under the "old" procedure the Commission would in a sense be one step further up the ladder. It is of course possible under the "new" procedure that a penalty could be imposed without any judicial review of the order. Such a review was built into the "old" procedure.

Second, under the "old" procedure, as it was approved by the courts, the Commission might never need affirmatively to establish a violation in order to secure an enforcement order. The Commission's allegations of violations might not be denied. Similarly, compliance reports might themselves disclose violations. However, the Commission has so formalized its methods with respect to the "old" procedures that these enforcement short-cuts may not as a practical matter ever be used. Moreover, to the extent the Commission is itself able to enter orders without proof of violation, that is, to the extent consent orders can now be entered, the same sort of "short-cut" is available in entering new orders.

Third, when the Commission seeks an enforcement order, it already has a fully developed record with respect to the earlier violation. While this record does not of itself establish a violation of the order, much of what it contains with respect to the business and practices of the respondent and the structure of the industry generally can be taken as established and need not be proved again.

Fourth, and most important, there is a marked difference between a violation of the Clayton Act, which must be established if a new

order is to be issued, and the violation of an outstanding order, which must be shown in obtaining judicial enforcement. These two situations involve violations of different prohibitions and thus cannot be equated. A Commission order may in some instances be violated by conduct which is in itself lawful and would not therefore afford a basis for entering a new order. In addition, even where the conduct which violates the order is also contrary to the prohibitions of the Clayton Act, the violation of the order may be established without proof of all the facts needed to sustain a finding of a statutory violation in the first instance.

This brief examination of the effect of *Jantzen* is not an appropriate place for a detailed examination of the scope of Commission cease-and-desist orders,[76] and a few general observations should be sufficient to identify the nature of the differences between a statutory violation and a violation of an order initially based upon a violation of the same statutory provision. First, it is clear that in some circumstances the Commission may enter an order prohibiting conduct not itself unlawful in order to ensure that a statutory violation will not continue or be repeated.[77] Such an order may be violated without any further direct violation of the statute. Second, the prohibitions of the Commission order are not necessarily couched in statutory language; conduct covered by the statute may be prohibited without regard to whether other elements of the statutory offense are proved.

The bulk of the orders affected by *Jantzen* were entered under section 2(a), (c), (d), and (e) of the Clayton Act, as amended by the Robinson-Patman Act. The orders under section 2(a), prohibiting price discrimination, may be used for illustrative purposes. Many of the early section 2(a) orders were very specific in their prohibitions, forbidding only practices of the exact type originally found in violation of the statute. In contrast, other orders prohibited not only such practices, but also any conduct of a "substantially similar" nature.[78] During these early days of Robinson-Patman enforcement, the Commission took the position that the order could not prohibit pricing practices which were lawful under the statute. As one observer has put it, the Commission's view was that "the function of an order was to compel obedience *to the statute*."[79] However, this

76. See generally ROWE, *op. cit. supra* note 50, § 16.10; *id.*, Supp. 1964, § 16.10; Jaffe, *supra* note 71; Long, *The Administrative Process: Agonizing Reappraisal in the FTC*, 33 GEO. WASH. L. REV. 671 (1965); Comment, 29 U. CHI. L. REV. 706 (1962).

77. See Sandura Co. v. FTC, 339 F.2d 847, 860 (6th Cir. 1965); FTC v. National Lead Co., 352 U.S. 419, 430 (1957).

78. See orders referred to in Rowe, *op. cit. supra* note 50, at 505-06, nn. 137-38.

79. Shniderman, *Federal Trade Commission Orders Under the Robinson-Patman*

view changed with the 1948 decision of the Supreme Court in *FTC v. Morton Salt.*[80]

In 1950, the Commission began experimenting with the so-called *Ruberoid* order, which prohibited all net price differentials to competing purchasers, but which made no reference to the statutory defenses or to the fact that the statute prohibited only those price differentials which had, or were likely to have, adverse competitive effects.[81] The Commission's position was simply that the order prohibited all such differentials, irrespective of the statutory defenses. If there were subsequent changes of fact or law, the defenses remained unavailable under the order, but the order could be modified, on petition, by the Commission.[82]

The *Ruberoid* order was sustained by the Supreme Court, but with significant qualifications.[83] The Court pointed out that the seller could not be prohibited from "differentiating in price in a new competitive situation involving different circumstances" where its pricing was within the statutory defenses. The statutory defenses —cost justification and good faith meeting of competition—were held implicit in every section 2(a) order. These defenses would not, however, permit the seller "to relitigate issues already settled by prior proceedings before the Commission which resulted in an order which was affirmed in the courts." The same defense could not be interposed "upon substantially similar facts" as those presented or which could have been presented to the Commission. The question of what constitutes a "new competitive situation" has not yet been resolved. But the important consideration in assessing *Jantzen* is that where the practices allegedly violating the order are similar to the earlier practices upon which the order was initially based, the Commission might have been able to secure an enforcement or-

Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct, 65 HARV. L. REV. 750, 754 (1952).

80. 334 U.S. 37, 53 (1948). The Court held that the FTC could not place in a § 2(a) order a proviso that differentials of less than five cents per case without adverse competitive effects were not prohibited. See Shniderman, *supra* note 79, at 757-59 for the developments brought about by *Morton Salt.*

81. Section 2(a) of the Clayton Act prohibits price differentials only where the effect "may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

The *Ruberoid* order simply directed Ruberoid to cease and desist from discriminating in price "by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." 46 F.T.C. 379, 386 (1950).

82. Shniderman, *supra* note 79, at 760.

83. FTC v. Ruberoid Co., 343 U.S. 470 (1952). The quotations which follow in the text are taken from *id.* at 476.

der under the "old" procedure without any examination into the statutory defenses.[84]

Curiously absent from the Court's opinion in *Ruberoid* is any mention of the anti-competitive effect requirements of section 2(a). The order entered in *Ruberoid* prohibited all net price differentials without reference to their effect. While the Court discussed the implicit availability of the statutory defenses, it did not deal with the extent to which the anti-competitive effect requirement, a part of the Commission's prima facie case in establishing a statutory violation, is also to be read into Commission orders.

Most pre-1959 section 2(a) orders entered after *Ruberoid* are like the *Ruberoid* order in the sense that they prohibit discriminatory pricing practices without inquiry into their competitive effects.[85] To the extent that a violation of such an order may be established without proof of adverse competitive effects, the Commission could secure an enforcement order far more easily than it could establish the statutory violation necessary to support a new order. *Ruberoid* did not deal with this question, and it has not been authoritatively dealt with since *Ruberoid*. It is therefore possible that the Commission may be able to prove a violation of any section 2(a) order without proof of an adverse competitive effect, unless the terms of the order itself require such proof.[86] The rationale of *Ruberoid* is as applicable to the requirement of an adverse competitive effect as it is to the statutory defenses.[87] The seller should therefore be able to require proof of adverse competitive effect if he can establish that the acts in question occurred "in a new competitive situation involving different circumstances." Even under

84. The same problem may be presented in connection with orders entered under §§ 2(d) & (e), 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(d), (e) (1964). The cost justification defense in § 2(a) is not applicable to these sections. See Simplicity Pattern Co. v. FTC, 360 U.S. 55, 70-71 (1960). The meeting competition defense in § 2(b) is applicable, however. *Id.* at 67 [§ 2(e)]; Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). The typical orders entered under §§ 2(d) or (e) are silent with respect to the meeting competition defense. See, *e.g.*, Sunshine Biscuits, Inc., 54 F.T.C. 1514 (1958); McCormick & Co., Inc., 54 F.T.C. 335 (1957) (consent); Yardley of London, Inc., 52 F.T.C. 1086 (1956) (consent).

85. See, *e.g.*, Oxford Filing Supply Co., 54 F.T.C. 1816 (1958); General Foods Corp., 52 F.T.C. 798 (1956); Aeration Processes, Inc., 50 F.T.C. 994 (1954) (consent); Page Dairy Co., 50 F.T.C. 395 (1953). In some geographic price discrimination cases, the Commissioner has entered orders prohibiting sales to any purchaser where the seller's lower price undercuts the price at which the purchaser charged the lower price can buy from a different seller. Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); Borden Co., 54 F.T.C. 563 (1957) (consent). Whether a seller under such an order may defend in a violation action on the ground that his differentials had no adverse effect on competition is not clear.

86. If the order itself prohibits only those differentials having adverse competitive effects, those effects must be proved before the violation prerequisite to an enforcement order is established. FTC v. Standard Brands, Inc., 189 F.2d 510 (2d Cir. 1951).

87. See 1 DAVIS, *op. cit. supra* note 46, at 610; Jaffe, *supra* note 71, at 897.

such an approach, the Commission may have a significant advantage in seeking enforcement by proof of a violation of the order, rather than by trying to issue a new order. If the practices involved are substantially similar to those upon which the order is predicated, and there has been no marked change in competitive conditions, no adverse competitive effects need be shown. This situation would exist, for example, where a seller has continued to use a quantity discount schedule substantially similar to a schedule already found to be in violation of section 2(a). Moreover, the Commission secures a certain advantage from the fact that the *seller* must establish the necessary change in circumstances.[88]

Thus, the equation of a violation of a section 2(a) order with a violation of section 2(a) itself is something of an oversimplification. The same conclusion may be drawn with respect to orders entered under other sections of the Clayton Act, where the order prohibits conduct in terms omitting one or more elements of the statutory offense, or where conduct not in itself found to be in violation of the act is nevertheless prohibited in order to prevent recurrence of the initial violation.

Whether the Commission can issue a new order, enforceable through the procedures contained in the Finality Act, with the same factual showing and as expeditiously as it could secure an enforcement order under the "old" procedure is therefore dependent on a number of variables, including the nature of the order, the similarity between the practices upon which the original order was based and the subsequent practices alleged to be in violation of the order, and the formalization of Commission procedures related to the "old" procedure. For example, if the nature of the order and the alleged violation are such that all the elements of the statutory offense must be proved, and if the Commission, prior to seeking enforcement, is to conduct a full hearing before a hearing examiner with all the rules for adjudicatory proceedings applicable, it might just as well issue a new complaint directed to the entry of a new order. In such a case, the Commission is in no worse position than it would have been had *Jantzen* been decided in its favor. Reversal of *Jantzen*, legislatively or judicially, with the "old" procedure again made ap-

88. This same question may arise in connection with orders entered under § 3 of the Clayton Act, which prohibits exclusive dealing arrangements only when they have an adverse effect on competition. 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964). Some pre-1959 orders entered under § 3 literally prohibit all such arrangements, whether they have such an effect or not. See Beltone Hearing Aid Co., 52 F.T.C. 830 (1956); Callaway Mills Co., 52 F.T.C. 564 (1955) (consent); Harley-Davidson Motor Co., 50 F.T.C. 1047 (1954); General Motors Corp., 50 F.T.C. 54 (1953); Champion Spark Plug Co., 50 F.T.C. 30 (1953).

plicable to pre-1959 orders, would accomplish little so far as this type of situation is concerned. However, there will be a number of circumstances where the differences between seeking enforcement and entering a new order will be significant, and where some improvement can be brought about simply by permitting the Commission to seek enforcement through the "old" procedure if it so desires.

III. Resolution of the Dilemma

Restoration of the old enforcement procedures for pre-1959 orders may permit more effective enforcement in some circumstances. Even where this is not the case, the very fact that entry of a new order *can* be equated with enforcement of an outstanding pre-1959 order graphically demonstrates the inadequacy of existing procedures.

Should further action be taken in connection with these pre-1959 orders? It seems apparent that before this question can be answered, the orders themselves must be surveyed, both in terms of their general import and the likelihood of violation in the absence of any direct enforcement procedure. Although the statutory provisions themselves are of obvious significance, the orders themselves may not be too important, since their objectives may already have been accomplished.[89] The practices of some of those subject to orders may no longer have any significant impact within their respective industries. In many instances the orders may be obeyed, at least in substance, even though no direct enforcement procedures are applicable, either because those involved are naturally obedient, have a well-developed compliance program, or are fearful of the initiation of new proceedings by the Commission, by the Department of Justice, or by private individuals seeking treble damages.[90] In short, such a

89. This is particularly true with respect to pre-1959 orders entered under § 7 of the act. 38 Stat. 731 (1914), as amended, 84 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). To the extent divestiture was ordered, it is likely to be fully accomplished or excused. While pre-1959 consent orders did on occasion ban future acquisitions and place other continuing restrictions on the respondent, these provisions in no case exceeded ten years. They will soon expire of their own terms. Automatic Canteen Co., 54 F.T.C. 1831 (1958); Vendo Co., 54 F.T.C. 253 (1957); International Paper Co., 53 F.T.C. 1192 (1957).

90. By FTC count, *Jantzen* involves more than four hundred orders, most of which were entered under the Robinson-Patman Act. In its consideration of the Finality Act, Congress was advised that between 1936, when Robinson-Patman was enacted, and 1959, the Commission had sought enforcement in but two Robinson-Patman cases. Testimony of Edgar E. Barton, in *Hearings on Finality of Clayton Act Orders*, *supra* note 72, at 89. To the cases there cited must be added at least *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959). In at least two unreported cases subsequent to the Finality Act, enforcement was granted without consideration of the *Jantzen* issue. See FTC v. Jantzen, 356 F.2d at 258. Several post-1959 Clayton Act orders have resulted in the assessment of civil penalties. In addition to the cases referred to in note 10 *supra*, see

survey may show that *Jantzen* simply precipitated a tempest in a teapot—a severe blow to Commission morale, but little more.

Assuming that the Commission concludes that machinery for the enforcement of these orders is needed, it has several alternatives available. It could seek reversal of the *Jantzen* ruling, either through the courts or from Congress, thereby making pre-1959 orders subject to enforcement through the "old," cumbersome procedures. Judicial reversal of the *Jantzen* ruling, whether in *Jantzen* or a similar case, seems unlikely,[91] but legislation accomplishing this end could be sought. As previously noted, revival of the old procedure might in some circumstances permit the Commission to proceed more effectively when a new proceeding must be initiated, but it is problematical whether these situations are of sufficient import to warrant seeking such legislation. Perhaps more important, the provision of *any* means of enforcement may assure voluntary compliance by those who might otherwise believe that the absence of enforcement machinery permits them to proceed as they wish, free of any continuing surveillance by the Compliance Division. If "psychological deterrence"[92] is all that is needed, reenactment of the pre-1959 procedures may well be sufficient. However, if the Commission must return to Congress, consideration should be given to legislation making the far more effective Finality Act procedures applicable to pre-1959 orders.

The application of Finality Act procedures to pre-1959 orders which were contested or issued on the basis of stipulated facts should present no major constitutional objections, so long as provision is made for judicial review before the order becomes final and enforce-

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Chung King Sales, Inc., FTC Docket No. 8093 (Aug. 24, 1960) (consent to cease and desist, Jan. 12, 1961) (settlement for $70,000).

These figures are not exhaustive, but are enough to suggest that formal enforcement procedures are little used. This is in large part due to the heavy use of informal compliance procedures, with pricing practices being voluntarily altered when alleged violations are called to the seller's attention. See Jaffe, *supra* note 71, at 901. But this may not be successful where *no* enforcement machinery is available. Nor is it possible to determine the extent to which the relatively slight use of formal enforcement machinery is attributable to shortage of FTC manpower and the very cumbersomeness of the pre-1959 machinery itself.

91. Reversal of *Jantzen* would eliminate two questions likely to be raised in connection with any new legislation, even legislation simply re-imposing the "old" procedure. First, once Congress has removed all means of enforcement, may it now constitutionally reimpose enforcement machinery? Second, may it make such procedures applicable to violations of the order between 1959 and the date when new legislation is enacted? But such legislation would undoubtedly be deemed curative and valid, even as applied to post-1959 conduct. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 703-06 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 238-42 (1960).

92. See the Wall Street Journal, Feb. 16, 1966, p. 28.

able. Such legislation, dealing with the effect of future violations, is not retroactive in the usual sense. The statute might be subject to attack, however, if it failed to provide an opportunity for judicial review before the order becomes final.[93] This problem can be resolved by use of the Wheeler-Lea formula, which provides that outstanding orders become final after the expiration of the sixty-day review period. The application of Wheeler-Lea to orders outstanding at the time of its enactment has been upheld against constitutional attack.[94]

The application of Finality Act procedures to pre-1959 consent orders presents a different question. In these cases, persons agreed to entry of an order, without admission that they had violated the Clayton Act, at a time when a violation of an order was not directly punishable but at worst might result in judicial enforcement. Whether or not a consent order of this type is classed as a "contract,"[95] it resembles a contract to the extent that it may have resulted from reliance on the existing state of the law. Moreover, there is a certain additional element of basic unfairness in permitting the Government to alter the consequences of an agreement to which it was a party. The courts have been most reluctant to permit the Government to alter the effect of its own agreements, except in cases where a strong public interest is involved.[96] Finally, irrespective of the merits of the constitutional question, such an alteration

93. Deprivation of the right of review, particularly when persons subject to post-1959 orders are given such a right, raises both due process and equal protection issues. These persons did have a right to review, but there was little need to exercise it because the validity of the order could be attacked if and when enforcement was sought. *Cf.* U. S. Fidelity Co. v. Struthers Wells Co., 209 U.S. 306 (1908), holding that a statute shortening an existing statute of limitations may be applied to causes of action already accrued if a reasonable time is provided for the commencement of such actions; Wilson v. Iseminger, 185 U.S. 55 (1902); Terry v. Anderson, 95 U.S. 628 (1877).

94. Piuma v. United States, 126 F.2d 601 (9th Cir.), *cert. denied*, 317 U.S. 637 (1942); see Ritholz v. March, 105 F.2d 937, 939 (D.C. Cir. 1939).

95. *Cf.* Hughes v. United States, 342 U.S. 353 (1952); Swift v. United States, 276 U.S. 311 (1928). See generally Note, 72 HARV. L. REV. 1314 (1959).

96. See Hochman, *supra* note 91, at 722-24; Slawson, *supra* note 91, at 243-44. *But cf.* FHA v. The Darlington, Inc., 358 U.S. 84 (1958). In *Darlington*, the plaintiff had secured FHA mortgage insurance in 1949, in connection with an apartment house project. The National Housing Act at that time contained no prohibition against the renting of property so financed to transients, and plaintiff made such rentals. In 1954 Congress enacted legislation stating that it had always been its intent to prohibit such rentals, and expressly forbidding them from that date on. Plaintiff sought a ruling that it was governed by the legislation as it existed at the time its financing was secured. As an alternative ground for rejection of plaintiff's contention, the Supreme Court held: (a) there was no due process issue because the new act applied only to future conduct and did not penalize past conduct, and (b) there was no substantial contractual right involved, since this was a regulated field and one doing business in such a field cannot object to such revisions of the regulatory scheme. See the extended discussion of the case in Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191 (1962).

of the consequences of a consent order seems unwise as a policy matter, both because of its basic unfairness and because it may impair the ultimate effectiveness of consent order and voluntary compliance procedures.

The solution to the consent order question may be to retain the "old" procedures for such orders, making the "new" procedure applicable only to orders entered on stipulation or after litigation.[97] Another possibility might be to provide a specified period during which the respondent is permitted to disclaim its consent, with the order becoming final and subject to the revised procedure if no disclaimer is filed. If a disclaimer is filed, the Commission would be given the option of proceeding on the original complaint, or electing to hold the respondent to its original order through the "old" enforcement procedures.

97. The Commission's present consent order procedure, in effect since 1954, permits entry of an order containing no admissions of guilt or findings of fact. The only admissions in the order relate to jurisdictional facts. 16 C.F.R. § 2.3 (Supp. 1965). See MacIntyre & Dixon, *The Federal Trade Commission After 50 Years*, 24 FED. B.J. 377, 420 (1964); Note, 62 COLUM. L. REV. 671, 689-91 (1962). Prior to 1951, varying procedures were used, calling in all cases for admissions or stipulation of facts or admissions of guilt. From 1951 through 1954, consent orders contained findings of fact which were neither admitted nor denied. See Sheehy, *Consent Settlement of Federal Trade Commission Complaints*, in UNIV. OF MICH. LAW SCHOOL SUMMER INSTITUTE ON INTERNATIONAL AND COMPARATIVE LAW, FEDERAL ANTITRUST LAWS 285 (1953).