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Two Little Words and FTC Goes Local

John A. Maher, Jr.*

I. Introduction

As 1975 started, the ponderously titled "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act" became law.[1] Accorded considerable acclaim, the enactment marked an end to long persevering agitation for more particularized warranty regulation.[2] Popular attention tended to obscure "improvements" suggested in the Act's title, *i.e.*, the Federal Trade Commission improvements. These "improvements" have the potency to involve practitioners who rarely, if ever before, were concerned with FTC jurisprudence. Practitioners in jurisdictions lacking comprehensive antitrust laws or consumer-fraud schemes,[3] or the will to enforce them, are well advised to consider the effect of the new act on their usual clientele. It may prove that a substantial portion of the bar will learn that FTC developments are too important to be left to antitrust and other practitioners concerned with the Commission's more specialized activities.

Central to the likely emergence of FTC as a regulator of local business activities is addition of the words "or affecting" to the Commission's present jurisdictional charter, section 5(a) of the Federal Trade Commission Act.[4] These two little words expand FTC's jurisdiction from activities "in commerce" to activities "in or affecting commerce," unleashing the Commission on a host of previously untuochable activities—all "unfair or deceptive acts or practices which, *although local in character*, affect interstate commerce."[5]

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1. Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2193 [hereinafter referred to as 1975 Act].
2. *See* 15 U.S.C.A. §§ 2301-12 (Supp. 1976).
3. *See* note 25 *infra.*
4. 15 U.S.C.A. § 45(a)(1) (Supp. 1976).
5. H.R. REP. No. 1107, 93d Cong., 2d Sess. (1974), *reported in* 4 U.S. CODE CONG. & AD. NEWS 7702, 7726 (1974) (emphasis added).

This article seeks to alert general practioners to a new source of trade regulation. Significance of the change in FTC jurisdiction will be explained. Then, the general nature of activities over which the Commission has exercised power will be discussed.

II. Jurisdictional Expansion of FTC

A. Definition of "In Commerce"—FTC's Old Jurisdiction

As enacted in 1914, section 5 of the Federal Trade Commission Act proscribed only "unfair methods of competition in commerce."[6] An early decision restricted FTC to controlling those activities that hindered competition.[7] Desiring to give FTC the power to protect consumers as well as competitors, Congress added the phrase "unfair or deceptive acts or practices" to section 5's ban on "unfair methods of competition."[8] Still, the focus on acts "in commerce" was retained.

Commerce is a word of art defined to include commerce with foreign nations, commerce in or otherwise involving the territories or the District of Columbia, and commerce between nations, territories, the District of Columbia, and the states, *i.e.*, interstate commerce.[9] As a consequence of statutory concentration on acts "in commerce," activities merely affecting interstate commerce were held to be beyond the delegation of power to FTC although within Congress' regulatory power.[10]

The Supreme Court prophesied that giving FTC power over activities affecting interstate commerce would "give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law . . . ."[11] While the Court did not decry this amplification of Commission power, it opined that such a sweeping change should emanate from Congress and not the Court:

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6. Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719.
7. FTC v. Gratz, 253 U.S. 421 (1920).
8. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111.
9. 15 U.S.C. § 44 (1970).
10. FTC v. Bunte Bros., 312 U.S. 349 (1941). Since 1941 the definition of "in commerce" for purposes of the FTC Act has been broadened. Thus, unfair practices by an intrastate retailer who resold goods received from an out-of-state resource were held to be "in commerce." American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962). An intrastate retailer was said to be "in commerce" when it received goods from a warehouse located within the retailer's state of operation because the warehouse received out-of-state deliveries. Holland Furnace Co. v. FTC, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 928 (1960). Recent Supreme Court decisions reaffirm the vitality of interstate commerce tests in the context of §§ 3 and 7 of the Clayton Act (15 U.S.C. §§ 14, 18 (1970)). United States v. American Bldg. Maint. Indus., 422 U.S. 271 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).
11. FTC v. Bunte Bros., 312 U.S. 349, 354 (1941).

> The problem . . . is very different from . . . the full scope of the constitutional power of Congress under the Commerce Clause . . . . This case presents the narrow question of what Congress did, not what it could do. And we merely hold that *to read 'unfair methods of competition in [interstate] commerce' as though it means 'unfair methods of competition in any way affecting interstate commerce', requires . . . much clearer manifestation than Congress has furnished.*[12]

More than three decades later, Congress manifested this intent in simple and direct fashion.

B. *"Affecting Commerce"—FTC's New Jurisdiction*

1. Changes by the 1975 Act.—Stripped to its essentials, title II of the 1975 Act does five principal things. First, as already noted, is expansion of the Commission's general jurisdiction from concern with unfair methods of competition and unfair or deceptive acts or practices "in commerce" to such transgressions "in *or affecting* commerce."[13] Its specialized jurisdiction over food, drug, and cosmetic advertising is similarly enlarged.[14] Second, powers to exact reports from, and otherwise investigate, *corporations* engaged in commerce have been enlarged to embrace any "*persons, partnerships*, or corporations, engaged in and whose business *affects* commerce," excepting only banks and Interstate Commerce Commission-regulated common carriers.[15] This has considerable pertinence in context of recent FTC stress on "line-of-business reporting." FTC powers to require documentary evidence and compel attendance of witnesses are similarly expanded.[16] Third, section 202 confirms Commission power to promulgate substantive trade regulation rules and defines certain

12. *Id.* at 355 (emphasis added).
13. 15 U.S.C.A. § 45(a)(1) (Supp. 1976).
14. *Id.* § 52(b).
15. *Id.* § 46(b). Commission investigatory powers are contained in §§ 6 and 9 of the FTC Act. 15 U.S.C. §§ 46, 49 (1970). Section 6 confers power on the FTC to require "reports" from persons affecting commerce. 15 U.S.C.A. § 46(b) (Supp. 1976). Prior to 1975, only "corporations engaged in commerce" were subject to this power; now, any "persons, partnerships or corporations . . . whose business affects commerce" are subject to it. *Id.* This power can be exercised to support § 5 proceedings, as well as for general surveys of economic activity. United States v. Morton Salt Co., 338 U.S. 632 (1950). Limits on the Commission's authority to conduct "mail-order investigations" lack precise definition:

> Even if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Id. at 652.
16. 15 U.S.C.A. § 49 (Supp. 1976).

procedural steps attendant upon their adoption.[17] Persons interested in a proposed rule are entitled to an oral hearing in which, if the Commission recognizes a dispute as to material fact, such persons may cross-examine witnesses and submit rebuttals.[18] Fourth, under section 205 the Commission may sue for a civil penalty up to $10,000 per day for each knowing violation of either a trade regulation rule or a cease-and-desist order.[19] Last, consumer redress for violations of these rules or orders is available through suits to be commenced at the discretion of FTC.[20]

Belief that the expanded jurisdiction of FTC is the most significant change under the 1975 Act does not belittle expanded investigatory power, meaningful civil penalties, or relative certainty as to power to promulgate legitimate trade regulations rules. But

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17. *Id.* § 57a(a)-(b). Trade regulation rules are not new. *See* 4 TRADE REG. REP. ¶¶ 38,011-43. Heretofore, their emphasis has been on merchandising methods, such as proper size labeling of sleeping bags, *id.* at ¶ 38,011, and table cloths, *id.* at ¶ 38,015. Such rules were challenged on the basis that the FTC Act contained neither authority nor standards for FTC to promulgate them. National Pet. Ref'rs Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). By expressly providing that the Commission has authority to make these rules, Congress moots this controversy. Whether there will be a resurgence of judicial demand for well-defined standards of delegation is unknown. Currently, the sole standard is the Commission's sense of unfairness to which the late Professor Cahn's *Sense of Injustice* may be as good an index as any. E. CAHN, THE SENSE OF INJUSTICE (1949).

Those who remember the N.R.A., studied it, or read the "Chicken Case," A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), can study the 1975 "improvements" to the FTC Act in the context of the FTC's evolving power to define what is unfair. Under the National Industrial Recovery Act the President was authorized to promulgate Codes of Fair Competition for trades, industries, or subdivisions thereof. Act of June 16, 1933, ch. 90, § 3, 48 Stat. 195. Violation of a Code was regarded as an unfair method of competition within the FTC Act and was punishable by a fine up to $500. Each day of the violation was deemed a separate offense. The Act failed to define "fair competition." Recognizing that the FTC Act had provided for a case-by-case determination of what constituted "unfair methods of competition," the Supreme Court nonetheless boggled at delegation of power to define *ab initio* what would constitute fair competition: "[T]he purpose is . . . to authorize *new and controlling prohibitions* through codes . . . which would embrace what the formulators would propose . . . as wise and beneficient measures for the government of trades and industries *in order to bring about their rehabilitation*, correction and development . . . ." A.L.A. Schecter Poultry Corp. v. United States, *supra* at 535 (emphasis added). Since the Act did not "prescribe rules of conduct," but merely authorized "codes to prescribe them," the "code-making authority" was held to be "an unconstitutional delegation of legislative power." *Id.* at 541-42.

It is difficult to perceive a substantial difference between the rulemaking power now explicit in § 18 of the FTC Act and the President's power under N.I.R.A. That rules issued under § 18 have the force of law is undoubted. Note that the penalty structure of § 5(m) of the FTC Act looks to violation of "any rule." 15 U.S.C.A. § 45(m)(1)(A) (Supp. 1976). Of course, the "Chicken Case" dealt with the propriety of convictions under the N.I.R.A., whereas the FTC Act does not contemplate penal proceedings. On the other hand, a civil penalty of $10,000 for each day of knowing violation is not inconsiderable. *Id.*

18. 15 U.S.C.A. § 57a(c) (Supp. 1976).
19. *Id.* § 45(m).
20. *Id.* § 57b.

it must be stressed that they exist to buttress the jurisdiction of FTC and, in terms of importance, must be regarded as subordinate to it.

Honesty compels admitting a certain skepticism about consumer redress litigation beyond meaningful consumer control. Those provisions have all the earmarks of becoming little more than a tool with which to coerce early submission of respondents. If this proves correct, their actual use will be infrequent and must prove an irritant to professional consumerists who inevitably will decry underutilization.

2. *The Meaning of "Affecting Commerce."*—Section 5(a) of the FTC Act now reads: "Unfair methods of competition in *or affecting* commerce, and unfair or deceptive acts or practices in *or affecting* commerce, are declared unlawful."[21] This is buttressed by section 5(b):

> Whenever the commission shall have reason to believe that any . . . person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in *or affecting* commerce, and if it shall appear to the commission that a proceeding by it . . . would be to the interest of the public, it shall issue and serve . . . a complaint stating its charges . . . . The person . . . so complained of shall have the right to appear . . . and show cause why an order should not be entered . . . requiring such person, . . . to cease and desist from the violation of the law so charged . . . .[22]

Congressional intent in extending FTC jurisdiction is clear. Remarking H.R. 7917, a precursor of the 1975 Act, the Interstate & Foreign Commerce Committee observed in June 1974,

> It is unrealistic to restrict the jurisdiction of the FTC under section 5 of the Act to only interstate transactions. Although almost all economic activity today has interstate effects, it is possible . . . for a persistent, inventive and determined law violator to cast his business in the form of a series of intrastate steps, with only incidental interstate transactions.[23]

The committee found that

> existing jurisdiction of the FTC . . . is much narrower than the scope of the 'commerce clause' of the Constitution. Consequently many unfair or deceptive acts or practices which affect commerce are now either beyond reach of the Commission or re-

21. *Id.* § 45(a)(1) (emphasis added).
22. *Id.* § 45(b) (emphasis added).
23. H.R. REP. No. 1107, *supra* note 5, at 7713.

quire an inordinate expenditure of time and effort to marshal evidence to satisfy purely jurisdictional technicalities. Many frauds occur in large cities where concentrations of the poor and the poorly educated make them easy targets for dishonest operators . . . largely beyond the Commission's reach.[24]

The committee recommended "placing within [FTC's] reach unfair or deceptive acts or practices which, *although local in character,* affect interstate commerce"[25] because granting this jurisdiction would reflect "both the structure of the modern American economy and the current Constitutional concept of the proper scope of the Federal Government's authority to regulate the economy."[26] Since the committee had noted the courts' recognition of "Congress' power to include authority over *ostensibly* intrastate transactions which *significantly* affect interstate commerce,"[27] it is virtually mandatory to infer that the "proper scope" usage was intended to convey a grant of maximum power under the commerce clause.[28] This effect has already been recognized by the Supreme Court, albeit by way of an aside.[29]

Fortunately, there is precedent that assists in grasping the "affecting commerce" concept. Since FTC deals with antitrust as well as consumer deception, the most useful precedents concern the reach of the Sherman Act.[30] The Sherman Act does not speak explicitly to methods or practices "affecting commerce," but to activities recognized by their effect on commerce, *i.e.*, activities that restrain it.[31] Nevertheless, it is well settled that the Sherman Act embraces all activities that affect interstate commerce.[32]

Under the Sherman Act a local newspaper's use of wire services and newsprint from out-of-state sources involved the newspaper in interstate commerce.[33] California beet-sugar refiners were prosecuted for an intrastate price-fixing conspiracy on the theory that sugar made from the beets would eventually pass into interstate

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24. *Id.* at 7726.

25. *Id.* (emphasis added). The committee added a caveat: "Where cases of consumer fraud of a local nature which affect commerce are being effectively dealt with by State or local government agencies, it is the Committee's intent that the . . . Commission should not intrude." *Id.*

26. *Id.* at 7713 (emphasis added).

27. *Id.* at 7712 (emphasis added).

28. U.S. CONST. art. I, § 8.

29. United States v. American Bldg. Maint. Indus., 422 U.S. 271, 277 n.6 (1975).

30. 15 U.S.C. §§ 1-7 (1970).

31. *Id.* §§ 1-2.

32. Burke v. Ford, 389 U.S. 320, 321 (1967); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232 (1948).

33. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

commerce.[34] The impact on commerce need not be as obvious as a product leaving the state or materials entering it. In *Burke v. Ford*[35] intrastate territorial division by liquor wholesalers was held to have "*inevitably* affected" interstate commerce;[36] without hearing argument, the Supreme Court devised a theory that higher prices and lower sales would follow successful market allocation, in which event procurements from out-of-state distillers would decline.[37] The true flavor of the requisite effect upon interstate commerce can be savored by reference to *United States v. Pennsylvania Refuse Removal Association*,[38] in which jurisdiction over Pennsylvania refuse collectors was retained because some Pennsylvania refuse was carted to New Jersey for disposition.

Cases such as *Burke v. Ford*[39] suggest that lower courts will not resist prophylactic stretches of the commerce power to reach species of conduct *already recognized as antisocial* to the extent such practices *can* affect interstate commerce to any appreciable degree. While the current Supreme Court can be expected to use restraint in defining "affecting commerce,"[40] it should be noted that Congress easily could have provided that the Commission's jurisdiction would cover matters "in or *significantly affecting* comerce" if a limitation other than constitutional was intended. The legislative history, however, indicates otherwise.[41]

References to Sherman Act jurisprudence are instructive but not necessarily exhaustive. Perhaps, looking to the future, reference to more specialized fields is useful. The basic prohibition of section 5 of the Securities Act of 1933 proscribes use of "any means or instruments of . . . communication *in* interstate commerce" to promote unregistered securities.[42] Section 10 of the Securities Exchange Act

34. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-34 (1948).
35. 389 U.S. 320 (1967).
36. *Id.* at 322.
37. *Id.*
38. 242 F. Supp. 794 (E.D. Pa. 1965).
39. *See* notes 35-37 and accompanying text *supra*.
40. An example of the Court's restraint is found in Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974). In considering whether to liberalize Clayton Act jurisdictional standards to bring them in conformance with the Sherman Act, the Court held that substantial effects on commerce cannot be presumed. "Plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods . . . ." *Id.* at 202.
41. *See* notes 23-27 and accompanying text *supra*.
42. 15 U.S.C. § 77e(a)(1) (1970) (emphasis added).

of 1934 proscribes uses "of any means or instrumentality *of* interstate commerce" for untoward purposes.[43] Interstate telephone calls will suffice to obtain jurisdiction.[44] To the best of the writer's knowledge, the Securities & Exchange Commission has not asserted that intrastate telephone calls are such a use. Yet, at the instance of private suitors, there has been a trend to regard intrastate calls, using facilities that are in fact interstate, as providing the jurisdictional nexus for complaints brought under federal securities laws.[45] Note that, as to interstate calls, there is no statutory requirement for either substantial use of interstate communications facilities or their use in a manner essential to the transaction under scrutiny.[46] So, too, it would seem with intrastate calls employing de facto interstate facilities. If such a broad jurisdictional nexus is applied in enforcing the securities acts, we cannot presume that courts will require that commerce be *significantly* or *substantially* affected to confer jurisdiction on FTC under the 1975 Act.

Renewed attention to the "public interest" requirement in section 5(b) of the FTC Act[47] may be respondents' route to compelling attention to the significance, in terms of societal values, of challenged practices. Section 5(b) states that the Commission may issue a complaint if it "appear[s] to the Commission that a proceeding . . . would be to the interest of the public."[48] This requirement has proved to be variously an annoyance[49] and an escape hatch[50] to the Commission. Its importance as an item of defense was downgraded as courts became less rigorous about a clear-cut showing of public interest. For example, addressing deceptive practices, the Second Circuit provided a minimizing formulation:

> [E]xistence of a public interest . . . may rest either on the deception suffered by the public . . . or the prejudice occasioned to competitors. . . . On either ground the public is entitled to be protected against unfair practices and its interest in

43. *Id.* § 78j (emphasis added).

44. Starck v. Dewane, 364 F. Supp. 466, 469 (N.D. Ill. 1973); Rochez Bros., Inc. v. Rhoades, 353 F. Supp. 795, 806 (W.D. Pa.), *vacated on other grounds*, 491 F.2d 402 (3d Cir. 1973).

45. Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967); Ingraffia v. Belle Meade Hosp., Inc., 319 F. Supp. 537 (E.D. La. 1970); Nemitz v. Cunny, 221 F. Supp. 571 (N.D. Ill. 1963). *But see* Rosen v. Albern Color Research, Inc., 218 F. Supp. 473 (E.D. Pa. 1963). Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974), should also be considered. In that case the Supreme Court resisted plaintiff's argument that paving work on a local (intrastate) portion of an interstate highway was sufficient involvement with an instrumentality of interstate commerce to warrant proceeding under the Clayton Act's "in commerce" standard.

46. *See* note 44 *supra.*

47. *See* note 22 and accompanying text *supra.*

48. 15 U.S.C. § 45(b) (1970).

49. FTC v. Klesner, 280 U.S. 19, 28 (1929).

50. *In re* Motorola, Inc., 64 F.T.C. 62 (1964); *In re* Atlantic Prods. Corp., 63 F.T.C. 2237 (1963).

> such protection is specific and substantial. . . . Nor is it necessary that the product misrepresented be inferior or harmful to the public. The deceptive misrepresentation suffices.[51]

Despite such invitation to FTC boot-strapping, respondents' counsel should continue to be alert to "public interest" implications in the event that the Commission, desirous in the dim and uncertain future of multitudinous pelts with which to impress front-line consumerists and/or appropriations subcommittees, should display arbitrariness in addressing practices supposedly affecting commerce. Will the courts refuse to entertain a challenge to proceedings evincing lack of "conscience and circumspection in prosecuting officers?"[52] Surely, if the Commission simultaneously addresses a peculiarly local activity and attempts to make prosecutorial breakthroughs on what is to be deemed "unfair," argument should be made that FTC has an affirmative obligation to substantiate that the proceeding is indeed "to the interest of the public."

3. *Practicalities of FTC's Assumption of its Expanded Jurisdiction.*—While there is a serious potential for imposition of changes on local trading patterns, it is impossible to estimate the rate at which such changes will be sought, let alone achieved. Powerful personages are reported to have needled FTC to something substantially greater than glacial change.[53] On the other hand, there is often a vast gap between obtaining jurisdiction and exercising it. Even assuming an institutional desire to maximize its new found jurisdiction (which the writer does not) the Commission has logistic restraints in common with every other agency.

Appropriations, obviously, are basic. It is at least unwise to assume that they will expand at a rate commensurate with newly assigned responsibilities. Even if they did, the Commission would have the burden of identifying, marshaling, and deploying human and material resources appropriate to the task. As of September 15,

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51. FTC v. Real Prods. Corp., 90 F.2d 617, 619 (2d Cir. 1937) (citations omitted).

52. Nash v. United States, 229 U.S. 373, 378 (1913).

53. It has been reported that

> [t]he Senate Commerce Committee has asked the . . . Commission to begin . . . semi-annual reports to the Committee on the agency's use of . . . new enforcement tools. . . . Chairman Warren G. Magnuson . . . and . . . Subcommittee Chairman Frank E. Moss . . . want . . . the FTC to report on . . . activities resulting from the 'affecting commerce' jurisdictional standard of the newly enacted 'FTC Improvements Act,' . . . FTC would be called for oversight hearings in early 1976.

699 BNA ANTITRUST & TRADE REG. REP. A-33 (Feb. 4, 1975).

1975, the commission had 1,546 employees of which only 420 were assigned to field offices. Its fiscal year 1975 appropriation was $38,983,000 and it was seeking $45,927,000 for the current fiscal year.[54] The writer believes, based on discussions with Commission personnel, that FTC employed 1,200 persons as of the end of fiscal year 1966.[55] Thus, during ten years in which it was severely criticized[56] and a reinvigoration proclaimed, Commission employees increased by only 350. Although a 28.83% increase, this accretion seems a drop in the jurisdictional bucket for an agency so in the public eye.[57]

Whether FTC will or should be better favored in light of its new responsibility is beyond the scope of this effort. One must assume that Commission staff will not be blind to local situations to which it may extend its de facto writ, with an eye not only to the public good, but also to the collection of trophies for display before appropriations subcommittees. Indeed, Commission personnel would be less than human if they failed to react to such pressures.[58]

III. FTC's Targets—Proscribed Activities

Having recognized that FTC now has jurisdiction over a considerable span of local activities, one must ask: "What sorts of activities?" Substantively section 5(a) of the FTC Act proscribes "unfair methods of competition" and "unfair or deceptive acts or practices."[59] For some time, it has been fashionable to consider "unfair or deceptive acts or practices" separately from "unfair methods of competition." There was logic, both historical and philosophical, in this, but as later discussion suggests, recent decisions make this questionable.[60]

"Unfair methods of competition" and "unfair or deceptive acts or practices" describe classes of conduct. Congress, however, "deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the

54. Letter from James A. Williams, Chief of the FTC Division of Budget & Finance, to John A. Maher, Jr., Sept. 15, 1975.

55. Address by John A. Maher, Jr., N.Y. State Bar Ass'n *You and Antitrust* Forum, Buffalo, N.Y., Nov. 5, 1966.

56. "Problems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency." ABA, REPORT OF THE COMMITTEE TO STUDY THE F.T.C. (Sept. 15, 1969).

57. In addition to the FTC Act, the Commission actively bears responsibility for the Fur Products Labeling Act, 15 U.S.C. § 69 (1970), the Textile Fibers Identification Act, *id.* § 70, and the Wood Products Labeling Act, *id.* § 68. Less consuming are its responsibilities under the Webb-Pomerene Act, *id.* §§ 61-65 and the Lanham Act, *id.* § 1064.

58. *See* note 53 *supra* for a source of such pressure.

59. 15 U.S.C. §§ 45(a)-(b) (1970).

60. *See* notes 140-43 and accompanying text *infra*.

multifarious means by which it is sought to effectuate such schemes."[61] Initially the Supreme Court limited "unfair methods of competition" to violations of existing law.[62] Later it was "recognized . . . that the Commission [had] broad powers to declare trade practices unfair."[63] Thus, one cannot mark out sharp and clear limits as to what, in an evolving FTC catalog of sins, may prove to be "unfair." While the language of the Act is almost unlimited in scope, the Commission has not yet made a habit of using section 5 "as a basis for bizarre doctrinal experimentation."[64] There have been charges, however, that undesirable overreaches have occurred.[65]

A. "Unfair Methods of Competition"

Proscription of "unfair methods of competition" includes restraints of trade addressed generally by the Sherman Act and particularly by the Clayton Act.[66] The Clayton Act explicitly provides a role for FTC; the Sherman Act does not. Nevertheless, it is now undoubted that price-fixing,[67] group boycotts,[68] and the array of Sherman Act sins unmentioned by the Clayton Act are "unfair methods of competition" within the ambit of section 5 of the FTC Act.

1. Evolving Definition: Antitrust by Analogy; Antitrust of Incipiency; Spirit of Antitrust.—Even when technical limitations explicit or implicit in antitrust statutes preclude their application to certain persons or transactions, the activities in question may be addressed by FTC under section 5(a). Thus, although the merger and acquisition strictures of section 7 of the Clayton Act focus on corporations,[69] the Commission has applied them to unincorporated associations.[70] Section 2(a) of the Clayton Act,[71] which embodies the principal thrust of the Robinson-Patman Act against price discrimination in sales, has been applied by analogy to discriminatory equipment rental.[72] Section 2(d) of Robinson-Patman prohibits sell-

61. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).
62. FTC v. Gratz, 253 U.S. 421, 427 (1920).
63. FTC v. Brown Shoe Co., Inc., 384 U.S. 316, 320-21 (1966).
64. Howery, *Utilization by the F.T.C. of Section 5 of the Federal Trade Commission Act As An Antitrust Law*, 5 ANTITRUST BULL. 161, 178 (1960).
65. *See, e.g.*, Handler, *Recent Antitrust Developments—1966*, 21 RECORD OF N.Y.C.B.A. 539, 544 (1966).
66. Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).
67. FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927).
68. Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).
69. 15 U.S.C. § 18 (1970).
70. Beatrice Foods Co., [1965-1966 Transfer Binder] TRADE REG. REP. ¶ 17,244 (FTC 1965).
71. 15 U.S.C. § 13(a) (1970).
72. LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

ers from affording certain merchandising supports to buyers, but does not prohibit buyers from soliciting or receiving such support;[73] section 5 of the FTC Act[74] has been successfully deployed against such buyers.[75] The catalog can be prolonged. Section 3 of the Clayton Act forbids exclusive dealing arrangements imposed by sellers or lessors on buyers or lessees.[76] It does not address similar arrangements imposed by principals upon agents or buyers on sellers; section 5 fills this void.[77]

Embracing such matters within "unfair methods of competition" may not shock the social conscience. But, taken individually or collectively, they present a real question as to how far FTC can go in applying what it conceives to be the spirit of the antitrust laws. Is unsuccessful solicitation of discriminatory pricing or disproportionate merchandising support prohibited by section 5 of the FTC Act, although unreached by Robinson-Patman? Since discriminatory equipment rentals fall under section 5,[78] can Congress' omission of the sale of services from Robinson-Patman be similarly "cured"? Can section 5 be used against the interlocking directorate of competing corporations that lack the $1,000,000 "capital, surplus and undivided profits" contemplated by section 8 of the Clayton Act?[79]

In an early case FTC specifically alleged that the Curtis Publishing Company had violated section 5 of the FTC Act and section 3 of the Clayton Act.[80] The company had entered into exclusive wholesaling contracts with numerous *agents* and required them not to distribute for other publishers. Concluding that the contracts had created an agency relationship and, thus, were technically not within section 3,[81] the Supreme Court said that there was no violation of section 5 since there was no showing that Curtis "*intended* to practice unfair methods, or unduly suppress competition, or to acquire monopoly."[82] Of significance is that the Court did not feel impelled

73. 15 U.S.C. § 13(d) (1970).
74. *Id.* § 45(a) (Supp. 1976).
75. American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). The significance of using the FTC Act to prohibit buyers from soliciting or receiving merchandising support is that Congress did prohibit knowing receipt of price discrimination, 15 U.S.C. § 13(f) (1970), and could easily have embraced discriminatory merchandising supports in the ban if it so chose.
76. 15 U.S.C. § 14 (1970).
77. FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 395 (1953).
78. LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).
79. 15 U.S.C. § 19 (1970).
80. FTC v. Curtis Publ. Co., 260 U.S. 568 (1923).
81. For there to be a violation of § 3, there must be a sale or lease. 15 U.S.C. § 14 (1970). In an agency contract there is no sale or lease, rather the owner consigns his product to the agent and retains title until it is sold. FTC v. Curtis Publ. Co., 260 U.S. 568, 581-82 (1923).
82. 260 U.S. at 581 (emphasis added).

to object to characterizing misuse of agency contracts as violative of section 5 if the aforesaid intent had been proven. Contemporaneously, in *FTC v. Beech-Nut Packing Co.*[83] the Supreme Court considered section 3 and section 5 counts separately although they complained of essentially the same thing. The message drawn from these cases is that even the "conservative" court of McReynolds & Company could accept section 5 as a vehicle for proscribing practices that would fall within section 3 of the Clayton Act but for technical deficiency.

The *Fashion Originators' Guild* decision,[84] often cited for the proposition that the Sherman Act proscribes group boycotts, was a section 5 case. Sustaining a Commission order to cease boycotting retailers who countenanced style piracy, the Supreme Court said, the "[C]ommission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. . . . [T]he Commission, upon adequate and unchallenged findings, correctly concluded that this practice constitutes an unfair method of competition."[85] In other words, the Court ruled that a group boycott, which violates the Sherman Act because it substantially lessens competition and tends to create a monopoly, is also an "unfair method of competition" that can be prohibited by FTC under section 5.

Not only may FTC attack practices that actually violate the Sherman and Clayton Acts, but it may also challenge practices that have the potential to violate them. This aspect of FTC's power may be termed *antitrust of incipiency*. The first *Raladam* case[86] explains that

> [t]he Clayton Act, so far as it deals with the subject, was intended to reach *in their incipiency* agreements embraced within the sphere of the Sherman Act. . . . The object of the Trade Commission Act was to stop *in their incipiency* those methods of competition which fall within the meaning of the word 'unfair'. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain'. . . . All three statutes seek to protect the public from abuses arising in the course of competitive interstate and foreign trade. *In a case arising under the Trade Commission*

83. 257 U.S. 441 (1922).
84. Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).
85. *Id.* at 464.
86. FTC v. Raladam Co., 283 U.S. 643 (1931).

Act, the fundamental questions are, whether the methods complained of are 'unfair' . . . .[87]

In *FTC v. Cement Institute*,[88] one of the principal books of the FTC Bible, the Commission attacked a multiple basing point pricing system *under section 5*, alleging it resulted in quotation of identical sale and price terms for cement at any given point in the United States, and *under section 2(a)* of the Clayton Act, alleging it resulted in systematic price discrimination among customers of each cement marketer-member of the institute. After rebuffing a jurisdictional attack grounded on a theory that only the Justice Department could prosecute violation of section 1 of the Sherman Act, the Supreme Court remarked that the Trade Commission was established "to hit at every trade practice, then existing *or thereafter contrived*, which restrains competition or might lead to such restraint if not stopped in *its incipient* stages."[89] Although the Commission had charged an actual, rather than an incipient price fixing conspiracy and proved actual agreement, Mr. Justice Black reiterated that a "major purpose" of the FTC Act was

> to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. . . .
>
> . . . [T]he basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so whether the findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing point system as practiced constitutes an 'unfair method of competition,' *because it either restrains free competition or is an incipient menace to it.*[90]

In 1953 FTC attacked the Motion Picture Advertising Service Company's arrangement with various theatre owners around the country for display of advertising films.[91] By contract with the company, a theatre owner undertook to limit his display of commercial advertising films to those furnished by the company. In the twenty-seven states in which it operated, the company allegedly had exclusive contracts with about forty percent of the theatres. Although a "standard contract" was for one year, many ran for terms up to five years. Four nonrelated organizations in the same business had exclusive arrangements with approximately seventy-five percent of these theatres showing such films. Finding that such exclusive contracts limited outlets for films of competitors and had forced some competitors out of business because of inability to obtain outlets, the

87. *Id.* at 647 (emphasis added).
88. 333 U.S. 683 (1948).
89. *Id.* at 693 (emphasis added).
90. *Id.* at 708-09 (emphasis added).
91. FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392 (1953).

Commission held that such contracts unduly restrict competition when they extend for periods in excess of one year. Saying that the vice of exclusive contracts was their tendency to restrain competition and develop a monopoly in violation of the Sherman Act, the Supreme Court reversed a fairly technical court of appeals decision that proceeded on the theory that the contracts in question were agency contracts and thereby governed by the *Curtis* rationale.[92] Regrettably, Justice Douglas confined himself to what has become a usual incantation: the Trade Commission Act was "designed to supplement and bolster the Sherman Act and the Clayton Act . . . *to stop in their incipiency* acts and practices which, when full blown, would violate those Acts, . . . as well as to condemn as 'unfair methods of competition' existing violations of them."[93] The Court observed that it was

> plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore 'an unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act.[94]

The Second Circuit has been in the vanguard of the evolving FTC jurisprudence. In 1962 it decided that section 5 would permit orders against buyers' inducing and receiving "disproportionate" promotional allowances from suppliers.[95] An advertising firm owned and operated an animated advertising sign in New York City's Times Square. Under an agreement with the advertising firm, Grand Union Grocery solicited fifteen of its suppliers to contract with the advertising firm. Each supplier paid $1,000 per month for one minute of each twenty minutes the animations operated. In return, Grand Union got the benefit of the nonsubscribed time and later arranged to get five percent of the fees paid by the initial advertisers

92. *See* notes 80-82 and accompanying text *supra.*

93. 344 U.S. at 394 (emphasis added).

94. *Id.* at 395. While his dissent did not differ as to the ambit of § 5(a), Justice Frankfurter strongly complained that the majority's analogy to the Sherman Act was inapplicable, since no conspiracy or concerted action to foreclose a market had been relied upon by the Commission. He maintained that the Commission had done no more than to express a legal conclusion that the questioned contracts constituted unfair methods of competition. He called upon the Commission not only to abstain from pronouncing conclusions "by way of fiat and without explication," but also to provide "some minimum demonstration to the courts that . . . [the] application is in the public interest" since "even if the Commission had afforded reasons why the law of unfair methods of competition should strike down exclusive contracts," it should provide "[a]t the least . . . adequate explanation of the reasons why public interest requires its intervention and . . . order." *Id.* at 401, 403-04.

95. Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

plus all rentals from selling the balance of the twenty minutes. None of the advertisers knew that Grand Union received these benefits as a result of their participation in the advertising. The Commission charged Grand Union with "unfair methods of competition" under section 5 of the FTC Act, alleging it had "knowingly [induced] . . . special payments and benefits from suppliers which were not made available on proportionately equal terms to [its] competitors."[96] Sections 2(d) and (e) of the Robinson-Patman Act[97] prohibit *sellers* from granting discriminations to purchasers under the guise of payments for advertising and promotional services. Neither section 2(c) nor 2(f), which are directed against buyers, deals with promotional benefits. Grand Union maintained that since Congress had not seen fit to include buyers within the prohibitions of section 2(d) and (e), the Commission lacked power under section 5 to fill this gap. The Second Circuit reasoned, however, that the omissions were "more 'inadvertant' than 'studious,' " holding

> *[t]he practices themselves, however, were declared contrary to the public interest and therefore unlawful.* Since, in the case of § 2(d) violations, there could be no unlawful preference made by a seller unless it was received by a buyer, it is clear that Congress did not intend to sanction buyers to continue to engage in the unlawful activity.[98]

The court dismissed those who might argue that Congress consciously omitted buyers from sections 2(d) and (e) as engaging in "metaphysical subtleties."[99] Noting that section 2(d) defines a per se offense, the court stated,

> There is no reason why this rule should not apply to the buyer as well as to the seller. Congress has made no such distinction; § 2(f), being the corollary of § 2(a), requires proof of injury to competition in cases brought against buyers while § 2(c) applies a *per se* rule to buyers as well as sellers. . . . Since § 5 is here utilized to reach an integral part of the violation of § 2(d), and the rationale of the proceedings is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the ques-

96. *Id.* at 94.
97. 15 U.S.C. §§ 13(d)-(e) (1970).
98. 300 F.2d at 97 (emphasis added).

> Certainly buyers were not left out because Congress favored them or wished to permit them to engage in activity proscribed to sellers. The Robinson-Patman Act was enacted . . . following an investigation of large chain-store buyers, to 'curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power'. . . . The Act outlaws several specific practices connected with the sale of commodities which had been utilized by large buyers to secure from their suppliers preferences not generally available . . . . Despite the evident purpose of the Act, and for reasons not apparent in the Congressional history, many of these practices were made specifically unlawful for only one of the participants in the underlying economic transaction.

Id. at 96-97.
99. *Id.* at 99.

> tion of the competitive effects to the buyer than it applies to the seller.[100]

Judge Moore's wonderful dissent contained these memorable words:

> Unable to charge (much less prove) a violation of 2(a), 2(d) or 2(f) and unable to avoid the inexorable mathematical law that three zeros still total zero, the Commission precipitately abandons the Clayton Act which had so generously contributed its language (but not its blessing) to the complaint and by *force majeure* seeks the protection of its natal act, alleging that Grand Union is guilty of 'unfair methods of competition, and unfair acts and practices in commerce, in violation of Section 5 . . . .' Having just cast off sections 2(d) and (f), the Commission quickly returns to them to turn (by some alchemic process) these two paragraphs, not violated . . . into a violation of section 5.[101]

Despite failure in the philosophic realm, alchemy appears to have triumphed over metaphysics.

In *American News Co. v. FTC*[102] the Second Circuit reaffirmed the reasoning of *Grand Union,* finding that a retail newstand operator had violated section 5 of the FTC Act by demanding rebates from publishers. The interesting twist in this case was that the retailer purchased its magazines from distributors. While receiving benefit from rebating publishers, technically the retailer was the distributors' customer and not the publishers'. Nevertheless, the court held that the retailer was a customer of the publishers for purposes of Section 5 analysis.[103] In both *Grand Union* and *American News* the Commission's order was directed against knowing inducement and receipt of disproportionate payments. Within the year, another circuit joined the camp.[104]

Dealing variously with applicability of section 5 to violation of the Sherman and Clayton Acts, incipient violation of them, and, finally, violation of their spirit, these decisions set the stage for *Brown Shoe II*[105] and *S&H.*[106]

2. *Antitrust of Incipiency Triumphant—Brown Shoe II.*—The essential facts of *Brown Shoe*[107] are simple. Some 659 dealers were involved in the "Brown Franchise Stores' Program." Of these, only

100. *Id.*
101. *Id.* at 102.
102. 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962).
103. *Id.* at 109.
104. Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962).
105. FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966).
106. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).
107. FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966).

259 entered written franchise agreements. According to this standardized agreement, Brown was obligated to provide various services, such as sales training, architectural plans, merchandising record systems, and group insurance at a discounted rate to participating dealers. In return, the dealers were to refrain from purchasing lines conflicting with Brown's. An FTC trial examiner found that franchised stores tended to purchase about seventy-five percent of their requirements from Brown, with the balance coming largely from noncompeting lines; that Brown "field men" checked up on franchised dealers; and that Brown would cancel those who persisted in deviating from the desired concentration. The dealers could withdraw from the franchise program.

The examiner characterized the program as an exclusive dealing arrangement that foreclosed Brown's competitors from selling to a substantial number of shoe retailers. Striking the examiner's characterization, the Commission substituted its own view that the program was "akin to the operation of tying clauses generally held as inherently anti-competitive."[108] The Commission held it unnecessary to examine the probable effect upon competition to find the program an unfair trade practice because the "*prospective* competitive impact . . . is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act . . . have been met."[109] Noting that Brown had 6,000 retailer customers including the 650-odd program participants, but lacked dominating power over either the "tying" services or the "tied" product, the Eighth Circuit reversed the Commission.[110] Since dominance was absent, the court of appeals could not find any comparability with *Northern Pacific*[111] or other classic "tying" decisions cited by the Commission.[112] The court quoted from *Northern Pacific*: "Of course where the seller has no control or dominance over the tying product . . . any restraint of trade attributable to such tying arrangement would obviously be insignificant at most."[113]

By a unanimous vote, however, the Supreme Court reversed the Eighth Circuit.[114] Without mentioning "tying" or citing the cases with which the Commission had justified its position, Mr. Justice Black nicely reduced the question to

> whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the nation, to pay a valuable consideration to hundreds of retail shoe purchasers in order to secure a contractual promise

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108. Brown Shoe Co., Inc. v. FTC, 339 F.2d 45, 50 (8th Cir. 1964).
109. *Id.* (emphasis added).
110. *Id.* at 53-54.
111. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).
112. 339 F.2d at 54-55.
113. *Id.* at 54.
114. 384 U.S. 316 (1966).

> . . . [to] . . . deal primarily with Brown and . . . not purchase conflicting lines of shoes . . . .[115]

He answered affirmatively: "[T]he Commission has power to find . . . such an anticompetitive practice unfair, subject of course to judicial review."[116] Presumably for our guidance, the Justice went on to say that the Commission has broad powers to condemn those

> trade practices which conflict with the basic policies of the Sherman and Clayton Acts *even though such practices may not actually violate these laws.* . . . [The Brown] program obviously conflicts with *the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market. Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof that its effect 'may be to substantially lessen competition or tend to create a monopoly'* which of course would have to be proved if the government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element must be made for . . . our cases hold that *the Commission has power under § 5 to arrest trade restraints in their incipiency* without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.[117]

The purpose of section 3 of the Clayton Act was to restrain specific practices that, otherwise unchecked, would tend to violate the Sherman Act.[118] Therefore, *Brown Shoe* leaves certain anomalies, both rhetorical and legal. First, if the Clayton Act's proscription against certain tying and exclusive dealing arrangements addressed incipient violations of the Sherman Act, we have the spectre of the FTC Act addressing incipient incipiencies.[119] Second, although condemnation of actual tying and exclusive dealing under section 3 of the Clayton Act requires a showing of reasonably probable adverse competitive effect,[120] proceedings against lesser but supposedly related practices under section 5 of the FTC Act do not.

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115. *Id.* at 320.
116. *Id.*
117. *Id.* at 321-22 (emphasis added).
118. FTC v. Raladam Co., 283 U.S. 643, 647-48 (1931).
119. Address by John A. Maher, Jr., N.Y. State Bar Ass'n *You and Antitrust* Forum, Buffalo, N.Y., Nov. 5, 1966. When the author first mentioned this concept in 1966, Robert Longman of the New York bar suggested that the next step, which he would be pleased to have known as the Longman Rule, would be to address practices in their incipiency that, if full blown, would violate § 5. Thus, there would be three levels of incipiency. He may have been prophetic. *See* notes 127-44 and accompanying text *infra*.
120. Standard Fashion Co. v. Magrame-Houston Co., 258 U.S. 346 (1922).

To better understand *Brown Shoe*, it is helpful to look back fifty-five years to the first Supreme Court decision dealing with section 5.[121] Fortuitously, it dealt with tying in that respondent Gratz, a manufacturer of bagging and ties used in baling cotton, refused to sell one without the other. Speaking for six of a seven-man majority, Mr. Justice McReynolds held that it was for the courts, not the Commission, to determine as a matter of law what the words "unfair method of competition" include. Further, he stated that

> they *are clearly inapplicable to practices never heretofore regarded as opposed to good morals* because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.[122]

So saying, he characterized the "tying" in question as "certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."[123]

In *Brown Shoe* Mr. Justice Black made what has become a standard reference to the strong dissent by Mr. Justice Brandeis in the *Gratz* decision, stating that "it is now recognized in line with the dissent of Mr. Justice Brandeis . . . that the Commission has broad powers to declare trade practices unfair."[124] It is worthwhile to examine the Brandeis dissent. FTC power was analogized to Interstate Commerce Commission power to prohibit "unjust and unreasonable charges" and "undue or unreasonable preference or advantage." Noting that the FTC Act addressed prevention of unfair methods, as opposed to mere acts of unfair competition, Justice Brandeis scored the majority for its failure to understand the congressional intent "to prevent any unfair method which may have been used by any concern in competition from becoming its general practice . . . . [since] only by stopping its use before it became a general practice . . . [could] . . . *the apprehended effect of an unfair method* in suppressing competition . . . be averted."[125] It is questionable whether Mr. Justice Black fairly cited Mr. Justice Brandeis because it appears that the Trade Commission has been largely relieved of showing "the apprehended effect" that it hopes to head off when addressing a method of doing business.

A 1919 Commission report said,

> Previous to . . . creation of the Commission, the courts had ruled upon various forms of unfair practices. Their decisions are designated as cases arising under the common law. But

121. FTC v. Gratz, 253 U.S. 421 (1920).
122. *Id.* at 427 (emphasis added).
123. *Id.* at 428.
124. 384 U.S. at 322.
125. 253 U.S. at 441-42 (emphasis added).

> upon the creation of the Commission, it was empowered to leave the shores defined by the common law and, taking the knowledge of these decisions with it, to embark on an uncharted sea, using common sense plus the common law for its compass.[126]

While *Gratz* overemphasized the common law and de-emphasized common sense, *Brown Shoe* represents quite another, but not reciprocal, extreme of the pendulum swing.

3. "Unfairness" Defined by "Public Values."—The pendulum swung still further after *Brown Shoe II.* The Supreme Court's *Sperry & Hutchinson (S&H)*[127] decision in 1972 established that in the realm of trade restraints, FTC's role is triggered by *"public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."*[128]

As one of its marketing techniques, S&H retained physical ownership of the trading stamps it sold retailers for their subsequent delivery to consumers as a premium for patronage. S&H's purpose was to minimize commercial trading in S&H stamps, lest such traffic reduce attractiveness of S&H stamps to customer-retailers. Frequent enlistment of courts' injunctive powers against unauthorized handling of S&H stamps, and threats of such action, lent credence to the position.[129]

An FTC examiner dismissed charges brought against S&H under section 5 of the FTC Act.[130] The Commission reversed, finding an "impairment of competition,"[131] and issued an order that, *inter alia,* barred interference with unauthorized stamp dealing, including suits to enjoin this traffic. Central to the Commission's opinion was a holding that S&H "prevents . . . competitive reaction[s] and thereby it has restrained trade. We believe this to be an *unfair method of competition and an unfair act and practice* in violation of Section 5 of the FTC Act."[132] The Fifth Circuit vacated the portions of the Commission's order enjoining prevention of unauthorized traffic in S&H stamps:

> Congress could not have intended to vest the Commission with such broad discretion as to allow it to label a restraint 'unfair' without applying some judicial guidelines. . . . To be the type

126. FTC ANN. REP. 45 (1919).
127. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).
128. *Id.* at 244.
129. *Id.* at 238.
130. Sperry & Hutchinson Co. v. FTC, 432 F.2d 146, 147 (5th Cir. 1970).
131. 405 U.S. at 247.
132. *Id.* (emphasis added).

of practice that . . . [is] . . . 'unfair' the act . . . must . . . [be]: (1) a per se violation of antitrust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; (3) *a violation of the spirit of these Acts as recognized by the Supreme Court* . . . .[133]

From this Judge Wisdom dissented, saying that the majority's view "blesses unfair anti-competitive practices against" trading stamp dealers, retailers who accept or trade S&H stamps without its authority, and consumers, thus failing "to give effect to the broad authority Congress granted to . . . FTC."[134]

The Commission's petition for certiorari asked for a ruling as to "[w]hether Section 5 of the Federal Trade Commission Act . . . is limited to conduct which violates the letter or spirit of the antitrust laws."[135] The Court answered in the negative:

> When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply.[136]

The Court concluded that FTC

> does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[137]

The Court ruled that FTC's power is not limited to prohibiting conduct that violates the letter or spirit of the antitrust laws, but that FTC may attack any *unfair* practice, using "public values" to define what is "unfair." Unfortunately, the Court failed to explain what it meant by "public values" unless explication is satisfied by pointing, via a footnote,[138] to the Commission's explicit predicates for a rule concerning cigarette advertising. Therein FTC enumerated bench marks for recognizing an unfair practice that neither violates the antitrust laws nor is deceptive:

> (1) [W]hether the practice, without necessarily having been previously considered unlawful, *offends public policy* as it has been established by statutes, the common law or otherwise—whether, in other words, it is within the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupu-

133. 432 F.2d at 150 (emphasis added).
134. *Id.* at 155.
135. 405 U.S. at 239.
136. *Id.* at 239-40.
137. *Id.* at 244.
138. *Id.* at 244-45 n.5.

> lous; (3) whether it *causes substantial injury to consumers* (or competitors or other businessmen).[139]

The FTC must consider

> whether the challenged practices, *though posing no threat to competition within the precepts of the antitrust laws,* are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.[140]

This standard notifies practitioners that there are "unfair methods of competition" that pose "no threat to competition." It seems to equate such "unfair methods" with "unfair practices." This conclusion is aided by the Court's seemingly approving reference to the Commission's penumbral bench marks. This gives rise to the doubt expressed earlier that there remains any necessary difference between "unfair methods of competition" and "unfair practices."[141]

Defining the nebulous "unfairness" standard is a difficult task. That which is within the "penumbra" of common-law, statutory *or some other established concept of unfairness* resists analysis. It would seem, at the least, to incorporate every statute that deals with unfairness. Perhaps meaning can be supplied by reference to the 1934 *Keppel* decision[142] upon which the 1972 Court heavily relied. Therein, it was suggested that conduct that receives "condemnation throughout the community" or is "of the sort which the common law and criminal statutes have long deemed contrary to public policy" is "unfair."[143]

In any event, the courts are now on notice that the Commission's case-to-case recognition of unfair practices is not to be lightly put aside. A saving grace is that remand was directed for the Commission to determine, *and explain,* whether there had been injury to competitors or consumers.[144] Arguably, this feature could become quite meaningful in that it strikes at agencies' ritualistic recital of holdings within their enabling statutes.

B. "Unfair or Deceptive Acts or Practices"

Looking to the pre-*S&H* role of "unfair or deceptive acts or practices," the Commission has a long track record of dealing with

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139. *Id.* (emphasis added).
140. *Id.* at 245 (emphasis added).
141. *See* note 60 and accompanying text *supra.*
142. FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1934).
143. *Id.* at 313.
144. 405 U.S. at 247-50.

questionable promotions aimed at consumers and competitors. Targets have included the following: trading on the gambling instinct;[145] false disparagement of a competitor's product;[146] inducing potential customers' breach of contracts with seller's competitor;[147] advertising claims in excess of product capacity;[148] and fictitious pricing.[149] Recently the Commission has taken the position that a marketer's failure to possess proof supporting a reasonable basis for affirmative product claims is itself an unfair practice.[150] Thus, false representations are not a *sine qua non* to consumer deception and such deception may arise from a failure to make adequate disclosures.[151]

Beneficiaries of FTC consumer protection vigilance include "the unthinking and credulous . . . as well as the more sophisticated and intelligent."[152] Focusing on consumer deception, a tendency or capacity to mislead will suffice for the requisite "unfairness"[153] and absence of intent to mislead is not a defense.[154]

Proceeding by analogy to statutes other than the FTC Act is not peculiar to FTC antitrust, but also surfaces in FTC's consumer protection role. Thus, when it enjoyed the lead role under the Flammable Fabrics Act,[155] FTC proceeded against a distributor of a lei composed of wood chips on the theory that distribution of the flammable product was unfair under section 5 of the FTC Act.[156]

In summary, FTC power over marketing practices is extraordinarily broad. Under the 1975 Act, FTC power is particularly relevant to jurisdictions lacking aggressive consumer protection schemes.[157]

145. Gellman v. FTC, 290 F.2d 666 (8th Cir. 1961) (punchboards); Wren Sales Co. v. FTC, 296 F.2d 456 (7th Cir. 1961) (lotteries); Deer v. FTC, 152 F.2d 65 (2d Cir. 1945) (bingo).

146. E.B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944).

147. Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940).

148. Western Radio Corp. v. FTC, 339 F.2d 937 (7th Cir.), *cert. denied*, 381 U.S. 938 (1965); Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964).

149. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Helbros Watch Co. v. FTC, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

150. *In re* Pfizer, Inc., 81 F.T.C. 23 (1972).

151. *See* Heller & Son, Inc. v. FTC, 191 F.2d 954 (7th Cir. 1951); Haskelite Mfg. Co. v. FTC, 127 F.2d 765 (7th Cir. 1942).

152. A.P.W. Paper Co. v. FTC, 149 F.2d 424, 426 (2d Cir. 1945), *aff'd*, 328 U.S. 193 (1946); *accord*, Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

153. Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944).

154. Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960); Koch v. FTC, 206 F.2d 311, 317 (6th Cir. 1953).

155. 15 U.S.C. §§ 1191-1204 (1970). When the Consumer Product Safety Commission was created, the FTC's functions under the Flammable Fabrics Act were transferred to it. Act of Oct. 27, 1972, Pub. L. No. 92-572, § 30, 86 Stat. 1231 (codified at 15 U.S.C.A. § 2079(b) (1974)).

156. Lamrite West, Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,000 (FTC 1969).

157. *See* note 25 *supra*.

IV. Conclusion

Confinement to a local practice will no longer excuse unawareness of FTC activity and trends. While the outer limits of FTC power are not discernible save by reference to what will ultimately shock courts, there is a substantial body of precedent on practices "in commerce" that have been deemed unfair. They will serve as a beginning index for assessing commercial conduct "affecting commerce" and must be considered.

The Commission is prolific about announcing triumphs and initiatives. Much "lunch-time law" is available from Commissioners' speeches, as well as those of staff members, which are available on request from FTC and at least alluded to in various commercial publications. Previously unmentioned are Commission-published guidelines on interpretation of the various statutes within its everyday sphere. These speeches and guidelines are invaluable, albeit not all-revealing, for gauging the direction of future enforcement. Counsel to local trade associations and substantial, intrastate enterprises will do well to watch the Federal Register carefully against the day that applicable trade regulation rules are proposed. This is particularly true if one entertains a bias toward or against "friendly competition."

Not every or even many FTC initiatives can be expected to raise issues significant enough to merit contest unto the Supreme Court. Much of what will be done will not be shocking. The stage is set, however, for arbitrary determinations that must be guarded against. On the other hand, counsel need not await FTC action to begin educating clients about the inadvisability of continuing previously untouched (if not untouchable) practices, such as uniform warranty policies. There is time for homework.