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## Section 5 of the Federal Trade Commission Act: A Source of Protection for Competitors and Consumers

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## SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT: A SOURCE OF PROTECTION FOR COMPETITORS AND CONSUMERS

The Federal Trade Commission was established in 1914 as a result of widespread belief that the judicial processes alone were not adequate to deal with the many complex and diverse problems of trade regulation which are presented by a burgeoning economy.<sup>1</sup> The Commission, pursuant to Section 5 of the Federal Trade Commission Act (F. T. C. A.), is authorized to challenge "unfair methods of competition . . . and unfair or deceptive practices in commerce. . . ."<sup>2</sup> Although the question of what constitutes unfair practices or methods of competition is left for judicial determination, considerable weight has been accorded the findings of the Commission.<sup>3</sup> Historically, however, there has been a substantial dispute as to which practices are cognizable as violations of the F. T. C. A. In analyzing the scope of the Commission's power, this comment will discuss two separate but interrelated types of activities. The first inquiry involves an assessment of the extent of the powers of the Federal Trade Commission to attack activities which are believed to constitute "unfair methods of competition." The second question relates to a determination of the scope of the authority possessed by the Commission to protect the consumer from undesirable business conduct irrespective of whether anti-competitive activity is found to be present.

In recent years, the Commission has been subjected to criticism

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<sup>1</sup> When proposing the creation of the Federal Trade Commission in 1914, President Wilson stated:

The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

51 Cong. Rec. 1963 (1914).

<sup>2</sup> 15 U.S.C. § 45(a)(1) (1964).

<sup>3</sup> The Supreme Court, in *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934), stated:

While this court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair . . . in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

from many and varied sources.<sup>4</sup> The crux of most of the criticism has been that the Commission, as an institution, has outlived its usefulness because of its inability to meet the dual problems of antitrust enforcement and direct consumer protection. A discussion of a recent decision<sup>5</sup> in the Court of Appeals for the Fifth Circuit could serve as almost a microcosmic description of the present powers of the Commission, and, at the same time, illuminate the areas of untapped potential that are still to be exploited.

### I. SPERRY & HUTCHINSON CO. v. FTC

In *The Sperry & Hutchinson Co. v. FTC*,<sup>6</sup> the Commission chose S&H, the largest and oldest trading stamp firm in the United States,<sup>7</sup> as the particular target for legal action in a full-scale assault upon the trading stamp as a viable merchandising tool. The *S&H* case presents an interesting assessment of the extent and potency of the weapons which the Commission purports to possess. It is obvious that in initiating this suit against S&H, the Commission was concerned less with the actions of a single company than with activities which had permeated an entire industry.<sup>8</sup>

With a view toward reducing the influence which trading stamp companies exert upon retailers' marketing habits and, consequently, upon consumers, the Commission brought its case against S&H before a Hearing Examiner on November 15, 1965.<sup>9</sup> The government's complaint alleged that S&H had illegally restrained trade by (1) requiring authorized retailer licensees to dispense not more than one stamp for each ten-cent purchase, (2) conspiring with other stamp companies to enforce the one for ten policy, and (3) unlawfully suppressing stamp redemption activity on the part of (a) small trading stamp exchanges which buy, sell or exchange stamps, and (b) retailers who offered to exchange the more popular S&H stamps for their own variety in order to attract customers.<sup>10</sup> The Hearing Examiner upheld the conspiracy

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<sup>4</sup> See Report of the ABA Commission to Study the Federal Trade Commission (1969); E. Cox, R. Fellmeth & J. Schultz, *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the F.T.C.*, 115 Cong. Rec. 1539 (1969).

<sup>5</sup> *The Sperry and Hutchinson Co. v. FTC*, 432 F.2d 146 (5th Cir. 1970), cert. granted, 401 U.S.—(1971), 39 U.S.L.W. 3419 (Mar. 31, 1971).

<sup>6</sup> *Id.*

<sup>7</sup> In 1964 S&H issued 140 billion stamps for which licensed retailers paid \$322,296,000. The retailers gave S&H trading stamps in connection with sales of ten to fifteen billion dollars worth of goods and services. About 60 percent of all households save S&H "green" stamps. In 1964 trading stamps of all companies were issued in connection with annual sales to the consuming public of about \$40,000,000.

<sup>8</sup> 432 F.2d 146, 151 n.1 (dissenting opinion).

<sup>9</sup> The Commission pointed out that six trading stamp companies, including S&H, represent between 83 and 88% of the stamp industry's volume. *Sperry and Hutchinson Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. ¶18,449, at 20,774 (FTC 1968).

<sup>10</sup> *Sperry and Hutchinson Co.*, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,862, at 23,219 (FTC 1967).

<sup>11</sup> *Id.*

charges but rejected the contention that S&H should not be able to continue the same types of activity on a unilateral basis.<sup>11</sup> On appeal, the Commission reversed the decision regarding S&H's unilateral conduct and, in effect, upheld all of the charges brought by the government.<sup>12</sup>

It is significant that in neither the decision of the Hearing Examiner nor that of the Commission was economic injury to the consumer posited as an independent basis for the results reached. Although repeated reference to consumer injury is made, the decisions rest solely upon traditional anti-competitive theories. Understandably, S&H appealed the adverse decision to the Court of Appeals for the Fifth Circuit.<sup>13</sup> However, for apparently tactical reasons, S&H did not appeal those portions of the decision relating to their restrictions on licensed retailers which prohibited them from dispensing more than one stamp for each ten cents worth of merchandise purchased. Believing this to be an irritable but tolerable situation, S&H decided to concentrate its legal firepower on the issue of trading stamp exchanges and unauthorized dealing by retailers. It is important to note that by isolating the third count, S&H blurred the total picture of anti-competitive, non-consumer-oriented activity in which it was allegedly engaged.<sup>14</sup> This isolation of issues permitted S&H to present for review only the narrow question related to the third count, probably in an attempt to escape a decision reflecting a judicial distaste for general business techniques within the trading stamp industry.

Confronted with this single issue, the court of appeals, in a two to one decision, overturned the judgment of the Commission, and determined that the S&H was not engaged in any conduct cognizable as a violation of the antitrust statutes.<sup>15</sup> It is submitted that the court in reaching its decision exhibited a retrogressive, myopic view of the powers of the Federal Trade Commission. Similarly, the case illustrates graphically the Commission's inability to afford a manifold direct protection to the consumer as a result of an institutionalization of a restrictive interpretation of Section 5 of the F.T.C.A.<sup>16</sup>

<sup>11</sup> *Id.*

<sup>12</sup> *Sperry and Hutchinson Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,449, at 20,792 (FTC 1968).

<sup>13</sup> 432 F.2d at 146.

<sup>14</sup> The Commission demonstrated its concern for S&H's overall conduct by noting that:

While the individual charges in the complaint will be separately considered below, the nature of the proceeding as a whole should be kept in mind. The practices, to be sure, break down into separate acts which in themselves may be found to be violations of the law as charged. However, to treat these solely as separate and non-related actions would give a far too fragmented view of the case.

See *Sperry and Hutchinson Co.*, *supra* note 12, at 20,774.

<sup>15</sup> 432 F.2d at 146.

<sup>16</sup> 15 U.S.C. § 45 et seq. (1964).

## II. THE ATTACK ON TRADING STAMPS UNDER TRADITIONAL ANTITRUST THEORIES

The Sperry & Hutchinson Company, like most trading stamp companies, sells pads of trading stamps to retailers, pursuant to contracts which authorize the retailers to dispense trading stamps to members of the consuming public in connection with the sale of goods and services.<sup>17</sup> Such contracts also require the trading stamp companies to maintain redemption stores where participating members of the consuming public may exchange or redeem the stamps for merchandise available at the redemption stores.<sup>18</sup>

Basically, the goal of S&H is to lock the consumer into a particular chain of stores which dispenses S&H stamps. This result is possible because of the nonfeasibility of a housewife collecting more than one type of stamp if she wishes to procure an attractive gift. Generally speaking, trading stamp exchanges are businesses engaged in the exchange of stamps issued by one trading stamp company for those issued by another, or engaged in the sale or purchase of trading stamps to or from members of the consuming public. In addition to stamp exchanges, another type of redemption activity not recognized by S&H involves retailers who offer to exchange S&H stamps for their own variety of stamps, or simply to redeem S&H stamps. As a result of these exchange activities, a housewife need no longer feel compelled to shop at a particular store to acquire S&H stamps. Therefore, simply as a promotional device, the trading stamps lose their attractiveness to retailers through the continued operation of unauthorized stamp exchange activity. Consequently, since this loss of attractiveness results in serious financial harm to the issuer, S&H argues that they have a right to place restrictions upon the transfer of the stamps by consumers or others.<sup>19</sup> Toward the goal of suppressing such undesirable activities, S&H, over a period of sixty-two years, has brought forty-three successful suits in federal and state courts to enjoin the unauthorized use of stamps.<sup>20</sup> Despite this long history of litigation, the Commission argued that S&H should be ordered to discontinue its use of the courts to suppress legitimate enterprise.

In terms of legal theory, it is evident that the Commission relied primarily upon its traditional power to attack unfair methods of competition. However, in reaching its decision, the court of appeals

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<sup>17</sup> Hammer, Will Trading Stamps Stick? *Fortune*, vol. 62, p. 116 (Aug., 1960).

<sup>18</sup> *Id.*

<sup>19</sup> 432 F.2d at 149. There is a notice in the stamp collector's book supplied by S&H to the effect that "the only right which you [the consumer] acquire in said stamps is to paste them in books like this and present them to us for redemption." See Sperry and Hutchinson Co., *supra* note 12, at 20,788. The Commission, however, chose not to base its decision upon the "narrow and technical basis of a restraint or alienation." *Id.* at 20,790.

<sup>20</sup> 432 F.2d at 149. For an example of these suits brought for injunctive relief, see *Rance v. Sperry & Hutchinson Co.*, 410 P.2d 859 (Okla.), cert. denied, 382 U.S. 945 (1965); *Sperry & Hutchinson, v. Fenster*, 219 F. 755 (E.D.N.Y. 1915).

determined that the challenged activity was not within the purview of the ascribed statutory powers of the Commission. The court outlined those areas in which the Commission has competence. It stated that in order for the Commission to act there must exist a violation of (1) the letter of existing antitrust laws, (2) the spirit of those laws as recognized by the Supreme Court, or (3) a per se violation of anti-trust policy.<sup>21</sup> These three areas must be separately considered in order to assess the wisdom of the court's rejection of section 5 as an instrument to attack the questioned conduct.

In enacting the F.T.C.A., it was believed that the Commission would have the power to attack activities which were deemed to be in violation of the Sherman and Clayton Acts.<sup>22</sup> When the Commission instituted an action under either of these statutes, it was understood that the traditional criteria of antitrust violations would be applied in determining whether the challenged conduct was unlawful.<sup>23</sup> Since the F.T.C.A. is a general proscription of unfair methods of competition in the same manner as the Sherman Act is a condemnation of actions "in restraint of trade," it is arguably impossible for any activity to be a violation of the letter of these statutes since no specific business conduct is condemned. However, rather than delve into semantic technicalities, the distinction will be accepted that "letter" violations in the present context are those which can be closely analogized to violations which have already been declared unlawful by the Supreme Court.<sup>24</sup> Using this standard of measurement, Judge Wisdom, in his dissent, argued that

S&H had restrained the trade of retail merchants by depriving them of their freedom to use tools (goods and services for stamps) used by their competitors, the S&H exclusive licensees. S&H did not simply restrain the stamp exchanges in trading: S&H put them out of business.<sup>25</sup>

The majority, on the other hand, argued that the result is justifiable when weighed against the legitimate business interests of S&H in suppressing this type of activity.<sup>26</sup> They reasoned that to allow such conduct to exist is unthinkable since it would reduce all trading stamp companies to a common level because all stamps would presumably become interchangeable. Surprisingly, the Commission in its decision ruled that prohibiting S&H from bringing suits for injunctive relief would not have an injurious effect upon the business of S&H.<sup>27</sup>

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<sup>21</sup> 432 F.2d at 150.

<sup>22</sup> 2 H. Toulmin, *A Treatise on the Anti-Trust Laws* 5-6 (1949).

<sup>23</sup> *Id.*

<sup>24</sup> "The Act [Federal Trade Commission Act] undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 310 (1934).

<sup>25</sup> 432 F.2d at 154-55.

<sup>26</sup> *Id.* at 151.

<sup>27</sup> See note 12 *supra*.

This somewhat bullheaded approach allowed the Commission to avoid a weighing of the company's business needs to undertake these legal proceedings. A more honest and realistic appraisal would have revealed that the stamp industry would indeed be materially affected if stamp exchanges and competing retailers are allowed to engage in this redemption activity. If this case is assessed as a violation of the "letter" of the Sherman Act, on balance, it would seem to be a reasonable contention that if the court is convinced that the Commission was mistaken in its assessment of the competitive balancing, then it should have the power to overturn the decision of the Commission. This balancing of interests under a "letter" violation is open to close judicial scrutiny since it requires production of substantial evidence by the Commission of anti-competitive conduct.

It is clear, then, that if the Commission brought the case as a "letter" Sherman Act violation, the actions and practices of S&H would have to be judged in reference to the standards governing cases arising under that statute. However, the Commission also possesses the concomitant power to strike down activity which violates the "spirit" of the antitrust laws or is a per se violation of those statutes. In recent years, however, these two concepts have become so intertwined that it is difficult to define exactly what the specific requirements are that distinguish one from the other. A working definition of a per se violation was supplied by Justice Black in *Northern Pacific Railway Co. v. United States*.<sup>28</sup>

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.<sup>29</sup>

This test is obviously reserved for only extreme situations since it effectively eliminates the necessity of hearing any defense presented by one charged with violations of the Sherman or Clayton Act.

Both the majority and minority opinions in the *S&H* case agree that S&H's activity does not constitute a per se violation.<sup>30</sup> Although technically this may be so, it is submitted that as an evolving concept, "the spirit" of the F.T.C.A. has developed to the point where it may be considered virtually synonymous with the concept of a per se violation. Consequently, a determination of what constitutes a violation of the "spirit" of the F.T.C.A. will produce an answer to the question of whether the Commission may reach the activity engaged in by S&H.

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<sup>28</sup> 356 U.S. 1 (1958).

<sup>29</sup> *Id.* at 5. For a discussion of the per se doctrine, see von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Anti-Trust*, 11 U.C.L.A. L. Rev. 569 (1964).

<sup>30</sup> 432 F.2d at 150, 154.

According to the interpretation given to Section 5 of the Act by the Supreme Court, the major purpose of that statute, in addition to providing an alternative method of antitrust enforcement, is to arrest in their incipiency, practices which, if allowed to continue, would develop into antitrust violations. This expansive construction of section 5 was articulated initially by Justice Brandeis, dissenting in *FTC v. Gratz*.<sup>81</sup> In his view

the task of the Commission was to protect competitive business from *further* inroads by monopoly. . . . If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act.<sup>82</sup>

The majority in *Gratz*, however, was opposed to this liberal interpretation, suggesting instead a narrow, restrictive interpretation of the law.<sup>83</sup> The majority opinion was soon rejected, however, and subsequent decisions consistently upheld a broad reading of the statute.<sup>84</sup>

The broadest reading of section 5 is found in *FTC v. Brown Shoe Co.*,<sup>85</sup> decided in 1966. In that case, Brown Shoe Company, the second largest shoe manufacturer in the United States, had entered into agreements with retailers requiring them to concentrate their "business within the grades and price lines of shoes representing Brown Shoe Company and . . . have no lines conflicting with Brown Division Brands of the Brown Shoe Company."<sup>86</sup> The retailers participating in this franchise program received valuable benefits and services without cost. These advantages, however, were not offered to the retailers who refused to enter the program.

Declaring that the Commission has broad powers to declare trade practices unfair under section 5, the Court proceeded to outline the standard by which they arrived at their decision:

Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof

<sup>81</sup> 253 U.S. 421 (1920).

<sup>82</sup> *Id.* at 435.

<sup>83</sup> *Id.* at 428-29.

<sup>84</sup> See, e.g., *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941): "It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and that through its attempts to bring about complete monopolization of an industry might be stopped in their incipiency (sic)." *Id.* at 466. *FTC v. Cement Institute*, 333 U.S. 683 (1948): "A major purpose of that Act, as we have frequently said, 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." *Id.* at 708. See also *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-95 (1953); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367-70 (1965); *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968).

<sup>85</sup> 384 U.S. 316 (1966).

<sup>86</sup> *Id.* at 318.



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 the § 3 element must be made for as we pointed out above our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.*<sup>87</sup> (Emphasis added.)

Essentially, this standard grants the Commission broad authority to declare conduct conflicting with the policies of the Sherman and Clayton Acts unlawful without proof of actual or probable anti-competitive effects. Not unexpectedly, both the majority and dissent in *S&H* rely upon the *Brown* case.<sup>88</sup>

The majority, somewhat disturbed at the vagueness of the standards governing the Commission since the *Brown* case, stated that

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 in making their findings. The Commission should at least determine that the practice violates the policy or spirit of the antitrust law. If it does not, then the Commission casts itself in the form of a legislative body.<sup>89</sup>

In view of the fact that the Commission was initially granted the authority to outlaw conduct which tended towards violating the Sherman or Clayton Act, it has been pejoratively stated that the *Brown* case granted to the Commission the power to arrest "incipient incipencies."<sup>40</sup>

However, under the *Brown* doctrine the Commission, in proceeding against allegedly illegal action, need make only a passing reference to a Sherman or Clayton Act violation before proceeding under the lesser quantum of proof required by Section 5 of the F.T.C.A. When proceeding under these traditional Sherman or Clayton Act violations, the Commission has the responsibility of balancing the business needs of the company engaging in such activities against the anti-competitive

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<sup>87</sup> Id. at 321-22.

<sup>88</sup> 432 F.2d at 150, 154.

<sup>89</sup> Id. at 150-51.

<sup>40</sup> See Handler, Some Misadventures in Antitrust Policymaking—Ninetcenth Annual Review, 76 Yale L.J. 92, 99 (1966), where the author states:

To assert that the Commission may arrest incipient Clayton [or Sherman] Act violations is to prohibit incipient incipencies—which could have the effect of converting qualified into absolute prohibitions or of substituting the mere possibility of competitive harm for the reasonable probability which hitherto had been the test.

effect such activities would have upon competing enterprises. Presumably, this balancing is still necessary under the *Brown* theory. However, the latter decision also established the F.T.C.A. as a separate and distinct antitrust law with its own standards of permissiveness. Production of direct, substantial proof of a lessening of competition is not necessary as under a "letter" violation.<sup>41</sup> It is rather an open-ended test which places great reliance upon the Federal Trade Commission as an expert body designed to evaluate complex and difficult situations to determine which activities have anti-competitive characteristics.<sup>42</sup>

Consequently, only when the Commission has clearly abused its discretionary powers will the court intervene to reverse its findings. In his dissent, Judge Wisdom agreed that this exercise of the Commission's power provides a workable and desirable situation. In citing *FTC v. Motion Picture Advertising Service Co., Inc.*,<sup>43</sup> as evidence of the necessity of granting broad powers to the Commission, Judge Wisdom stated that "Congress advisedly left the concept [unfair methods of competition] flexible to be defined with particularity by the myriad of cases from the field of business."<sup>44</sup>

Since this broad concept of the powers of the Commission has been consistently accepted and expanded, it appears that the majority in *S&H* attempted to reject the modern trend and return to interpretations similar to those which obtained immediately after passage of the F.T.C.A. The majority has, in effect, confined the court to a verbal prison as a result of their unwillingness to accept an expansion of the concept "unfair methods of competition" as a device to attack injurious business activities. In deciding in favor of *S&H*, the court has become bound by outmoded and anachronistic interpretations of a rule which was left deliberately vague in recognition of the dynamic and non-definitional field which the rule was meant to regulate. Furthermore, the majority has cast doubt upon the sagacity of the Warren Court's grant of power to the Federal Trade Commission, and has raised for consideration the continued vitality of *Brown* and its predecessors.<sup>45</sup> Consequently, if this decision is appealed, it will present to the Supreme Court an opportunity to reaffirm and make more intelligible, the role which section 5 is to play in antitrust enforcement.

<sup>41</sup> "Moreover, the cases are clear, as a matter of law, that alleged business justifications, no matter how factually accurate, are irrelevant to save the lawfulness of these arrangements once it is found that widespread industry use of the agreements produces a destructive effect upon commerce." *L.G. Balfour Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,485, at 20,850 (FTC 1968).

<sup>42</sup> For cases subsequently relying upon the *Brown* decision, see *Luria Bros. & Co. v. FTC*, 389 F.2d 847 (3d Cir. 1968); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968).

<sup>43</sup> 344 U.S. 392 (1953).

<sup>44</sup> 432 F.2d at 154.

<sup>45</sup> For a general discussion of the Warren Court's influence upon antitrust enforcement, see Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 Mich. L. Rev. 325 (1968).

### III. THE FEDERAL TRADE COMMISSION—A NEW DIMENSION

The foregoing analysis has traditionally been the extent of any discussion of the powers and concern of the Federal Trade Commission.<sup>46</sup> However, Judge Wisdom's dissent in the *S&H* case adds an interesting and important dimension to an analysis of the Commission's powers. His concern centers on the effect which business activities have upon the consumer irrespective of any anti-competitive considerations. Specifically, in the context of trading stamps Judge Wisdom is disturbed because of the injustice in not allowing consumers to dispose of stamps for which they paid by purchasing the article. He is concerned with the economic waste of unredeemed stamps and, more importantly, with the artificial compulsion which stamps place on a consumer to shop for considerations other than price or quality.

The dissent in *S&H* points out that the burden of paying for trading stamps ultimately falls upon the consumer and not the retailer. Virtually every member of the public acquires stamps whether he or she wants them or not. Invariably, individuals find themselves in possession of a number of different brands, many of which are undesirable, are no longer dispensed by the stores being patronized by the particular member of the public involved, or are insufficient in number to be of any use for redemption. There is substantial economic waste from these stamps which are unredeemed or thrown away. Since the six largest competing firms account for over eighty percent of both the dollar volume received and the stamps issued, it is apparent that the consuming public is at the mercy of the trading stamp companies. Therefore, in view of the fact that between five and fourteen percent of *S&H*'s stamps are never redeemed,<sup>47</sup> it is not unreasonable to inquire whether *S&H*'s use of the courts to prevent transfer of stamps should be categorized as an unfair practice, even if it could not be categorized as anti-competitive.

At the present time, there exists an important shift away from the preservation of competition as the prime insurer of consumer welfare, toward more direct and obvious consumer protection techniques. Because of this shift in emphasis, legislatures have been quick to respond to popular pressures by enacting a plethora of new consumer

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<sup>46</sup> The decision of the Commission has been analyzed elsewhere. See Comment, *The Attack on Trading Stamps—An Extended Use of Section 5 of the Federal Trade Commission Act*, 57 *Geo. L.J.* 1082 (1969); Note, *The Federal Trade Commission and the Green Stamp: The Effect upon Competition of Restrictions on Distribution and Redemption of Trading Stamps*, 67 *Mich. L. Rev.* 560 (1969).

<sup>47</sup> The dissenting opinion by Judge Wisdom noted that

[f]rom 1914 through 1964, *S&H* issued 1120 billion stamps. At the end of 1964, 156 billion stamps, worth many millions of dollars, were still outstanding. The Commission found that the record did not permit a determination with certainty of the percentage of stamps never presented for redemption by the public, but concluded that it was probable that redemptions would fall "somewhere between 86 and 95 percent of total stamps issued."

432 F.2d at 152 n.4.

protection legislation.<sup>48</sup> It is submitted that much of this legislation would be unnecessary if a more affirmative and sympathetic response had been shown by the courts to efforts by the Federal Trade Commission to assume a function as the general protector of the consuming public.

At first glance, it may appear that harm to the consumer is an irrelevant consideration when speaking of antitrust statutes. On closer scrutiny, however, it becomes clear that antitrust statutes have often had as a major goal the prevention of injury to consumer interests. The Sherman Act of 1890<sup>49</sup> was the first consumer statute of a broad nature, for that Act was designed to protect the consumer against his greatest threat—monopolization. In preserving competition, Congress was attempting to protect those who were to be the ultimate beneficiaries of that and all such related statutes, the consumers.<sup>50</sup> In a similar but much more definite manner, the F.T.C.A., as it was originally passed, outlawing “unfair methods of competition,”<sup>51</sup> demonstrated potential as a broad protective statute for the consumer.

As enacted in 1914, Section 5 of the F.T.C.A. provided: “Unfair methods of competition in commerce . . . are hereby declared unlawful.”<sup>52</sup> This expression, new in the law, was intended to have a broader meaning than simply “unfair competition.” Such unfair methods were to be determined in individual instances upon evidence in light of particular competitive conditions, and judged against the specific

<sup>48</sup> See Consumer Protection Legislation—1970, 39 A.B.A. Antitrust L.J. 385 (1970).

<sup>49</sup> 15 U.S.C. § 1 et seq. (1964).

<sup>50</sup> An example of such concern is the following statement by Senator Sherman: Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public . . . .

It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination . . . . Sir, now the people of the United States, as well as other countries are feeling the power and the grasp of these combinations, and are demanding of every Legislature and of Congress a remedy for this evil, only grown into huge proportions in recent times. They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist and the nihilist.

Society is now disturbed by forces never felt before. The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition of wealth and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.

<sup>21</sup> Cong. Rec. 2457, 2460 (1893).

<sup>51</sup> 15 U.S.C. § 45(a)(1) (1964).

<sup>52</sup> *Id.*

and substantial public interest involved.<sup>53</sup> When the Supreme Court was required to pass upon the section in *FTC v. Raladam Co.*,<sup>54</sup> it held that the Commission's jurisdiction over unfair trade practices was limited to cases in which such a practice was used as a weapon for diverting business from, or injuring or impairing the business of, a competitor. This decision was severely criticized as a nullification of the powers delegated to the Commission to protect the consumer. Perhaps because of this criticism a change of attitude quickly appeared in a number of decisions<sup>55</sup> culminating in *FTC v. R. F. Keppel & Bros., Inc.*<sup>56</sup>

As early as 1920,<sup>57</sup> the Supreme Court decided that the Federal Trade Commission had the authority to attack practices "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression. . . ."<sup>58</sup> Then, in *Keppel*, the Court made it unquestionably clear that Section 5 of the F.T.C.A. embraces acts, practices or methods of competition that are neither deceptive nor misleading on the one hand, nor monopolistic or anti-competitive on the other.<sup>59</sup> *Keppel* involved the sale of penny candy to children by lottery numbers which unfairly exploited consumers to the prejudice of respondent's competitors. In its decision, the Supreme Court stated:

A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a *powerful moral compulsion not to adopt, even though it is not criminal*, was thought to involve the kind of unfairness at which the statute was aimed.<sup>60</sup> (Emphasis added.)

In 1938, the F.T.C.A. was amended so as to give the Commission the power to attack "unfair and deceptive acts or practices in commerce. . . ."<sup>61</sup> The amendment was passed subsequent to the *Keppel* decision and effectively eliminated prejudice to competitors as a prerequisite to Commission action under section 5. The failure to mention competition in the latter phrase demonstrates a legislative intent to remove the procedural requirement set up in the *Raladam* case.<sup>62</sup> Thus, the Commission could now center its attention on the direct

<sup>53</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>54</sup> 283 U.S. 643 (1931).

<sup>55</sup> *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

<sup>56</sup> 291 U.S. 304 (1934).

<sup>57</sup> *FTC v. Gratz*, 253 U.S. 421 (1920).

<sup>58</sup> *Id.* at 427.

<sup>59</sup> 291 U.S. at 312-14.

<sup>60</sup> *Id.* at 313.

<sup>61</sup> 15 U.S.C. § 45(a)(1) (1964).

<sup>62</sup> See text at note 54 *infra*.

protection of the consumer where formerly it could protect him only indirectly through the protection of the competitor.<sup>63</sup>

The amendment, of course, did not reject, but rather approved and codified, the principal of *Keppel*. The amendment is conceptually divisible into two separate and independent proscriptions. The first allows the Commission to attack "deceptive acts or practices"<sup>64</sup> to the public. This phrase has been interpreted to mean that the necessity of finding competitive injury was eliminated in those cases involving misrepresentations of a product or service.<sup>65</sup> However, another important provision granted the Commission the concomitant power to prevent "unfair . . . acts or practices."<sup>66</sup> Before enactment of the amendment, the *Keppel* decision was mentioned several times in the deliberations, and its broad scope was implicitly approved with passage.<sup>67</sup> Since conduct which was deceptive or anti-competitive had already been ruled illegal, this provision should have been used to attack merchandising practices which are neither fraudulent nor criminal, but rather are practices which the merchant is under a strong moral compulsion not to adopt.<sup>68</sup>

The *Keppel* case was relied upon in subsequent litigation by the Commission, but these cases can be distinguished in that the questioned activities were also challenged as unfair methods of competi-

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<sup>63</sup> In the House of Representatives, Congressman Lea who proposed the amendment, stated:

The Act as originally passed makes competition a necessary element to be established in order to proceed. It is not sufficient to show only an unfair practice. It must also be shown that this unfair practice is injurious to a competitor. One thing we propose in the pending bill in this respect is that it is sufficient to establish the unfair practice without showing injury to a competitor in order to give the Commission jurisdiction. If this bill becomes law, one of the things it will do is to relieve the Federal Trade Commission of the necessity of showing injury to a competitor. That is one of the practical purposes of the legislation. This will save unnecessary time and expense in showing that an act is injurious to a competitor. Indeed, the principle of the Act is carried further to protect the consumer as well as the competitor. In practice the main feature will be to relieve the Commission of this burden, but we go further and afford a protection to the consumers of the country that they have not heretofore enjoyed.

83 Cong. Rec. 391-92 (1938).

<sup>64</sup> 15 U.S.C. § 45(a)(1) (1964).

<sup>65</sup> See MacIntyre and Volhard, *The Federal Trade Commission*, 11 B.C. Ind. & Com. L. Rev. 723 (1969).

<sup>66</sup> 15 U.S.C. § 45(a)(1) (1964).

<sup>67</sup> Hearings on S. 3744 Before the House Comm. on Interstate and Foreign Commerce on the Federal Trade Commission Act Amendments, 74th Cong., 2nd Sess. 89-90 (1936); Hearings on H.R. 3143 Before the House Comm. on Interstate and Foreign Commerce, 75th Cong., 1st Sess. 14, 17 (1937).

<sup>68</sup> At the time of the passage of the amendment several commentators thought that the statute could be made the basis for considerable expansion of the Commission's power should the courts be so inclined. See Note, *The Federal Trade Commission Act of 1938*, 39 Colum. L. Rev. 259 (1939); Note, *The Federal Trade Commission*, 53 Harv. L. Rev. 834 (1940).

tion or on the basis of common law illegality.<sup>69</sup> However, analogies can be made to cases involving lotteries since the practice of selling goods by means which involve a game of chance or gift enterprise was considered contrary to the established public policy of the United States and consequently violative of the F.T.C.A.<sup>70</sup> The same rationale should be true in the trading stamp context since the consumer has no choice but is tied to the stamp system, while the Commission stands powerless to protect him when his problems stem from a weak bargaining position rather than from deceptive practices or unfair methods of competition.

Admittedly, the Commission cannot censor the morals of businessmen. However, it should not be denied the power to attack those activities which are unscrupulous or contrary to public policy and result in injury to the consumer.<sup>71</sup> By its continued use of the courts to obtain injunctive relief, S&H and other companies have suppressed trading stamp exchanges and, in turn, the free and open redemption and exchange of stamps by retailers. This suppression results in the consumer being unfairly prevented from deriving full benefit from his purchases. Even if it is conceded that S&H was not engaged in illegal activity, it is still conceivable that their conduct was of a type that merchants were under "a powerful moral compulsion not to adopt."<sup>72</sup> Therefore, in view of recent judicial decisions and consumer legislation it could be argued that S&H's conduct is contrary to public policy and developing community standards and should be actionable within the scope of the amended section 5.

The majority opinion in the *S&H* case, however, does not even address itself to the issues suggested by the *Keppel* doctrine. Rather, the court raises and dismisses only the "unfair methods of competition" issue and ignores any discussion of possible violations of the "unfair . . . acts or practices" proscription.<sup>73</sup> This is unfortunate since it is obvious from the long history of the Commission that its responsibility is not limited to determining whether certain practices

<sup>69</sup> See, e.g., *Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1969); *Independent Directory Corp. v. FTC*, 188 F.2d 468 (2d Cir. 1951); *Hastings Mfg. Co. v. FTC*, 153 F.2d 253 (6th Cir. 1946).

<sup>70</sup> See, e.g., *National Candy Co. v. FTC*, 104 F.2d 999, 1006 (7th Cir. 1939), where the court stated that "such sales are contrary to the established public policy of the Federal Government. . . . This is sufficient even in the absence of competition, for in the *Keppel* case the Court said that a method of competition which is contrary to the established public policy of the United States is an unfair method of competition within the intent and meaning of section 5 of the statute." See also *Douglas Candy Co. v. FTC*, 125 F.2d 665 (8th Cir. 1942); *Surf Sales Co. v. FTC*, 259 F.2d 744 (7th Cir. 1958).

<sup>71</sup> See *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 484 (1922).

<sup>72</sup> 291 U.S. at 313.

<sup>73</sup> "Although fairly challenged to do so in S&H's main brief, the Commission has been unable to point to any antitrust law which S&H has violated either in letter or spirit." 432 F.2d at 151.

fall within pre-existing categories of illegality. It is also to determine, within broad limits, what kinds of trade practices should be forbidden in the public interest because they are unfair and thus injurious to the consuming public.

#### CONCLUSION

This *S&H* decision, if affirmed, would give cause for serious reconsideration of casting the Federal Trade Commission as an unimaginative, superannuated administrative agency. It is submitted that many of the Commission's failures and limitations can be attributed to unresponsive, tradition-bound courts. The Fifth Circuit in *S&H* has interpreted the section 5 powers of the Federal Trade Commission with excessive stringency. They have chosen not to give a broad reading to the *Brown* decision and, as a result, redefinition by the Supreme Court is a necessity.

The case also aptly demonstrates the necessity of the courts' reorienting themselves to afford direct protection to the consumer based upon the *Keppel* decision. At least in this instance the Commission cannot be faulted for attempting to provide manifold protection to the consumer. It is the judiciary which has failed to recognize the essential interrelationship of antitrust and consumerism. This will probably remain true until it is realized that the boundaries of antitrust are constantly expanding, embracing increasingly the outer limits of trade practices which have the purpose of imposing artificial encumbrances upon the consuming public.

EDWARD J. MARKEY