COMMENT

THE USE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IN ROBINSON-PATMAN ENFORCEMENT: A DESIRABLE END THROUGH QUESTIONABLE MEANS

THE Robinson-Patman Act[1] exhibits certain jurisdictional defects which have proved a source of frustration to the Federal Trade Commission. With the recent approval of the Second Circuit, the Commission has utilized section 5 of the Federal Trade Commission Act[2] as a means of proceeding against enterprises which the Commission thought had participated in price discrimination, but which apparently could not be subjected to a cease and desist order under the literal language of the Robinson-Patman Act. It is the purpose of this comment to examine the propriety of the Commission's action through a comparison of the basic policies of section 5 with those of the Robinson-Patman Act.

I

THE GRAND UNION AND AMERICAN NEWS CASES

The primary purpose of the original section 2 of the Clayton Act[3] was to eliminate the practice of price discrimination on the part of large suppliers.[4] In contrast, the Robinson-Patman Act, which has amended section 2, was an effort to effectively curb the use by large *buyers* of their strong economic position to force sellers to grant them special price concessions.[5] Two recent cases provide signal examples of the conduct Congress sought to prevent in passing the Robinson-Patman Act. In *Grand Union Co. v. FTC*,[6] a com-

[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

[2] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (a) (1958).

[3] 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13 (1958).

[4] NEALE, THE ANTITRUST LAWS OF THE U.S.A. 216-18 (1960). ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 155 (1955).

[5] NEALE, *supra* note 4, at 217 (1960). For discussion of legislative history of the Robinson-Patman Act see EDWARDS, THE PRICE DISCRIMINATION LAW 21-53 (1959).

[6] 300 F.2d 92 (2d Cir. 1962). This case received wide attention at the time it was before the Federal Trade Commission. See Alexander, *Section 5 of the Federal Trade Commission Act, A Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317 (1961); Handler, *Recent Antitrust Developments*,

pany which owned a chain of supermarkets made use of a promotional scheme for a number of its suppliers as a clandestine method of receiving a discriminatory price as compared with its competitors.[7] Similarly, in *American News Co. v. FTC*,[8] the nation's largest newsstand chain was receiving bogus promotional rebates from unwilling publishers for supposedly giving their publications display preferences. In these two cases the sellers found it economically impractical to resist demands for participation in the respective promotional programs.

While the FTC seemed justly concerned, a proceeding under Robinson-Patman presented difficulties. Section 2 (d) of the act[9] is clearly directed at the transactions here in question, but that provision is worded in terms which make it applicable only to sellers. Section 2 (f), on the other hand, attempts to reach the *buyer* through a provision making it "unlawful for any persons . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."[10] Since this provision refers only to *price* it has been regarded as inapplicable to such payments as the advertising allowances granted in the instant cases.[11]

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71 YALE L.J. 75 (1961); Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161 (1960); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961); Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 ANTITRUST BULL. 533 (1960); Note, 13 STAN. L. REV. 657 (1961); Note, 61 COLUM. L. REV. 291 (1961).

[7] The promotional scheme in the *Grand Union* case involved the lease by the Grand Union Company of a "spectacular" advertising board which was located on Broadway in the Times Square area of New York City. By the terms of the lease Grand Union was to receive most of the advertising space on the board in exchange for a nominal rental and its agreement to secure the participation of other advertizers who would each purchase time segments in the so-called "Epok Panel." The "Epok Panel" operated in a twenty-minute cycle during which the products of each of the participants were flashed on the screen at one-minute intervals.

As the scheme obviously contemplated, nearly all of those companies taking part in the "Epok Panel" plan were suppliers of the Grand Union Company. Since the suppliers paid substantial amounts for their shares, the effect was to give Grand Union all of its advertising for a nominal amount.

It seems clear that the payments made by the suppliers amounted to advertising allowances of the type contemplated by section 2 (d) of the Robinson-Patman Act.

[8] 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962).

[9] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (d) (1958).

[10] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (f) (1958).

[11] EDWARDS, *op. cit. supra* note 5, at 60. There have been no litigated cases on this point, and the question was specifically left open in Automatic Canteen Co. v. FTC, 346 U.S. 61, 73 n. 14 (1953). The majority opinion in the *Union* case intimated that the Second Circuit might well have found favorably to the Commission on this point if the issue had been raised.

Rather than attempting to broaden the scope of section 2 (f), the Commission decided to proceed under section 5 of the Federal Trade Commission Act which declares illegal "unfair methods of competition in commerce."[12] The decision to make use of section 5 in the *Grand Union* situation has prevented clearly culpable parties from escaping the arms of the price discrimination law. Nevertheless, such a resolution of the problem can only be justified if it may properly be said that the conduct under consideration in the *Grand Union* and *American News* cases was an "unfair method of competition" within the purview of section 5. In attempting to evaluate the holdings in the *Grand Union* and *American News* cases, an examination of the legislative background and the judicial development of section 5 is necessary.

II

Legislative History of Section 5

Section 5 was enacted as part of a congressional plan to supplement the Sherman Act and make more effective its antitrust policy. Congress realized that, in practice, the Sherman Act was successfully employed to attack monopolies only after they had become an accomplished fact, and thus Congress turned its attention to halting violations of the act in their incipiency.[13] In the report to the House on section 5 it was said,

> It is now generally recognized that the only effective means of establishing and maintaining a monopoly, where there is no control of a natural resource as [or?] of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition.[14]

The fact that the congressional motive in enacting section 5 was to "stop monopoly at the threshold" has been reflected in subsequent

[12] Section 5 (a) currently provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared illegal." The deceptive practices clause was added by the Wheeler-Lea Amendment of March 21, 1938. 52 Stat. 111 (1938), 15 U.S.C. § 45 (a) (1958). This clause enables the Commission to attack practices which deceive the consuming public, even though there is no effect on competition. This clause is not properly a part of the antitrust laws and will not be considered in this comment. For discussion of this topic see Moore, *Deceptive Trade Practices and the Federal Trade Commission,* 28 Tenn. L. Rev. 493 (1961); Note, 39 Colum. L. Rev. 259 (1939).

[13] Both § 5 and the Clayton Act were framed initially with this end in mind. See generally Neale, *op. cit. supra* note 4, at 185-88.

[14] H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914).

developments,[15] and has an important bearing on the substantive meaning to be ascribed to the terms of the Act.

While Congress was concerned with unfair competition primarily from the point of view of its effect on antitrust enforcement, section 5 was framed in very broad terms. This reflected Congress' desire not to restrict the Commission to a specific list of business practices, but to rely on a general provision condemning unfair competition.[16] The managers of the House Bill made the point that,

> It is impossible to frame definitions which embrace all unfair practices. . . . Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstancess may be beneficial under different circumstances.[17]

Congress thus decided to "leave it to the Commission to determine what practices were unfair,"[18] subject, of course, to review by the courts.

It is clear that Congress laid the groundwork for application of section 5 across a wide spectrum of business activity. However, judicial reaction was apprehensive, and section 5 has never gained the full realization of its potential role.

III

JUDICIAL EVOLUTION OF SECTION 5

The Supreme Court first encountered section 5 in *FTC v. Gratz*.[19] The Commission had issued a cease and desist order against a company which refused to sell binding wire for cotton unless the purchaser bought his bagging from the same company. The Court held such conduct to be an insufficient basis for complaint. Mr. Justice McReynolds, writing for the majority, asserted that the act was "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression. . . ."[20] This interpretation of section 5 as little more than a codification of common law principles was not destined to last. In another aspect of the case Justice McReynolds emphasized that in each Commission order there must be a showing

[15] See *infra* pt. III.
[16] S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914).
[17] H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914).
[18] S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914).
[19] 253 U.S. 421 (1920).
[20] *Id.* at 427.

that the proceeding was in the interest of the public; that is, the complained of practice must clearly have an adverse effect on competition. This determination reflected congressional intent,[21] and tended to keep the focus of section 5 on Sherman Act objectives. The courts have continued to air this qualification on the meaning of section 5,[22] and recognition has been given to the Federal Trade Commission's general willingness in recent years to accept this limitation.[23]

The restrictive view which characterized the early years of litigation under section 5 prevented its use to curb such practices as informal tying agreements.[24] On the other hand the flexibility of section 5 quickly demonstrated its value. While the Attorney General had been defeated in his attack on price maintenance through refusal to deal in *United States v. Colgate & Co.*,[25] the Commission was able to make significant inroads in this area via its use of section 5 in *FTC v. Beech-Nut Packing Co.*[26] The Commission also effectively used section 5 in *FTC v. Eastman Kodak Co.* to reach forced exclusive dealing agreements.[27] Section 5, in addition, seemed to achieve concurrent jurisdiction with the Sherman Act over price fixing during this period.[28]

The modern trend towards broadening the scope of section 5 began with the majority opinion by Justice Stone in *FTC v. R. F.*

[21] Senator Cummins, in response to questions on the floor of the Senate, said, "We are here endeavoring to sustain competition; that is the primary purpose of the antitrust law; it is the chief object of all these laws that we are now proposing, it is the only justification for the establishment of a trade commission; . . . ." 51 CONG. REC. 11104 (1914).

The phrase "adverse effect on competition" is a somewhat elusive concept. The courts have seemed to follow the view that, "The unfairness must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor." 51 CONG. REC. 11105 (1914). (Remarks of Senator Cummins.) See cases cited note 22 *infra*. Perhaps it could best be said that the courts look for a "reasonably significant" effect on the competitive market.

[22] FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923). "[T]he record does not show that the probable effect of the practice will be unduly to lessen competition." *Id.* at 475; FTC v. Klesner, 280 U.S. 19 (1929). It was not enough that there was unfairness towards one individual. *Id.* at 25. "To justify filing a complaint the public interest must be specific and substantial." *Id.* at 28; FTC v. Raladam, 283 U.S. 643, 648-49 (1931) (injury to the consuming public alone not enough). Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 466 (1941); FTC v. Cement Institute, 333 U.S. 683, 690, 720 (1948).

[23] HOWREY, *supra* note 6, at 178.

[24] FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923); FTC v. Curtis Pubilshing Co., 260 U.S. 568 (1923).

[25] 250 U.S. 300 (1919). [26] 257 U.S. 441 (1922). [27] 274 U.S. 619 (1927).

[28] FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927).

Keppel & Bros., Inc.[29] Keppel was one of a number of manufacturers in the penny candy business who had introduced an element of chance in their vending machines as an inducement to children. The Commission found this to be an unfair method of competition because it threw the rest of the industry into the dilemma of either losing business or adopting a practice which they were morally bound to reject. In affirming the Commission's order Justice Stone took the view that the operation of the act was not restricted to those methods of competition which were illegal at common law.[30] He further said that, "neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to *fixed* and *unyielding* categories."[31] Viewing the language of the act itself, as well as its legislative history, this interpretation is preferable to the earlier restrictive view. Furthermore, this decision, although reiterating the earlier view that it was for the courts to determine what practices were unfair, held that the determination of the Commission was to be given weight.[32] This gave recognition to the congressional intent to establish a body of men specially qualified to make these decisions.

The scope of section 5 was further broadened in *Fashion Originators' Guild v. FTC*,[33] where a group boycott was under attack. In that case Mr. Justice Black, speaking for the Court, said, "If the purpose and practice of the combination . . . runs counter to the public policy declared in the Sherman and Clayton Acts, the Commission has the power to suppress it as an unfair method of competition."[34] The statement was relied upon heavily by the Court in the recent *Grand Union* decision,[35] and provided the key step in their reasoning. If one takes the statement in *Fashion Originators'* at face value it does indeed provide support for the proposition that conduct contrary to the policy of the amended section 2 of the Clayton Act is a violation of section 5. However, a more careful reading of Mr. Justice Black's opinion in this case, particularly in light of his opinion in the subsequent *FTC v. Cement Insitute* case,[36] indicates that he did not envisage at that time possible conflicts between the Robinson-Patman amendment and the Sherman Act. It seems rather that he used the term "Sherman and Clayton Acts" generically to

[29] 291 U.S. 304 (1934).
[30] *Id.* at 310.
[31] *Id.* at 310. (Emphasis added.)
[32] *Id.* at 314.
[33] 312 U.S. 457 (1940).
[34] *Id.* at 463.
[35] 300 F.2d at 98-99.
[36] 333 U.S. 683 (1948).

indicate general Sherman Act objectives. Thus Mr. Justice Black's statement is meager authority when a portion of the Clayton Act reveals itself as opposed to Sherman Act policy.

While the practices complained of in *Fashion Originators'* and in the subsequent "base point pricing" cases[37] were clearly anti-competitive, and were condemned as tending towards monopoly, the *FTC v. Motion Pictures Advertising Service Co.* case[38] seemed to indicate less concern on the part of the Supreme Court with the requirement of adverse effect on competition.[39] Thus it is difficult to predict the direction the Supreme Court would take today if faced squarely with a practice alleged to have been a violation of section 5 where that practice had no "reasonably significant" effect on competition. The history of section 5 would seem to dictate a refusal to uphold a cease and desist order under such circumstances.

IV

Criticism of the Grand Union Decision

There is no doubt that practices which contravene the public policy of the Sherman Act are a proper subject of Commission action under section 5. However, the Commission in the *Grand Union* decision reached the conclusion that "it is the duty of the Commission to 'supplement and bolster' section 2 of the amended Clayton Act by prohibiting under section 5 practices which violate the spirit of the amended act."[40] In spite of the fact that the Robinson-Patman Act considerably post-dates the Federal Trade Commission Act,[41] this conclusion would be justified *if* it could be assumed that the public policy of the Robinson-Patman Act (both in its inception and its enforcement) were exactly the same as that of the Sherman Act. The fact that the Clayton Act was originally designed to stop incipient Sherman Act violations has lent superficial support to such an assumption, and this has apparently satisfied the Second Circuit. Once that court had accepted the reasoning of the Commission on this point it was an easy step to say that jurisdiction was taken "only fully to realize the basic policy of the Robinson-Patman Act."[42]

[37] Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949), *affirming per curiam*, 168 F.2d 175 (2d Cir. 1948); FTC v. Cement Institute, 333 U.S. 683 (1948).

[38] 344 U.S. 392 (1953).

[39] A strong dissent by Justice Frankfurter was directed specifically to this point. *Id.* at 398.

[40] The Grand Union Co., Trade Reg. Rep. ¶ 28,980 (FTC 1960).

[41] 1936 as opposed to 1914.

[42] 300 F.2d at 98.

However, the purpose and enforcement of the Robinson-Patman Act is *not* in complete harmony with the Sherman Act.[43] It is generally agreed that the primary objective of the Sherman Act is the promotion of competitive markets.[44] In order to maintain this emphasis on free competition the courts have resorted to the "rule of reason" in Sherman Act litigation.[45] Section 5 of the Federal Trade Commission Act harmonizes with the Sherman Act through its own rule of reason—that an adverse effect on competition be shown in each Commission proceeding. On the other hand, a recent study reveals that the Robinson-Patman Act had a broader purpose than simply promotion of competition.[46] Congress was not only concerned with the predatory practices of large buyers insofar as such practices affected the competitive market as a whole, but Congress also sought to preserve equality of opportunity for those usefully employed in the distributive process.[47]

Laudable as the objectives of the Robinson-Patman Act may be, legal commentators and economists, as well as the Supreme Court, have become aware that enforcement of the act will often have an *adverse* effect on competition.[48] The reason this is thought to be so is that wide enforcement of the act tends to make both buyers and sellers reluctant to bargain vigorously, even where there is no predatory purpose, for fear of being found guilty of price discrimination. Opportunities to effectively alter prices in a local market will often be passed up in order to maintain a price level that is known to be safe from Federal Trade Commission attack. The net result may often be a sluggishness in the general price

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[43] See generally, EDWARDS, *op. cit. supra* note 5, 617-35. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 131 (1955).

[44] The Attorney General's Committee has taken the position that this is the objective of all the antitrust laws. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1 (1955). *Cf.* NEALE, *op. cit. supra* note 4, at 421.

[45] See generally, NEALE, *op. cit. supra* note 4, at 11-23.

[46] For discussion of legislative history of the Robinson-Patman Act see EDWARDS, *op. cit. supra* note 5, 21-53.

[47] *Id.* at 29.

[48] Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 73-74 (1953). ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 131-32 (1955). EDWARDS, *op. cit. supra* note 5, at 630. For an exhaustive citation of sources on this point see Rowe, *Price Differential and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 34 n.141 (1951). The author there said, "The Robinson-Patman Act has been characterized as anticompetitive and antithetical to overall antitrust policy, either in basic conception or specific application, by virtually every economist or market analyst of academic repnte—establishing a common *scholarly* consensus that transcends political or philosophical persuasion."

structure that clearly does not enhance the competitive nature of a particular market.

If the enforcement of the Robinson-Patman Act may have an adverse effect on competition, then, to the extent that it does so, it is working at cross-purposes with the Sherman Act objective of promoting competition in the open market. It is to the same extent working at cross-purposes with the objectives of section 5. The conclusion is thus unavoidable that section 5 and the Robinson-Patman Act may not be interchanged in a cavalier fashion. Situations may well exist where both section 5 and the Robinson-Patman Act are applicable, but it is wrong to assume that conduct contrary to the policy of the Robinson-Patman Act is *ipso facto* an unfair method of competition—at least absent a showing that an adverse effect on competition exists. The Second Circuit did not examine the anti-competitive effects of the conduct involved in the *Grand Union* case, and in doing so it may have used section 5 to gain an end diametrically opposed to that which it was created to achieve.