Restraint of Trade--Trading Stamps--The Federal Trade Commission and the Green Stamp: The Effect upon Competition of Restrictions on Distribution and Redemption of Trading Stamps

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RESTRAINT OF TRADE—Trading Stamps—The Federal Trade Commission and the Green Stamp: The Effect upon Competition of Restrictions on Distribution and Redemption of Trading Stamps

Sperry and Hutchinson Company (S & H), the largest trading stamp company in the United States, has maintained two policies throughout its seventy-two years of business. The one-for-ten policy requires retailers licensed by S & H to issue stamps to consumers at the rate of one stamp for every ten cents worth of merchandise purchased. The intent of this policy is to prevent retailers from engaging in "multiple stamping"—the practice of giving more than one stamp for every ten-cent purchase. This restricted rate of issuance is maintained through contractual agreements between the stamp company and its licensees. The second policy that the company has pursued has as its goal preventing redemption of S & H stamps at any place other than S & H "redemption centers." This effort is directed primarily at the independent trading stamp exchanges and independent retail outlets which redeem various kinds of stamps. Acting alone and with other stamp companies, S & H has effectively suppressed such redemption activity with litigation and threats of legal action. As might be expected, all of these practices generated a good deal of litigation,[1] most of it initiated by S & H or its licensees asserting that the restrictions should be enforced. However, in *Sperry & Hutchinson Co.*[2] the Federal Trade Commission (FTC) recently challenged both policies under section 5 of the Federal Trade Commission Act.[3]

The FTC complaint had three parts: (1) that the one-for-ten restrictions were an illegal restraint of trade; (2) that S & H had conspired with others to enforce the one-for-ten policy; and, (3) that S & H, alone or in combination with others, deliberately attempted to restrain free and open redemption of trading stamps. The Commission's hearing examiner found some changes proved and others unproved, and both parties appealed. The FTC found that all three counts of the complaint had been sustained; with regard to the S & H policies that were challenged, it found that both the one-for-ten restrictions on stamp issuance and the suppression of stamp redemption were unfair trade practices within the meaning of section 5 of the Federal Trade Commission Act.[4]

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1. *See* notes 27, 34-35 *infra* and accompanying text.

2. Sperry & Hutchinson Co., 3 CCH 1968 TRADE REG. REP. ¶ 18,449 (June 26, 1968) [hereinafter principal case].

3. 15 U.S.C. § 45(a)(1) (1964) which reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

4. Principal case at 20,785, 20,791.

S & H argued that the company's actions with regard to the one-for-ten policy were motivated by legitimate business purposes.[5] The Commission stated that, even assuming the existence of legitimate business purposes, the company's actions must still be judged by their effect upon competition. The FTC concluded that the one-for-ten policy did result in a substantial impairment of competition, but it did not clarify exactly how competition had been impaired.[6] To understand fully how competition is affected by the one-for-ten policy, it is first necessary to discover how multiple stamping is used as a means of competition.

If retailers use multiple stamping to intensify their competitive efforts—that is, by engaging in this practice without eliminating or cutting down on any of their existing competitive activity—the obvious result is an increase in total competitive activity. If a retail competitor will lower prices *and* give extra stamps, or if he will use stamps where price competition is not a practical alternative, the S & H restraint of multiple stamping clearly results in a lessening of competition. However, multiple stamping may be employed simply as a substitute for another method of competition. If a retail competitor will either lower prices *or* give extra stamps to make his product more desirable, the one-for-ten policy does not result in a lessening of total competitive activity; rather, it simply channels competition into other forms.[7] A third possibility is that the use of multiple stamping may tend to reduce competition. Retailers who engage in multiple stamping may be able to compete effectively with each other without giving the consumer the same benefits in terms of cost and product quality which would result from price competi-

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5. S & H claimed its purposes were (1) to select a rate of issuance that would be both attractive to the consumer and profitable to the retailer; (2) to aid licensees in budgeting their costs; (3) to provide a uniform rate of issuance so that the public would know what to expect at an S & H store; and, (4) to avoid the injury to its licensees that would occur if one of the group dispenses more than one stamp for each ten-cent purchase. Principal case at 20,778.

6. The FTC held that the S & H one-for-ten policy, "by limiting retailers' opportunities to compete, has substantially impaired or may substantially impair competition." Principal case at 20,783. At another point, the Commission indicated that it was seeking to preserve stamp competition against limitations and restraints. Finally, it was stated that S & H had "engaged in a practice restraining trade in much the same way as if it had entered into agreements with such dealers bearing specifically on the prices of the products they sold." Principal case at 20,783-84. These statements could be interpreted to mean that the impairment of competition by S & H consisted of any of the following: restraining retailer stamp competition; restraining over-all retailer competition by eliminating a competitive tool; or restraining the retailer's opportunity to choose his method of competition. The first—restraining stamp competition—would be nonsensical since retailers do not compete in the sale or giving of stamps, but use them only to compete in the sale of other items.

7. Usually, this channelling would lead to price competition. The FTC set forth a great deal of testimony and evidence to the effect that price and stamp competition were effective responses to each other. Principal case at 20,779-82. Of course, without the option of engaging in stamp competition, a retailer could engage in various other forms of nonprice competition.

tion.[8] In such a situation, the one-for-ten policy would increase competition by eliminating the use of an economically undesirable substitute for price competition.

Thus, the effect on competition of the one-for-ten policy depends upon whether the use of multiple stamping creates additional competition, simply results in the same amount of competitive activity in a different form, or tends to reduce competition between retailers. It is clear that only if the first effect is present will the restrictions imposed by the one-for-ten policy lessen or impair competition. The Commission, however, did not offer any evidence to show that multiple stamping by retailers leads to an increase in total competitive activity. Thus, there is nothing to support the conclusion that S & H's restrictions on multiple stamping impaired competition.[9] Moreover, the FTC seemed to view multiple stamping as a substitute for price competition—a view that would presumably lead to the conclusion that competitive activity had not been lessened.[10]

However, though the Commission failed to show that the one-for-ten policy actually lessened competition, its conclusion that the S & H policy is an unfair trade practice may be justified on other grounds. First, the FTC obviously cannot allow every method of competition to be restrained on the rationale that only the form of competitive activity—not its total level—will be affected by particular challenged restrictions. Thus, the Commission can either judge among the various competitive tools, choosing which may be restrained and which must be left free, or it can protect the use of all legitimate means of competition, trusting to the individual trader to

8. This might occur because of an economically irrational consumer preference for trading stamps rather than cost reductions or quality improvements. It is certainly true that, in general, consumers seem to like stamps. The FTC opinion indicates the rapid growth of stamp companies in general and S & H in particular, especially after 1955. Principal case at 20,773-75, 20,775 graph cx444. However, the fact that trading stamps and game plans have been a target of consumer boycotts—the housewives' strikes of supermarkets—indicates that there is some awareness of the realities of the competitive tradeoff. Moreover, some large supermarkets now advertise the fact that they do *not* give stamps, stating that their prices therefore are lower.

9. The only evidence concerning the comparative efficiency of price and stamp distribution as competitive tools was the testimony of one witness who stated that stamps are a more effective form of competition than price in those markets where price cuts are subject to rapid neutralization through imitation. Principal case at 20,781. In such situations, the adoption of a stamp plan is more effective because it is not quickly or easily imitated. This testimony, however, does not show that *multiple stamping* is a superior form of competition in these markets; unlike securing a stamp plan, multiple stamping is as easily imitated as price cuts once the retailer has stamps to distribute.

10. The following statement summarizing the Commission's discussion of the one-for-ten policy is indicative of the FTC view:

> On the desirability of the use of stamp competition in place of price competition we make no finding either way; we can only recognize, looking at the record before us, that such competition does exist; that it is substantial; that, in some circumstances, it is worth preserving against limitations and restraints.

Principal case at 20,783.

determine which is the preferable competitive tool for his purposes. By choosing the latter approach, the FTC would avoid the necessity of making difficult—if not impossible—decisions about the relative value of various methods of competition. A related consideration is that, by outlawing S & H's restrictions on the distribution of stamps, the FTC decision protects the freedom of the individual trader to make an independent business judgment concerning his choice of competitive tools. It is submitted that preserving the trader's right to compete in his own way is, in and of itself, a goal that is within the intent of section 5 of the Federal Trade Commission Act as it has been interpreted.

In assessing both of the challenged practices, the FTC disclaimed any interest in formulating a broad rule of per se illegality.[11] Instead, it relied heavily on the particular facts and stated that it could find a violation of section 5 "without a showing of such anticompetitive effects as would be required under the antitrust laws."[12] The Commission was of course relying on the Supreme Court cases indicating that conduct can be an unfair method of competition under section 5 of the Federal Trade Commission Act without also being an antitrust violation.[13] In *Federal Trade Commission v. Brown Shoe Co.*,[14] the Court set out a broad standard for judging FTC action under section 5: "the broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."[15]

In recent years the Supreme Court has indicated that it is part of the policy of the Sherman Act to protect the freedom of the individual trader to compete. In *Keifer-Stewart Co. v. Seagram & Sons, Inc.*,[16] defendant manufacturers were charged with fixing maximum wholesale prices. The Court of Appeals for the Seventh Circuit held that defendants had not violated the Sherman Act because their actions tended to promote rather than restrain competition. The Supreme Court reversed, holding that agreements to fix maximum prices, just as those to fix minimum prices, "*cripple the freedom of traders* and thereby restrain their ability to sell in accordance with their own judgment."[17] Although the price-fixing agreements may in

11. Principal case at 20,777 (one-for-ten policy), 20,790 (suppression of "unauthorized" redemption).

12. Principal case at 20,779.

13. The Supreme Court stated in Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369 (1965), "It has been long recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations." *See also* FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); FTC v. Cement Institute, 333 U.S. 683, 694 (1948).

14. 384 U.S. 316 (1966).

15. 384 U.S. at 321.

16. 340 U.S. 211 (1951).

17. 340 U.S. at 213 (emphasis added).

fact have been presumed to reduce wholesaler competition, it is significant that the Court chose to focus on the restriction on the use of a competitive tool instead of the restricted competition itself.

There are other cases that demonstrate the Court's concern with the freedom of individual traders to compete. In *Apex Hosiery*, the Supreme Court stated that a restrictive practice is not unlawful "unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."[18] This passage apparently limits finding a restraint unlawful to those situations in which the restraint produced the kind of injurious effects upon the price level usually associated with a lessening of competition. The *Apex Hosiery* decision was in fact so interpreted by the Ninth Circuit in *Klor's Inc. v. Broadway-Hale Stores, Inc.*[19] However, on appeal the Supreme Court specifically rejected an interpretation of *Apex Hosiery* which would require a showing of effect on market prices in order to find an unreasonable restraint.[20] Reversing the decision of the Ninth Circuit, the Supreme Court held that a complaint charging manufacturers and distributors with a concerted refusal to deal with plaintiff—an appliance dealer—did allege an unlawful restraint of trade in spite of the fact that the elimination of plaintiff from the retail market would not have resulted in an injury to the public through lessened competition.[21] The attempt to eliminate a single competitor was found to violate the Sherman Act even though the victim was "just one merchant whose business is so small that his destruction makes little difference to the economy."[22] As in *Keifer-Stewart*, the Court emphasized the effects of the restraint on individual traders: "This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products. It deprives the manufacturers and distributors of their freedom to sell to Klor's . . . ."[23]

Both *Klor's* and *Keifer-Stewart* are distinguishable from the *S & H* case because they involved per se offenses.[24] Thus, neither

18. Apex Hosiery Co. v. Leader, 310 U.S. 469, 501 (1940).

19. 255 F.2d 214, 235 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959).

20. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

21. It was shown at the trial that Klor's was only one of hundreds of retail competitors in the market area, and that competition would not have been diminished by the elimination of one dealer. 359 U.S. at 209-10.

22. 359 U.S. at 213.

23. 359 U.S. at 213. Quoting from its opinion in *Keifer-Stewart*, the Court found that defendant's actions tended to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgement." 359 U.S. at 212. *See* text accompanying note 17 *supra*.

24. Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959); Recent Decision, *Antitrust Laws—Concerted Refusals To Deal—Public Injury*, 57 MICH. L. REV. 1244 (1959).

holding was necessarily based solely upon the finding that the trader's independent judgment was restrained. However, the cases do demonstrate an increasing concern for the protection of the individual trader's ability to select his methods of competition unencumbered by agreements with other traders who seek to restrain his choice.[25] Thus, it is submitted that a sounder basis for the FTC decision condemning S & H's one-for-ten policy as an unfair trade practice would have been a holding that significant restraints upon an individual retailer's freedom to employ important competitive tools violate section 5 whether or not they in fact tend to lessen competition.

This rationale would also focus attention on factual considerations such as the seriousness of the restraint and the possible justifications for imposing it. It is clear that not every restraint upon a trader's freedom to use a competitive tool should be attacked as an unfair trade practice. In determining whether a restraint is unreasonable the Commission and the courts should examine the extent to which retailers are foreclosed from using a competitive tool, the importance of the particular tool to a retailer or group of retailers, and whether the restraint is reasonably necessary to protect a legitimate business interest of the company imposing it.

In the *Sperry & Hutchinson Co.* case, the company sought to eliminate completely the use of multiple stamping by its licensed dealers. The restraint is substantial because multiple stamping, where it has been allowed, has proved to be an attractive and effective mode of competition.[26] As the FTC observed, the effectiveness of multiple stamping is apparent from the complaints from S & H licensees to the company about competing licensees who disregard the one-for-ten agreement.[27]

The legitimate business interests of S & H,[28] of course, must be weighed against this restraint on the retailer. The stamp company claimed that the one-for-ten policy was necessary to define its

25. There are several other decisions which reflect the Supreme Court's solicitude for the freedom of the trader or, on a broader scale, its devotion to the preservation of small businessmen. The Court has condemned tying arrangements as a means by which a "seller coerces the abdication of the buyer's independent judgment as to the 'tied' product's merits . . . ." Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 605 (1953). The element of imposition upon the retailer in these arrangements was also noted in United States v. Loew's Inc., 371 U.S. 38 (1962).

In Simpson v. Union Oil Co., 377 U.S. 13 (1964), the Court was particularly concerned with the coercive aspects of a resale price maintenance program which deprived dealers of "[p]ractically the only power they have to be wholly independent businessmen . . . ." 377 U.S. at 20, 21. *See also* United States v. Von's Grocery Co., 384 U.S. 270 (1966); Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965); Brown Shoe Co. v. United States, 370 U.S. 294 (1962). For a general discussion of this phenomenon *see* T. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism,* 67 MICH. L. REV. 325, 330, 332-34 (1968).

26. Principal case at 20,779-82.

27. Principal case at 20,783-85.

28. *See* note 5 *supra.*

services to the customer. This presumably means that customers are thought to be less attracted to stores distributing S & H stamps when they are not assured of receiving one stamp for every ten-cent purchase. However, since multiple stamping results in more stamps being given to the customer, removing the one-for-ten restriction could only increase the attractiveness of the S & H stamp.

S & H also claimed a need to provide a rate of issuance which would be profitable to its licensees and to protect them from the injuries of multiple stamping by competing licensees. The most likely injury to retailers from multiple stamping stems from the use of stamps in multiple stamp wars. The 1953 supermarket stamp war in Denver showed that multiple stamp competition can be as intense and difficult to end as ordinary price wars.[29] By maintaining the one-for-ten restriction on its own dealers and cooperating with other stamp companies which have similar policies,[30] S & H can offer its stamp plan to retailers with the assurance that they will not become engaged in multiple stamp competition. The result, as the Supreme Court has described it, is that "[t]he product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer."[31] Thus, it seems that S & H's objective of protecting its licensees from multiple-stamp competition tends to condemn rather than justify the one-for-ten policy.[32] It is possible, however, that, despite the example of the Denver stamp war, multiple stamping will generally be a more limited and safer form of competition—from the retailer's point of view—than price reductions. As suggested above, in such a situation retailers may forgo price competition in order to use a competitive method which requires fewer concessions to the consumer; if this

29. Hammer, *Will Trading Stamps Stick?*, FORTUNE, Aug. 1960, at 116.

30. The FTC found that S & H, in addition to maintaining its own one-for-ten policy, had cooperated with other stamp companies in imposing the policy upon their respective licensees. Although this cooperative action raises the possibility of a horizontal restraint of trade by competing stamp companies, the FTC treated the inter-company actions as part of the vertical restraint which S & H had placed upon its licensees. Principal case at 20,785-86.

31. United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960). The FTC analogized the relationship of S & H to its licensed dealers to practices involved in cases dealing with resale price maintenance and price maintenance combinations. Principal case at 20,783 [citing *Parke, Davis*, FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911)]. It stated that situations in which S & H contacted multiple-stamping retailers at the behest of competing retailers were not necessary to prove restraint of trade under count 1 of the complaint, but that they were important to illustrate that the restrictive "agreements were more than a mere formality." The FTC then stated that this was "close to a horizontal combination among retailers." Principal case at 20,784.

32. The FTC so found. Principal case at 20,785, where the Commission stated that the facts involving S & H "have gone far beyond the bounds proscribed by the Supreme Court of a mere announcement of policy and a refusal to deal," an obvious reference to the *Colgate* doctrine, U.S. v. Colgate & Co., 250 U.S. 300 (1919) and its treatment in cases like *Parke, Davis* and Albrecht v. Herald Co., 390 U.S. 145 (1968).

was in fact the case, S & H's restraints on multiple stamping might be justifiable.

However, S & H has not shown that multiple stamping limits competition or that restraints upon multiple stamping will produce a return to price competition. Retailers who are denied the use of multiple stamping may simply employ other forms of nonprice competition—for instance, games or free gifts with purchases. The retail gasoline market offers an example of this behavior. Since S & H supplies stamps to a variety of retail markets where competitors may use stamps in a variety of ways, it may be impossible to determine with any degree of certainty what effect multiple stamping has upon total competitive activity. In the absence of any concrete evidence on the question, it certainly seems that any doubt should be resolved in favor of removing restraints upon retailers' freedom to choose their own methods of competition. Therefore, if the trader's freedom to choose his competitive tools can be protected in its own right under section 5, the S & H one-for-ten policy, regardless of its competitive effects, is clearly an unfair trade practice.[33]

As noted at the outset, the FTC also attacked the legality of S & H's suppression of two forms of stamp redemption. The first type of redemption activity is carried on by stamp exchanges that buy, sell, and arrange the trading of collector's stamps on a commission basis. The second type is a form of sales promotion in which retailers offer to redeem the stamps which their customers have previously collected at other stores. Some of these retailers offer their own variety of stamp in exchange for whatever stamps the customer has collected and others accept stamps in payment for merchandise. S & H effectively suppressed much of the exchange and retailer redemption by obtaining injunctions; in many instances, redemption was suppressed simply by threatening to seek such injunctions.

The problem of unauthorized stamp redemption activity (from S & H's viewpoint) has been considered many times by various courts in the suits by S & H to obtain injunctions against these forms of redemption. Most of these courts[34] granted injunctions on the grounds that such redemption was injurious to the legitimate business interests of S & H, that the use being made of S & H stamps was inconsistent with the limited purpose for which they were issued, and that in so using them the redeemers were appropriating something of value from the stamp company and its licensees. It was also

33. Under this view Commissioner Jones is clearly correct in suggesting in her dissenting statement that the S & H restraint upon the minimum number of stamps issued should also be prohibited. The fixing of minimum and maximum rates are equally restrictive of the trader's freedom to use a competitive weapon as he sees fit. Principal case at 20,794-95. *See also* Albrecht v. Herald Co., 390 U.S. 145 (1968).

34. *E.g.*, Sperry & Hutchinson Co. v. Fenster, 219 F. 755 (D.C.N.Y. 1915); Sperry & Hutchinson Co. v. Temple, 137 F. 992 (C.D. Mass. 1905); State *ex rel.* Richman v. Sperry & Hutchinson Co., 56 N.J. Super. 589, 153 A.2d 691 (1959).

held that the S & H restrictions on the use of its stamps did not violate a state antitrust law prohibiting acts, combinations, contracts, and conspiracies in restraint of trade or commerce.[35]

When this practice came before the FTC for the first time in the principal case, the Commission argued that suppression of stamp redemption by S & H constituted an unlawful restraint upon alienation. The FTC noted that if the S & H policy were such an unlawful restraint it might be a per se offense under section 1 of the Sherman Act.[36] The Commission declined to base its holding on that ground, but it did consider the problem of whether S & H had retained title to the stamps. It found that although S & H gives notice in each collector's book that title to the stamps is retained by the company, the company retains none of the risks of ownership such as the duty to replace lost stamps or pay a tax on stamps in the hands of its licensees. The Commission concluded that "the evidence is not sufficient to demonstrate that [S & H] has exercised dominion over the stamps."[37]

Other courts have, however, found that S & H does retain an interest in the stamps sufficient to warrant placing restraints upon their use.[38] In 1908, a federal circuit court stated that S & H's "stamps are not, in the full sense, property. Their nontransferability is an essential element of their value, both to complainant [S & H] and its subscribers."[39] In this case and others like it, the stamp is not considered as physical property over which the company may or may not have retained dominion. Rather, it is viewed as a token of certain rights which the customer receives. In *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*,[40] another early federal case, it was held that the rights of the customer are limited to those which are expressly or impliedly promised him by the company. Thus, while the stamp "may be transferred in any way which confines its use within the purpose for which it was issued, it may not be transferred in such a way as to destroy its value as an instrument of special trade advantage . . . ."[41]

35. Rance v. Sperry & Hutchinson Co., 410 P.2d 859 (Okla.), *cert. denied*, 382 U.S. 945 (1965).

36. The Commission cited United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), for the proposition that unlawful restraints on alienation may be per se violations of section 1 of the Sherman Act. However, it noted that the circumstances of the trading stamp scheme might be distinguishable from the situation where products are transferred to dealers for resale.

37. Principal case at 20,790.

38. *E.g.*, Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 F. 833 (C.C.D. R.I., 1904); State *ex rel.* Richman v. Sperry & Hutchinson Co., 56 N.J. Super. 589, 153 A.2d 691 (1959); Sperry & Hutchinson Co. v. Siegal, Cooper & Co., 309 Ill. 193, 140 N.E. 834 (1923).

39. Sperry & Hutchinson Co. v. Louis Weber & Co., 161 F. 219, 221 (C.C.N.D. Ill. 1908).

40. 135 F. 833 (C.C.D. R.I. 1904).

41. 135 F. at 836.

Under this early rationale, a limitation upon the transfer of stamps is a limitation upon the rights given to the customer by the stamp company rather than a restraint upon the customer's ability to transfer his property. The trading stamp is, as one judge observed, "sui generis,"[42] and for this reason the courts and the FTC are probably correct in refusing to apply the ancient property concept of improper restraint upon alienation to the stamp situation.

The FTC found that the S & H policy of suppressing stamp redemption was an unfair trade practice because the policy had severe anticompetitive effects upon exchange operators and retailers who used stamp redemption. S & H again attempted to justify this policy on the grounds of business necessity, but the FTC found that the company had failed to show any injury to its business resulting from the unauthorized redemption activities. The opinion noted that since most stamp exchanges had been quickly suppressed there was very little evidence about what effect they might have had, but the Commission concluded that commercial exchanges were unlikely to have any greater effect than the informal exchanges among housewives presently allowed by S & H.[43]

The FTC finding that the stamp company does not suffer injury if it allows the exchange activity is unique. Previously, state and federal courts found that such redemption activity does harm the stamp companies.[44] The rationale of the trading stamp scheme is that once the purchaser has begun to collect a certain stamp, he becomes "locked in" and will return to the store issuing that stamp until he has collected enough stamps for redemption.[45] One advantage to a retailer of associating with S & H, which issues between thirty-seven and forty per cent of all trading stamps circulated in this country, is that more people are locked in to the S & H green stamp. The stamp exchanges, where consumers can trade their S & H stamps for another kind (or vice versa), enable the purchaser to switch stores in response to factors of convenience or considera-

42. 135 F. at 834.

43. The FTC noted that in 1960 twenty per cent of the stamps issued were exchanged by housewives on an informal basis. The Commission also cited S & H's policy of encouraging the pooling of stamps for charitable purposes as an instance in which the necessity to complete books is not an element in inducing the consumer to patronize S & H licensees. Principal case at 20,789.

44. As one court stated the problem, "to create an unfair market for partly filled and nontransferable stamp books would have the tendency to keep purchasers from trading with subscribers until they were filled." Sperry & Hutchinson Co. v. Louis Weber & Co., 161 F. 219, 221 (C.C.N.D. Ill. 1908). Also, "the function of the stamp as a symbol is not merely to induce a single purchase of the retailer's offering, but to provide an incentive for continued patronage." State by Richman v. Sperry & Hutchinson Co., 56 N.J. Super. 589, 603, 153 A.2d 691, 699 (1959).

45. The creation of "families" of stamp stores in each market area incorporates the same idea. The purchaser who is collecting one type of stamp at his supermarket will presumably patronize other local businesses—gas stations, stationers, and so forth —issuing the same stamp.

tions of price and quality. This increased mobility does not come at the expense of losing the value of a consumer's partly filled books as long as stamp exchanges operate. Of course, the interchangeability of stamps eliminates the necessity of returning to a store dispensing S & H stamps; the retailer loses the long-term drawing power of his stamp scheme, and consequently the stamp company will probably lose some retailers as customers. Since this loss to the company is a logical result of the redemption activity, the FTC finding that S & H was not injured is suspect.

The Commission stated that even if S & H did have good business reasons for its suppressive policy, such reasons would have to be weighed against the policy's anticompetitive effects on exchange operators and competing retailers. Finding that there was no injury to S & H enabled the FTC to avoid the necessity of weighing the company's business needs. Assuming, however, that a stamp company could demonstrate injury to its business along the lines suggested above, it is submitted that a balancing of the business justifications and the anticompetitive effects of suppressing redemption should result in a finding that the S & H policy is an unfair trade practice only with regard to independent retailer redemption. In light of the potential injuries to a major stamp company, the two types of redemption activity do not warrant the same protection under section 5.

The trading stamp exchange might be likened to the second-hand market situations involved in *Butternick Publishing Co. v. FTC*[46] and *United States v. United Shoe Machinery Corp.*[47] In *Butternick*, a group of magazine publishers had attempted to suppress the second-hand sale of their publications by concerted refusals to deal with retailers who marketed the second-hand copies. The Second Circuit held that this was a violation of section 5, basing its decision in part on a finding that the publishers' actions restrained the purchasers' right to resell the magazines. But the decision was also based on a finding that the new and used copies of a particular issue compete with each other in the retail magazine market and that the suppression of second-hand sales necessarily restrained this competition. Similarly, in *United Shoe Machinery Corp.*, a federal district court in Massachusetts held that the manufacturing company's refusal to sell its machines in addition to leasing them prevented the creation of a second-hand market that could have competed with the company in supplying machines to shoe manufacturers.

The trading stamp exchange is similar to a second-hand market in that both activities are totally dependent upon the products of another business, but they differ in other, more important aspects. Unlike the second-hand dealer and the primary producer, the stamp

46. 85 F.2d 522 (2d Cir. 1936).
47. 110 F. Supp. 295 (D.C. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

exchange and the stamp company do not compete directly: the exchange does not compete with the company in the sale of stamps to retailers, nor does it compete in the redemption of stamps for goods, since the trading stamps which are bought and sold by the exchange must still be redeemed by the trading stamp companies. Accordingly, neither the number of stamps received by the customer nor the quality of goods offered by the stamp company is enhanced by the existence of the exchanges. Thus, one justification for protecting a second-hand market—that such a market provides meaningful competition to the original producer or issuer—is inapplicable to the stamp exchanges, which produce none of the benefits associated with the second-hand markets in *Butternick* and *United Shoe*.[48]

Moreover, no competitive response by the company can counteract the exchange's destructive effects on the stamp scheme. Regardless of how many stamps are issued or what kind of stamps are used, the long-term drawing power of the scheme will still be reduced if the customer knows that he can trade in his disparate stamps at the exchange. But there is a serious question whether this drawing power should be protected at all. Since the "lock-in" feature of trading stamps tends to bring the consumer back to a certain store for reasons unrelated to price or product quality, the scheme may tend to foreclose competing retailers from access to the consumer saving the stamps of another store, thus inhibiting retailer competition for such a consumer. Still, if the stamp scheme is—as the Federal Trade Commission found—a competitive tool worth preserving, the stamp company should be allowed to protect the drawing power of its stamps against the destructive effects of the stamp exchanges so long as the means used are not in themselves unlawful.

The competitive effects of stamp redemption by competing retailers are essentially different from those resulting from the stamp exchanges. The retailer who redeems his competitor's stamps is using stamp redemption as a means of competition. New stamp companies and their licensees can employ this method to win acceptance for their stamp, and nonstamp retailers may use it to lure customers from stamp-giving stores. Although retailer redemption may alter the use of trading stamps, it does so in the process of competition. Unlike the stamp exchanges, redemption by competing dealers may produce beneficial competitive responses. The threat of competition from a new stamp may evoke efforts to make the old ones more attractive.

48. The stamp exchange does benefit the stamp collector at least temporarily by allowing him to choose from all the companies' goods when redeeming his stamps. However, the advantage of this choice may be offset by a general reduction in the quality of goods offered by all the companies. The fact that a collector can obtain a stamp company's redemption goods without patronizing its retailers reduces the incentive of the stamp companies to compete in the quality of goods they offer. Furthermore, the collector's expanded choice of redemption goods is of obviously limited value if the exchanges are sufficiently harmful to eliminate the stamp schemes altogether.

Unrestricted stamp redemption by some dealers may be met with similar action by other dealers. Thus, restraint of retailer redemption has detrimental effects on competition which may outweigh the damage that it does to the stamp companies and their licensees. The antitrust laws do not protect businessmen from the effects of legitimate competition, nor do they allow them to protect themselves by restraining that competition. Therefore, the FTC was correct in finding that the S & H policy of suppressing retailer redemption is an unfair trade practice which restrains an effective and generally beneficial method of competition.