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Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission

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CEASE AND DESIST: THE HISTORY, EFFECT, AND SCOPE OF CLAYTON ACT ORDERS OF THE FEDERAL TRADE COMMISSION

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> The practice of entering broad orders in the terms of the statute, routinely and automatically without citing need or justification therefor, is indefensible as a matter of law and sound administration; and I would assume it to be a thing of the past.[1]

THE primary focus of the present study is upon the content of cease and desist orders entered by the Federal Trade Commission (FTC) under the Clayton Act. Whether the FTC practice referred to above is, or should be, "a thing of the past" is not as clear as the quoted statement might suggest. The statement, made in dissent by one of the protagonists in an intra-Commission dispute which began in 1962, is more in the form of a challenge than a statement of fact. Some re-examination of FTC practice has resulted, but it has not been complete.[2] Fundamental questions remain unsolved. As more and more firms find themselves subject to FTC orders, and as the policing of existing orders is given increasing emphasis, these problems will assume greater significance both to the firms involved and to the public whose interest is at least ostensibly being protected.

This study is confined to orders entered by the FTC under sections 2 and 3 of the Clayton Act[3] upon a finding that one or both of these sections have been violated. The vast majority of the orders discussed deal with price discrimination, condemned by section 2(a)

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1. Vanity Fair Paper Mills, Inc., 60 F.T.C. 568, 581 (1962) (dissenting opinion of Commissioner Elman), *modified*, 311 F.2d 480 (2d Cir. 1962).

2. An extensive literature dealing with various aspects of FTC orders and their enforcement has begun to develop. The reader is referred to 1 K. DAVIS, ADMINISTRATIVE LAW § 8.19 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION ch. 8 (1965); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT 504-24 (1962), 142-64 (1964 Supp.); Austern, *Five Thousand Dollars a Day*, 21 A.B.A. ANTITRUST SECTION 285 (1962); Long, *The Administrative Process: Agonizing Reappraisal in the FTC*, 33 GEO. WASH. L. REV. 671 (1962); Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457 (1965); Shniderman, *Federal Trade Commission Orders Under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct*, 65 HARV. L. REV. 750 (1952); Comment, *Permissible Scope of Cease and Desist Orders: Legislation and Adjudication by the FTC*, 29 U. CHI. L. REV. 706 (1962).

3. Clayton Act §§ 2, 3, 15 U.S.C. §§ 13, 14 (1964).

of the Clayton Act if the discrimination is injurious to competition, or the related types of conduct (the granting of promotional allowances or brokerage) covered by the balance of section 2, as amended by the Robinson-Patman Act.[4] Orders under section 3, which prohibits tie-ins and other exclusive dealing arrangements likely to have an anticompetitive effect, are far fewer in number.[5] This study does not directly encompass orders under section 7 of the Clayton Act,[6] the so-called antimerger law, because of the unique problems of the divestiture remedy commonly employed in such cases.[7] Nor is detailed consideration given orders entered under section 5 of the FTC Act, which broadly condemns "unfair methods of competition" and "unfair or deceptive acts or practices."[8] But section 5 orders, which most commonly deal with deceptive advertising or sales practices, cannot be ignored altogether; both the FTC and the courts have relied heavily on section 5 practices and precedents in Clayton Act cases. Whether such reliance is proper is one of the questions to be considered.

A cease and desist order is not entered in a vacuum. What an order should say or require depends upon the effect which the order is to have. A substantial portion of the present study is therefore concerned with the array of effects which may result from the order's entry, and with the relationship between those effects and the order itself. Not all of the detailed discussion of enforcement procedures which follows may seem directly relevant to the content of the FTC's orders. There are important unresolved issues within the enforcement procedures themselves which warrant examination for their own sake and are therefore considered in detail. But in a broad sense,

4. Section 2(a), 15 U.S.C. § 13(a) (1964), provides in part as follows:

> It shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

Section 2(b) permits the seller to justify discriminatory pricing where the lower price "was made in good faith to meet an equally low price of a competitor." 15 U.S.C. § 13(b) (1964).

Sections 2(c) (brokerage), 2(d) and (e) (promotional allowances and services), and 2(f) (knowing inducement of discriminatory pricing) are set out respectively in notes 351 and 369 *infra* and in the text accompanying note 395 *infra*.

5. Section 3, 15 U.S.C. § 14 (1964), is set out in note 407 *infra*.

6. 15 U.S.C. § 18 (1964).

7. *See generally* Comment, *Divestiture of Illegally Held Assets: Observations on Its Scope, Objectives and Limitations*, 64 MICH. L. REV. 1574 (1966).

8. 15 U.S.C. § 45 (1964).

all aspects of the enforcement procedures bear on the ultimate question of content. If nothing else, the complexity of the enforcement procedures and the difficulty of reconciling the roles of the FTC and the judiciary emphasize the critical role played by the order itself.

The study is thus broadly divided into two parts: (1) a detailed consideration of enforcement and other more indirect effects of FTC orders; (2) examination of the content of the orders themselves. The array of effects emanating from an order is relatively well established and not easily changed. It is reasonable therefore to consider the procedural enforcement pattern, and so forth, as fixed, and to treat the content of the orders as the controllable variable. Hence the fixed framework is considered first.

The discussion of direct enforcement procedures begins with legislative history. Some may ask why. The historical background of these procedures may of course illuminate their meaning and provide some insight into what an order is meant to do. But my purpose is somewhat broader. As enforcement procedures have changed, the FTC's role has changed. Why this has occurred, and whether it has been the result of reasoned choices, is of primary import. The legislative history is followed by a detailed discussion and comparison of the so-called "old" and "new" enforcement procedures, and of the impact of FTC orders on private litigation. The succeeding portion of the study, dealing with the scope of the orders themselves, begins with an evaluation of the objections to "broad" or "vague" orders and the existing criteria for determining permissible scopes. A set of workable standards is then proposed. The final portion of the study consists of a detailed examination of past FTC practices, and an evaluation of those practices in light of the proposed standards.

No attempt will be made to determine whether violations should be found or whether the statute should be changed. The Robinson-Patman Act has been condemned by many as vague and economically unsound. Many have suggested its amendment or repeal.[9] Obviously such views color arguments about what the FTC should or should not do. But a fair assessment of remedies should proceed, so far as possible, on the assumption that the statute, as long as we have it, does embody valid public policy. Arguments against the statute and

9. For three relatively recent examples of such criticism *see* Austern, *Difficult and Diffusive Decades: An Historical Plaint About the Robinson-Patman Act*, 41 N.Y.U.L. REV. 897 (1966); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1 (1966); McGee, *Some Economic Issues in Robinson-Patman Land*, 30 LAW & CONTEMP. PROB. 530 (1965). *See also* C. EDWARDS, THE PRICE DISCRIMINATION LAW, 646-56 (1959); C. KAYSEN & D. TURNER, ANTITRUST POLICY 183-84 (1959); F. ROWE, *supra* note 2, at 535-55. A "bibliography of criticism" appears in *id.* at 551 n.69 and 554 n.80.

its interpretation should be directed primarily at the statute itself, and not at the remedy used by the FTC. Thus while it might be urged that the FTC should use its remedial power in a very circumscribed manner because by so doing it can in effect "change" the requirements of a "bad" statute, such arguments are misdirected.

The relationship between attacks on the statute and its interpretation, on the one hand, and the orders, on the other, is particularly close in those cases where the FTC's order simply repeats the prohibition of the violated statute. The argument that in such cases the FTC's orders are as vague as the language of the admittedly vague statute is sufficiently obvious that it need not be belabored.[10] But unless such an argument is to be nothing more than an outcry against the statute itself, it must be cast in different terms, namely, that the nature of the statute and the policies which the FTC is charged with implementing are such as to call for the use of specific, carefully worded orders.

I. Effects of a Cease and Desist Order

The entry of a cease and desist order entails certain clear consequences: the respondent will become subject to enforcement procedures; he will be obliged to file compliance reports with the FTC; and he must learn to live with more intensive FTC scrutiny than he had suffered previously. There are, in addition, certain consequences which *may* follow upon the entry of an order, but about which there is presently some doubt. Thus an order may ultimately be held to be within section 5(a) of the Clayton Act,[11] so that it can be used to create a prima facie case in subsequent treble damage actions by private litigants. These consequences all have some bearing on the more immediate question of what the FTC should or must do when the order is entered.

A. *Direct Enforcement*

Orders entered upon a showing of violation of one or more of the substantive provisions of the Clayton Act are enforced pursuant to procedures contained in section 11 of the Act.[12] Section 5 of the FTC Act contains its own provisions for the enforcement of orders entered as a result of substantive section 5 violations.[13] This divi-

10. The classic statement concerning the vagueness of the Robinson-Patman Act is that of Justice Jackson, dissenting in FTC v. Ruberoid Co., 343 U.S. 470, 483 (1952). *See* F. Rowe, *supra* note 2, at 535 n.4.

11. 15 U.S.C. § 16(a) (1964). *See* discussion accompanying notes 193-207 *infra*.

12. 15 U.S.C. § 21 (1964).

13. 15 U.S.C. § 45 (1964).

sion of enforcement provisions between two different statutes contributes to the disorder which now characterizes the enforcement machinery, but it was both logical and without particular significance at the time both statutes were enacted in 1914.[14]

As originally enacted, the FTC Act and Clayton Act enforcement provisions were virtually identical.[15] Both statutes called for entry of orders which were not in themselves final and which carried no immediate sanctions. If the person subject to the order then violated it, the FTC could apply to a United States circuit court of appeals for enforcement. Violations of the court's order, if enforcement was decreed, constituted contempt. The individual respondent was also entitled to seek review at any time in the circuit court of appeals. The incentive to seek such independent review was not great, however, since the respondent could safely await the filing of an enforcement petition before questioning the validity of the order.

This is the oft-described "three bites at the apple" procedure, so called because no sanctions could be imposed until the respondent had engaged in his third violation. Proof of violation of the statute was needed to secure issuance of the order in the first instance. Proof of violation of the order was a condition of entry of the court's enforcement order. And the contempt sanction rested on proof of subsequent violation of the court's order. It should be noted at the outset, however, that in some cases, depending upon the terms of the FTC and court orders, these three violations were not violations of the same substantive provisions. Orders, whether those of the FTC or of the court, are not necessarily the same as the language of the statute. As the Supreme Court has noted, "there is quite a difference between proving a violation of the Clayton Act and a failure to obey a specific order of the Commission."[16]

These procedures were changed by the Finality Act of 1959.[17] Orders now become final after expiration of the sixty-day period for seeking review. If review is sought, the affirmed order becomes final within a specified time after completion of the review proceedings. If a final order is violated, civil penalties in the maximum amount

14. While § 5 of the Federal Trade Commission Act (FTC Act) could be enforced only by the FTC, several other agencies were given authority to enforce the Clayton Act under the § 11 enforcement procedures. Moreover, it was thought difficult, in the Senate, to incorporate by reference the provisions of the FTC Act when that statute had not yet passed the House. *See* note 39 *infra*.

15. FTC Act § 5, 38 Stat. 717 (1914); Clayton Act § 11, 38 Stat. 730 (1914).

16. FTC v. Jantzen, Inc., 386 U.S. 228, 236 (1967). *See* Kauper, *FTC v. Jantzen: Blessing, Disaster or Tempest in a Teapot?* 64 MICH. L. REV. 1523, 1536, 1543-47 (1966).

17. 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

of $5,000 per violation (with each day of a continuing offense defined as a separate violation) may be imposed in a suit brought for that purpose in federal district court.

The procedural changes wrought by the Finality Act are of sufficient magnitude that the Supreme Court, in a now famous dictum in *FTC v. Henry Broch & Co.*,[18] suggested that the FTC's practices in entering orders should be changed as a result. Much more will be said of this after the "old" and "new" procedures have been compared in detail. But first, how and why were the changes in enforcement procedure made?

1. *Legislative Development*

a. *The original concept.* It is easy now, with the benefit of hindsight, to condemn the "three bites" procedures as "laborious, time consuming and very expensive."[19] But to the Congress which established them they were sensible and based on precedent. Moreover, they represented a workable compromise between conflicting views of the FTC's functions, views which are of relevance today in evaluating the FTC's order practices.

It is difficult to specify with precision the purposes which the Congress thought it was serving in creating the FTC. The legislative history of the Clayton and FTC Acts is difficult to evaluate. There are the usual problems of identifying whether a given speaker was speaking for or against and was informed or uninformed. Additionally, a large degree of confusion was engendered by the fact that the two statutes were being debated and sent back and forth between the two houses at the same time: in each house the two bills were handled by different committees;[20] debate took place on one bill before the other was before the debating body; and speakers did not always know what the other body had done, or what was going on in committee.[21]

18. 368 U.S. 360 (1962).

19. S. REP. No. 83, 86th Cong., 1st Sess. 2 (1959). One can see their defects in the protracted *American Crayon* litigation. *See* note 77 *infra*.

20. The trade commission bill, H.R. 15,613, 63d Cong., 2d Sess. (1914), was assigned to the Interstate Commerce Committee in both the Senate and the House. The Clayton bill, H.R. 15,657, 63d Cong., 2d Sess. (1914), was referred to the Judiciary Committee in both the Senate and the House.

21. Senator Cummins, referring to the peculiar distribution of the two bills between committees, thus lamented about "this miserable tangle in which we find ourselves." 51 CONG. REC. 11,535 (1914). At the time, he was attempting to place in the trade commission bill (H.R. 15,613) provisions which in substance gave the FTC Clayton Act enforcement powers. But while the trade commission bill was on the floor, the Judiciary Committee had not yet reported out the Clayton bill (H.R. 15,657). *See also* remarks of Senator Reed, 51 CONG. REC. 12,028-30 (1914).

Early in the Senate debate Senator Newlands indicated an intention to entrust

The first versions of the FTC Act and the Clayton Act were both passed by the House on June 5, 1914. The FTC Act, in this initial form, gave the FTC only investigatory, advisory, and publicity-giving powers.[22] All amendments purporting to confer adjudicative or regulatory powers had been declared out of order.[23] The Clayton Act, as originally passed by the House, made no mention of commission enforcement, although the issue was raised by those favoring creation of an agency with enforcement powers.[24] Enforcement of the Clayton Act was to be through criminal sanctions, private suits, and suits by the United States for injunctive relief.[25] It is clear that the two bills, as they stood at that point, did not reflect the desires of many businessmen who, in the years immediately following the 1911 decision in the *Standard Oil* case, wanted a commission which would advise *them* of the legality of their business practices.[26] Indeed, creation of a body with such functions was deemed unwise.[27]

Clayton Act enforcement in part to the FTC. He asked for prompt enactment of the commission bill so that the Judiciary Committee could then consider the FTC as an existing body. 51 CONG. REC. 11,536 (1914). Others expressed the desire that no action be taken on H.R. 15,613 until H.R. 15,657 was reported out. *Id.* (remarks of Senator Lippitt).

22. H.R. 15,613, as passed by the House, appears at 51 CONG. REC. 12,795-96 (1914).

23. A number of amendments to this effect were offered and rejected by the chair. *See* 51 CONG. REC. 9059-67 (1914). The most significant, offered by Congressman Stevens, would have amended H.R. 15,613 to state that "unfair or oppressive competition in commerce is hereby declared unlawful." The Stevens amendment would have authorized entry of a "restraining and prohibiting order," to be enforced by order of a federal district court upon petition of the FTC. 51 CONG. REC. 9059-60 (1914). The Stevens amendment is of import as the predecessor of the FTC Act as finally enacted. In June 1914 President Wilson became converted to the basic idea of the Stevens bill (H.R. 15,660, from which the amendment proposed to H.R. 15,613 was taken). *See* G. HENDERSON, THE FEDERAL TRADE COMMISSION 26 (1924); Austern, *The Parentage and Administrative Ontogeny of the Federal Trade Commission*, in N.Y. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 83, 85-88 (1955).

Another amendment, offered by Congressman Morgan, would have made violation of an FTC order a misdemeanor, punishable by a fine not to exceed $5,000. It is not, therefore, entirely accurate to conclude that "the first suggestion that orders should be final when entered was made in 1933." Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 459 n.15 (1965).

24. During debate, an inquiry was made as to "why the trade commission was not given specific power to enforce a provision like that of Section 2 . . . ." 51 CONG. REC. 9069 (1914) (remarks of Congressman Cooper). The reply was that the trade commission bill had been developed by a different committee and in any event the proposed bill imposed criminal sanctions. *Id.* at 9069 (remarks of Congressman Webb).

25. Sections 2, 4, 8, and 9 of H.R. 15657, as it originally passed the House, were the predecessors of the substantive prohibitions in §§ 2, 3, 7, and 8 of the Clayton Act as finally enacted. Each of these provisions carried its own criminal sanctions. Section 13 of the original bill provided for equitable suits under the direction of the Attorney General. Treble damage actions were authorized by § 5. *See* the description of these provisions in 51 CONG. REC. 9068-74 (1914) (remarks of Congressman Webb).

26. *See* the discussion in G. HENDERSON, THE FEDERAL TRADE COMMISSION 21-22 (1924); W. HOLT, THE FEDERAL TRADE COMMISSION 6-7 (1922).

27. *See, e.g.*, 51 CONG. REC. 8840-41 (remarks of Congressman Covington).

The trade commission bill, as reported out of committee in the Senate, was markedly changed. Section 5 of the bill declared "unfair competition" unlawful, directed the Commission to prevent the use of "unfair methods of competition," and empowered the Commission to enter orders "restraining and prohibiting the use of the same." Upon a finding that its order had not been complied with, the Commission was authorized to seek an enforcement order in federal district court.[28]

Much of the Senate debate concentrated on the meaning of the phrase "unfair methods of competition." Section 5 of the bill was criticized as an improper delegation of legislative and judicial power.[29] Such attacks were generally met by drawing the comparison between the proposed trade commission and the existing Interstate Commerce Commission[30] and by repeated emphasis on the inability of the commission itself to impose sanctions.[31] Since sanctions could be imposed only by a court, for violation of a *court* order, judicial power was not really delegated at all. The enforcement provisions thus became an integral and necessary part of the argument in support of section 5.

There was little debate over the enforcement provisions themselves. Those who supported the bill accepted them and relied on their presence. Those who attacked the bill concentrated on the substantive prohibitions of section 5. Congress was not blind to defects in the court enforcement procedure. The procedure was criticized;[32] alternatives were suggested.[33] But the general attitude of Congress was reflected in a significant statement by Senator Newlands, chairman of the Interstate Commerce Committee, early in the Senate debate:

28. The Senate substitute appears at 51 CONG. REC. 10,377-78 (1914). The accompanying report, S. REP. No. 597, 63d Cong., 2d Sess. (1914), appears in *id.* at 11,086-99.

29. *See, e.g.*, 51 CONG. REC. 11,113-15 (remarks of Senator Reed), 12,216 (remarks of Senator Sterling), 12,651-52 (remarks of Senator Sutherland) (1914).

30. *See, e.g.*, 11,231 (remarks of Senator Robinson), 51 CONG. REC. 12,142 (remarks of Senator Hollis), 12,220 (remarks of Senator Newlands), 13,004 (remarks of Senator Cummins) (1914).

31. *See, e.g.*, 51 CONG. REC. 12,145 (remarks of Senator Hollis), 12,652 (remarks of Senator Cummins), 14,932 (remarks of Congressman Covington) (1914).

32. The most scathing criticism came from Senator Reed who attacked the "three bites at the apple" procedure contained in the bill as finally enacted in the following terms:

> Who has ever heard of creating a commission to determine, first, whether a man has been guilty of committing burglary, then to order him to stop, then to give him a right to appeal to a court, and in the end if he be defeated to solemnly adjudge that he must now stop? Why should a man hesitate to commit burglary with such a law as that? If he succeeds in escaping with the goods, wares and chattels of his victim and is not detected he is so much the profiter. If he is detected all he has to do is lay down the swag and seek other windows and other doors.

51 CONG. REC. 14,790 (1914).

33. *See* note 23 *supra.*

> Now, I will state that throughout this bill, so far as I am individually concerned, I have not been disposed to suggest extreme penalties. I thought it only fair that, inasmuch as this was a new provision of law, to be tested through this tribunal the parties brought before it, at all events in the earlier stages, should have the opportunity without facing the penitentiary to assert their rights, or what they claim to be their rights, either before the commission or before the courts, and that the penalty should be imposed only in case of disobedience to the order of the courts. *Of course we could have put a provision in the bill that after an order was made by the commission every day's failure to comply with it would involve a fine of a thousand dollars a day or a hundred dollars a day or whatever else we might make it, or perhaps imprisonment.*[34]

The bill initially passed by the Senate declared "unfair competition in commerce" unlawful and directed the Commission, upon a finding of violation, to enter an order requiring that the offender "cease and desist from such unfair competition." If the offender did not cease and desist, and the order had not been set aside, the commission was empowered to seek an enforcement decree in federal district court. The court was to apply "the law and rules applicable to suits in equity." No penalty for violation of the court's order was established.[35]

The Senate took up the Clayton bill after passage of the commission bill. Senator Newlands had indicated during debate of the latter that the Clayton bill might entrust antitrust enforcement, at least in part, to the Commission.[36] While the bill reported out of the Senate Judiciary Committee made few changes in the House version,[37] the Committee ultimately proposed an amendment giving the agency enforcement powers with respect to the substantive provisions of the bill and incorporating by reference the enforcement provisions contained in the trade commission bill.[38] Before Senate

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34. 51 Cong. Rec. 11,112 (1914) (emphasis added).

35. The original Senate version of H.R. 15,613 is set out in 51 Cong. Rec. 14,923-24 (1914). Section 5 of the bill as passed by the Senate is the result of the so-called Cummins amendment, adopted on the floor in preference to the Pomerene amendment, which had been accepted by the Interstate Commerce Committee. While there were a number of differences between these amendments, the most important related to the weight to be given FTC findings in subsequent enforcement and review proceedings. The Pomerene amendment simply made FTC findings "prima facie evidence." The Cummins amendment, by reference to the Interstate Commerce Act, purported to give greater weight to the FTC's findings and orders, restricting the scope of review. For the Pomerene amendment, *see* 51 Cong. Rec. 12,993, 13,103 (1914). The Cummins amendment appears in *id.* at 13,045.

36. 51 Cong. Rec. 11,536, 12,028-31 (1914).

37. H.R. 15,657, as originally reported by the Senate Judiciary Committee, appears in 51 Cong. Rec. 13,659-61 (1914). *See* G. Henderson, *supra* note 23, at 27-33.

38. The amendment initially proposed by the committee, in the form of a new § 9(b) in H.R. 15,657, followed the language of the Pomerene amendment to § 5 of the

passage, the bill was again amended to set out those provisions in full.[39]

Little of the tortuous history of the Clayton bill in the Senate is relevant to the present study. Most of the debate focused on the need for specific substantive prohibitions, in light of the general prohibition against unfair competition in the commission bill, and on the elimination of criminal sanctions.[40] Defects in the proposed enforcement machinery were again pointed out, although it is not clear that such complaints would have been made had criminal sanctions not been removed from the bill.[41] Significantly, in light of subsequent FTC practice in the drafting of orders,[42] it was suggested that while the proposed procedures might be a legitimate means of enforcing section 5 where it was "hard to distinguish whether [conduct] was right or wrong," there was no reason to enforce the specific prohibitions of the Clayton bill in such a manner.[43]

Both bills assumed their final form in conference committee.[44] For the first time, express provision was made for review of FTC orders in the court of appeals on petition by the respondent. The forum for enforcement proceedings at the behest of the FTC was changed from district court to the court of appeals "in order to

trade commission bill, which the Senate rejected when it accepted the Cummins amendment. *See* note 35 *supra*. The committee then immediately sought to amend the amendment by striking most of the detailed enforcement and review procedures and adding a paragraph incorporating the procedures in § 5 of the trade commission bill by reference. *See* 51 CONG. REC. 14,223-24 (1914).

39. The final amendment appears at 51 CONG. REC. 14,321 (1914). Placing the enforcement provisions of H.R. 15,613 into H.R. 15,657 almost verbatim was thought preferable to incorporating those provisions by reference because the Senate's version of H.R. 15,657 had not yet passed the House. *See* 51 CONG. REC. 14,321 (1914) (remarks of Senator Walsh). It is clear, however, that the overriding concern was to insure that the enforcement machinery in both bills was the same. *See id.* at 14,225, 14,323 (remarks of Senator Walsh), 14,227 (remarks of Senator Cummins) (1914).

40. H.R. 16,567, as passed by the Senate, deleted § 2 of the House bill (price discrimination), and substantially modified the exclusive dealing provision, enacting instead a provision directed toward tie-ins involving patented articles. Criminal sanctions for violations of all substantive provisions, except the provision dealing with tie-ins, were eliminated, and enforcement responsibility was given to the FTC. *See* G. HENDERSON, *supra* note 23, at 29-33.

41. Senator Reed continued to be the most vocal critic, condemning the delay and general ineffectiveness of the proposed procedures. He would apparently have been satisfied if criminal sanctions were available as an additional or alternative remedy. 51 CONG. REC. 14,225-28, 14,251 (1914) (remarks of Senator Reed). *See also id.* at 14,262 (remarks of Senator Borah).

42. *See* text accompanying note 272 *infra*.

43. 51 CONG. REC. 14,269 (1914) (remarks of Senator Reed).

44. The conference version of the trade commission bill appears in 51 CONG. REC. 14,919-21 (1914). The conference revisions of the commission enforcement procedures in the Clayton bill appear in *id.* at 15,637-40.

obtain the speediest settlement of disputed questions."[45] While this change seemed reasonable and was not sufficiently controversial to warrant further discussion on the floor, it contributed directly to the over-all ineffectiveness of the enacted procedures by requiring an appellate court to make an original finding of fact—that the FTC's order had been violated—before the court could proceed further.[46]

The FTC enforcement procedures were severely criticized as cumbersome and ineffective in both houses during debate on the two conference reports. As during the initial Senate debate, such criticism invariably accompanied complaints about the absence of criminal sanctions from the Clayton bill.[47] Supporters of the legislation continued to emphasize that court enforcement proceedings prior to the imposition of penalties were designed to eliminate constitutional obstacles.[48] The conference reports on both bills were ultimately accepted by both houses.

The ever-present temptation to draw sweeping generalizations from bits and snatches of legislative history must be resisted here, given the chaotic nature of the reports and debates. But it is clear that the enforcement procedures in both statutes are compromises, dictated both by political and constitutional considerations. In the FTC Act, those who wanted a commission with regulatory and enforcement powers were unwilling to give a wholly new agency powers which did not rely directly on the judiciary. Opposition would undoubtedly have been far greater had a more summary procedure been part of the bill. The Clayton Act enforcement provision reflected both a compromise over criminal penalty and an attempt to synchronize enforcement. Neither statute was designed to create or utilize a commission for advice-giving or conduct-approving purposes.

The feature of the "three bites" procedure which ultimately was to prove most troublesome was the "second bite"—the provision permitting the FTC to seek enforcement only upon a showing that its own order had been violated. There is nothing in the history, other than references to the Interstate Commerce Act, to sug-

45. CONFERENCE REP. No. 1142, 63d Cong., 2d Sess. (1914), appearing in 51 CONG. REC. 14,919-24 (1914).

46. *See* text accompanying notes 97-103 *infra*.

47. *See, e.g.*, 51 CONG. REV. 15,827-29 (1914) (remarks of Senators Reed and Borah), 15,858-68 (remarks of Senator Reed), 16,045 (remarks of Senator Norris), 16,281 (remarks of Congressman Volstead), 16,325 (remarks of Congressman Nelson), 16,327 (remarks of Congressman Mondell) (1914).

48. *See, e.g.*, 51 CONG. REC. 14,932 (remarks of Congressman Covington), 14,938 (remarks of Congressman Stevens) (1914).

gest why this step was thought necessary. Later legislation permitting other agencies to seek enforcement without such a showing has worked reasonably well. One can speculate that had the enforcement provisions in 1914 not contained such a requirement the legislative changes of 1938 and 1959 might have been unnecessary.

b. *Wheeler-Lea Act of 1938: amendment of section 5.* The Wheeler-Lea Act of 1938[49] made substantial changes in both the substantive and procedural provisions of the FTC Act but left the Clayton Act untouched. From 1938 until the amendment of the Clayton Act in 1959, therefore, orders entered under section 5 of the FTC Act were enforced pursuant to the Wheeler-Lea civil penalty procedures, while Clayton Act orders remained subject to the procedures enacted in 1914. Under the Wheeler-Lea section 5 revisions, cease and desist orders became final upon expiration of the sixty days allowed for seeking review, or at defined times thereafter if review had been sought. Persons violating orders after they had become final were subject to a civil penalty suit brought by the United States in federal district court. The maximum recovery in such an action was set at $5,000 for each violation. No provision was made in the 1938 revision for FTC enforcement actions in courts of appeals. Orders outstanding on Wheeler-Lea's effective date were made subject to the revised enforcement procedures.

The 1938 revisions in the section 5 enforcement machinery, revisions made applicable to Clayton Act orders in 1959, were not those initially sought by the FTC. The FTC had recommended passage of legislation (1) eliminating proof of violation of the FTC order as a prerequisite to court enforcement; (2) directing the court of appeals to enter its own enforcement order whenever it affirmed the FTC's order; and (3) making the FTC's order final, with violation thereof punishable as contempt, *if* the respondent did not seek court review.[50] A bill embodying these limited recommendations passed the Senate in 1936, but died in committee in the House.[51] The Senate bill was subsequently re-introduced in 1937,[52] and, after extensive amendment, was enacted as the Wheeler-Lea Act of 1938. Somewhere between the introduction of the Senate bill and final

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49. Act of March 21, 1938, § 3, 52 Stat. 111 (1938).

50. 1935 FTC ANN. REP. 15; 1936 FTC ANN. REP. 17; 1937 FTC ANN. REP. 15. It has been suggested that the FTC's request was motivated by the fact that the National Labor Relations Board, established in 1935 with enforcement powers ostensibly patterned after those of the FTC, was given authority to seek judicial enforcement without proof that its own order had been violated. Louis, *supra* note 3, at 460 n.28.

51. S. 3744, 74th Cong., 2d Sess. § 2 (1936).

52. S. 1077, 75th Cong., 3d Sess. § 2 (1937).

passage, the nature and purpose of the now familiar civil penalty scheme changed and it assumed its present form.

The bill, as introduced, reported, and passed by the Senate, did not eliminate court of appeals enforcement as the primary method of securing compliance. It authorized the FTC to seek an enforcement order whenever it had "reason to believe that [respondent] has failed or neglected to obey, or intends or is about to disobey" its order, and it directed the court to enter its own enforcement order directing compliance with the FTC's order to the extent such order was affirmed.[53] The bill expressly stated that proof of violation of the FTC's order was not to be a condition precedent to the entry of an enforcement order. If no review was sought within sixty days, the FTC order became "final and conclusive." Violation of such an order subjected the violator to a civil penalty suit by the United States. The penalty was set at $500 for each offense and $25 for each day it continued. The Senate committee reported that these finality and civil penalty provisions were patterned on the provisions of the Packers and Stockyards Act.[54]

The civil penalty procedures, applying only to orders as to which no review was sought, were intended only to supplement and not to replace court of appeals enforcement. Indeed, the main thrust of the amendments was to facilitate court of appeals enforcement by elimination of "the second bite at the apple." The stated purpose of the civil penalty procedure was simply "to prevent a respondent playing fast and loose with the Commission's order, neither obeying nor asking the court to set it aside."[55]

By the time the bill reached the floor of the House the enforcement provisions had been changed. The bill, as reported out by

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53. The FTC's explanation of this provision was that it was necessary to resolve a dispute among the circuits as to whether a court of appeals could consider the basic validity of the FTC's order prior to the finding of violation needed to support the entry of an enforcement order. S. Rep. No. 1705, 74th Cong., 2d Sess. 6 (1936); S. Rep. No. 221, 75th Cong., 1st Sess. 6 (1937). *Compare* FTC v. Balme, 23 F.2d 615 (2d Cir.), *cert. denied*, 277 U.S. 598 (1928), *with* FTC v. Standard Educ. Soc'y, 14 F.2d 947 (7th Cir. 1926). *See* the discussion of these cases in Kauper, *supra* note 16. The FTC's further suggestion that the Second Circuit had done away with the requirement of violation as a prerequisite to entry of an enforcement order altogether, and that S. 1077 simply reflects this position, reflects an inaccurate reading of the *Balme* case, as later decisions of the same court make clear. *See, e.g.*, FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945).

54. S. Rep. No. 1705, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 211, 75th Cong., 1st Sess. 7 (1937). The Packers and Stockyards Act then made unappealed orders final, and violation subjected the offender to heavy fine or imprisonment.

55. S. Rep. No. 1705, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 211, 75th Cong., 1st Sess. 7 (1937). *See also* testimony of Commissioner Davis, *Hearings on H.R. 3143 To Amend the Federal Trade Commission Act Before the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 17-20, 56-58 (1937).

the House committee and as finally enacted into law, eliminated all reference to the earlier judicial enforcement procedures, except for an anachronistic provision directing the court of appeals to enter an enforcement decree to the extent it affirmed the FTC's order. The civil penalty procedure was made applicable to FTC orders which were reviewed and affirmed as well as to those which were never taken to the courts. The maximum penalty recoverable in a civil penalty action was changed to $5,000. In short, the civil penalty procedure became a substitute for, rather than a supplement to, the existing enforcement scheme.

The House committee never gave a detailed explanation of these amendments to the Senate bill.[56] Substantial revision of the Food and Drug Act was under consideration, and extensive hearings had been held before the same House committee which considered Wheeler-Lea.[57] One of the critical questions throughout those hearings was whether responsibility for the control of false advertising of food, drugs, and cosmetics should be with the FTC, and, if so, whether it needed added powers. There was public demand for severe penalties. The committee resolved this issue, in part, by using Wheeler-Lea as a vehicle to add a number of new sections dealing with the advertising of food, drugs, and cosmetics to the FTC Act.[58] There was strong objection to these new sections —which relied on control through the use of section 5 cease and desist orders—on the grounds that the penalty was inadequate and the cease and desist order procedures were time-consuming and historically ineffective.[59] There can be no doubt that the committee changes in the existing procedures were to some extent responsive to this criticism and were made primarily to deal with false advertising as such.[60] Yet the fact remains, as others have observed, that

56. The Committee did continue to state that the finality and civil penalty procedures were patterned upon the Packer and Stockyards Act, as well as upon the Securities Exchange Act of 1934. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 4 (1937). The analogy to the Packers and Stockyards Act was no longer perfect, as that statute attributed finality only to orders which were not reviewed. *See* Austern, *Five Thousand Dollars a Day*, 21 A.B.A. Antitrust Section 285, 290 n.17 (1962).

57. *Hearings on Food, Drugs and Cosmetics Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935).

58. S. 1077, 75th Cong., 1st Sess. § 2 (1937) (as reported by House Committee). These provisions became §§ 12-18 of the FTC Act, 15 U.S.C. §§ 52-58 (1964). *See* 83 Cong. Rec. 397-99 (1938) (remarks of Congressman Reece).

59. *See, e.g.*, Statement of Additional Views, H.R. Rep. No. 1613, 75th Cong., 1st Sess. 23-28 (1937); 83 Cong. Rec. 394-95 (remarks of Congressman Kenney), 399-400 (remarks of Congressman Chapman) (1938).

60. Thus the House Committee itself stated, with respect to the procedural amendments, that "[t]he amendments proposed further provide for a more effective prevention of *misleading advertisements* by procedural changes under cease and desist orders as now practiced." H.R. Rep. No. 1613, 75th Cong., 1st Sess. 6 (1937) (emphasis added).

the procedural changes received little attention.[61] They were not even the changes requested by the FTC.

c. *$5,000 per day: the Oleomargarine Act of 1950.* The final amendment to the FTC Act section 5 enforcement procedures, contained in the Oleomargarine Act of 1950,[62] provided that each separate violation of a final order was a separate offense (and therefore subject to a maximum civil penalty of $5,000), "except that in the case of a violation through continuing failure or neglect . . . each day of continuance of such failure or neglect shall be deemed a separate offense."[63] This provision, which after its embodiment in the Clayton Act in 1959 became the basis for much of the recent furor over FTC orders,[64] was enacted in a most cavalier way. An addition to section 5(*l*) of the FTC Act, it was originally offered on the floor of the Senate during debate on the bill as originally passed by the House and was adopted without debate.[65] The matter was the subject of debate in the House, where attention was called to the "sleeper" in the Senate version.[66] The House debate reflected more concern over the propriety of the provision in a bill concerned with oleomargarine than over the necessity for or significance of the provision itself.[67] The FTC entered the fray in defense of the amendment, with the explanation that it was needed because some long-continuing violations were in fact but single offenses under the existing provisions and could not be deterred by imposition of a single $5,000 penalty. Moreover, the FTC pointed out that the bill set only a maximum penalty; the actual amount of the penalty rested with the court.[68]

The House accepted the bill with the Senate amendment. The

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61. Austern, *supra* note 56, at 289-90; Louis, *supra* note 23, at 460-61.

62. 64 Stat. 20 (1950).

63. FTC Act § 5(l), 15 U.S.C. § 45(2) (1964).

64. *See* text accompanying notes 91-94 *infra*.

65. 96 CONG. REC. 333 (1950).

66. After the passage of the bill in the Senate, members of both houses received communications from various groups protesting the inclusion of the "sleeper" in the bill. One such protest apparently came from the Section on Antitrust Law of the New York State Bar Association. *See* 96 CONG. REC. 3024 (1950) (remarks of Senator Wherry). *See also id.* at 2973 (remarks of Congressman Cooley), 3019 (remarks of Senator George). Supporters of the legislation were by this time armed with letters from the FTC's Chief of Compliance and General Counsel, which were presented in full during the House debate. 96 CONG. REC. 2974 (1950).

67. *See* 96 CONG. REC. 2973 (remarks of Congressman Michener), 2975 (remarks of Congressman Halleck) (1950).

68. *See* the letters referred to in note 66 *supra*. The FTC also explained that "the principal value of the amendment would be in the field of price fixing and continuing conspiracies in restraint of trade," *i.e.*, not in connection with deceptive advertising at all. In such cases, a single $5,000 penalty was thought inadequate. *Id.*

Senate did likewise, after further debate on the conference report.[69] The "$5,000 per day" formula was thus enacted without hearings, not because the FTC asked for it but because a number of legislators felt that without it oleomargarine producers might deceptively advertise their product as a dairy product.[70] While Congress was aware that the provision was not limited to orders dealing in some way with "oleo," no serious consideration was given to its over-all significance.[71]

d. *Civil penalties under Clayton Act: Finality Act of 1959.* The FTC began formally recommending legislation making the Wheeler-Lea procedures applicable to Clayton Act orders in 1946.[72] Its request was repeated regularly thereafter.[73] The passage of the penalty amendment in the Oleomargarine Act of 1950 did not alter the FTC's request for legislation which would simply provide, for Clayton Act orders, "the same degree of finality and the same penalty provisions that are provided for orders under the Federal Trade Commission Act."[74] Presumably, what was good for FTC Act orders was therefore good for Clayton Act orders as well.

The FTC's recommendations were finally enacted into law by the Finality Act of 1959.[75] The net effect was to substitute the pro-

69. During the further Senate debate, Senator Aiken, who had introduced the provision on the Senate floor, stated that he had been concerned that an oleomargarine producer could advertise his product as "a butter product" for a "license" fee of $5,000. He had then requested the FTC's General Counsel to draft legislation to deal with the problem. The provision he introduced was thus prepared by the FTC and transmitted to him. Senator Aiken denied that the amendment was a "sleeper," stating that he knew it applied to all commodities and that he himself had in mind misrepresentation of maple syrup. *See* 96 CONG. REC. 3025-26 (1950) (remarks of Senator Aiken).

Supporters of the legislation also suggested that the bill would work no real hardship because penalties would be imposed only on those who deliberately and "with their eyes open," violated a FTC order which itself was entered only after a full hearing. *See* 96 CONG. REC. 3019 (1950) (remarks of Senator George).

70. *See* note 69 *supra*. *See also* 96 CONG. REC. 2981 (remarks of Congressman Poage), 3019 (remarks of Senator George) (1950). It was also suggested that the amendment was offered simply to obtain votes against the bill. *See id.* at 2973 (remarks of Congressman Michener).

71. The legislative history of this provision is discussed in more detail in Austern, *supra* note 56, at 291-93. *See also* Louis, *supra* note 23, at 461; REPORT OF THE ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTITRUST LAWS 372-73 (1955).

72. 1946 FTC ANN. REP. 12.

73. 1958 FTC ANN. REP. 7; 1952 FTC ANN. REP. 3; 1951 FTC ANN. REP. 7-8; 1948 FTC ANN. REP. 12; 1947 FTC ANN. REP. 13. *See also* Kelley, *Should the Law of Section 2 Be Revised?*, N.Y. STATE BAR ASS'N ROBINSON-PATMAN ACT SYMPOSIUM 114, 118-19 (1948). The Attorney General's Committee recommended the passage of such legislation only "when the presently exorbitant Federal Trade Commission Act penalty provisions have been reduced and the Commission makes more specific its orders, particularly in Clayton Act Section 2 cases." REPORT OF THE ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTITRUST LAWS 374 (1955).

74. 1951 FTC ANN. REP. 7.

75. 73 Stat. 243 (1959).

cedures of Wheeler-Lea, with the 1950 "$5,000 per day" amendment, for the original Clayton Act procedures. Twenty-one years after the revision of section 5 of the FTC Act, the symmetry contemplated by the Congress which initially enacted both statutes was once again restored, albeit with a different set of procedures.

The Finality Act was not hastily enacted. Hearings were held in both houses. The opposition to the bill was well organized and presented.[76] The FTC's position was simple. The "three bites at the apple" procedure was cumbersome, costly, and generally ineffective. The *American Crayon* litigation,[77] referred to regularly throughout the hearings, was a striking illustration of the deficiencies of the old procedures. The *Ruberoid* decision[78] had made the FTC's burden yet greater by holding that a court of appeals could not enter an enforcement order, absent a showing of violation, on the FTC's cross-petition when the case was already before the court on a petition for review. The best escape from these problems was simply to carry over the Wheeler-Lea procedures which, in the judgment of the FTC, had worked well with respect to FTC Act orders.

While questioning the necessity for change in the existing procedures,[79] opponents of the legislation did not deny that the civil penalty procedures were more efficient or effective. Rather, they made three basic points: (1) it would force parties to seek review of orders in cases where no review had previously been sought; (2)

76. Prepared statements in opposition were submitted by the Law Department of the National Association of Manufacturers, the Antitrust Section of the American Bar Association, and the Committee on Trade Regulation of the Association of the Bar of the City of New York. *Hearings on Finality of Clayton Act Orders Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st Sess., ser. 3, 93-105 (1959). Mr. Edgar E. Barton testified on behalf of the last-named group. *Id.* at 87-93.

Hearings were held in the Senate on S. 721, 85th Cong., 2d Sess. (1958), a bill virtually identical to that enacted in the next session, which passed the Senate but died in the House. *Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958).

77. The history of the *American Crayon* litigation, FTC No. 4142, is set out in detail in *House Hearings, supra* note 76, at 37-38. An order rising out of violations of §§ 2(a) and (d) of the Clayton Act, as amended, was entered in 1940. An investigation into compliance was initiated in 1948 after complaints had been received. A petition for enforcement was filed in 1951. The court of appeals finally entered an enforcement order, after two decisions on the matter by the Supreme Court, in 1957. Only at this point did further violation subject the company to direct sanctions.

78. FTC v. Ruberoid Co., 343 U.S. 470 (1952). The legislative reports accompanying S. 726 (Finality Act) emphasize the difficulties ostensibly created by *Ruberoid*. H.R. REP. No. 580, 86th Cong., 1st Sess. 5 (1959); S. REP. No. 83, 86th Cong., 1st Sess. 2 (1959).

79. Opponents of the legislation were quick to point out that the FTC had brought but two enforcement proceedings under § 2 of the Clayton Act, as amended, between 1936 and 1959. *Hearings, supra* note 76, at 89. At least one additional enforcement proceeding was then pending. *See* Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 462, n.48 (1965).

the penalty was too severe for the offense committed; (3) automatic finality and substantial civil penalties were singularly inappropriate with respect to the vague and overly broad orders of the type typically entered by the FTC under section 2(a) of the Clayton Act.

While it is the last point which is of greatest concern here, the first point requires some explanation. Under the old procedure, a party subject to an order could attack its validity or propriety at any time. Indeed, these questions could be raised for the first time when the FTC sought enforcement. As a result, a party could wait until the order began to pinch before taking steps to have it set aside or modified. The new procedures, however, required review within sixty days. Otherwise, all chance to have the order modified or set aside was lost, for the district court could not consider the validity or propriety of the order in civil penalty proceedings. Critics therefore asserted that the new procedures would force review on many firms who felt the order might at some future time be unduly inhibiting. The more broad and vague the order, the more likely that review would be sought. This would place unnecessary litigation expense on small firms and add to the work load of the courts of appeals. But the FTC saw elimination of "delayed" review as one of the reasons for enactment of the legislation. In the words of the FTC representative, the respondent "should not be allowed to sit back, possibly for years, and then not only contest the charges of a new violation, but be in a position to challenge all of the aspects of the original case upon which the Commission's order was based, as well as that order itself."[80] Congress agreed.

Most of the objection to the Finality Act derived from the type of orders entered by the FTC in section 2(a) cases.[81] By 1959, the broad *Ruberoid* type order had become commonplace.[82] Such orders had all the imprecision of the statutory language which they incorporated. And despite the decision in *Ruberoid*, there was great uncertainty about the extent to which the statutory defenses—meeting competition and cost justification—would be available in civil penalty proceedings. Pricing decisions by parties subject to order

80. *Hearings, supra* note 76, at 19.

81. Virtually no mention was made of orders entered under the other substantive provisions of the Clayton Act. This is not surprising since the FTC had not entered many § 3 orders, and experience with § 7, as amended in 1950, was still relatively undeveloped. There was therefore no consideration of the appropriateness of civil penalty enforcement procedures in connection with § 7 divestiture orders, and no suggestion that the enforcement of orders under one section called for analysis of factors different from those under another.

82. *See* notes 321-22 *infra* and accompanying text. For the wording of the order, *see* text accompanying note 266.

would therefore be made at great risk, for the cost of being wrong was a civil penalty suit. The vagueness of orders, coupled with the penalty provision, created what was essentially a due process issue. The breadth of the orders maximized the extent of the risk.

These same arguments are even today frequently heard in contests over particular orders. The same is true of the FTC's responses. First, the Supreme Court had upheld the *Ruberoid* order without modification. There was therefore no basis for the claim that such orders were improper. (The Court had not, of course, examined the *Ruberoid* order in the setting of the new procedures). Second, the question of drafting of orders was to be resolved on a case-by-case basis: the appropriateness of particular orders was not relevant to mode of enforcement. Third, the FTC, through informal guidance and compliance procedures, would both counsel the respondent who had bona fide doubts about the meaning of the order and forewarn those believed to be in violation. Fourth, the "$5,000 per day" formulation simply set a *maximum* penalty. The FTC and Department of Justice would not seek, and the courts would not assess, exorbitant or unreasonable penalties.[83] Whether or not the FTC's arguments were responsive to the objections raised, they were accepted by Congress, which passed the bill with little debate. But the legislative reports did take cognizance of the asserted deficiencies in FTC orders, stating that "[t]he committee intends that the commissions and boards affected by the bill will make a continuous effort to issue orders that are as definitive as possible."[84] The opposition to the Finality Act thus brought a congressional response and thereby planted the seeds which developed into the now famous dictum in *FTC v. Henry Broch & Co.*[85]

The Finality Act had one remarkable deficiency. It contained no provision making the civil penalty procedures applicable to orders entered before its effective date, July 23, 1959, and yet it seemed to repeal the existing provisions conferring jurisdiction on the courts of appeals to entertain FTC petitions for enforcement.[86] This deficiency is all the more remarkable because the Wheeler-

83. These assertions appear at various points in the testimony of representatives of the FTC. *Hearings, supra* note 76, at 15-35.

84. H.R. Rep. No. 580, 86th Cong., 1st Sess. 6 (1959). *See also* S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959).

85. 368 U.S. 360 (1962).

86. The enacting language of the Finality Act provides that "the third, fourth, fifth, sixth and seventh paragraphs of such section [section 11] are amended to read as follows . . . ." The questions of repeal, and the possible application of the General Savings Statute [1 U.S.C. § 109 (1964)] are discussed in Kauper, *FTC v. Jantzen: Blessing, Disaster or Tempest in a Teapot?*, 64 Mich. L. Rev. 1523 (1966); Note, 34 Geo. Wash. L. Rev. 939 (1966).

Lea Act, upon which the 1959 legislation was patterned, expressly provided that its civil penalty procedures were applicable to existing orders.[87]

It was quickly established that Finality Act procedures cannot be applied to orders entered prior to July 23, 1959,[88] and in *FTC v. Jantzen, Inc.*,[89] the Supreme Court concluded, on grounds that are unclear, that the "old" procedures were applicable to such orders. But the opinion creates a new question, namely, whether orders entered after July 23, 1959 on FTC complaints issued before that date are also to be enforced through the old procedure.[90] For most cases, however, it is enough to state that orders outstanding at the time of enactment of the Finality Act may be enforced only through the "three bites" procedure.

2. *A Comparison of the Old and New Enforcement Procedures*

The detailed consideration of the "old" and "new" procedures which follows sets the framework for the later examination of the scope of orders and also deals with some of the problems inherent in these procedures for their own sake. More important, however, such a comparison is essential to evaluation of the dictum in *FTC v. Henry Broch & Co.*,[91] which underlies much of the contemporary debate about Clayton Act orders.

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87. Act of March 21, 1938, § 5(a), 52 Stat. 117:

> In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of enactment of this Act, the sixty day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this act, shall begin on the date of enactment of this Act.

The period referred to was that provided for seeking review after the entry of an order by the FTC.

88. Sperry Rand Corp. v. FTC, 288 F.2d 403 (D.C. Cir. 1961). The Supreme Court has twice indicated its approval of the *Sperry Rand* decision. *See* FTC v. Henry Broch & Co., 368 U.S. 360, 365 n.5 (1962); FTC v. Jantzen, Inc., 386 U.S. 228, 234 (1967).

89. 386 U.S. 228 (1967).

90. The Court's decision rests primarily on a strained interpretation of a savings clause within the statute, which provided that the new procedures were inapplicable and that the old procedures should be applied "to any proceedings initiated before the date of enactment of this Act under the third or fourth paragraph of Section 11 of the [Clayton] Act." Finality Act of 1959, § 2, 73 Stat. 243.

The third and fourth paragraphs referred to provide for judicial proceedings on petitions for enforcement or review. The Court rejected the obvious construction, namely that the old procedures were applicable where review or enforcement had been sought prior to July 23, 1959, concluding that the word "proceeding" referred to the proceeding as initiated by the FTC. While the Court speaks throughout its opinion of *orders* entered prior to July 1959, its construction of the saving clause makes the date of FTC's complaint the critical date. It is therefore unclear whether the new procedures, old procedures, or both are applicable to orders entered after July 23, 1959, on complaints entered before that date. The FTC has already recovered civil penalties in several such cases. *See* Kauper, *supra* note 86, at 1524 n.10.

91. 368 U.S. 360 (1962).

In *Broch* a broker violated section 2(c) of the Clayton Act by reducing his normal brokerage commission to induce Smucker, a buyer, to buy a large quantity of apple concentrate from Canada Foods, one of the broker's principals. The first portion of the order was narrowly confined to the specific conduct involved in the findings of violation, although it prohibited such conduct in connection with the sales to "any" buyer for "any" seller principal.[92] The second portion of the order prohibited the broker "[i]n any other manner" from paying or allowing any buyer "anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof" on sales to such a buyer for its own account. The court of appeals limited both parts of the order to acts in connection with sales between Canada Foods and Smucker. The Supreme Court reversed, holding that a ban against repetition of the broker's conduct in transactions between *any* buyer and any seller was within the FTC's discretion.

The Court noted that the Finality Act procedures were inapplicable to this 1957 order, and that Broch was therefore subject to penalties only for violation "of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order." Hence, no penalty could be imposed "without further administrative and judicial consideration and interpretation." The Court then went on:

> Upon any future enforcement proceedings, the Commission and the Court of Appeals will have already at hand interpretative tools —the employment of which we have previously sanctioned—for use in tailoring the order, in the setting of specific asserted violations, so as to meet the legitimate needs of the case. They will be free to construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which Broch was found to have committed, or as forbidding "no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." *Federal Trade Comm'n v. Cement Institute* . . . . They need not—as we have already made clear—read the order as denying to Broch the benefit of statutory defenses or exceptions. . . . Nor need the order be construed as prohibiting anything as clearly lawful as a uniform reduction in commissions. And,

92. Specifically, para. 1 of the order prohibited respondent from paying any allowance in lieu of brokerage by selling

> at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for [any seller principal] . . . where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services.

368 U.S. at 362 n.4.

> we repeat, these various interpretive aids will have to be brought to bear by a Court of Appeals upon a particular practice of Broch, and will have to yield the announced result that such practice violates the order, before Broch can be subjected to penalties because of still a second repetition of the violation.[93]

Finally, the Court described Broch's attempt to restrict the scope of the order as "premature."

The Court's statements concerning the "three bites at the apple" procedure and the effect of a cease and desist order are of considerable import, as we shall see. But the part of the opinion which has received the most attention is the following gratuitous statement:

> We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.[94]

The Court did not of course hold that the order *would be* invalidated under the 1959 amendments. It simply raised the question. In answering it, the "old" and "new" procedures must be compared.

a. *Enforcement by contempt.* The entry of a cease and desist order under the pre-1959 Clayton Act and pre-1938 FTC Act procedures meant little, in and of itself, to firms bent upon violation.[95] It did of course have considerable impact on firms desirous of full compliance. Indeed, one of the probable explanations for the fact that these enforcement procedures were little used, at least with respect to Clayton Act orders, is that many firms complied.[96] But

93. 368 U.S. at 366-67.

94. 368 U.S. at 367-68.

95. These procedures are still applicable to pre-1959 Clayton Act orders. FTC v. Jantzen, Inc., 368 U.S. 228 (1967). Moreover, since under Wheeler-Lea and the Finality Act the court of appeals which affirms an order of the FTC on direct review is required to enter its own enforcement decree, the contempt process is available for enforcement of all other FTC orders where respondent has sought review and lost. This differs from the "old" procedure, however, in that the judicial order is entered *without* proof that the FTC order has been violated.

96. At the time hearings were held on the Finality Act, the FTC had sought enforcement of but three Clayton Act orders. *See* note 79 *supra*. There had been but one contempt proceeding in connection with a Clayton Act order at that time, and this was in a case where the FTC had not independently sought an enforcement order. FTC v. Biddle Purchasing Co., 117 F.2d 29 (2d Cir. 1941). Since that time, enforcement has been sought in connection with several other pre-1959 Clayton Act orders. FTC v. Jantzen, Inc., 383 F.2d 981 (9th Cir. 1967); FTC v. Standard Motor Prods., Inc., 371 F.2d 613 (2d Cir. 1967). And one violator has been convicted of criminal contempt. *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959) (fined $2,000).

until a court enforcement order was secured, no direct sanction for violation was present.

In order to secure judicial enforcement, a violation of the FTC's order had to be established.[97] This was so even in cases where the respondent filed a petition for review and the FTC sought enforcement by cross-petition.[98] The difficulties created by this requirement are obvious, for the court of appeals, an appellate court, is not prepared or equipped to conduct hearings, take evidence, and make findings on this preliminary issue.[99]

The FTC's initial practice in seeking enforcement was to allege violation and to support the allegation with affidavits or data from compliance reports. If the violation was admitted, or the allegation of violation was not contested, the court could proceed directly to consideration of the validity of the order and the propriety of enforcement. But if the allegations of violation were denied, the issue was referred to a master or referee, usually the FTC itself, to conduct hearings and report its findings. While the FTC commonly sought to establish violation by affidavits filed with its enforcement petition, the affidavits were generally stricken and were not a basis for avoiding a hearing on the violation issue. However, if respondent's compliance reports revealed a violation, or if the facts relating to the alleged violation were stipulated, the court could make its own findings on the violation issue.[100]

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97. Both statutes provided that the FTC could seek enforcement if the person against whom the order was entered "fails or neglects to obey such order." FTC Act § 5, 38 Stat. 717 (1914); Clayton Act § 11, 38 Stat. 730 (1914). While there have been suggestions that a judicial enforcement order can be issued simply on proof that the FTC's order "was about to be violated," no enforcement orders have actually been issued on that basis. *See* FTC v. Standard Motor Prods., Inc., 371 F.2d 613, 615 (2d Cir. 1967).

98. FTC v. Ruberoid Co., 343 U.S. 470 (1952). Under both Wheeler-Lea and the Finality Act, the court is required to enter its own enforcement order if the FTC's order is sustained on direct review. 15 U.S.C. §§ 21(c), 45(c) (1964). Thus, as a "bonus" for seeking review, respondent subjects himself to a contempt sanction not otherwise present.

99. This same difficulty will arise when the FTC, under the authority of FTC v. Dean Foods Co., 384 U.S. 597 (1966), seeks preliminary injunctions under the All Writs Act [28 U.S.C. § 1651(a) (1964)] in the court of appeals against corporate acquisitions alleged to be in violation of § 7 of the Clayton Act. *See* Comment, *The FTC's Power To Seek Preliminary Injunctions in Anti-Merger Cases*, 66 MICH. L. REV. 142, 160-61 (1967).

100. There was disagreement among the circuits as to whether, where violation was alleged but denied, the court could consider the validity of the order *before* referring the question of violation to the FTC. *Compare* FTC v. Standard Educ. Soc'y, 14 F.2d 947 (7th Cir. 1926) (calling for proof of violation before any consideration of the order), *with* FTC v. Whitney & Co., 192 F.2d 746 (9th Cir. 1951) *and* FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945) (giving consideration to the validity of the order and then referring the matter to the FTC).

A more extended discussion of the matters in this note and in the text, together

In more recent years, the FTC has conducted investigative hearings on the question of compliance prior to seeking judicial enforcement. This ostensibly eliminates the need for a reference back to the FTC. The respondent is entitled to appear, be heard, and present evidence. The FTC's enforcement petition has then been accompanied by the record of the hearing and the FTC's findings of violation, thus permitting the court to resolve that question without further hearing. While the procedure seems more efficient and has received judicial approval,[101] it has become highly formalized.[102] And in the process of formalization, much of its advantage over the prior procedure has been lost. In several instances, questions concerning the applicability of internal FTC procedures in these "investigative" hearings have significantly delayed enforcement.[103]

Before the court enters an enforcement decree, it must also consider the propriety of the order, just as it would if respondent petitioned for review.[104] Assuming that violation is established and that the order withstands scrutiny, the court will enter its enforcement order, which typically does nothing more than direct com-

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with citation to relevant authorities, may be found in Kauper, *supra* note 86, at 1536-38. *See also* C. McFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 74-77 (1933).

101. FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959); FTC v. Standard Brands, Inc., 189 F.2d 510 (2d Cir. 1951).

102. These development are discussed in detail in Kauper, *supra* note 86, at 1538-40.

103. Initially, the FTC conducted "investigational" hearings, pursuant to the investigational hearing provisions of its rules of practice [now § 2.8 of the FTC Rules of Practice, 32 Fed. Reg. 8442, 8447 (1967)]. *See* FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959).

But in Nash-Finch Co., 43 F.T.C. 297 (1947), the FTC ordered that a "public investigational hearing" be held to determine whether its order had been violated, and further directed the hearing examiner to proceed "in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable." Respondent protested, asserting that the FTC could not proceed until it clarified the nature and purpose of the proceeding, stated the duties of the hearing examiner, and promulgated more concrete rules. Ultimately respondent filed a declaratory judgment action, asking that the FTC be enjoined from proceeding on these same grounds. Relief was denied. Nash-Finch Co. v. FTC, 233 F. Supp. 910 (D.C. Minn. 1964). Thereafter, the FTC was required to rule on several other procedural matters. [1965-1967 Transfer Binder] TRADE REG. REP. ¶¶ 17,247 (memorandum of Commissioner MacIntyre concerning a disqualification motion) (1965), 17,416 (opinion of FTC denying motion for production of documents) (FTC 1966). The investigation was ultimately closed. *Id.* at ¶ 17,842 (1967). *See also* National Biscuit Co., 3 TRADE REG. REP. ¶¶ 18,016, 18,100 (FTC 1967).

I have criticized the over-formalization of these procedures elsewhere. *See* Kauper, *supra* note 86, at 1540. *See also* National Biscuit Co., 3 TRADE REG. REP. ¶ 18,016 (1967) (memorandum of Commissioner MacIntyre); C. H. Robinson Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,247 (1965) (memorandum of Commissioner MacIntyre concerning a disqualification motion).

104. *See, e.g.*, FTC v. Balme, 23 F.2d 615, 618 (2d Cir. 1928).

pliance with the cease and desist order, unless the court has modified the order.

Responsibility for policing the court order remains primarily with the FTC.[105] If further investigation reveals noncompliance, the FTC may petition the court for entry of an order requiring the respondent to show cause why it should not be adjudged guilty of criminal contempt.[106] In the past, the FTC's petitions or memoranda have alleged violations of the court decree in some detail and have been accompanied by affidavits and other documentary attachments. If the FTC's submission indicates, in the court's judgment,[107] that its order has been violated, an order to show cause will be issued and FTC attorneys will be appointed to prosecute on behalf of the court.[108]

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105. Both the Clayton Act and FTC Act originally provided, and still provide, that with the filing of the record the jurisdiction of the court of appeals "to enforce, set aside or modify orders of the commission . . . shall be exclusive." Clayton Act § 11, 15 U.S.C. § 21 (1964); FTC Act § 5, 15 U.S.C. § 45(d) (1964). It is equally apparent that the underlying theory of enforcement through the contempt process is that it is the *court's* order which is being violated.

Nevertheless, the FTC remains the primary investigating body. This is made clear in United States v. Morton Salt Co., 338 U.S. 632 (1950). The FTC had ordered Morton, which was subject to a court of appeals order compelling compliance with an FTC § 5 order, to file detailed extra compliance reports. Morton contended that the FTC lacked the authority to demand such reports on several grounds, including: (a) that § 6(b) of the FTC Act, 15 U.S.C. § 46(b) (1964), which authorizes the FTC to require the filing of "annual" and "special" reports, is limited to general economic inquiries and may not be extended to investigations of compliance with § 5 orders; and (b) that the FTC's action was an invasion of the "exclusive" jurisdiction of the court of appeals. In rejecting both contentions, the Court made clear that the FTC retains the basic authority to determine compliance with enforced orders, and to use the "report" authority of § 6(b) for this purpose.

106. There is early and rather dubious authority indicating that contempt proceedings initiated by the FTC based upon alleged violations of enforced orders are *necessarily* "criminal" contempt proceedings since the FTC asserts no private right of its own. FTC v. A. McLean & Son, 94 F.2d 802 (7th Cir. 1938). But in Cheff v. Schnackenberg, 384 U.S. 373 (1966), the question was regarded as open, with the Court simply holding that *in the case before it* the proceeding was criminal because there was no remedial, as opposed to punitive, purpose served. The parties subject to order had already withdrawn from the type of business covered by the order.

Actions for violation of court-enforced NLRB orders are most commonly civil contempt actions, although in given cases, depending on the nature of the sanctions asked and the interest involved, criminal contempt may also be involved. See Note, *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 COLUM. L. REV. 603 (1954). In any event, since *McLean*, contempt actions initiated by the FTC have been "criminal" contempt proceedings pursuant to 18 U.S.C. § 401(3) (1964).

107. The court may, in its discretion, decline to issue a show cause order. *See FTC* v. A. McLean & Son, 94 F.2d 802 (7th Cir. 1938).

108. The court's order may direct the respondent to file a verified answer to the FTC's allegations. While such answers are commonly filed, the respondent may be unwilling to do so. This raises the question whether an individual respondent can satisfy the court's order by filing a general denial, or, treating this as a criminal case, by pleading "not guilty." The *sui generis* nature of criminal contempt makes these questions difficult. *See* note 116 *infra*. Equally difficult is the question whether an individual respondent could refuse to file a verified answer, if such is directed, by

In most of the contempt cases involving alleged violation of judicial enforcement decrees, the facts have either been stipulated or have been submitted in the form of affidavits or attachments to the FTC's petition and respondent's answer.[109] But not all cases can be handled in this manner. In *In re Holland Furnace Co.*,[110] the respondent corporation and eleven individual officers and directors were charged with criminal contempt in the disobedience of an order entered under section 5 of the FTC Act and enforced by the court of appeals.[111] While a number of the individuals, with the consent of FTC attorneys, were willing to have the matter resolved on the basis of affidavits and other documentary submissions, some were not. Several of the respondents, including the president of the corporation, unsuccessfully demanded a jury trial. The court conducted a ten-day trial of all the respondents before a three-judge panel. Testimony was taken, and additional evidence was received. The corporation and three officers were adjudged guilty.

The *Holland Furnace* case is a vivid demonstration of the practical difficulties of enforcement through the court of appeals. Before punishment can be imposed, someone must find that the court's order has been violated. In many cases, there may be no need to engage in fact finding, but if there is, a court of appeals is singularly ill-suited for the task. It is not of course necessary that the court conduct fact-finding hearings itself. It may refer the matter to a master, or possibly to the FTC.[112]

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asserting his fifth amendment privilege against self-incrimination, on the ground that his conviction for criminal contempt is likely to follow if he files a detailed answer. And, to carry the question-asking one step further, may an individual respondent subject to a judicial enforcement order refuse to respond on fifth amendment grounds to an FTC demand for a compliance report without incurring the sanctions set out in § 10 of the FTC Act, 15 U.S.C. § 50 (1964)?

109. See *In re* Florsheim, 316 F.2d 423 (9th Cir. 1963) (FTC Act); *In re* P. Lorillard Co., 1959 Trade Cas. ¶ 69,272 (4th Cir.) (FTC Act); *In re* Dolcin Corp., 247 F.2d 524 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 988 (1957) (FTC Act); FTC v. Biddle Purchasing Co., 117 F.2d 29 (2d Cir. 1941) (Clayton Act); FTC v. Pacific States Paper Trade Ass'n, 88 F.2d 1009 (9th Cir. 1937) (FTC Act); FTC v. Hoboken White Lead & Color Works, Inc., 67 F.2d 551 (2d Cir. 1933) (FTC Act). Apparently no hearing for the taking of testimony was held in *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959) (Clayton Act).

110. 341 F.2d 548 (7th Cir. 1965).

111. The order allegedly violated was a *pendente lite* enforcement order, directing compliance with the FTC's order during the pendency of review proceedings. Although an enforcement order was entered at the conclusion of review proceedings, violations of that order were not alleged.

112. The ultimate power to find facts must rest with the court of appeals whose order is allegedly violated. In this sense, this is part of the court's "judicial" function, if that label has any utility in such a case at all. On this basis, it can be argued that the court should refer the case, where referral is deemed necessary, to a master rather than to the FTC. This would in turn raise the question whether the court of appeals must accept the findings of its master unless "clearly erroneous." FED. R. CIV. P.

The job of the court of appeals would obviously be still more difficult if the parties charged with contempt are entitled to a jury trial. In that event, one might expect enforcement through the contempt process to become a dead letter, for an appellate court is hardly equipped to call a jury. The jury trial question was raised in the *Holland Furnace* case. The Supreme Court rejected the demand of the former president of the corporation for a jury trial on the familiar grounds that criminal contempt proceedings are not criminal actions within the meaning of the jury trial provisions of the Constitution.[113] But the Court then went on to rule, in the exercise of its supervisory power, that "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.[114] This may limit the utility of criminal contempt proceedings as an FTC enforcement device, for as a practical matter it sets the maximum prison sentence which may be imposed at six months. Whether the FTC needs the threat of longer sentences is conjecture at this point.[115]

It is now well established that in such criminal contempt proceedings the "ordinary criminal rules of evidence apply."[116] Not

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53(e)(2) (1967) so provides, but these rules apply only to civil actions in district courts. FED. R. CIV. P. 1 (1967).

Reference to the FTC seems desirable in making use of the FTC's competence, but raises additional questions. Is it appropriate to have facts found by what is essentially the moving party? If the FTC does make findings, are they to bind the court of appeals if supported by "substantial evidence"? These matters are thoughtfully considered, in the context of NLRB orders, in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 307-11 (1965). *See also* Note, *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 COLUM. L. REV. 603 (1954); Note, *Use of Contempt Power To Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541, 1545-46 (1958).

113. 384 U.S. at 378-80. The Court relied primarily on United States v. Barnett, 376 U.S. 681 (1964), where the issue was fully explored.

As this Article was in final preparation, the Supreme Court, in Bloom v. Illinois, 36 U.S.L.W. 4429 (U.S. May 20, 1968), reversed its earlier long-held position and concluded that the constitutional jury trial requirements are applicable to criminal contempt proceedings, even in state courts. The decision will apparently not affect the rule already imposed on the federal courts in the *Cheff* case, since presumably criminal contempt with a sentence of six months or less will continue to be regarded as a "petty" offense for which jury trial is not necessary.

114. 384 U.S. at 380.

115. It should be noted, however, that the president of Holland Furnace Co. is apparently the first individual to receive a jail sentence for violation of a court order enforcing an FTC cease and desist order.

116. *In re* Florsheim, 316 F.2d 423, 428 (9th Cir. 1963). While this may be true with respect to rules of evidence, it is clearly not true with respect to many of the usual rules of criminal procedure. The Federal Rules of Criminal Procedure are applicable to "criminal proceedings" in the courts of appeals. FED. R. CRIM. P. 1, 54(a)(1) (1966). But it is not clear that a criminal contempt action is a "criminal proceeding." As noted earlier, criminal contempt has not in the past been deemed a criminal prosecution within the constitutional jury trial provisions. *See* note 113 *supra*. Moreover,

only must it be established that violation was "knowing" and "willful," but guilt must be established "beyond a reasonable doubt."[117] Even in civil contempt proceedings guilt must be established by "clear and convincing evidence." The critical point is that in all probability a respondent acting in good faith but guilty of what may later be viewed as a technical violation of the order will not have sanctions imposed; he will leave court with a mere forewarning that *next time* the same conduct will result in the imposition of sanctions.[118] In short, for the good faith violator the contempt process is likely to be little more than an additional step in defining his duties.[119]

It is not clear that this flexibility *within the contempt process* is the point of emphasis in the Supreme Court's discussion of the "old" enforcement procedures in *Broch*.[120] The Court does emphasize that in later enforcement proceedings the court will be able to interpret and further tailor the FTC order, even though it has already examined the order on direct review. But this discussion is in the context of its earlier statement that an enforcement order cannot *be entered* without proof that a particular practice violated the FTC order. *Broch*, then, seems to be irrelevant to the court of appeals contempt procedure as it exists under the "new" procedures of Wheeler-Lea and the Finality Act, for in cases where those procedures are applicable the court is to enter an enforcement order

rule 42, which deals with criminal contempt, appears to be self-contained and exclusive of other rules. It states little more than basic due process requirements. FED. R. CRIM. P. 42 (1966). It has been said that "[r]ule 42(b) prescribes the 'procedural regularity' for all contempts in the federal regime . . . ." Harris v. United States, 382 U.S. 162, 167 (1965). *See also* Brown v. United States, 359 U.S. 41, 51 (1959); Green v. United States, 356 U.S. 165, 187 n.20 (1958).

The Federal Rules of Civil Procedure apply only in "the United States District Courts." FED. R. CIV. P. 1 (1967). It therefore appears that criminal contempt actions in the courts of appeals are governed only by the general requirements of due process and rule 42.

117. *See, e.g., In re* Florsheim, 316 F.2d 423 (9th Cir. 1963); *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959); *In re* Dolcin Corp., 247 F.2d 524 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 988 (1957). In *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 382 U.S. 873, *rehearing denied*, 382 U.S. 873 (1965), the court declined to equate a showing of "gross negligence" with criminal contempt, indicating that "willful" and "intentional" participation in the violation must be shown.

118. This occurred in *In re* Florsheim, 316 F.2d 423, 428 (9th Cir. 1963). Respondent's conduct was found to be in violation of a judicially enforced § 5 order. But the court found that he did not "intentionally, flagrantly, deliberately and recklessly violate the court's order" and found him not guilty of criminal contempt.

119. The flexibility of enforcement through contempt is carefully and extensively developed, primarily in the context of NLRB civil contempt procedures, in JAFFE, *supra* note 112, at 276-83. The statements in the text reflect Professor Jaffe's views to a considerable extent.

120. *See* the discussion of the *Broch* case in the text accompanying notes 91-94 *supra*.

without proof of violation whenever it affirms an order of the FTC on direct review.

Nevertheless, as Professor Jaffe has so carefully made clear, the contempt procedure in itself affords a large measure of protection against the seeming dangers of vague decrees.[121] Vague orders present what are essentially due process issues. Such objections to an order are to a large extent obviated by the nature of the contempt proceeding. Thus the change in the enforcement procedures may well call for orders formulating more precise standards of conduct.

But the flexibility of the contempt procedure is not as helpful in taming the overly broad order, which prohibits in precise and understandable terms conduct dissimilar from or unrelated to the kind of conduct which formed the basis for entry of an order in the first instance. Violations of such an order may well be held to be "willful," since they contravene language which is by hypothesis clear. The breadth of the order will already have been considered in an earlier proceeding, and there is not likely to be a disposition to re-examine it in the contempt proceeding. The fundamental questions raised by broad orders concern the interrelationship between agency and court, questions which are likely to be the same whether enforcement is through contempt or civil penalty. Nevertheless, the court of appeals, which has itself examined the underlying FTC order and issued its own, may well be far more conscious of the interrelationship than a district court which is confronted with the FTC's order for the first time in a civil penalty suit. Moreover, in the contempt procedure, the enforcing court is likely to consider the respondent's conduct on the basis of the purpose, rather than the language of the order. There is, in short, a greater probability of flexibility with the broad order when the court treats the order as its own than when a court must interpret an FTC order under the admonition that it is final.

The sanctions which a court may impose for criminal contempt rest in its discretion.[122] Fines have been imposed in most contempt cases arising out of FTC order violations.[123] But individual violators can go to jail for extended periods of time. For this reason, it is difficult to assert with any confidence that the civil penalty pro-

121. *See* JAFFE, *supra* note 112, at 279.

122. *See, e.g.*, Green v. United States, 356 U.S. 165, 179-89 (1958).

123. In all of the following cases, only fines were imposed: *In re* Trade Union Courier Publishing Corp., 1960 Trade Cas. ¶ 69,642 (3d Cir.) (corporation fined $35,000, with two individuals fined $20,000 and $5,000 respectively); *In re* P. Lorillard Co., 1959 Trade Cas. ¶ 69,272 (4th Cir.) ($40,000); *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959) ($2,000–1960 FTC ANN. REP. 72); *In re* Dolcin Corp., 247 F.2d 524 (D.C.

cedure, even with its "$5,000 per day" formula, is any more severe than the contempt procedure. Many businessmen may be far more fearful of jail sentences, however short, than any amount of fine. The very fact that the FTC itself seems inclined to use the contempt procedure for deliberate and flagrant violators, even though the civil penalty procedure is also available, is some indication that it feels a contempt conviction is more effective in such cases.[124]

b. *Enforcement by civil penalty.* Under the Wheeler-Lea and Finality Act procedures, an order of the FTC becomes final sixty days after service of the order, if no judicial review is sought, or at a stated time after termination of such review proceedings.[125] Thereafter violation may result in the imposition of civil penalties in a suit in federal district court, brought not by the FTC but by the United States.[126]

Cir. 1956), *cert. denied,* 353 U.S. 988 (1957) (corporation fined $15,000 and three individuals fined total of $4,250–1956 FTC ANN. REP. 49); FTC v. Biddle Purchasing Co., 117 F.2d 29 (2d Cir. 1941) ($500); FTC v. Pacific States Paper Trade Ass'n, 88 F.2d 1009 (9th Cir. 1937) ($10,000); Louis Leavitt, 1932-39 Trade Cas. ¶ 55,096 (2d Cir. 1935) ($1,000); FTC v. Hoboken White Lead & Color Works, Inc., 67 F.2d 551 (2d Cir. 1933) ($500). In addition to the jail sentence imposed in *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied,* 382 U.S. 873, *rehearing denied,* 382 U.S. 873 (1965), two other individuals were fined $500 and the corporation was fined $100,000. Cheff v. Schnackenberg, 384 U.S. 373, 375 (1966).

124. Both *Holland Furnace* and *Dolcin* involved what the FTC undoubtedly felt to be persistent and flagrant violations. In both cases the civil penalty procedure was available but not used.

125. Under both statutes, an order becomes final upon expiration of the time allowed for filing a petition for review. Clayton Act § 11(g), 15 U.S.C. § 21(g) (1964); FTC Act § 5(g), 15 U.S.C. § 45(g) (1964). Both statutes permit the filing of such a petition within sixty days of the service of the FTC's order. Clayton Act § 11(c), 15 U.S.C. § 21(c) (1964); FTC Act § 5(c), 15 U.S.C. § 45(c) (1964). Both then contain a number of identical provisions making orders final after termination of review. Clayton Act §§ 11(g)-(k), 15 U.S.C. §§ 21(g)-(k) (1964); FTC Act §§ 11(g)-(k) 15 U.S.C. §§ 45(g)-(k) (1964).

Both statutes provide that to the extent the order of the FTC is affirmed, the court of appeals shall "issue its own order commanding obedience to the terms of such order . . . ." Clayton Act § 11(c), 15 U.S.C. § 21(c) (1964); FTC Act § 5(c), 15 U.S.C. § 45(c) (1964). Both statutes also provide, in subsection (d) of the same sections that upon the filing of the record with it the "jurisdiction of the court of appeals . . . to affirm, enforce, modify or set aside orders of the Commission shall be exclusive." Despite this language, it has consistently been held that where an affirmed order has been violated, the FTC may proceed *either* by charging contempt of the court of appeals *or* by seeking civil penalties. United States v. Standard Distribs., Inc., 267 F. Supp. 7 (N.D. Ill. 1967); United States v. Standard Educ. Soc'y, 55 F. Supp. 189 (N.D. Ill. 1943). *See* Testimony of William Kern, *Hearings on H.R. 432, H.R. 2977, H.R. 6049, and S. 726 Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 86th Cong., 1st Sess., ser. 3, 31 (1959).

126. Civil penalties have been recovered for violations of a significant number of FTC Act § 5 orders. The 1959 hearings on the Finality Act contain an exhibit listing ninety-one cases in which penalties were assessed. The highest penalty assessed was $38,000; the lowest was $40. These ninety-one assessments totalled about $363,000. *Hearings, supra* note 125, at 28-29. At least one additional § 5 penalty suit was concluded prior to June 30, 1959. 1959 FTC ANN. REP. 62. In the year ending June 30,

The Wheeler-Lea amendments to the FTC Act contain an express provision calling upon the FTC to "certify the facts [of violation] to the Attorney General,"[127] a provision which has been interpreted as barring the Attorney General from initiating penalty proceedings independently of the FTC.[128] For reasons that are not clear, the Finality Act contains no such provision.[129] It is therefore possible, although hardly probable, that the Department of Justice may proceed independently of the FTC. While the Department does have concurrent responsibility for enforcement of the Clayton Act,[130] such independent enforcement hardly seems desirable. The

1960, eleven § 5 suits resulted in the total recovery of $39,300. 1960 FTC ANN. REP. 74-75. The figures on § 5 orders in following years are as follows: 1961 FTC ANN. REP. 56 (four suits—total penalties of $38,000); 1962 FTC ANN. REP. 62-63 (twelve suits—total penalties of $100,400); 1963 FTC ANN. REP. 13 (ten deceptive practice suits—total penalties of $86,200); 1964 FTC ANN. REP. 49 (fifteen suits, with penalties assessed in twelve—totalling $69,500); 1965 FTC ANN. REP. 61-62 (twelve deceptive practice suits, with penalties assessed in eight totalling about $40,000). The largest penalty assessed to date for violation of a § 5 order is a $100,000 penalty assessed against a second offender. United States v. Americana Corp., (D.C. Md. 1965) (unreported, FTC Docket No. 5058). The largest penalty sought is apparently in Columbia S. Chem Corp., (N.D. Ohio 1963), 1963 FTC ANN. REP. 39, where the complaint asked penalties of $1,000,000 for violation of a § 5 price-fixing order.

Civil penalty assessments to date for violation of Clayton Act orders are as follows: United States v. Chun King Sales, Inc., No. 8093 (D. Minn. 1965) ($70,000); United States v. MacFadden Publications, Inc., No. 7392 (S.D.N.Y. 1965) ($32,500); United States v. Select Magazines Inc., No. 7384 (S.D.N.Y. 1964) ($30,030); United States v. Hearst Corp., No. 7391 (S.D.N.Y. 1963) ($40,000). *See* 3 TRADE REG. REP. ¶ 9701. These cases all involved orders entered under § 2(d) of the Clayton Act. The FTC has recently brought its first civil penalty suit for violation of a Clayton Act § 7 divestiture order, seeking $1,000 per day for each day divestiture is delayed. ABC Consol. Corp., 3 TRADE REG. REP. ¶ 18,046 (1967).

127. FTC Act § 16, 15 U.S.C. § 56 (1964), which states more fully:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under . . . subsection (l) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such . . . subsection.

FTC Act § 5(l), 15 U.S.C. § 45(l) (1964), is the basic civil penalty provision.

128. United States v. St. Regis Paper Co., 355 F.2d 688 (2d Cir. 1966); *Administrative Law—Procedure—United States Attorney Cannot Sue to Recover Civil Penalties For Violation of FTC Order Without Prior FTC Certification*, 80 HARV. L. REV. 1347 (1967). In *St. Regis*, the Department had secured FTC consent to the civil penalty suit, and had proceeded on the basis of information obtained from an independent grand jury investigation. The facts were not certified by the FTC. The court held that the certification requirements of § 16 of the Act were jurisdictional, and dismissed the penalty suit.

129. Most likely, the omission was simply not recognized. The Finality Act simply incorporated, virtually verbatim, the procedures of § 5 of the FTC Act as they existed in 1959. The certification provision, § 16, was separate and perhaps therefore not considered.

130. The court in *St. Regis* (*See* note 128 *supra*) placed heavy emphasis on the fact that the FTC was exclusively responsible for the enforcement of § 5 of the FTC Act. The Department shares responsibility for Clayton Act enforcement. Clayton Act § 15, 15 U.S.C. § 25 (1964).

But in some cases the argument that the FTC has sole responsibility for § 5 is somewhat illusory, although technically correct, for the FTC may deem conduct in violation

FTC is given a broad discretion in formulating policy and in framing its orders, based in part upon recognition of its particular competence and in part on its continuing role as enforcing agency. Independent Department enforcement of orders so entered is inconsistent with the role assigned to the FTC.[131] Moreover, much of the FTC's success rests on its ability to secure voluntary compliance after an order has been issued. Firms are much less likely to work out detailed compliance procedures with the FTC if it does not have ultimate control of the enforcement machinery. Nor are firms as likely to agree to the issuance of consent orders if the Department, which was not privy to the negotiations, is free to proceed without FTC approval.[132] It is difficult to see any affirmative reason for permitting the Department to proceed independently.[133] Independent Department enforcement should not be permitted in the absence of proof that the FTC has been consulted and has consented, even though the statute requires no such consent.[134]

Although, as noted above, the statutory requirements differ, the FTC in most instances is likely to proceed under the Clayton Act as it has done under the FTC Act. An order, once entered, requires

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of § 5 *because* it violates the Sherman Act, which is enforced by the Department. In such cases, orders of the FTC may simply be implementing policies for which the Department is primarily or concurrently responsible. *See* P. AREEDA, ANTITRUST ANALYSIS 33 (1967).

131. It is true that the Department in essence has a veto over FTC requests for initiation of penalty proceedings. But it hardly follows from this that on some principle of mutuality the Department should be able to proceed on its own. For example, knowledge that the Department may not proceed although the FTC desires to do so is not likely to have any impact on voluntary compliance procedures.

132. *See* the discussion of these matters in United States v. St. Regis Paper Co., 355 F.2d 688 (2d Cir. 1966).

133. The most plausible reason is that in some instances the Department either has, or can obtain, information which is not available to the FTC. Two kinds of cases suggest themselves. First, the Department may obtain information as an incident to another investigation which cannot be made available to the FTC. This was the case in *St. Regis*. The data obtained from the grand jury could not be obtained by the FTC. *In re* Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962). While most of the same information could be obtained through the Commission's subpoena and report powers, FTC Act §§ 6(a), (b), 9. 15 U.S.C. §§ 46(a), (b), 49 (1964), duplication of effort in such a case is undesirable. If the FTC consents to initiation of penalty proceedings, the Department should be able to proceed.

Second, the Department may have more effective tools for precomplaint investigation. This, however, seems unlikely. The Department cannot convene a grand jury to consider violations of an FTC order, for no criminal violation is involved. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958). Nor is it clear that the Department may use the civil investigative demand for this purpose. Use of the investigative demand is limited to "civil antitrust investigation." This may include investigation of violation of an "antitrust order," which in turn is limited to orders "of any court of the United States." Antitrust Civil Process Act §§ 2, 3(a), 15 U.S.C. § 1311, 1312(a) (1964).

134. This does not mean courts should insist upon certification of facts, as required by the court in *St. Regis*, under § 16 of the FTC Act. If the FTC approves the initiation of the proceeding, most objections are obviated.

respondent to file a compliance report. If that report or supplemental reports are insufficient, and if further investigation reveals conduct which appears to violate the order, certification to the Attorney General will be considered. This is of course equally true if follow-up investigations reveal noncompliance. In the past, certification has been deemed an internal FTC matter. The FTC has not generally conducted investigational hearings as a preliminary to certification and initiation of penalty proceedings, although this can be done in appropriate cases.[135] However, before the Compliance Division recommends certification, the respondent is advised of the alleged violations and permitted to prepare a statement of his position for submission to the FTC along with the recommendation of the Compliance Division.[136] In most instances, this action by the Compliance Division has been preceded by full discussion and negotiation directed toward voluntary compliance.[137] The FTC may of course still refuse to initiate proceedings.

Once the complaint is filed, the litigation is controlled by the Department of Justice.[138] It is now accepted doctrine that the only question to be resolved in a penalty proceeding, apart from matters relating to relief, is whether respondent has violated the FTC's order. Because the order has become final, the respondent may not in the penalty proceeding raise questions going to the validity or permis-

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135. The FTC does, on occasion, use investigational hearings to secure information on compliance matters. *See* 1962 FTC ANN. REP. 52.

136. Testimony of PGad Morehouse, *Hearings on H.R. 432, H.R. 2977, H.R. 6049 and S. 726 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st Sess., ser. 3, 21-22 (1959); Anderson, *Settlement and Compliance Procedures*, 14 ABA ANTITRUST SECTION 60, 65 (1959). The procedures described in the text are discussed in these sources. Since this Article was prepared, a district court has indicated that no civil penalties may be assessed until the FTC has made a "finding" of violation and advised the respondent of that fact. Penalties may then be assessed only from that date forward. The decision purports to rest on due process grounds. What kind of finding is to be made, and by whom, is not indicated. Continental Baking Co. v. Dixon, 283 F. Supp. 285 (D. Dela. 1968).

137. If the Compliance Division believes as a result of its negotiation that the respondent is now in full compliance with the order despite past violations, it is not likely to seek FTC certification on the basis of such violations. Testimony of PGad Morehouse, *Hearings*, *supra* note 136, at 23.

138. *See* Anderson, *supra* note 136, at 65. However, the FTC participates to a considerable extent in the proceedings:

> In forwarding civil penalty cases to the Attorney General for filing in the U.S. District Court, the [Compliance] Division prepares all the necessary pleadings and a trial memorandum, and attorneys of the Division usually participate in and often conduct the trials. They usually prepare any needed further pleadings and briefs for filing with the court, which include requests for admissions, interrogatories, objections, motions and court findings, and arrange and take oral depositions. 1962 FTC ANN. REP. 62.

Similarly, while settlement of penalty suits is controlled by the Department of Justice, the Department "extends to the Commission the courtesy of ascertaining the Commission's views prior to any settlement . . . ." Anderson, *supra* note 136, at 65.

sible scope of the order itself; these matters are to be raised on direct review or not at all, unless the FTC itself can be induced to modify its own order.[139] This puts a premium on a full understanding of the impact of the order at a time when review can still be sought, as well as on the review process itself. And this is undoubtedly what the courts have in mind, as well as what Congress intended. It makes for a neater, more compartmentalized set of procedures, where issues can be finally resolved. Evasion is more difficult, given the severity and simplicity of enforcement. Such procedures are also likely to be much more flexible, and therein lies the danger.

But in fact the penalty procedures cannot be adjudged within such a simple framework. First, in many penalty cases questions of interpretation of the order must be resolved.[140] Just as courts have been agile in probate cases by "interpreting" wills, and thereby avoiding collision with the age old doctrine that a will cannot be reformed,[141] courts in penalty cases have the ability to moderate the apparent harshness of some FTC orders through interpretation.[142] Yet such powers are obviously limited to cases where there is some flexibility in the language of the order itself. Moreover, in interpreting an FTC order there will be a strong and natural tendency to place heavy weight on the FTC's interpretation of its own order. In a probate proceeding, the draftsman is dead; in a penalty proceeding, it is not.[143]

139. United States v. Karns, 1963 Trade Cas. ¶ 70,950 (S.D.N.Y.); United States v. Post-Graduate School of Nursing, Inc., 1963 Trade Cas. ¶ 70,911 (N.D. Ill.); United States v. Wilson Chem. Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa.), *aff'd*, 319 F.2d 133 (3d Cir. 1963); United States v. Piuma, 40 F. Supp. 119 (S.D. Cal. 1941), *aff'd*, 126 F.2d 601 (9th Cir.), *cert. denied*, 317 U.S. 637 (1942).

140. *See, e.g.*, United States v. Union Bag-Camp Paper Corp., 1965 Trade Cas. ¶ 71,378 (S.D.N.Y.); United States v. Post-Graduate School of Nursing, Inc., 1963 Trade Cas. ¶ 70,911 (N.D. Ill.); United States v. Hindman, 179 F. Supp. 926 (D.N.J. 1960).

141. *See generally* Henderson, *Mistake and Fraud in Wills—Part I: A Comparative Analysis of Existing Law*, 47 B.U.L. REV. 303, 356-63 (1967).

142. In a penalty proceeding, a jury trial may be demanded. This raises troublesome questions concerning which matters must be submitted to the jury. Obviously the jury must resolve disputed factual questions, e.g., did the respondent in fact charge Buyer *X* a lower price than Buyer *Y*, as alleged by the government? And interpretation of the order, on the other hand, is the proper function of the court. But determination of the applicability of the order to a particular set of facts may involve both fact-finding and interpretation. *E.g.*, if the order prohibits sales at different prices to "competing" purchasers, must the jury determine whether the purchasers in fact compete? On a somewhat similar problem involving § 5 orders, *compare* United States v. Hindman, 179 F. Supp. 926 (D.N.J. 1960), *with* United States v. Vulcanized Rubber & Plastics Co., 288 F.2d 257, 258 n.2 (3d Cir.), *cert. denied*, 368 U.S. 821 (1961). *See* the discussion of these cases in L. JAFFE, *supra* note 112, at 319 n.237 (1965).

143. While it is difficult to generalize, there certainly appears to be a tendency towards literalism in penalty proceedings. In a number of § 5 cases, the general approach of the court seems to have been to read the order, examine the facts, and determine whether the latter precisely fits the former. The prime example is United

Second, the language of the order is not necessarily dispositive; some things are "implicit" in the order. Thus, for example, in an order entered under section 2(a) of the Clayton Act the "meeting competition" defense is "read into" the order, whether the order makes provision for it or not.[144] Adequate guidelines with respect to matters "implicit" in Clayton Act orders have not yet been established, but the opportunity exists through this means to interject additional flexibility into penalty proceedings.

Finally, the courts have tempered the severity of the penalty procedures through their control over the amount of penalty to be assessed once violation is found.[145] Thus, a respondent's good faith and the absence of any willful intent to violate the order, while not defenses, have often been taken into account in determining the penalty.[146] Similarly, the courts have imposed light, indeed almost nominal penalties in cases of technical violations, or where there has been a long history of compliance.[147] Penalties have also been

States v. Vulcanized Rubber & Plastics Co., 288 F.2d 257 (3d Cir. 1961), discussed in more detail in note 151 *infra*. *See also* United States v. Union Bag-Camp Paper Corp., 1965 Trade Cas. ¶ 71,378 (S.D.N.Y.); United States v. Wilson Chem. Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa.), *aff'd*, 319 F.2d 133 (3d Cir. 1963); United States v. American Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd*, 272 F.2d 945 (6th Cir. 1959). I do not mean to be critical of the analysis used in these cases. But they demonstrate an approach which requires most precise drafting of orders.

144. FTC v. Ruberoid Co., 343 U.S. 470 (1952). *See* discussion in text accompanying notes 297-304 *infra*.

145. Even in civil penalty cases before a jury, the practice has been for the judge to determine the amount of the penalty. *See* L. JAFFE, supra note 112, at 318-19; Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 465 n.65 for discussion.

The FTC, as a matter of practice, generally demands the maximum penalty of $5,000 per violation. *See* Louis, *supra* at 464; Austern, *Five Thousand Dollars a Day*, 21 ABA ANTITRUST SECTION 293, 297 (1962). *But cf.* ABC Consolidated Corp., 3 TRADE REG. REP. ¶ 18,046 (1967). This, of course, leaves open the question of what constitutes a separate violation and, more particularly, of what constitutes "continuing failure or neglect to obey," for in such violations "each day of continuance" is a separate offense.

In the Finality Act hearings, the FTC asserted that as of 1959 it had not "yet brought any suits on the basis of a continuing offense day by day," and that "[i]t is hard to get a continuing offense." A continuing price-fixing conspiracy was suggested as an illustration of such an offense. Testimony of PGad Morehouse, *Hearings*, *supra* note 136, at 21. While no Clayton Act cases have dealt with the problem, one might suggest that pricing pursuant to an established, but violative, discount schedule might be such an offense. In other instances, each discriminatory price or allowance might be a separate offense. *Cf.* United States v. Wilson Chem. Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa.), *aff'd*, 319 F.2d 133 (3d Cir. 1963).

146. United States v. H. M. Prince Textiles, Inc., 262 F. Supp. 383 (S.D.N.Y. 1966); United States v. Karns, 1963 Trade Cas. ¶ 70,950 (S.D.N.Y.); United States v. Vitasafe Corp., 212 F. Supp. 397 (S.D.N.Y. 1962) (opinion), 234 F. Supp. 710 (S.D.N.Y. 1964) (order), *aff'd* 352 F.2d 62 (2d Cir. 1965); United States v. Home Diathermy Co., 1960 Trade Cas. ¶ 69,601 (S.D.N.Y. 1959). Proof of intent to violate is of course essential to establish violation if the order itself so requires. *Cf.* United States v. Elliot Knitwear Co., 1966 Trade Cas. ¶ 71,885 (S.D.N.Y.).

147. *E.g.*, United States v. Home Diathermy Co., 1960 Trade Cas. ¶ 69,601 (S.D.N.Y.

mitigated where the conduct complained of was divulged in a compliance report and was not questioned at the time by the FTC.[148] One court has suggested that the extent of injury to the public should be a factor considered.[149]

Recognition of such factors in determining a penalty contributes an important degree of flexibility to the penalty procedures. But it is the threat of a penalty, more than the actual amount of penalty assessed, which is significant in enforcement. The threat of a penalty may not be mitigated at all by the fact that the respondent will not ultimately be assessed "too much." As Professor Jaffe has observed, "the penalty procedures, whatever the modes of mitigation, create a large uncertainty as to the dimension of their threat."[150] Moreover, the "good faith" standard may in fact be a trap for the unwary. The courts in mitigating penalties have emphasized (1) factors going to the magnitude of, and injury caused by, the violation, or (2) factors demonstrating that the violation was not "deliberate" or "willful." The very emphasis on deliberateness may make mitigation unavailable to persons subject to vague orders, or orders which are unduly broad. For if the respondent seeks FTC guidance and is informed that his conduct is in violation, his persistence in the conduct in the belief that the FTC was wrong has all the hallmarks of being deliberate.[151] If he does not seek FTC guidance, he proceeds entirely

1959). Conversely, an extended pattern of violations is a basis for imposition of much higher penalties. United States v. Wilson Chem. Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa.), *aff'd*, 319 F.2d 133 (3d Cir. 1963).

148. In two § 5 cases, respondents in civil penalty proceedings have asserted as a defense that the conduct was fully disclosed in compliance reports filed with the FTC and was either accepted or not objected to for an extended period of time. In both cases it was held that such allegations were not a defense, although they were relevant in determining the penalty to be assessed. United States v. Vitasafe Corp., 212 F. Supp. 397 (S.D.N.Y. 1962), *aff'd*, 352 F.2d 62 (2d Cir. 1965); United States v. American Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd*, 272 F.2d 945 (6th Cir. 1959). *But cf.* Vanity Fair Paper Mills v. FTC, 311 F.2d 480, 488 (2d Cir. 1962). Professor Jaffe is sharply critical of the result in *American Greetings*, suggesting that no penalty should have been imposed. L. JAFFE, *supra* note 112, at 319 n.37.

149. United States v. Karns, 1963 Trade Cas. ¶ 70,950 (S.D.N.Y.).

150. L. JAFFE, *supra* note 112, at 319.

151. *Cf.* Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 790-91 (D.C. Cir. 1965). The classic demonstration of respondent's dilemma is the *Vulcanized Rubber* litigation. Respondent was prohibited by FTC order from advertising combs as "rubber" or "hard rubber." In a compliance report, it informed the FTC that it would advertise its combs as "rubber-resin." The FTC advised, by letter, that this would violate the order. Respondent amended its existing review petition, contending that the order as interpreted was too broad. The court declined to consider the "interpretation," on the ground that it might be changed or not enforced and there was therefore no controversy to be reviewed, upholding the order as written. Vulcanized Rubber & Plastics Co. v. FTC, 258 F.2d 684 (D.C. Cir. 1958). Respondent continued to assert the right to use "rubber-resin." In a subsequent civil penalty proceeding, respondent was assessed $6,000 in penalties. The court did not allude to the fact that respondent obviously had

at his own risk and may indeed be deemed in bad faith for not going to the FTC.

The assessment of penalties is of course the primary focus of a civil penalty suit. But the relief granted may not be so limited. It has now become common practice in section 5 cases for the court, upon a finding of violation, to enter its own mandatory injunction compelling obedience to the FTC's order.[152] The violator is thus placed in much the same position it would have been in under the old procedure, where the first violation would have formed the basis of a judicial enforcement order, except that here a contempt action would be brought in district court and, in addition, the penalty suit remains available. Why such an injunction is requested is not altogether clear. It has been suggested that this is done so that in a subsequent contempt action based upon further violation the respondent cannot demand a jury trial, as he could in a penalty suit.[153] The more obvious explanation is that upon violation of the court's order criminal sanctions, including jail sentences, might be imposed,[154] thereby more effectively deterring hard-core violators.

The issuance of mandatory injunctions in penalty suits presents a number of difficult questions. First, the injunction invariably compels obedience to the order as written by the FTC. Indeed, since the order is final, and the district court lacks the authority to review or modify it, it is not clear that the injunction could do anything else. It is of course true that the respondent has had an opportunity

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been frustrated in his efforts to secure a judicial ruling prior to the penalty suit. United States v. Vulcanized Rubber & Plastics Co., 288 F.2d 257 (3rd Cir.), *cert. denied*, 368 U.S. 821 (1961). Judge Hastie dissented, on the ground that the prior ruling of another court had established that the conduct was not within the language of the order.

152. *See* Louis, *supra* note 145, at 464 n.64; *Hearings*, *supra* note 136, at 24; 3 TRADE REG. REP. ¶ 9711.40. In most instances where such injunctions have been issued, the penalty suits have been settled and the issuance of the injunction has been with respondent's consent. However, such injunctions have also been issued in litigated cases over the objection of the respondent. United States v. Herbold Laboratory, Inc., 267 F. Supp. 53 (C.D. Cal. 1967); United States v. Vitasafe Corp., 234 F. Supp. 710 (S.D.N.Y. 1964), *aff'd*, 352 F.2d 62 (2d Cir. 1965).

Such injunctions are not issued as a matter of course, In United States v. Universal Wool Batting Corp., 1961 Trade Cas. ¶ 70,168 (S.D.N.Y.), the request for an injunction was refused because of the limited nature of the violations and because the judgment was by default.

153. Louis, *supra* note 145, at 464 n.64.

154. In United States v. Herbold Laboratory, Inc., 267 F. Supp. 53 (C.D. Cal. 1967), the court suggested that an injunction was warranted because (1) the respondent might find it financially desirable to risk another penalty suit, suggesting therefore that the maximum penalty assessment might be insufficient to deter further violation, and (2) because of the time and effort involved in bringing another penalty suit. The court also felt that the respondent could not be prejudiced, because it was under order anyway.

to seek review and may in fact have done so.[155] Nevertheless, it hardly seems proper for the court to issue its own injunction on the basis of administrative findings over which it has no control, and the court may not be justified in issuing an injunction in the words of the FTC order on the basis of the evidence in district court establishing violation of the FTC's order. The violation of the order may be of such a nature that standing alone it does not justify entry of an injunction as broad as the FTC's order.[156] Therefore, if the district courts are to issue such injunctions at all, they should be limited to the prohibition of conduct similar to that held violative of the FTC's order by the court. The deliberate violator who repeats the same conduct thus might be held in contempt; a dissimilar violation would still result in the imposition of civil penalties, but not criminal sanctions.

A more serious question is whether such injunctions may be issued at all. In seeking injunctions, the government has relied on section 9 of the FTC Act,[157] which authorizes district courts to issue writs of mandamus on application of the United States at the request of the FTC, to compel obedience to orders of the FTC entered pursuant to a number of sections of the FTC Act, including section 5. Section 9 has been held to authorize the issuance of such injunctions,[158] although it has been used primarily to compel obedience to subpoenas and other investigatory orders. Professor Louis has suggested that if section 9 is to be read in this literal manner, the FTC since 1914 has had the authority to seek enforcement of its cease and desist orders in district court.[159] This does not necessarily follow, but the argument to the contrary is sufficiently strained[160]

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155. If he has in fact done so, the issuance of an injunction by the district court will now provide *three* possible sanctions for a subsequent violation, as follows: (1) a second civil penalty suit; (2) an action for contempt of the district court; or (3) an action for contempt of the court of appeals, which was required to enter its own enforcement order upon affirmance. Such multiplicity ought in itself to be the basis for denial of injunctive relief by the district court.

156. To make the issue more concrete, assume that the FTC's order prohibits three types of conduct, referred to here as *A*, *B* and *C*. Further assume that in the penalty suit it is found that respondent violated the order by engaging in conduct *A*. Should the court's injunction prohibit only conduct *A*, or should it compel compliance with the order of the FTC as such, thereby prohibiting conduct *B* and *C* as well?

157. 15 U.S.C. § 49 (1964). During the Finality Act hearings, the FTC representative stated that it secured such injunctions under § 10 of the Act. 15 U.S.C. § 50 (1964). *Hearings, supra* note 136, at 24. This was clearly an error.

158. United States v. Herbold Laboratory, Inc., 267 F. Supp. 53 (C.D. Cal. 1967). *See* United States v. Vitasafe Corp., 352 F.2d 62 (2d Cir. 1965); United States v. Universal Wool Batting Corp., 1961 Trade Cas. ¶ 70,168 (S.D.N.Y.).

159. Louis, *supra* note 145, at 464 n.64.

160. It might be argued that this portion of § 9 was intended to permit district court enforcement of all types of FTC orders whose validity the court had authority to

to warrant the conclusion that the specific enforcement provisions of section 5, which do not authorize recourse to the equity jurisdiction of the federal district courts, were intended to be exclusive. The multiplicity of sanctions which may come into play, and the obvious problems in permitting a court to compel obedience to an administrative order which it lacks authority to review or modify, also suggest that the issuance of such injunctions was never intended.

Even if such injunctions are authorized by section 9 of the FTC Act, it does not follow that they may be issued in civil penalty suits based upon violations of Clayton Act orders. For section 9 authorizes only writs of mandamus to compel obedience with FTC orders entered pursuant to provisions of the FTC Act.[161]

It should now be apparent that the differences between the "old" and "new" procedures for enforcement are both real and significant. The mere presence of a maximum penalty of $5,000 per day may create some additional *in terrorem* effect, which has particular significance when the FTC is trying to induce "voluntary" compliance. But the fundamental differences are more subtle. The elimination of the "second bite," while it assures a more effective response against the deliberate violator, also deprives the firm acting in good faith of a judicial determination of the legality of its conduct before that conduct will result in the imposition of sanctions. Quite apart from the flexibility inherent in the contempt process itself, enforcement by the court which had itself reviewed the administrative record

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review prior to the entry of its own order or which had otherwise become "final." Prior to Wheeler-Lea, § 5 cease and desist orders were not within this category, with the possible exception of those orders which has been reviewed by the court of appeals (in which event the use of § 9 as device for enforcing cease and desist orders might be barred by the provision giving the court of appeals exclusive jurisdiction to modify or enforce, etc.). With the passage of Wheeler-Lea, an opportunity for review was provided and, if not taken, the order became final. On this basis, it could be argued that while the FTC could not seek enforcement in district court prior to 1938, it could thereafter. But such an argument, while it recognizes some of the conceptual difficulties of permitting a court to issue an injunction enforcing an order when authority to review the validity of the order is in another court, bears little relationship to the *language* of the statute.

161. Section 9 is expressly limited to orders entered pursuant to §§ 41-46 and 47-58 of Title 15. 15 U.S.C. § 49 (1964). These are all provisions of the FTC Act. It should be noted, however, that the FTC's right to access and subpoena powers, also conferred by § 9, are also granted "[f]or the purposes of sections 41-46 and 47-58 of this title." and are not therefore literally applicable to FTC Clayton Act investigations and proceedings. Despite this fact, and although the Clayton Act is silent on the question, it has been consistently held that the FTC's § 9 investigatory powers may be used in connection with possible Clayton Act violations. *See* Withrow, *Investigatory Powers of the Federal Trade Commission—Constitutional and Statutory Limitations*, 24 FED. B.J. 456, 477-78 (1964). This same approach might be used to secure mandatory injunctions under § 9 in Clayton Act civil penalty suits.

was likely to reflect better the basic purpose of the order. The danger of undue literalism was not as great under the old procedures.

These differences do call for a re-examination of the standards applied in drafting and reviewing FTC orders. Some of that re-examination has taken place, and the results will be discussed at a later point. The changes in enforcement machinery have also created new interest in the availability of modification and advisory guidance.

c. *Modification, advisory opinions, and voluntary compliance.* Section 11 of the Clayton Act authorizes the FTC to reopen and modify orders which have become final upon expiration of the period for review, if no petition has been filed, whenever, in its opinion, "conditions of fact or law have so changed as to require such action or if the public interest shall so require."[162] The FTC's Rules of Practice embody the same standards.[163] Such modification may occur only after notice and opportunity for hearing. The FTC has interpreted this provision to mean that such reopening may be upon its own motion, or upon motion of the respondent.[164]

The Rules of Practice also permit reopening and modification where the order has been affirmed by a court of appeals,[165] although there is no specific statutory authorization for such a practice.[166] Despite this peculiar gap in the statutory language, the courts have permitted the FTC to modify such orders.[167] Modification of enforced orders once again presents difficult questions of court-agency interrelationship, for the order is now technically the court's; the court has been described as the "senior partner" in what is now a

162. 15 U.S.C. § 21(b) (1964). The FTC is also authorized to modify its orders, for any reason, prior to expiration of the time for review, if no review has been sought, or, if it has, prior to the filing of the administrative record with the court of appeals. The FTC Act provisions are identical. 15 U.S.C. § 45(b) (1964).

163. 16 C.F.R. § 3.28(b) (1968).

164. *Id.*

165. *Id.*

166. The statute expressly confers authority to modify *final* orders only if no review petition has been filed. 15 U.S.C. § 21(b) (1964).

167. American Chain & Cable Co. v. FTC, 142 F.2d 909, 911-12 (4th Cir. 1944). *See* Dolcin Corp. v. FTC, 219 F.2d 742 (D.C. Cir. 1954), *cert. denied,* 348 U.S. 981 (1955). *Cf.* Standard Distribs., Inc. v. FTC, 211 F.2d 7 (2d Cir. 1954). In *American Chain,* respondent, which was subject to an order enforced by the court of appeals, filed a mandamus action to compel the FTC to consider its petition for modification. The FTC asserted that because a review petition had been filed it was powerless to modify. In granting the requested relief, the court found it "not reasonable" to believe that Congress intended that no such authority should exist. The court also stated that since it had inherent authority to modify its own enforcement order, it also could direct the FTC to entertain the petition to assist through the use of its administrative expertise. *See* discussion in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, at 312-13.

cooperative enterprise.[168] I question the aptness of this description, however, in connection with orders subject to civil penalty enforcement procedures. In a penalty suit the order is simply that of the FTC, as *affirmed* by the court. The presence of a judicial *enforcement* order is virtually irrelevant. The primary responsibility for modification should now rest with the FTC. In most cases, reopening and modification should be sought initially at the FTC level, and the court should decline to modify its own order (and thereby presumably the FTC's order) until the FTC has considered the matter.[169] Nevertheless, the question is not one which should be resolved in terms of "power" or "jurisdiction" to modify. Rather, each case must be handled individually. If some degree of administrative competence is called for, as for example when the alleged basis for modification is a change in industry structure or respondent's market position, the matter should be deferred to the FTC. If not, as might be the case where the issues are primarily legal, the court should not consider itself helpless to act without FTC findings.

It is sometimes suggested that the hardship imposed on a respondent by a vague or unduly broad order is at least in part illusory because a modification of the order can be obtained upon a showing of such hardship;[170] the ability of the good-faith respondent to secure modification inserts back into the civil penalty procedures much of the flexibility which was inherent in the old "three bites at the apple" procedure. Such an argument can be carried to absurd extremes, permitting an order to say virtually anything because it can be modified later. But the argument is generally made within narrower confines: that the language of the order, though broad or vague, is necessary in order to anticipate future violations of the kind already engaged in by respondent. If the order should prohibit some future

168. L. JAFFE, *supra* note 167, at 312. Professor Jaffe concludes that "the court is the senior partner in enforcement, free to use or not the agency's services."

169. This presents little difficulty if the order is modified by the FTC. The court may then consider the modification on direct review. 15 U.S.C. § 21(b) (1964). The more difficult question is whether there is any recourse to the reviewing court when the FTC has *rejected* respondent's request for modification. It has been held that the court of appeals cannot review such action, since review is limited to the order entered after reopening. Review then is limited to the modifying order, and not to the original order, which has become final. Martin Marietta Corp. v. FTC, 376 F.2d 430 (7th Cir.), *cert. denied*, 389 U.S. 923 (1967). It should be noted, however, that the order in that case was a consent order.

Even so, however, in those cases where the original FTC order has been affirmed by the court of appeals, the respondent should be able to secure a court ruling on the propriety of the FTC's failure to modify. The court has inherent power to modify its own decree apart from its direct review powers. *See* note 167 *supra*. *Cf.* Indiana Quartered Oak Co. v. FTC, 58 F.2d 182 (2d Cir. 1932).

170. *See, e.g.*, Chain Institute, Inc. v. FTC, 246 F.2d 231, 239 (7th Cir.), *cert. denied*, 355 U.S. 895 (1957); *cf.* FTC v. National Lead Co., 352 U.S. 419, 431 (1957).

conduct, presently unforeseeable, which ought not be prohibited, modification may be obtained when such conduct is actually contemplated.[171]

Modification by the FTC can eliminate hardships or uncertainties which are likely to arise with the passage of time, although many of the matters which are most commonly asserted as a basis for modification can probably be asserted in defense in a civil penalty action anyway. Proof of changed conditions of fact, may, for example, enable a respondent to assert as a defense that a particular price discrimination did not injure competition, even though the order on its face prohibits such conduct irrespective of its effect on competition.[172] Changed rules of law may automatically be incorporated into the terms of the order.[173] In such cases, modification serves only to enable the respondent to proceed on the basis of prior approval rather than proceeding at his own risk. But the possible availability of modification is not an excuse for the issuance of unduly broad or vague orders in the first instance. The FTC may not modify the order. It is natural for it to be chary about doing so. But it may be wrong. At the present time, there is authority holding that an FTC decision refusing modification is not subject to review.[174] Thus, the good faith respondent denied a modification is in the difficult position of either forgoing the conduct in question or risking a civil penalty suit where his very inability to secure modification may work to his prejudice. Moreover, the very difficulties of securing modification make it of little value where business decisions must be arrived at rapidly, as is often the case in pricing matters, or where the loss by forgoing the conduct in question is less than the cost and time of seeking modification. Yet the decision to forgo the conduct, particularly if pricing is involved, may work to the detriment of the consuming public.[175]

171. *See, e.g., In re* Foremost Dairies, Inc., 62 F.T.C. 1344, 1364 (1963), *aff'd*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

172. FTC v. Ruberoid Co., 343 U.S. 470, 475-77 (1952). *See* discussion in text accompanying note 302 *infra*.

173. In Russell-Ward Co., Inc., 62 F.T.C. 1563 (1963), the respondent sought modification of a consent order entered in the language of § 2(c) (brokerage) on the ground that the FTC had recently found in another proceeding that conduct of the type with which it was charged did not violate the statute. The FTC declined modification, in part on the ground that the order itself would of course be construed on the basis of current standards in any event. This is the likely result where statutory standards are set out in the order. *See also* Southern Fruit Distribs., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,191 (FTC 1965).

174. Martin Marietta Corp. v. FTC, 376 F.2d 430 (7th Cir.), *cert. denied*, 389 U.S. 923 (1967).

175. The modification of consent orders might be thought to present additional difficulties. There has been some suggestion, for example, that the standards for modification of judicial consent decrees are more difficult to meet than those for litigated judicial decrees. *See generally* Note, *Requests by the Government for Modification of*

The FTC's Rules of Practice now also provide that the FTC will advise a respondent, at his request, as to whether conduct proposed by him is in compliance with the order to which he is subject,[176] and that upon the filing of a compliance report the FTC will review the report and advise respondent whether the conduct revealed complies with the order.[177] Such "advisory opinions" may be revoked by the FTC at any time, although prior to revocation notice and an opportunity to be heard will be given respondent.[178] The Rules further provide that the FTC will not proceed against a respondent who has in good faith relied upon the FTC's advice, if full disclosure was initially made in the request for advice *and* if the conduct "was promptly discontinued upon notification of rescission or revocation of the Commission's approval."[179] Moreover, such advice is commonly given informally by members of the FTC's compliance staff whenever questions of compliance are raised.[180] The relationship between FTC and respondent created by the entry of an order thus has been described as a " 'marriage' under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order."[181] Perhaps I am unduly pessimistic, but my observations have always been that marriages involving a reluctant partner either do not last long or result in the coercion of the partner who was reluctant. And if a "marriage" does exist here, it is abundantly clear that the respondent is reluctant.

It is now common for courts sustaining FTC orders attacked on the grounds of undue breadth or vagueness to suggest that the order will work no real hardship because the respondent can secure advice from the FTC in advance.[182] The next step is to suggest that failure to seek such advice demonstrates bad faith.[183]

Consent Decrees, 75 YALE L.J. 657 (1966); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1314-17 (1967). However, the FTC's rules clearly contemplate that the standards for modification of both litigated and consent orders shall be the same. 16 C.F.R. § 2.3 (1967).

176. 16 C.F.R. § 3.26(b) (1968).
177. 16 C.F.R. § 3.26(a) (1968).
178. 16 C.F.R. § 3.26(c) (1968).
179. *Id.*
180. *See* Testimony of PGad Morehouse, *Hearings, supra* note 136, at 21-22 (1959); Anderson, *Settlement and Compliance Procedures*, 14 A.B.A. ANTITRUST SECTION 60, 64-65 (1959).
181. Foremost Dairies, Inc., 62 F.T.C. 1344, 1363-64 (1963), *aff'd*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).
182. *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394 (1965); Purolator Prods. Inc. v. FTC, 352 F.2d 874, 886 (7th Cir. 1965); *cert. denied*, 389 U.S. 1045 (1968). The classic statement of this position is that of Judge Friendly in Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 488 (2d Cir. 1962). *But see* Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 790-91 (D.C. Cir. 1965).
183. *Cf.* Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 488 (2d Cir. 1962).

The advisory opinion procedure is of greatest value to the respondent who is uncertain about the meaning of the order. For this purpose, it has marked advantages over more formal modification procedures. Rulings can be secured far more rapidly, and with considerably less effort. But these advisory procedures have far less relevance to the order which, although unduly broad, clearly prohibits the conduct in question. While the FTC *could* use its advisory role to exempt conduct which the order clearly but improperly prohibits, it is not likely to do so. If these procedures have any relevance to the propriety of an order in the first instance, it is with respect to vagueness, not overbreadth. But the availability of FTC advice, however desirable it might be, provides little more excuse for the issuance of imprecise orders than does the fact that an order once issued can be modified.

In some instances, as with modification, FTC advice cannot be obtained before a decision can be made. This is particularly true of many pricing decisions. Moreover, many businessmen view the FTC as a prosecutor. They are therefore naturally reluctant to divulge facts about their operations to the FTC and are likely to feel that seeking advice is a futile gesture. Finally, as Professor Auerbach has noted, the difficulty with reliance on FTC guidance to justify otherwise objectionable orders "is highlighted by not assuming . . . that the respondent proposes a method of compliance which the Commission accepts, but instead, a method of compliance which the Commission rejects."[184] The FTC is after all not likely to be generous toward respondent: it has a certain vested interest in its order. The respondent who in good faith believes his conduct lawful must either proceed at his own risk, seek an advisory opinion and proceed at possibly greater risk if he disagrees, or capitulate when perhaps he ought not.[185] The respondent acting in good faith may be well advised in some cases not to seek FTC "advice."

184. Auerbach, *The Federal Trade Commission: Internal Organizational and Procedure*, 48 MINN. L. REV. 383, 513 (1964).

185. *See* Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 790-91 (D.C. Cir. 1965). In the past, it has appeared unlikely that the respondent could obtain judicial review of the FTC's informal "interpretation" of a cease and desist order. *See* Rettinger v. FTC, 392 F.2d 454 (2d Cir. 1968); *cf.* Vulcanized Rubber & Plastics Co. v. FTC, 258 F.2d 684 (D.C. Cir. 1958). In the *Vulcanized Rubber* case, the FTC notified respondent of its "interpretation" of the order, and the court refused to consider the validity of the order as interpreted on direct review of the order itself. It has seemed even more unlikely that an informal advisory opinion would be reviewed when the time for seeking review of the order itself has expired. The antipathy toward judicial review of advisory or interpretive administrative rulings, whether such review is direct or by action for declaratory judgment, is discussed in 3 K. DAVIS, ADMINISTRATIVE LAW §§ 21.01-21.02, 21.06-21.08 (1958). In considering the developments discussed by Professor Davis, the reader should give particular attention to the textual material in the pocket supple-

The greatest danger of the vague or unduly broad order is that legitimate conduct will be forestalled. Price discrimination, for example, may not only be legitimate but economically desirable. Such conduct, if it is arguably prohibited by an order which is unclear or unduly broad, may be forgone simply because the anticipated benefit to the respondent is offset by the prospect of a dispute with the FTC. Harm to the public interest may well result. The tendency to forgo is made greater when the FTC makes its view known informally through voluntary compliance procedures, where considerable pressure can be brought to bear through the threat of violation proceedings.[186] A formal advisory opinion may aggravate this tendency still further.[187] The entry of a broad order may thus become a kind of jurisdictional incident which serves as a basis for the assumption of a quasi-regulatory role by the FTC.[188]

B. *FTC Orders and Private Litigation*

The FTC and the courts seem to operate on the assumption that unless the FTC's order proscribes *all* the ways to violate a statute which the respondent has already violated once, he is left free to violate the statute in ways not prohibited by the order.[189] This is undoubtedly true *with respect to the FTC*: where subsequent conduct violates the underlying statute but not the order, the FTC must initiate new proceedings which can result only in modification of the existing order or entry of another order. But the assumption is un-

ment to § 21.08 of the Davis treatise. *See also* L. JAFFE, *supra* note 168, at 412-18 (1965).

The question whether the formalization of the advisory opinion procedures taken with the fact that the FTC has bound itself not to revoke its advice retroactively should be deemed to make such rulings "declaratory orders" within § 5(d) of the Administrative Procedure Act, now 5 U.S.C. § 554(d) (Supp. II, 1964), has not yet arisen. If these advisory opinions are within § 5(d), they are clearly reviewable. The ability to obtain judicial review would make the advisory opinion procedures far more attractive to the respondent who is acting in good faith but feels he will be substantially prejudiced in the judicial forum by an adverse FTC opinion. Professor Davis has stated, correctly in my judgment, that FTC "advisory opinions" are declaratory orders. 1 K. DAVIS, *supra*, § 4.09 (Supp. 1965). *Accord*, Reilly, *Declaratory Orders Under the APA—The Need for Legislation*, 52 IOWA L. REV. 657, 666 (1967).

186. *See* Louis, *supra* note 145, at 465, 473.

187. This is not of course to suggest that voluntary compliance procedures, including negotiations with the underlying threat of violation proceedings, and the advisory opinion procedure are not useful. They are obviously essential if compliance is ever to be secured in many cases. But the presence of such procedures ought not be used to justify orders which prohibit more than they ought to, or which are unclear in their coverage.

188. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (Supp. 1964) 157.

189. *See, e.g.*, Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 487 (2d Cir. 1962): "Respondent's first proposal would leave it free to repeat the very practice here found to violate § 2(d) if only it substituted radio or television for newspaper advertising . . . ."

warranted at least as to Clayton Act orders, for statutory violations may result in treble damage liability to injured private parties.[190] To be sure, such actions are perhaps not as likely to be initiated as FTC enforcement proceedings, if for no other reason than that private litigants are not as likely to be aware of such violations. Moreover, if the order does cover the conduct in question, the pressures by the FTC through compliance procedures are more likely to be effective in assuring obedience to the statute than the threat of potential treble damage liability. Nevertheless, the threat of private action does remain, and is often very real. Such potential liability may be a most effective deterrent to statutory violation irrespective of the coverage of the FTC's order.

The very fact that such potential liability to private parties does exist under the Clayton Act raises questions concerning the relationship of Clayton Act cease and desist orders to private treble damage actions. It is not the purpose of the present study to consider these questions in detail. Yet there are points at which consideration of this relationship may be relevant to the language of the order itself. If this is so, the impact of the order on private litigants is one of the factors to be considered in the issuance of the order in the first instance.

There is no private cause of action for injury caused by violation of the FTC's order as such.[191] A treble damage action must be predicated upon proof of violation of one of the "antitrust laws."[192] But if the treble damage suit seeks recovery for injury caused by conduct which the FTC has found to be in violation of such a statute, the plaintiff may, and likely will, assert that the FTC proceedings and order establish that the statute has been violated and that all he need prove in addition is the damage to himself. And in some cases, the order may be used by the defendant for the opposite purpose, claiming that the order expressly directs or authorizes the conduct

190. Clayton Act § 4, 15 U.S.C. § 15 (1964). Treble damage actions have long been common in connection with Robinson-Patman violations. While some doubt may once have existed, it is now quite clear that such actions may be brought for violations of § 3. *See* Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671, 688 (1966). But there is presently conflict over the availability to private litigants of treble damage actions charging violations of § 7. *See* cases and authorities cited in S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 881-82 (3d ed. 1968); J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967, at 340-42 (1967).

191. *See, e.g.*, Steel v. American Broadcasting-Paramount Theatres, Inc., 1961 Trade Cas. ¶ 70,175 (S.D.N.Y.); Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961); Ida Amusement Corp. v. RKO Pictures Corp., 1954 Trade Cas. ¶ 67,837 (S.D.N.Y.). While these cases all deal with judicial decrees, there is no reason to distinguish FTC orders.

192. Clayton Act § 4, 15 U.S.C. § 15 (1964). "Antitrust laws" include the Sherman Act and Clayton Act, but not the FTC Act. Clayton Act § 1, 15 U.S.C. § 12 (1964).

complained of, or reflects a determination that such conduct does not violate the statute, thereby establishing the absence of violation.

Section 5(a) of the Clayton Act permits the introduction in private treble damage actions of any "final judgment or decree" entered in any "civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws" as prima facie evidence against the defendant "as to all matters respecting which said judgment or decree would be an estoppel between the parties thereto."[193] Most FTC consent orders, and most orders under section 5 of the FTC Act, are clearly not admissible under section 5(a).[194]

But nonconsent orders entered under the Clayton Act may be. It had long seemed clear, although the Supreme Court had never passed on the question, that the FTC's Clayton Act orders did not fall within section 5(a).[195] Two early decisions had held FTC orders inadmis-

193. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964), which, in more complete form, provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . .

194. Most FTC consent orders are entered prior to the taking of testimony, and fall within the excepting proviso of § 5(a); *see* note 193 *supra*. In the case where testimony has been taken, a consent order is admissible to the extent any FTC order is admissible, although there may be considerable difficulty in determining the estoppel effect of such an order, which contains no admissions or findings of violation. *See* Y & Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709 (E.D. Pa. 1967), where the court was apparently willing to admit a Clayton Act § 7 consent order entered after the taking of testimony but expressed doubts whether the matters as to which there would be an estoppel could be delineated.

FTC orders entered under § 5 of the FTC Act are normally inadmissible because the FTC Act is not one of the "antitrust laws." *See* note 192 *supra;* Wilson, *Federal Trade Commission Orders and the Clayton Act § 5: A Reexamination*, 12 ANTITRUST BULL. 27, 42-47 (1967). In some cases, however, the FTC proceeds under § 5 against conduct on the basis of Sherman or Clayton Act standards. *See* P. AREEDA, ANTITRUST ANALYSIS 33 (1967). If the FTC finds conduct in violation of § 5 *because* it violates the Sherman or Clayton Act, a persuasive argument can be made that such an order should be treated as one "under the antitrust laws." *See* J. SCOTT & E. Rockefeller, *supra* note 190, at 327, 330 (1967). In the *Y & Y Popcorn* case, *supra*, the consent order was entered on a complaint alleging a violation of § 7 of the Clayton Act *and*, on the same basic facts, a violation of § 5 of the FTC Act. The court held that if the order rested on the latter, the FTC might ultimately have entered an order on the basis of "unfair methods of competition" short of an "antitrust" violation. Since this was a consent order, it was impossible to tell whether the order was to the effect that the "antitrust laws" were violated. The order was therefore held inadmissible. But this case may have no relevance where the FTC clearly finds a § 5 violation applying "antitrust law" standards.

195. The application of § 5(a) to FTC proceedings is discussed in greater detail in Wilson, *supra* note 194; Matteoni, *An Antitrust Argument: Whether a Federal Trade Commission Order Is Within the Ambit of the Clayton Act's Section 5*, 40 NOTRE DAME LAW. 158 (1965); Note, *Federal Trade Commission Proceedings and Section 5 of the Clayton Act: Application and Implications*, 64 MICH. L. REV. 1156 (1966).

sible, primarily on the ground that such orders were not "final."[196] The enactment of the Finality Act has made this position untenable with respect to Clayton Act orders. Nevertheless, such orders do not come within the literal language of section 5(a). First, FTC proceedings are not brought "by or on behalf of the United States." These are normally thought to be words of art, referring to suits by the Department of Justice.[197] But in a broader sense, the action of any federal agency can perhaps be deemed action of the United States, and the statutory requirement can perhaps be met on this basis.[198] However, the greatest textual barriers to the inclusion of FTC orders within section 5(a) are the requirements that there be a final "judgment or decree" rendered in a "civil proceeding";[199] whether final or not, there are marked differences between administrative orders and judicial decrees which have long been recognized and which afford a logical basis for the exclusion of FTC orders in subsequent treble damage litigation.[200] The arguments for admissibility rest primarily on the desirability of facilitating actions by injured private litigants and the unfairness and inequality inherent in making the availability

196. Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945); Proper v. John Bene & Sons, 295 F. 729 (E.D.N.Y. 1923). *Brunswick* involved a Clayton Act order. *Proper* dealt with an order entered under § 5 of the FTC Act. The court in *Proper* gave a number of reasons in support of its conclusion of nonadmissibility, including the fact that § 5 was not an "antitrust law." On the latter point, *Proper* is precedent for nonadmissibility of FTC Act orders even if Clayton Act orders are ultimately deemed admissible. *See* Wilson, *supra* note 194, at 42-47.

197. *See* Proper v. John Bene & Sons, 295 F. 729, 732 (E.D.N.Y. 1923). This same reasoning had been relied upon in holding FTC orders beyond the scope of § 5(b) of the Clayton Act, which tolls the statute of limitations on private actions during government proceedings, for that statute applies to actions "instituted by the United States." *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 223 F. Supp. 712, 713 (E.D. Tenn. 1963). However, the decision in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965), holding FTC orders within § 5(b), may be taken as implicit rejection, for the purposes of both § 5(a) and 5(b), of the argument that an FTC action is not an action "by the United States." *See* text accompanying note 203 *infra;* Wilson, *supra* note 194, at 41-42.

198. *Cf.* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

199. On the interpretation of "civil proceedings," the decision in *id.* seem determinative, for § 5(b), like § 5(a), is limited to a government "civil or criminal proceeding." *See* note 203 *infra*.

200. The primary objection to the use of FTC orders as prima facie evidence in judicial proceedings relates to the less restrictive evidentiary standards applied in administrative proceedings. *See* Matteoni, *supra* note 195, at 1165; Note, *supra* note 195, at 1161-62. *See also* Brief for United States as Amicus Curiae at 17, 35, Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

While it might be argued that an FTC order becomes a "judicial decree" once it is affirmed and enforced by the court of appeals, and that such orders fall within § 5(a) while orders which become final without review do not, this cannot be so. First, simple affirmance of an FTC order does not make it something other than the administrative order, based upon administrative findings. Second, to put the respondent at yet another disadvantage because he exercises his right to review seems very undesirable.

of the benefits of government litigation dependent upon which of two government agencies with concurrent enforcement responsibility brings suit.[201]

The status of FTC Clayton Act orders under section 5(a) is now unclear. The decision of the Supreme Court in *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*,[202] holding that under section 5(b) of the Clayton Act the pendency of FTC proceedings will toll the statute of limitations on treble damage actions based "in whole or in part on any matter complained of" by the FTC, may suggest the admissibility of FTC orders under section 5(a). Like section 5(a), section 5(b) applies only to "civil or criminal" proceedings "instituted by the United States."[203] The court of appeals in *Minnesota Mining*, apparently accepting the now rejected proposition that sections 5(a) and 5(b) were interdependent—that section 5(b) should toll the statute of limitations only in those cases where a judgment favorable to the government would be admissible under section 5(a)—did hold that FTC orders are so admissible.[204] But the Supreme Court held that the two provisions are not "coextensive" and "venture[d] no opinion" on the section 5(a) question.[205] The Solicitor General, appearing amicus, expressed the view

201. *See* Note, *supra* note 195, at 1163-64.

202. 381 U.S. 311 (1965).

203. Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b) (1964), reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .

The Court reached its result by emphasizing the strong policy in favor of private litigants, without any explanation as to the meaning of the statutory language, which does not seem to encompass FTC orders any more than the language of § 5(a) does. *See* P. AREEDA, ANTITRUST ANALYSIS 42 n.97 (1967). The Court's only statement about the statutory language was that it "does not clearly encompass Commission proceedings." 381 U.S. at 321 (1965).

Even if *Minnesota Mining* is taken as determining that FTC proceedings are "civil proceedings" brought "by the United States" within the meaning of § 5(a) as well as § 5(b), the question remains whether the presence of the words "judgment or decree" in § 5(a) still affords a basis for holding FTC orders outside that section. One commentator has expressed the view that these words afford no grounds for differentiation once it has been held that FTC proceedings are "civil proceedings." Wilson, *supra* note 194, at 50 n.33. *But see* Note, *supra* note 195, at 1161-62. The Solicitor General, appearing as amicus in *Minnesota Mining*, took the position that "[t]he words 'final judgment or decree' . . . are the most persuasive textual arguments for excluding Federal Trade Commission proceedings from Section 5(a) . . . ." Brief for United States as Amicus Curiae at 35, Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

204. 332 F.2d 346, 357-59 (3d Cir. 1964).

205. 381 U.S. 311, 318 (1965). The Court's holding that the two subsections of § 5 are not coextensive was reaffirmed in Leh v. General Petroleum Corp., 382 U.S. 54 (1965).

that FTC orders were within section 5(b) but might not be covered by 5(a), pointing out that the critical language "final judgment or decree" does not appear in 5(b).[206] It can therefore hardly be said that the Supreme Court has resolved the section 5(a) question. Nevertheless, at least three lower court decisions after *Minnesota Mining* have held FTC Clayton Act orders admissible.[207]

The question for this study, assuming the admissibility of Clayton Act orders, is whether the actual terms of the order have any particular relevance as prima facie evidence. More particularly, where the terms of the order prohibit conduct other than conduct of the same type found illegal by the FTC, does the order itself constitute prima facie evidence that *all* conduct falling within the terms of the order has been held violative of the antitrust laws? Clearly it should not. Under the principles of collateral estoppel, which determine the evidentiary effect of a decree under section 5(a), the decree is prima facie evidence only as to matters distinctly put in issue and necessarily decided in finding a violation by the defendant.[208] The prospective features of the decree are a result of the violation, but are not matters put in issue in determining whether a violation has occurred. Moreover, any plaintiff asserting that an order, by its terms, is prima facie evidence of a violation other than that specifically adjudicated by the FTC will presumably have no specific findings to rely upon and will not be able to establish the necessary relationship between the violation and his particular injury.[209] Determination of the effect to be given a prior decree under section 5(a) is to be made by the court, which is then to instruct the jury.[210] Judicial control of this question is in itself some safeguard against the danger described above.

A somewhat different question is presented where the party

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206. Brief for United States as Amicus Curiae at 35, Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965). The Solicitor General also observed that the legislative history supports the view that FTC orders are not covered by § 5(a). *Id.* at 32.

207. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 1967 Trade Cas. ¶ 72,262 (D. Me.); Y & Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709 (E.D. Pa. 1967); Carpenter v. Central Ark. Milk Producers Ass'n, 1966 Trade Cas. ¶ 71,817 (W.D. Ark.). The *Y & Y Popcorn* case rests in part on the fact that the court of appeals decision in *Minnesota Mining* so held (text accompanying note 204 *supra*), and this holding governs within the Third Circuit. 263 F. Supp. at 711.

208. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-72 (1951).

209. *E.g.*, suppose the respondent violated the Robinson-Patman Act in selling milk, and that the FTC's order extends to all "dairy" products. The plaintiff in a subsequent treble damage action alleges injury from discrimination in the price of butter. It seems clear that unless the FTC actually found a violation in the sale of butter, the order itself is irrelevant on this question in the subsequent action. Moreover, even if the order did have some relevance, it establishes no specific violation to which plaintiff's injury can be connected.

210. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 571-72 (1951).

subject to an FTC Clayton Act order has violated the *order,* and *that fact* has been determined in a civil penalty or contempt action. May a private litigant who is allegedly injured by the conduct violating the order maintain a treble damage action charging a violation of the Clayton Act and introduce the civil penalty or contempt judgment under section 5(a) as prima facie evidence of that fact? In the civil penalty case, at least, the action is literally a civil proceeding brought by the United States under an "antitrust law."[211] This is so even if FTC orders themselves are not covered by section 5(a). A contempt action is somewhat more difficult to bring within the coverage of section 5(a), for contempt actions are neither specifically authorized by the Clayton Act nor brought by the Department of Justice. Admissibility of a contempt judgment may then rest upon recognition that the contempt proceeding is ancillary to and part of the initial proceeding under the antitrust laws, and, in turn, upon the admissibility of the FTC's order.[212] Whatever the conceptual difficulties, sound reasons exist for granting the injured party the benefits of either the penalty or contempt action, *if* those judgments establish statutory violations.

The basic difficulty with admitting judgments based upon order violations is that they do not necessarily establish the violation of the underlying antitrust statute which is necessary to the maintenance of plaintiff's action. The question may be put in terms of whether such a judgment is "to the effect that the defendant has violated [one of the 'antitrust'] laws" within the meaning of section 5(a),[213] but it is more fundamental than whether the literal language of the statute has been satisfied. Permitting a plaintiff to establish an antitrust violation by reliance on a previous determination that an antitrust decree or order has been violated places undue weight

211. Civil penalty suits are expressly provided for in the Clayton Act, and are to be brought by the "United States." Clayton Act § 11(*l*), 15 U.S.C. § 21(*l*) (1964).

212. In Simco Sales Serv. of Pa., Inc. v. Air Reduction Co., 213 F. Supp. 505, 507 (E.D. Pa. 1963), the plaintiff asserted that a plea of guilty to a charge of criminal contempt based upon violations of a *judicial* consent decree was admissible under § 5(a) of the Clayton Act. The court stated that if the contempt judgment was instituted to compel compliance, or to punish violation, it was "ancillary to and, therefore, a 'proceeding under' the laws for the enforcement of which the decree was entered." *See* Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma,* 53 CALIF. L. REV. 627, 644 (1965).

In *Simco,* the contempt judgment was ancillary to a consent judgment, which was not itself admissible under § 5(a). The court concluded that the admissibility of the contempt judgment was not dependent upon the admissibility of the underlying decree, as the congressional policy reflected in the exclusion of consent judgments was not contravened by admission of the guilty plea in the contempt proceedings. A similar argument may be advanced in the case of FTC orders, if such orders are ultimately held inadmissible.

213. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964).

upon the remedial aspects of the decree.[214] Yet there is no simple resolution of the issue, for in some cases, either because of the language of the order or the nature of the violating conduct, the penalty or contempt judgment does represent a finding of statutory violation.[215] In such cases, the judgment ought not be deemed inadmissible simply on the facile assertion that the enforcement action was not literally brought to establish a statutory violation.

The effect of a FTC order on subsequent treble damage litigation has been considered to this point in terms of a plaintiff who desires to use the order to establish violation. There may also be occasions when the defendant will attempt to assert the order in defense. For example, the FTC might enter an order prohibiting a type of conduct (such as, discriminating in price between competing purchasers) but exempting certain acts which would otherwise be proscribed (for instance, "nothing contained herein shall prohibit price differentials of five per cent or less"). In a subsequent proceeding, the plaintiff may allege that conduct *within the exempting proviso* violates the Robinson-Patman Act. Such an allegation might be based either (1) on some of the very conduct which was considered in the proceedings leading to the issuance of the order, or (2) on conduct by the defendant after the order has been issued. In the former case, the exempting clause is likely to preclude plaintiff's use of the order as prima facie evidence.[216] In both cases, the determination of the FTC reflected in the order will have at least some impact as precedent for a finding of no violation. But in neither case should the exempting clause be considered a complete bar to the private plaintiff attacking conduct within it. Apart from the difficulty of binding a plaintiff in a judicial proceeding by the use of administrative findings made in a proceeding to which he was not a party, an exempting clause of the type described above is neither an authorization for the exempted conduct nor, at least in some cases, a finding that the conduct in question does not violate the statute. The clause is simply recognition that such conduct ought not be prohibited, either because it does not violate the stat-

214. This question was raised in Simco Sales Serv. of Pa., Inc. v. Air Reduction Co., 213 F. Supp. 505, 507 (E.D. Pa. 1963), discussed in note 235 *supra*. The court felt that the issue could not be resolved without full consideration of the terms of the order and of the facts involved in the contempt proceedings. *See* Comment, *supra* note 212, at 644-47.

215. The most obvious case is where the order is in the language of the underlying statute.

216. This might not be the case if the FTC's *findings* indicate that the conduct within the exempting clause did in fact violate the underlying statute. In such a case, the proceeding might still be prima facie evidence of violation even though the FTC did not, for reasons related only to the remedy, prohibit such conduct.

ute or because as a remedial matter the conduct does not seem significant enough to warrant the cost of enforcement. It is difficult to see how this type of clause differs in any very substantial way from outright dismissal of the case by the FTC, insofar as the exempted conduct is concerned. And the Supreme Court has indicated that dismissal of a case by the FTC on findings of no violation would not bar a private plaintiff from maintaining a cause of action under the same statute on the same facts.[217] Finally, private litigation attacking the legality of the conduct exempted from the FTC's order is not likely to result in any undue interference with the FTC's enforcement of the balance of the order.

More difficult questions arise when a private plaintiff attacks, as a violation of the antitrust laws, conduct by the defendant which is either required by the mandatory provisions of a FTC order, or is fully in accord with a detailed compliance program set forth in the order. In such a case, the order will undoubtedly have strong precedential effect. The court is likely to resolve questions of possible violations in favor of the defendant, to the extent that this is possible, simply to avoid creating a conflict with the order.[218] But if such a conflict does exist, the court must either disrupt the enforcement efforts of the FTC or, in essence, bind the plaintiff through administrative action to which he was not a party.[219] Although the present study is already far too long to consider this question in detail, it should be noted that such conflicts may arise when affirmative orders are entered.

II. The Scope of Clayton Act Cease and Desist Orders

A. *Introduction: The Problem in Focus*

The present study began with the proposition that what an order says cannot be evaluated without understanding what an order does. Nor can the variant array of effects which may follow upon entry of the order be fully considered without an examination of

217. *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961) (". . . just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation.").

218. This may be done by determining that although the defendant's conduct would, in the absence of the FTC order, constitute a violation, the fact that it is done pursuant to order removes defendant's responsibility for the conduct. In short, the presence of the decree means that defendant is no longer a responsible actor. *See* K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1, 4 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

219. The court in *id.*, avoided the question by finding that conduct by the American Society of Composers, Authors, and Publishers (ASCAP) pursuant to judicial decree did not in fact violate the antitrust laws, thereby avoiding what it described as "a very perplexing problem long existing in federal antitrust law." *Id.* at 3.

why they are what they are. Most important for our purposes, whatever the complexities of legislative history and procedural detail, is recognition that through "bits and pieces" legislation and the judicial struggles with the legislative product the role of the FTC, both as to the courts and the respondents, has almost imperceptibly changed. The reviewing court no longer plays a major role in enforcement: the FTC's order is more likely to be literally applied in enforcement proceedings. At the same time, the threat of penalties and the formalization of compliance and "advice-giving" procedures have increased the FTC's bargaining strength. In short, the FTC is perhaps on the threshold of becoming a full-blown regulatory agency. Examination of the scope of FTC orders goes, then, to more than the simple question of what is "fair" to a given respondent, although this is surely a relevant question. The order itself becomes the critical element in the FTC's continuing enforcement role.

The dilemma is clear enough. A guilty respondent must be prevented from repeating the same violation. But prohibitions must be written in words, and words are slippery and imprecise things. The difficulties of prohibiting particularized forms of human conduct in understandable terms are compounded when the statutory standards which govern the respondent's acts are themselves unduly vague.

If words are slippery, so indeed are some respondents. It is easy to repeat the same basic violation, and to achieve the same goals, in a somewhat different form. If the order is not to be evaded, it must in at least some cases prohibit conduct which is different from, but simply a variant of, the original violative conduct.[220] The need for at least some degree of clarity may in such cases call for orders which incidentally prohibit conduct which does perhaps violate the statute but is basically dissimilar from the original violation. Indeed, in some cases an effective order cannot be entered without a prohibition of some conduct which is in fact lawful; the desirability of the lawful conduct must then be weighed against the dangers created by evasion of the order.[221] This may not be ideal, but it is the best we can expect.

220. *E.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); All-Luminum Prods., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,665 (FTC 1963). *See* FTC v. Mandel Bros., Inc., 359 U.S. 385, 392 (1959).

221. *See* Separate Statement of Commissioner Elman in Ace Books, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,273 at 22,380-81 (FTC 1965). It has been stated that the "Commission . . . apparently may not enjoin lawful activity related to the violation in order to assure a return to competitive conditions." Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV.

But the benefit derived from effectively prohibiting renewed violations must not be overborne by injury to the public, fundamental unfairness to the respondent, or the disruption of administrative and judicial machinery. These are strong countervailing considerations which determine the boundaries within which the FTC operates, considerations which are not banished by asserting that a violator should expect to be "fenced in" or that the respondent who objects to the breadth of an order is simply seeking a chance to violate the underlying statute without imposition of sanctions.

The unfairness of subjecting a respondent to a penalty for violation of an order whose terms he cannot understand need not be belabored, other than to note that such unfairness was the primary concern in *Broch*.[222] It is as a device for ameliorating such unfairness that the availability of advisory rulings is most pertinent. Frequently orders objected to as unduly vague are in statutory language, leading to the suggestion that respondent is not prejudiced by the order because he is subject to damage actions based on the same vague standards anyway. But more uncertainty can be tolerated when the sanction rests on proof of individual damage in a civil action than when violation may result in a penalty of $5,000 per day. Nor is this suggestion responsive to the argument that the FTC is under a duty to formulate standards more precise than those of the statute.

Apart from such unfairness to the individual respondent, the vague or ambiguous order may also run counter to the same policies which should determine an order's breadth. To the extent uncertainty is present, an order becomes more or less broad depending on its ultimate construction. The respondent's conduct is likely to be governed as much by what the order might say as what it does say, at least if he believes that the FTC adheres to a broad interpretation. Broad orders—orders prohibiting conduct that in varying degrees differs from that on which the order is based—may effectively prohibit repetition of the initial violation. Moreover, they need not be overly vague, for such orders may be precise and easily understood. But a broad order may forestall legitimate conduct to a degree that the damage caused to the public more than offsets

457, 484 (1965). But there is no basis for distinguishing between the FTC Act and Clayton Act on this question, and the power of the FTC under § 5 of the FTC Act to prohibit lawful conduct, in at least some circumstances where effective enforcement requires, seems established. FTC v. National Lead Co., 352 U.S. 419, 429-31 (1957); Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962).

222. *See* text accompanying note 94.

whatever is gained by the effectiveness of the prohibition. This is of particular concern with Robinson-Patman Act orders, where the public interest often demands that the respondent be encouraged to walk close to the line of illegality.[223] The tendency of broad orders to restrict lawful activity is aggravated when the FTC, armed with a broad order, is able to bring great pressure to bear with its demands for compliance. The cost and likelihood of success in contesting with the FTC may become controlling elements in pricing decisions. A rational business judgment resting on these factors may work to the detriment of the public.

In some cases broad orders simply state statutory standards, so that one may assume that even the conduct prohibited which differs from the initial violation would in fact also violate the statute. The FTC, for example, upon finding a violation of section 2(a) in the use of a quantity discount schedule, may simply order respondent to comply with section 2(a).[224] Arguably no lawful conduct is restrained. But the question of violation will now be determined in a civil penalty suit. The primary responsibility for making findings and formulating standards should rest in the first instance on the FTC, not the courts: sanctions are to be imposed at the behest of the FTC on the basis of its initial findings of violations. Whether or not the FTC is in fact peculiarly competent to deal administratively with these matters, it must carry out the role assigned to it. The entry of a broad order of the type described above transfers the FTC's role as the "court of first instance" to the court hearing the civil penalty suit. If the conduct before that court is unrelated to the conduct initially examined by the FTC, the court must proceed without the benefit of prior administrative adjudication.[225]

Obviously one cannot carry this "administrative-judicial function" analysis too far. Some conduct cannot effectively be prohibited without requiring the court to make determinations of the kind which are appropriate for administrative adjudication, and if the system is to work at all it must do so. And the argument that some determinations under the Clayton Act are peculiarly administrative is belied by the fact that district courts constantly make precisely

223. *See* Louis, *supra* note 221, at 463; Shniderman, *The Impact of Robinson-Patman Act on Pricing Flexibility,* 57 Nw. U.L. Rev. 173 (1962). *See generally* F. Rowe, Price Discrimination Under the Robinson-Patman Act, 543-47, 549-51 (1962).

224. The FTC has been known to enter such an order. *See* Samuel H. Moss, Inc., 36 F.T.C. 640, 649-50 (1943), *aff'd,* 148 F.2d 378 (2d Cir. 1945).

225. *See generally* 1 K. Davis, *supra* note 185, at 607-11; L. Jaffe, Judicial Control of Administrative Action 274-83 (1965); Shniderman, *Federal Trade Commission Orders Under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct,* 65 Harv. L. Rev. 750 (1952).

the same determinations, without any administrative involvement, in treble damage actions. Nevertheless, courts should not assume such responsibilities without some demonstration that effective enforcement demands it.[226]

B. *General Standards on Permissible Scope of Administrative Orders: NLRB and FTC Compared*

The Clayton Act simply provides that if the FTC "shall be of the opinion that any of the provisions of said sections have been or are being violated, it . . . shall issue . . . an order requiring such person to cease and desist from *such violations* . . . ."[227] The basic purpose of the order is therefore to prevent repetition of the kind of violation found by the FTC in the first instance. But the generality of the statute offers little assistance in determining the boundaries to the FTC's discretion in achieving this goal.

Any examination of the permissible scope of FTC orders necessarily begins with *NLRB v. Express Publishing Co.*[228] While the case involves an order of the National Labor Relations Board (NLRB), the standards set forth have been accepted as applicable to administrative orders generally and, more particularly, to Clayton Act orders of the FTC.[229] The National Labor Relations Act (NLRA) at the time condemned the following acts as unfair labor practices: (1) refusal to bargain in good faith—section 8(a)(5); (2) employer domination of, interference with, or financial support of a union—section 8(a)(2); (3) discrimination in hiring or in connection with tenure of employment on the basis of union membership—section 8(a)(3).[230] Section 8(a)(1) made it an unfair labor practice "to inter-

226. A broad order may work yet another kind of hardship in cases where respondent is subject to such an order but his competitors are not. Such inequality may not only be unfair, but may work competitive damage to respondent. The balance of the firms in the industry, aware that the FTC cannot seek direct sanctions against them, can be more flexible than respondent. *See generally* L. JAFFE, *supra* note 225, at 272-73; Comment, *Permissible Scope of Cease and Desist Orders: Legislation and Adjudication by the FTC*, 29 U. CHI. L. REV. 706, 723 (1962). *See also* Rabiner & Jontow, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,709 (FTC 1966) (dissenting opinion).

The FTC has typically denied requests that its order be stayed pending the entry of similar orders against competitors, and it has been upheld by the courts. *See* FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958); Rabiner & Jontow, Inc., *supra*, *aff'd*, 386 F.2d 667 (2d Cir. 1967), *cert. denied*, 36 U.S.L.W. 3390 (U.S. April 8, 1968).

227. 15 U.S.C. § 21(b) (1964) (emphasis added).

228. 312 U.S. 426 (1941).

229. *See, e.g.*, FTC v. Henry Broch & Co., 368 U.S. 360 (1962); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Vanity Fair Paper Mills, Inc., 311 F.2d 480 (2d Cir. 1962).

230. National Labor Relations Act (NLRA) § 8(a), 29 U.S.C. § 158(a) (1964).

fere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."[231] Section 7, in turn, provided:

> [E]mployees shall have the right to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.[232]

The NLRB concluded that respondent had violated section 8(5) of the NLRA by refusing to bargain in good faith, and that the refusal to bargain, together with statements made to employees during the dispute, constituted a violation of section 8(1). No other anti-union activities were found. The first portion of the NLRB's order specifically directed the employer to bargain in good faith. The second part of the order, attacked on review, directed the employer to cease and desist from

> [i]n any manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.[233]

In short, all forms of infringement of section 7 rights were prohibited, including conduct declared to be unfair labor practices in section 8(2) and 8(3).

The Supreme Court struck virtually all of the "catchall" provision. The NLRA permitted the NLRB, upon the finding of an unfair labor practice, to direct respondent to cease and desist "from such unfair labor practice"[234] and authorized the court of appeals to enforce, modify, or set aside NLRB orders. Because the statute specified judicial enforcement, the Court indicated that NLRB orders should be governed by judicial injunction standards. A federal court may "restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past," but it is not authorized, upon finding a statutory violation, to issue "an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit

231. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).
232. NLRA § 7, 29 U.S.C. § 157 (1964).
233. Quoted at 312 U.S. 430.
234. NLRA § 10(c), 29 U.S.C. § 160(c) (1964).

some new violation unlike and unrelated to that with which he was originally charged."[235] So too the authority conferred on the NLRB to restrain the illegal practice found "is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."[236] The Court concluded that "[t]o justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."[237]

The decision in *Express Publishing* does not rest on any fear that the order would restrain legitimate conduct. Presumably, any violation of the order would violate the underlying statute. The opinion is therefore not directly concerned with the agency's ability to restrain legitimate conduct in order effectively to prohibit repetition of the basic violation. The decision rests primarily on the ground that a contempt proceeding is an inappropriate forum for determining questions of statutory violation in the first instance, not because of anything peculiar about contempt proceedings as such, but because Congress has vested the primary responsibility for making such determinations elsewhere.[238]

The Court did not hold that an order like the one which was before it is *always* impermissible. In several earlier cases the Court had upheld orders in terms similar to those it was now striking. It did not suggest that those cases were wrongly decided, but distinguished them on the ground that they did not involve

> isolated acts in violation of the right of self-organization, like the refusal to bargain here, but . . . persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future.[239]

The Court's distinction pointed the direction that subsequent cases involving attacks on broad orders would take.

The restrictive standards of *Express Publishing*, as applied to the FTC, must be weighed against repeated judicial emphasis on the FTC's broad discretion in determining the appropriate remedy against future violations. Time and again the courts have stated that

235. 312 U.S. at 435-36.
236. 312 U.S. at 433.
237. 312 U.S. at 437.
238. *See* L. JAFFE, *supra* note 225, at 277, 281 (1965).
239. 312 U.S. at 437-38.

the FTC is an administrative agency with developed expertise in the matters which it administers.[240] Its judgment with respect to remedy must be accepted except in those cases where it has clearly abused its discretion. The classic statement, invariably cited whenever an FTC order is upheld, appears in *FTC v. Jacob Siegel Co.*[241] There respondent violated section 5 of the FTC Act by selling coats under the name "Alpacuna," which, the FTC held, suggested that they contained vicuna when in fact they did not. Among other things, the FTC's order prohibited the use of the name "Alpacuna." Respondent contended that the order should have required only that use of the trade name be coupled with qualifying language indicating the absence of vicuna. The Court actually *held* that because there was no FTC consideration of this less restrictive alternative, it could not determine whether the FTC's "discretion" had been "abused."[242] The case was therefore remanded for FTC reconsideration. This specific holding, requiring the FTC to employ less restrictive prohibitions if they are adequate to remedy the violation, is of considerable significance. But it has had less impact than the Court's statements that judicial review "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of remedy" and that the FTC "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[243] Such statements may not resolve particular cases, especially when the FTC routinely enters broad orders in statutory language without apparent use of its "expertise," but they do create in reviewing judges a state of mind receptive to the FTC's order which may, in an area of uncertain standards, be determinative.

Siegel and *Express Publishing* are the two leading early cases on the scope of administrative orders. Neither involved orders under the Clayton Act; indeed, the latter did not involve the FTC at all. Yet both cases are persistently relied upon in Clayton Act cases.[244] Should NLRB orders, FTC Act orders, and FTC Clayton Act orders be adjudged under the same standards? Should the agency have greater discretion in one case than another?

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240. *See generally* Austern, *Five Thousand Dollars a Day,* 21 A.B.A. ANTITRUST SECTION 285, 312 (1962).

241. 327 U.S. 608 (1946).

242. On reconsideration, the FTC entered an order permitting respondent to use the name "Alpacuna" in conjunction with language stating actual fiber and material content. Jacob Siegel Co., 43 F.T.C. 256 (1946).

243. 327 U.S. at 612, 613.

244. *E.g.,* heavy reliance was placed on *Siegel* in FTC v. Ruberoid Co., 343 U.S. 470 (1952). For reliance on *Express Publishing, see* cases cited in note 229 *supra.*

No detailed comparison of NLRB and FTC orders can be made at this point. But although *Express Publishing* has been said to be applicable to both, the courts have imposed stricter limitations in terms of parties, geographic area, and type of conduct prohibited on orders of the NLRB.[245] While the courts have either not observed these differences or have not felt called upon to explain them, they have not escaped notice. It has been suggested that the disparity may be attributable to the historic suspicion of the injunction in labor disputes, particularly when aimed at a union. But this explanation is not entirely satisfactory, as Professor Jaffe has pointed out, for the NLRB order does no more than create a different sanction for violation: in many cases, a private cause of action may be based on the same violation anyway.[246] It has also been suggested that FTC orders are more likely to be "legislative" in character than NLRB orders, which, because of the specificity of the statutory provision defining unfair labor practices, are primarily "adjudicative."[247] Put another way, the FTC is charged with a greater duty to fill in the precise details and formulate standards for the legislation which it enforces than is the NLRB. And to the extent this function is performed by an order, the agency must be given a broader range of discretion than when its order is purely remedial. While one may doubt the utility of "legislative-adjudicative" labels in this setting,[248] there is merit in this explanation, insofar as it deals with NLRB orders and FTC Act orders. I do not find it a basis for distinguishing NLRB orders and Clayton Act orders, for reasons that appear below. However, little attention has been paid to what seems to me a strong argument for restricting FTC orders to a *greater degree* than those of the NLRB. NLRB orders are enforced through the contempt process. If the concerns expressed in *Broch* over the effect of the Finality Act on the permissible scope of orders are legitimate, do they not also suggest a basis for distinguishing FTC orders from those of the NLRB?[249]

245. *Compare* cases cited in note 363 *infra with* cases cited in note 436, *infra.*

246. *See* L. JAFFE, *supra* note 225, at 278-79.

247. This analysis is a very brief restatement of that in Comment, *supra* note 226, particularly at 711-13. The fundamental idea here expressed by the author of the comment is sound to a point. The comment draws distinctions for permissible scope purposes between FTC orders and NLRB orders, treating FTC Act and Clayton Act orders alike for this purpose. It is on the latter point that I cannot agree.

248. *See* L. JAFFE, *supra* note 225, at 264.

249. The only court which has directly confronted the relationship between FTC and NLRB orders relied on the difference in enforcement procedures to restrict the FTC to a *greater* degree. In R.J. Reynolds Tobacco Company v. FTC, 192 F.2d 535 (7th Cir. 1951), the court concluded that an FTC Act § 5 order could not be directed against respondent's "officers, agents, representatives and employees," although vir-

Whatever the relationship between Clayton Act orders and orders of the NLRB, the same basic standards have been applied to FTC and Clayton Act orders.[250] But in my judgment the FTC should have a narrower range of permissible discretion in Clayton Act cases. Section 5 of the FTC Act contains only a broad condemnation of "unfair methods of competition . . . and unfair or deceptive acts or practices."[251] Congress made no attempt specifically to define unlawful trade practices. This task was given to the FTC, and to the FTC alone. Its broad discretion in determining what practices are "unfair" has long been recognized.[252] The FTC's role in formulating substantive standards is carried out, in part, by its section 5 orders. To a considerable degree, such orders are definitional; they simply contain a statement that a particular practice is in fact "unfair." To the extent that an order carries out this function, it should be judicially restricted only if the FTC has gone beyond the limits of its authorization to establish substantive standards.[253] Such orders also perform remedial functions. Once the unfair practice is defined, its repetition must be prohibited. In determining whether the remedy is appropriate to the stated unfair practice, the courts need not and should not be as deferential toward the FTC. But the FTC's role with respect to the Clayton Act is markedly different. Of course the statute, particularly with the Robinson-Patman Act amendments, is vague. But no one would suggest that it

tually every FTC order is so drafted and although the court recognized that such provisions in NLRB orders had been upheld. But because of the differences in enforcement procedures, the court concluded that the FTC was subject to *more* restrictive standards. In Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954), the same court in a perfectly consistent manner upheld the inclusion of such language in a Clayton Act § 3 order, pointing out that (at the time) Clayton Act orders, like NLRB orders, were enforced through contempt. *Reynolds* was later overruled on this point, however. Mandel Bros., Inc. v. FTC, 254 F.2d 18 (7th Cir. 1958), *rev'd*, 359 U.S. 385 (1959).

250. This is most clearly demonstrated by the continuing reliance on Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), in Clayton Act cases. *See, e.g.*, FTC v. Ruberoid Co., 343 U.S. 470 (1952); FTC v. Henry Broch & Co., 368 U.S. 360 (1962).

Moreover, the *Broch* dictum, suggesting a closer scrutiny of Clayton Act orders subject to Finality Act procedures, has also had an impact on FTC Act orders, even though such orders have been subject to similar enforcement procedures since 1938 and courts had apparently not thought the change in procedures relevant to the content of orders from 1938 through 1962. *See, e.g.*, Country Tweeds, Inc. v. FTC, 326 F.2d 144 (1964); Giant Food, Inc. v. FTC, 307 F.2d 184 (2d Cir. 1962); Korber Hats, Inc. v. FTC, 311 F.2d 358 (1st Cir. 1962). The Supreme Court itself has indicated that its observations in *Broch* are relevant to FTC Act orders. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).

251. 15 U.S.C. § 45(a)(1) (1964).

252. The most recent and perhaps most striking example is FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

253. *See* Comment, *supra* note 226, at 711-14, 717-21, with the caveat expressed in note 247 *supra*.

is as broad, or the violations as ill-defined, as the FTC Act. It has never been suggested, for example, that section 5 orders may simply prohibit "unfair methods of competition."[254] The very fact that Clayton Act orders in statutory form are common, and thought necessary on occasion, is indicative of the differences between the two statutes. Because the prohibitions of the Clayton Act *are* more narrowly defined, the FTC does not have the same broad definitional authority which it has under section 5. Its function under the Clayton Act is primarily remedial. Moreover, Congress did not give the FTC sole responsibility for the development of Clayton Act standards. The judiciary has a concurrent role, for it must apply such standards, without administrative assistance, at the behest of the Department of Justice or private litigants.[255] Since FTC and judicial standards must be coordinated the FTC cannot be given as broad a range of discretion in defining illegal practices under the Clayton Act.

Moreover, the dangers of restraining lawful conduct are significantly greater in Clayton Act cases than in at least those section 5 cases dealing with deceptive practices. Particularly where pricing conduct is involved, it is often desirable that firms approach the line of illegality. By contrast, the public loses little when an order prevents conduct which comes close to being deceptive, but is not.

C. *Permissible and Desirable Scope of Clayton Act Orders*

1. *General Standards: Morton Salt Through Broch, et seq.*

Specific standards governing the permissible scope of Clayton Act orders were slow to develop. This is attributable in part to the fact that few respondents sought review, because prior to the Finality Act the respondent could wait to question the FTC's order until the FTC sought enforcement.[256] Moreover, most orders entered by the FTC prior to 1945 were narrowly drawn. Seldom could they be read to prohibit legitimate conduct. Nor are the early standards applied by the FTC readily discernible, for its orders and findings

254. "I can not conceive of an order being issued simply commanding a corporation to cease and desist from unfair methods of competition, saying nothing more. The defendant could not know what he was ordered to desist from. The order, I assume, by necessity must specify the thing which he must desist from." 51 CONG. REC. 12,791 (1914) (remarks of Senator Sutherland).

255. Clayton Act §§ 4, 15, 15 U.S.C. §§ 15, 25 (1964). The Department of Justice has very rarely attempted to enforce the Robinson-Patman Act, leaving that role to the FTC. See F. ROWE, *supra* note 223, at 40 (1962); EDWARDS, THE PRICE DISCRIMINATION LAW 682-84 (1959).

256. *See* text accompanying note 104 *supra*.

of fact were not regularly accompanied by opinions until 1955.[257] The FTC's practices in entering Clayton Act orders, and the judicial response to these practices, will be discussed in detail in succeeding sections. But some general standards have now developed, and a brief discussion of several leading cases at this point will give direction to what follows.

In its first major decision on the scope of Clayton Act orders, *FTC v. Morton Salt Co.*,[258] the Supreme Court applied the standards of *Express Publishing*. Respondent had violated section 2(a) by regular use of an established quantity discount schedule, adversely affecting competition on the purchaser (secondary) level. The FTC's order prohibited any discrimination between competing wholesalers, and between competing retailers, with the proviso that differentials of less than five cents per case which did not adversely affect secondary line competition were not prohibited.[259] The *Morton Salt* order was significantly broader, in its flat prohibition of all discrimination between competing purchasers, than most section 2(a) orders previously issued. With the exception of the exempting proviso, the order was upheld by the Court, which stated that the order was confined to the precise practices adjudged illegal and was therefore within the *Express Publishing* standards. This was obviously not literally so. For example, the *language* of the *Morton Salt* order clearly prohibited all discriminatory functional discounts between competing wholesalers. While such discounts may be illegal, the use of such discounts could hardly be said to be reasonably related to Morton's use of a quantity discount schedule.[260] Never-

257. 2 K. DAVIS, ADMINISTRATIVE LAW 486 (1958).

258. 334 U.S. 37 (1948).

259. The order prohibited respondent

> from discriminating directly or indirectly in the price of [table salt] products of like grade and quality as among wholesale or retail dealers purchasing said salt when the differences in price are not justified by differences in the cost of manufacture, sale or quantities in which such products are sold or delivered:
>
> (a) By selling such products to some wholesalers thereof at prices different from the prices charged others, who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than 5 cents per case which do not tend to lessen, injure or destroy competition among such wholesalers.
>
> (b) By selling such products to some retailers thereof at prices different from the prices charged other retailers, who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than 5 cents per case which do not tend to lessen, injure or destroy competition among such rettailers.
>
> (c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.
>
> For the purposes of comparison, the term "price" so used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

Morton Salt Co., 39 F.T.C. 35, 45 (1944), *modified*, 40 F.T.C. 388, 398 (1945).

260. A bona fide functional discount is simply a price concession designed to compensate the buyer for the performance of certain distribution functions. The simplest

theless, the Court may have felt that a more precisely drafted order could too easily be evaded. The Court also observed that the basic prohibitions did not forbid "noninjurious differentials."[261] Why this was so is not clear, for apart from the narrowly limited exempting proviso the prohibitions in the order were not qualified by the statutory requirements of anticompetitive effect. The only explanation for the Court's statement is that the order was limited to *competing* purchasers. Earlier in its opinion, when dealing with the case on the merits, the Court had held that an injury to competition at the secondary level was established within the meaning of the statute whenever a seller sold goods to some customers "substantially cheaper" than to their competitors.[262] Assuming the correctness of this standard, it would follow that any substantial discrimination between competing purchasers would injure competition.

The Court directed that the exempting proviso be modified. While it did not deny that the FTC could exempt *all* differentials of less than five cents, the order could not make the exemption turn on the absence of the statutory anticompetitive effect, for this did nothing more "than shift to the courts in subsequent contempt proceedings . . . the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order."[263] In a fumbling way, the Court was beginning to see the difficult questions of agency–court relationship inherent in the enforcement process.

The decision in *Morton Salt* brought about a dispute within the

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case is the sale of goods to wholesalers at a price lower than that charged retailers. Such a case presents no threat to secondary line competition, since the wholesaler and retailer do not compete, and has not therefore been held unlawful. Nor is such a functional discount covered by the *Morton Salt* order.

The more difficult cases, literally covered by the *Morton Salt* order, involve (1) functional discounts to vertically integrated concerns which do compete, at one level, with firms not receiving such discounts (*e.g.*, the wholesaler who also sells to some extent at the retail level, where he competes with a nonfavored retailer, or (2) functional discounts between purchasers at the same level who perform different distributive functions but compete for the same buyers (*e.g.*, the wholesaler who performs a warehousing function, for which he is compensated, and the wholesaler who does not). The FTC has generally relied on the simple proposition that substantial discriminations between competing purchasers injures competition in attacking such arrangements, and has to a considerable extent been upheld by the courts. *See, e.g.*, Purolator Prods., Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965) *cert. denied*, 389 U.S. 1045 (1968); Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963). Yet the fact that the discount received may simply offset additional assumed costs makes the legality of such discounts turn on considerations markedly different from those reflected in *Morton Salt*. *See* F. ROWE, *supra* note 223, at 174-78, 188-93 (1962); Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773, 799-809 (1968).

261. 334 U.S. at 54.
262. 334 U.S. at 50.
263. 334 U.S. at 54.

FTC which culminated in the development of the so-called *Ruberoid* order,[264] upheld by the Supreme Court in *FTC v. Ruberoid Co.*[265] Respondent had violated section 2(a) by discriminating in price between competing purchasers, apparently on the basis of an established discount schedule. The FTC's order was simplicity itself, prohibiting respondent from discriminating in price "[b]y selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."[266]

Even though *Ruberoid* orders have been constantly referred to as vague,[267] the order in *Ruberoid* was not attacked on vagueness grounds. It is hard to see how it could have been, for on its face its meaning is perfectly clear: respondent shall not charge competing purchasers different prices. The meaning of the order becomes uncertain only if one assumes that the order does not mean what it says. In fact it does not, as we shall see. But this is hardly due to any ambiguity of the language used. Nor, it should be pointed out, is the *Ruberoid* order simply a recitation of statutory language, although critics of orders cast in statutory terms often refer to the *Ruberoid* order by way of example.[268]

The order was attacked on three grounds. First, it was claimed that since all differentials found illegal were in excess of five per cent, differentials of a lesser amount should have been exempted. In rejecting this contention, the Court emphasized that the FTC had found that "very small differences in price were material factors" in competition at the secondary (purchaser) level.[269] Unless there was evidence that lesser differentials would *not* have an adverse impact on competition, the FTC was under no duty to exempt them.[270] Second, the violations involved discriminations between competing retailers, and between competing roofing contractors. The FTC had expressly found the evidence of discrimination among competing wholesalers insufficient. For this reason, respondent asserted that the order should not cover sales to wholesalers. The Court noted

264. These developments are set forth in detail in Shniderman, *supra* note 225, at 757-58.

265. 343 U.S. 470 (1952).

266. Ruberoid Co., 46 F.T.C. 379, 387 (1950).

267. *See, e.g.,* Long, *The Administrative Process: Agonizing Reappraisal in the FTC,* 33 GEO. WASH. L. REV. 671, 674 (1965); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS 168 (1955).

268. *See, e.g.,* Comment, *supra* note 226, at 706, 718 (1962).

269. 343 U.S. at 473-74.

270. This raises the question whether the respondent who requests exempting provisos in the order must carry the burden of establishing that the exempted conduct will *not* injure competition or otherwise violate the underlying statute.

evidence that respondent's classification of customers was ambiguous and did not always reflect functional differences. If evasion were to be blocked, discrimination among all competing purchasers had to be prohibited. Third, respondent objected that because the statutory defenses were not set out in the order, it prohibited lawful conduct. The Court responded that the "provisos are necessarily implicit in every order" issued.[271] More will be said of this ruling subsequently. But it should be noted that the very vagueness in the *Ruberoid* order of which many complain was created in large part by the Court's efforts to assure that lawful conduct would not be restrained. Here is a lesson to be learned. The more carefully we try to prohibit only conduct which violates the statute, the more vague the order may become.

The opinion in *Ruberoid* placed heavy emphasis on the broad discretion given the FTC in formulating remedies. As to this the Court relied primarily on its opinion in *Siegel.* Justice Jackson, in a ringing dissent,[272] saw in this very discretion a correlative duty. Congress directed enforcement by the FTC precisely because it wanted "effective rules of conduct," within the broad outlines established by legislation. The order should embody such rules and clarify the duties of the party subject to it. Otherwise, the whole administrative process is pointless. One need not accept all of this analysis, which suggests that the FTC's duties for formulating Clayton Act standards are the same as under the FTC Act, to recognize that the FTC is under some affirmative duty to formulate its orders in workable terms related to the conduct before it. But Justice Jackson's standards were unworkably high, as anyone who has tried drafting an effective order within the confines of the underlying statute will readily attest.

Justice Jackson's dissent was only that. The critical fact to the FTC and the lower courts was that the order was sustained. In the interval between the decisions in *Ruberoid* and *FTC v. Henry Broch & Co.*[273] virtually all FTC orders entered under section 2(a) in cases where the violation was predicated upon a showing or allegation of injury at the purchaser level were in the form approved in *Ruberoid.*[274] No such order was held improper by a reviewing court.[275]

271. 343 U.S. at 476.

272. 343 U.S. at 480. *See* discussion of the dissent in 1 K. DAVIS, *supra* note 257, at 611 (1958); L. JAFFE, *supra* note 225, at 291; Comment, *supra* note 226, at 717-19.

273. 368 U.S. 360 (1962).

274. A partial listing of such orders appears in F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 507 nn.144-46.

275. Typically, the order was upheld with the observation that it was the same as that upheld in *Ruberoid. E.g.,* E. Edelmann & Co., 239 F.2d 152, 156 (7th Cir. 1956),

Consent orders were in the same form. Contested and consent orders entered under the brokerage provision, section 2(c), continued simply to recite the language of that section. This was equally true of orders under section 2(d) and (e), dealing with the furnishing of promotional and advertising services or facilities, or the paying of allowances for them. The same pattern is discernible with respect to orders against exclusive dealing arrangements under section 3 of the Act. During this period, only two FTC orders under section 2 or 3 were modified by reviewing courts.[276]

The dictum in the *Broch* case,[277] calling for closer scrutiny of orders subject to civil penalty procedures, has brought a confused response. The confusion arises in part from the fact that in *Broch* an order in statutory language was in fact *upheld.* While the Court questioned the propriety of such an order under the "new" procedures, it did not indicate that it *would* direct its modification. Thus when an order virtually identical to that in *Broch* but subject to civil penalty procedures was attacked on review, the court took cognizance of *Broch* but upheld the order anyway.[278] Moreover, while *Broch* was primarily concerned with vagueness, most recent orders have been attacked as too broad. Whether *Broch* is relevant has tended to obscure the basic question whether the change in enforcement procedures calls for changes in the orders themselves.[279]

Nevertheless, a number of changes have appeared since 1962. Counsel have attacked orders with far greater frequency.[280] Courts have been increasingly willing to confine orders more closely to the practices adjudged illegal. The FTC, under the constant prodding of Commissioner Elman,[281] has begun to experiment with its orders and to develop defined standards with respect to permissible breadth. The FTC has not acceded to the demand of Commissioner Elman for affirmative orders, which would require the respondent to establish and follow particularized programs to insure that the violation could

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cert. denied, 355 U.S. 941 (1958); Moog Indus., Inc. 238 F.2d 43 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958).

276. Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961) (modification of § 2(d) order, noting passage of Finality Act); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957) (modification of § 2(a) order entered in area price discrimination case).

277. *See* text accompanying note 94 *supra.*

278. Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963). The court did attempt to distinguish *Broch* on completely spurious grounds.

279. *Cf.* United Biscuit Co. v. FTC, 350 F.2d 615, 623 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966).

280. *See* Long, *supra* note 267, at 688.

281. While Commissioner Elman has written a number of opinions for the FTC dealing with orders, most of his opinions on these questions are either dissenting or concurring separately. *See* note 309 *infra.*

not be repeated,[282] on the ground that such orders would constitute an unwarranted interference with day-to-day business decisions.[283] There is also doubt about the FTC's power to enter such an order.[284] But the FTC's unwillingness to experiment in this direction should not obscure the changes which have occurred.

In determining how closely an order should be confined to the practice originally held illegal, the FTC has followed the path suggested in *Express Publishing*, where the Court emphasized that the violation was "isolated" and did not reveal "persistent attempts" to reach the same end "by varying methods."[285] In recent cases, the FTC, and the courts, have placed emphasis on similar factors. If the practice was in clear violation of existing standards and was not simply a reflection of accepted industry practice or a misjudgment about legality in areas where legality is uncertain, the FTC has been unwilling to confine its order to the specific practice before it.[286] Similarly, broad orders have been deemed justified where the record demonstrates that respondent has engaged in varying forms of violating conduct, or where he has a past history of violations.[287] Conversely, if respondent acted in good faith, if his violation was such that he could legitimately assert that the governing law was unclear, or if his violation was technical or isolated, his conduct affords little basis for believing that he will repeat his violation or attempt to evade the order,[288] and narrower orders have been entered. Precisely how these standards have been applied will soon appear. It is enough now to recognize that these various factors all relate to the same questions: How likely is it that respondent will

282. Vanity Fair Paper Mills, Inc., 60 F.T.C. 568, 581 (1962) (dissenting opinion); *modified*, 311 F.2d 480 (2d Cir. 1962); Quaker Oats Co., 60 F.T.C. 798, 812 (1962) (dissenting opinion).

283. Quaker Oats Co., 60 F.T.C. 798, 809-10. *See generally* Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 508-12 (1964).

284. *See* Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 478 n.147 (1965). *But see* Auerbach, *supra* note 283, at 511-12.

285. *See* text accompanying note 239 *supra*.

286. *Compare, e.g.*, Foremost Dairies, Inc., 62 F.T.C. 1344, 1363 (1963), *aff'd*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965) (respondent demonstrated a "bland disregard" for the Act) *and* Nuarc Co., 61 F.T.C. 375 (1962) *with* Clairol, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,594 (FTC 1966) (order appears at 31 Fed. Reg. 10,262). Also *compare* Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961) *with* William H. Rorer, Inc. v. FTC, 374 F.2d 622 (2d Cir. 1967).

287. *See, e.g.*, Purolator Prods., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,877 at 21,891 (FTC 1964). *Cf.* FTC v. Mandel Bros., Inc., 359 U.S. 385, 393 (1959).

288. These factors are all thoughtfully analyzed in detail in Louis, *supra* note 284, at 479-84. *See also* Comment, *Permissible Scope of Cease and Desist Orders: Legislation and Adjudication by the FTC*, 29 U. CHI. L. REV. 706, 719-20 (1962).

repeat the same conduct? How likely is it that respondent will use variant forms to reach the same end? The emphasis has been on the "anticipated recidivism of the wrongdoer,"[289] as disclosed by the record.

It is not enough, however, to inquire only whether respondent is likely to engage in particular conduct in the future. For once it is determined that respondent is likely to repeat his original conduct, or to engage in conduct bearing a family resemblance to the original violation, the question remains whether such conduct will violate the underlying statute. Suppose Company *X* has violated section 2(a) by charging a lower price to purchasers in Philadelphia than it charges to purchasers in New York, thereby injuring competition at the seller level (primary line) in Philadelphia. Further assume that the FTC may properly find that such conduct is likely to be repeated in other sections of the country. Should the FTC enter a nationwide order unless it is reasonably clear that the charging of discriminatory lower prices in other areas will injure competition and thus violate the underlying statute? When a broad order is entered, must the FTC not determine whether all the conduct which is encompassed by the order will in fact violate the statute?

The FTC has not clearly articulated such standards, although many of its orders are fully consistent with such an approach. It is the failure of the FTC and courts to consider these questions adequately in the past that is the primary point of my criticism. This is attributable, in part, to the fact that the relationship beween the underlying statute and the FTC order has never really been understood.

2. *The Ruberoid Principle—A Proposed Set of Standards*

What does the so-called *Ruberoid* order really mean? If it literally means what it says, any future discrimination between competing purchasers will violate the order[290] irrespective of any demonstration that it has the adverse competitive effects which are the hallmark of illegality under section 2(a), and even though the discrimination is cost-justified or is made in good faith to meet competition within the meaning of the statutory defenses. Similar questions might be asked when a company which has acquired a competing corporation in violation of section 7 of the Clayton Act is directed not to acquire any competing corporation for ten years.[291] Does this mean that

289. The phrase is that of Professor Louis. Louis, *supra* note 284, at 483.

290. The *Ruberoid* order appears in the text accompanying note 266 *supra*.

291. *See, e.g.*, International Paper Co., 53 F.T.C. 1192 (1957); Automatic Canteen Co., 54 F.T.C. 1831 (1958).

such acquisitions violate the order, even though they might not adversely affect competition and might not, therefore, violate section 7?[292] Until these questions are resolved, the FTC is entering orders in a vacuum, without knowledge of their ultimate effect.

Many early orders entered for section 2(a) violations did not present these difficulties. It was common practice to condition all prohibitions on a showing of the statutory anticompetitive effect, and statutory defenses were recited as provisos in the order.[293] In short, the FTC's orders directly enforced the underlying statute as such. If conduct did not violate statutory standards, it did not violate the order. But then came *Morton Salt*,[294] holding that the FTC could not condition exempting provisos on the absence of adverse competitive effect, since this had the effect of "shifting" to the courts "the very fact questions of injury to competition, etc." entrusted to the FTC.[295]

Morton Salt could have been a case of limited significance. Respondent objected to the provisos only because the presence of an anticompetitive effect standard in the provisos suggested that the fundamental prohibitions were absolute. This was denied by the FTC, which pointed to the fact that the order expressly permitted any differential which was cost-justified and further asserted that proof of violation of the order would require proof of practices "forbidden by the Act."[296] But the ground relied upon by the Court ultimately led the FTC to the position, which it took in the *Ruberoid* case, that *Morton Salt* prevented any conditioning of the prohibitions of its orders on a showing of adverse competitive effect and any provisos recognizing statutory defenses. In an enforcement proceeding, respondent was foreclosed from raising any matter which was litigated, or could have been litigated, in the original FTC proceeding. If circumstances changed, respondent's only recourse was to seek modification.

The decision in *Ruberoid*[297] was a rejection of the FTC's posi-

292. Section 7 forbids corporate acquisitions only "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Clayton Act § 7, 15 U.S.C. § 18 (1964).

293. *See, e.g.*, orders cited at F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 506 n.140, and in notes 354-58 *infra*. Such orders did not generally refer to the meeting competition defense, presumably because its status as an absolute defense was not clear until Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

294. 334 U.S. 37 (1948).

295. 334 U.S. at 54.

296. *See* Shniderman, *Federal Trade Commission Orders Under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct*, 65 HARV. L. REV. 750, 756-57 (1952).

297. FTC v. Ruberoid Co., 343 U.S. 470 (1952).

tion and a retreat from *Morton Salt.* In rejecting respondent's argument that the order condemned lawful conduct because it contained no provisos recognizing the availability of the cost justification and meeting competition defenses, the Court held that such provisos "are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso.*"[298] The seller need not seek modification, but "in a new competitive situation, involving different circumstances" he may discriminate in price if he can justify his conduct in accord with the statutory defenses.[299] The statutory defenses would not always be available: matters which had already been litigated in proceedings resulting in an order affirmed by the courts,[300] or which could have been litigated on available evidence in such proceedings, are finally decided, and the same defense "upon substantially similar facts" cannot be raised again. "In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present."[301]

Ruberoid is, for all practical purposes, the last word on these questions. But it raises more questions than it answers. Most important is the question assiduously avoided by the Court: whether in any circumstances respondent may successfully defend against a charge of order violation by asserting that conduct which on its face violates the order does not injure competition. Throughout the opinion, the Court speaks only of the implicit availability of the statutory defenses, and more particularly, the meeting competition and cost justification defenses. Its recognition that factual determinations involved in such defenses must in some cases be made by the enforcing court is a clear rejection of the broad implications which can be drawn from *Morton Salt.* But *Morton Salt* dealt expressly only with the statutory anticompetitive effect requirements. *Ruberoid* says nothing about them. Are we then to say that *Morton Salt* continues to preclude any examination into anticompetitive effect by the enforcing court? Such a result would be nonsensical. As Professor Davis has pointed out, factual determinations with respect to competitive effect are no more peculiarly entrusted to the FTC than are those concerning meeting competition or cost justification.[302]

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298. 343 U.S. at 476.

299. 343 U.S. at 476.

300. Presumably, the Court's discussion is equally applicable to any order which is final under the Finality Act, whether affirmed or not.

301. 343 U.S. at 477.

302. 1 K. DAVIS, *supra* note 257, at 608-11; *accord,* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 289-90 (1965).

Assuming, then, that upon a proper showing of "change of circumstances" the enforcing court must determine whether conduct violating the order violates statutory anticompetitive requirements as well, who has the burden of proof with respect to the latter? Under *Ruberoid*, the respondent must establish the requisite change of circumstances to avoid the preclusive effect of the order, but having done so, must he also establish that his conduct does not have adverse competitive effects? Unlike the statutory defenses, where the burden of proof is always on respondent, the FTC normally bears the burden of establishing adverse competitive effects.[303] In a penalty proceeding, once the requisite changed conditions are demonstrated, there is no apparent reason why the FTC should not bear the burden of establishing that respondent's conduct is anticompetitive despite such changes. If competitive effect is to be put in issue at all, in cases where because of changed circumstances the FTC's initial findings are no longer determinative, the FTC ought once again to bear the burden of establishing competitive injury.[304]

In determining whether there has been a sufficient change of circumstances to permit the respondent to rely upon statutory defenses, or to assert the absence of competitive injury, the basic question is whether the conduct violating the order is sufficiently different from that which originally violated the order that the original FTC findings are no longer determinative of legality.[305] This might come about either because of factual differences, or because of changes in or clarifications of governing legal standards. What constitutes a "change of circumstances" depends on the issue the respondent is trying to raise. For example, he may assert changes in competitive conditions, either throughout the industry or in his own position within the industry. He may have gone through an extended period of declining sales, or even be on the verge of bankruptcy. Proof of such changes should be sufficient to permit the respondent to assert the lack of anticompetitive effect, even where his conduct is precisely

303. F. ROWE, *supra* note 293, at 274.

304. *Accord, id.* at 510.

305. This presents obvious difficulties where the order is a consent order. Under the FTC's present consent order procedure, in effect since 1954, the order is to have the same effect as a litigated order, but the agreement contains no admissions of guilt or findings of fact. FTC Rules of Practice § 2.33, 16 C.F.R. § 2.33 (1968). What, then, constitutes proof of "change of circumstances" when there are no findings to determine what was litigated or what might have been at issue? The consent order represents an agreement not to engage in particular conduct. Having made such a bargain, respondent cannot simply be freed of it by raising matters which could have been raised originally. At the same time, barring a respondent from raising matters which it now appears he might have raised, without knowing why he did not, may work great hardship. See Shniderman, *supra* note 296, at 769-71.

the same as that previously adjudged illegal, if such changes have been recognized as significant under developed statutory standards. At the same time, this has little to do with the cost justification or meeting competition defenses. Changed circumstances, to warrant the reliance on the cost justification defense in enforcement proceedings, must relate either to altered legal standards or changes directly relevant to that defense, such as changes in cost arising from differing methods of delivery or manufacture, or changes in the *amount* of differential which must be justified. Much the same thing may be said of the meeting competition defense. A simple change in industry structure may not be particularly relevant to determining the availability of the defense, but changes in the manner or method of response to the offer of another seller, or in the identity or behavior of the competing seller, may well be.

Changes in legal standards or in the business environment in which the respondent's conduct takes place may permit a successful defense to a penalty suit, where the respondent's conduct violates the order but is not unlawful in terms of statutory standards, even though the order is narrowly drawn and respondent's conduct is precisely the same as that originally found to be in violation. But the *Ruberoid* rationale is also relevant where the respondent's own conduct changes. If respondent engages in conduct which is significantly different, in terms of governing legal standards, from that upon which the order is based, this fact alone should permit respondent to assert in penalty proceedings either the absence of injury to competition or the statutory defenses. Assume, for example, that the meeting competition defense was unavailable at the time of the FTC proceedings because respondent's prices *undercut* those offered by a competitor. While subject to a *Ruberoid* order, respondent again discriminates in price, but this time his low prices *meet* those of a competitor. This is a significant difference under existing statutory standards,[306] and such proof should enable respondent to avoid the preclusive effect of the order itself. This does not of course mean that respondent will win, for other requirements of the defense may not be satisfied. It only means that the defense should be considered.

The use of the "changed circumstances" standard to determine the applicability in enforcement proceedings of statutory anticompetitive requirements presents an additional difficulty. Most section 2(a) orders are wholly silent about statutory defenses. But when the FTC prohibits discrimination among "competing" purchasers, it is

306. See F. ROWE, *supra* note 293, at 241-42.

actually reformulating anticompetitive effect standards in different terms.[307] Based on the findings before it and on existing statutory standards, the order represents a determination that such discrimination *will* injure competition. To some extent, such reformulation is precisely what we expect the FTC to do. If the FTC's reformulation is clearly not in accord with existing statutory standards, that is, if the FTC is not warranted in finding that most discriminations between competing purchasers will injure competition, the order should be modified on review. If the order does accurately restate statutory standards for most conduct which it covers, it should not be modified simply because not every conceivable discrimination between competing purchasers can be said to injure competition (unless these cases can be eliminated from the order through exempting clauses). Effective enforcement may demand an order based upon probabilities. Nevertheless, if respondent can demonstrate in a subsequent penalty proceeding for violation of the order that his conduct differs from that as to which the FTC's reformulation does represent existing statutory standards, the FTC should be put to proof of competitive injury.

Does all this have any relevance to the permissible scope of orders in the first instance? The implicit availability in enforcement proceedings of the statutory defenses, and perhaps the statutory anticompetitive requirements, clearly add flexibility to the enforcement process. But it should not be assumed that the FTC may enter broader or more uncertain orders because under *Ruberoid* the respondent is protected from unwarranted applications of the order. *Ruberoid* not only does not remedy the problems created by vagueness in orders, but may in fact increase them, for the insertion of statutory defenses, and so forth, while making orders less prohibitive, also adds to their uncertainty. While *Ruberoid* does reduce the danger that an overbroad order can be used to impose sanctions on lawful conduct, it does so only after the conduct has taken place. The standards set out in *Ruberoid* are themselves so uncertain that the seller operating under a broad order is not likely to determine his courses of conduct in reliance upon them. Finally, *Ruberoid* does no more than recognize that in some cases enforcing courts must resolve factual questions under statutory standards if the enforcement

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307. *See* Forster Mfg. Co., Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,455 (FTC 1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) ("Hence this provision of the order is not, as respondents contend, a 'substitution' of another and arbitrary 'standard' of competitive injury for the standard set forth in the Act; it is, instead, an express embodiment of that statutory standard into an order narrowly tailored to the facts of this particular case.").

system is to work at all. This does not mean that "shifting" of such questions from the FTC to the courts is desirable, and that the FTC, through the use of broad orders, may do so with impunity. *Ruberoid* simply reflects practical necessity. To prohibit evasion, such orders may need to encompass conduct which is either flatly lawful or which is sufficiently different from the original conduct that inferences of illegality cannot legitimately be drawn. *Ruberoid* simply provides a safety valve in such cases. But unless necessity demands, the responsibility given the FTC should not be "shifted."

Ruberoid is relevant to the formulation of standards governing the scope of orders in a quite different way. First, by emphasizing that the FTC is to operate within statutory standards, it focuses attention on the undesirability of prohibiting conduct which does not, in fact, violate the statute. Second, by giving some indication of what an order really means, it makes possible more meaningful evaluation of existing standards. Third, understanding of the "changed circumstances" requirements of *Ruberoid* affords guidance in assigning particular roles to the FTC, reviewing court, and enforcing court in a coordinated manner.

What *Ruberoid* implicitly holds is that the FTC, having found certain conduct unlawful, may prohibit only conduct the legality of which can reasonably be said, *on the basis of its original findings*, to violate statutory standards. Obviously, then, it can prohibit conduct which is precisely the same as that adjudged illegal. If factual circumstances or legal standards change sufficiently, the original findings of illegality are no longer determinative and the question must be examined anew by the enforcing court.[308] The FTC's order is proper, however, for the FTC can neither anticipate nor assume such changes. The same principle applies to broad orders—orders prohibiting conduct differing in varying degrees from that determined unlawful. Ideally, the order should condemn no more than conduct which, although differing from the original, is sufficiently similar that its legality is controlled by the FTC's findings. Put another way, the FTC should prohibit factually different conduct, if this is deemed necessary to prevent recurrence of the violation already found by it, only where the differences are without legal significance. But ideals are rarely attainable. The FTC must have the ability to prevent evasion, where evasion is likely. Its order must be simple and understandable and cannot make exceptions for all conceivable factual variants, just

308. While respondent may not have a duty in such cases to seek modification of the order by the FTC, as *Ruberoid* makes clear, it does not follow that he should not do so, if time permits and some relief can reasonably be expected. Modification of the order in many cases will still be preferable to the gamble involved in waiting to raise these matters in a penalty suit.

as it cannot anticipate future changes of circumstances. This, too, was recognized in *Ruberoid.*

These standards can be applied by the FTC and reviewing courts in considering the scope of the order, recognizing a subsidiary duty to apply statutory standards in the enforcing court as follows. If the violation found by the FTC is in an uncertain area of the law or is unintentional or inadvertent, and if respondent has not engaged in other forms of conduct of a similar or related nature, the order should be closely confined to the original violating practice. In such a case, there is no demonstrated need for a more broadly drawn order, and no basis for burdening the enforcing court with the prospect of applying statutory standards under the *Ruberoid* formula. But in many cases "recidivism" in variant forms may be anticipated. Respondent may already have used variant means to accomplish the same ends. Or the violation may be flagrant, in clear violation of the underlying statute. On the basis of such factors of record, the FTC may enter an order barring the variant forms of conduct which the record demonstrates may reasonably be anticipated and which *may be deemed illegal on the basis of the original FTC findings.* The order should not prohibit conduct which is in fact lawful, or conduct whose legality is governed by standards significantly different from those governing the original conduct. These criteria are not of course absolute. The order must be also precise and understandable, and this calls for some leeway in drafting. Unduly detailed standards, or a multitude of exceptions, may make the order wholly unworkable.[309]

The reviewing court must insure that these criteria have been

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309. Several of the FTC's most recent decisions formulate standards quite similar to these, although given past practices and the fact that disagreement exists between the commissioners it is not clear that they will be generally applied. *See especially* Forster Mfg. Co., Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,455 (FTC 1965), *aff'd,* 361 F.2d 340 (1st Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967).

Apart from Commissioner Elman's call for affirmative orders and his emphasis on the role of advisory opinions (*see* text accompanying notes 181 and 282 *supra*), these standards are also, I believe, largely in accord with those which he has proposed, but which have not always been adhered to by the FTC. These opinions cannot be analyzed in detail, but the reader's attention is directed to them. *See especially* National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,430 (FTC 1967) (dissenting); Forster Mfg. Co., Inc., *supra,* at 22,456 (concurring); Ace Books, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,273 at 22,380 (FTC 1965) (separate statement) and All-Luminum Prods., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,665 (FTC 1963) (for the Commission). *But see* Foremost Dairies, Inc., 62 F.T.C. 1344 (1963), *aff'd,* 348 F.2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965) (for the Commission). *See also* Lloyd A. Fry Roofing Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,303 (FTC 1965) (concurring), *aff'd,* 371 F.2d 277 (7th Cir. 1966); Dean Milk Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,357 (FTC 1965) (dissenting, but concurring on order), *set aside in part,* — F.2d — (7th Cir. 1968); J.A. Folger & Co., 61 F.T.C. 1166 (1962) (dissenting); Transogram Co., 61 F.T.C. 629 (1962) (for the Commission); Quaker Oats Co., 60 F.T.C. 798 (1962) (dissenting); Vanity Fair Paper Mills, Inc., 60 F.T.C. 568 (dissenting), *modified,* 311 F.2d 480 (2d Cir. 1962).

applied. If there is no substantial evidence to support a finding of anticipated recidivism, the order should be confined to the original practice. If such a finding *is* supported by substantial evidence, the FTC should be given discretion within the confines suggested above. If the standards of the order prohibit lawful conduct, or conduct clearly not governed by the FTC findings, the court should modify the order unless it is demonstrated that such conduct must be proscribed in order to prohibit, effectively and in an understandable manner, repetition of violations substantially similar to the original. In the latter case, the court must balance the need for effective enforcement, including consideration of the magnitude of public injury likely to be caused by repetition of the original violation, against the dangers of overbroad prohibition. Recognition of drafting realities, and of the practical difficulties in formulating vague statutory standards into workable ones, will result in approval of some orders which on their face encompass conduct significantly different from the original violation. In such a case, the ultimate safeguard must rest in the ability of the enforcement court, within the "changed circumstances" formula of *Ruberoid*, to apply *statutory standards* to such conduct.[310]

There is nothing radical about these standards; they are only a reformulation of those tersely set out in *Express Publishing*. One purpose in stating them is to focus attention on a deficiency in existing standards. A broad order cannot be justified simply by showing that respondent is likely to engage in the conduct prohibited. There also must be a demonstration that such conduct is illegal.

The balance of this study will consider the usefulness of these standards with respect to three particular aspects of cease and desist orders: the type of conduct prohibited, product coverage, and territorial coverage.

3. *The Orders Examined—A Study and Criticism of Administrative Practices*

Separate examination of each of three particular aspects of Clayton Act orders—the type of conduct prohibited and the products and territory covered—is likely to be somewhat misleading, for these are

310. The use of orders prohibiting the original conduct in narrow, precisely defined ways and then, in addition, prohibiting "like or related" practices may also be an effective means of preventing evasion. It has been suggested that such orders, while somewhat vague, are preferable to broad orders of the usual type in at least some cases. *See* Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 487 (1962); Louis, *supra* note 284, at 477. It does not seem likely that the FTC will return to the practice of entering such orders. And if it is to go beyond narrow prohibition of the original conduct at all, it seems preferable to have it do so in more precise terms.

not three separate problems at all. The over-all impact of an order must be assessed on the basis of all of its features. An order narrowly defining the prohibited conduct but covering all of respondent's products may work a greater restraint than an order limited to one product but prohibiting a wider variety of conduct.[311] The reverse may also be true. Nevertheless, separate treatment of each aspect serves to focus on each order in a more detailed way and provides an analytic structure for the discussion.

a. *Conduct prohibited. Section 2(a)—price discrimination.* Section 2(a) prohibits only those discriminations in price which have specified adverse competitive effects.[312] Such effects may be at the purchaser (secondary) level, if the discrimination is between competing purchasers, or at the seller (primary) level, if, for example, the seller charges different prices in different areas for the same product.[313] The nature of the FTC's order will vary depending upon which type of injury is established. When the requisite injury is only at the secondary level, the FTC has consistently limited its orders to discriminations between competing purchasers. Orders based on findings of primary level discrimination have been markedly different. For this reason, each will be separately considered.

Section 2(a) orders predicated on secondary level injury. Most early FTC orders under section 2(a) based upon findings of secondary level injury were in one of three forms: (1) prohibition of "the unlawful discriminations in price" found in specified FTC findings;[314] (2) prohibition of discriminations found in specified findings or "similar discriminations in price . . . under substantially like circumstances and conditions" between competing purchasers;[315] (3) prohibition of variant forms of discrimination where the effect was to injure com-

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311. The FTC has been more inclined to enter broad orders limited to a particular product or products, apparently in the belief that a respondent is more likely to use variations on the same theme with the original product than to repeat the same conduct with other products. *See* Louis, *supra* note 284, at 477-78.

312. See note 4 *supra*.

313. In a very few cases, where the seller is engaged in dual distribution (*e.g.*, sells both to wholesalers and retailers), injury may be found on the tertiary level (competition among customers of the supplier's customer). *See generally*, F. ROWE, *supra* note 293, at 195-205.

314. *E.g.*, Agricultural Laboratories, Inc., 26 F.T.C. 296, 301-02 (1938); Christmas Club, 25 F.T.C. 1116, 1127-28 (1937).

315. *E.g.*, National Biscuit Co., 38 F.T.C. 213, 222 (1944); Vonnegut Hardware Co., 32 F.T.C. 512, 515-16 (1941); American Crayon Co., 32 F.T.C. 306, 313-14 (1940); Nutrine Candy Co., 30 F.T.C. 115, 127-28 (1939); Hollywood Hat Co., 25 F.T.C. 555, 562-63 (1937). *See also* Sherwin-Williams Co., 36 F.T.C. 25, 71-75 (1943); Simmons Co., 29 F.T.C. 727, 747-48 (1939).

Significantly, the *National Biscuit* order was subsequently modified on the motion of FTC counsel to conform to the *Ruberoid* order, *i.e.*, to prohibit all discrimination between competing purchasers. National Biscuit Co., 50 F.T.C. 932, 936-37 (1954).

petition, the order simply reciting the statutory language, and making the order subject to statutory defenses. Some orders of the latter type covered virtually all forms of price discrimination,[316] some only discrimination between competing purchasers,[317] and still others dealt with conduct even more narrowly defined.[318] But with a few exceptions,[319] orders reaching discriminations differing in any significant way from those initially found unlawful were conditioned upon a showing of anticompetitive effect and subject to statutory defenses.[320]

Following the approval by the Supreme Court of the *Ruberoid* order, albeit with the statutory defenses implicit in the order, that order became the model for virtually every order entered in secondary level injury cases to the present time.[321] Orders prohibiting all

316. *E.g.*, National Grain Yeast Corp., 33 F.T.C. 684, 691-92 (1941); Anheuser-Busch, Inc., 31 F.T.C. 986, 993-94 (1940); United States Rubber Co., 28 F.T.C. 1489, 1503-06 (1939); American Optical Co., 28 F.T.C. 169, 183-85 (1939). Such orders were also entered at a somewhat later date, but with less frequency. *E.g.*, Ferro Enamel Corp., 42 F.T.C. 36, 52-55 (1946). In a similar vein, the FTC on occasion entered orders directing respondent not to discriminate in price "in any manner prohibited by Section 2(a)." *E.g.*, Samuel H. Moss, Inc., 36 F.T.C. 640, 649-50 (1943), *aff'd*, 148 F.2d 378 (2d Cir. 1945); C.F. Sauer Co., 33 F.T.C. 812, 828-29 (1941).

317. *E.g.*, Booth Fisheries Corp., 40 F.T.C. 690, 695 (1945); Clinton Co., 34 F.T.C. 879, 889-90 (1942); Williams & Wilkins Co., 29 F.T.C. 678, 681-82 (1939); Master Lock Co., 27 F.T.C. 982, 993 (1938).

318. *E.g.*, American Oil Co., 29 F.T.C. 857, 866-67 (1939) (limited to discrimination between General Finance Co. and its competitors); Pittsburgh Plate Glass Co., 25 F.T.C. 1228, 1259-63 (1937). *See also* Standard Brands, Inc., 29 F.T.C. 121, 159-60 (1939), *enforced in part*, 189 F.2d 510 (2d Cir. 1951) (limited to discriminations predicated upon volume purchased).

319. *E.g.*, Life Savers Corp., 34 F.T.C. 472, 478-79 (1941).

320. In a few cases, the prohibited conduct was narrowly defined, without reference to FTC findings, anticompetitive effect, or statutory defenses. The best example is Goodyear Tire & Rubber Co., 22 F.T.C. 232, 332-34 (1936), where the order is limited to discriminations between Sears, Roebuck and other retail customers and defines the prohibited conduct in detailed terms.

321. Orders similar to the *Morton Salt* order, note 259 *supra*, with similar exempting clauses, were issued in Curtiss Candy Co., 44 F.T.C. 237, 274-78 (1947) and Standard Oil Co., 41 F.T.C. 263, 284-85 (1945). The *Standard Oil* order was modified by the FTC by striking the exempting provisos for differentials less than 0.5 cents per gallon, and adding provisos exempting discriminations "not found under the facts herein" to injure competition or which were cost justified. Standard Oil Co., 43 F.T.C. 56, 57-59 (1946). After a remand of the case on the merits, the FTC again entered an order, this time in *Ruberoid* form. Standard Oil Co., 49 F.T.C. 923, 954 (1953), *set aside*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958). The *Curtiss Candy* order was also modified by striking the provisos exempting small differentials. Curtiss Candy Co., 48 F.T.C. 161 (1951).

During the interim between the decisions of the Supreme Court in *Morton Salt* and *Ruberoid*, the FTC's practice varied. In Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 388-90 (1948), *set aside*, 191 F.2d 786 (7th Cir. 1951), the order was similar to that in *Ruberoid* but set out the cost justification defense. In other cases, the order set out the cost justification defense but prohibited only discriminations between competing purchasers in excess of stated percentages. U.S. Rubber Co., 46 F.T.C. 998, 1012-13 (1950); F & V Mfg. Co., 46 F.T.C. 632, 639-40 (1950). *See* Jacques Kreisler Mfg. Corp., 45 F.T.C. 136, 143-44 (1948). Still other orders prohibited only particular types of discrimination between competitors. *E.g.*, Ideal Cement Co., 47 F.T.C. 221, 228-29 (1950).

discrimination between competing purchasers have been entered in literally scores of cases.[322] There have been no major differences between litigated and consent orders. *Ruberoid* orders have been entered in cases where the initial violation was in the use of regular quantity discount schedules, nonsystematic off-list pricing, functional discounts, and differentials between products bearing the manufacturer's advertised label and those bearing the private brand labels of the purchasers.[323] Only rarely has the FTC attempted to tailor the order more narrowly to the precise type of discrimination adjudged unlawful.[324] Nor have the courts insisted that it do so.[325] There has been virtually no demonstrable change in FTC practice, or in the attitude of reviewing courts, as a result either of *FTC v. Henry Broch & Co.*[326] or the change in enforcement procedures.

322. One common variant employed in cases where the "indirect purchaser" doctrine has been or could be employed is to define purchaser to encompass "indirect purchasers." *E.g.*, Purolator Prods., Inc., 29 Fed. Reg. 6278 (1964); Perfect Equip. Corp., 58 F.T.C. 65, 70 (1961) (purchaser shall include "any purchaser buying directly or indirectly from respondent by means of group buying or any related device"); E. Edelmann & Co., 51 F.T.C. 978, 999 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); Champion Spark Plug Co., 50 F.T.C. 30, 51-53 (1953).

Other orders have prohibited discrimination among competing purchasers as well as the charging of higher prices to purchasers whose customers compete with the favored purchasers. *E.g.*, Arrow Food Prods., Inc., 60 F.T.C. 1771, 1779-80 (1962) (consent); Allen v. Smith, Inc., 54 F.T.C. 967, 970-71 (1958) (consent).

323. *E.g.*, National Dairy Prods. Corp., 31 Fed. Reg. 11,719 (1966), *aff'd*, — F.2d — (7th Cir. 1968) (quantity discount schedule); Purolator Prods. Inc., 29 Fed. Reg. 6278 (1964) (functional discount), *aff'd*, 352 F.2d 874 (7th Cir. 1965); Borden Co., 62 F.T.C. 130, 195 (1963), *set aside*, 381 F.2d 175 (5th Cir. 1967) (private label sales); American Oil Co., 60 F.T.C. 1786, 1826 (1962), *set aside*, 325 F.2d 101 (7th Cir. 1963) (short-term price reduction during price war); Mueller Co., 60 F.T.C. 120, 133 (1962) (functional discount), *aff'd*, 323 F.2d 44 (7th Cir. 1963); Sunshine Biscuits, Inc., 59 F.T.C. 674, 677-78 (1961), *set aside*, 306 F.2d 48 (7th Cir. 1962) (quantity discount schedule).

324. *E.g.*, Clairol, Inc., 29 Fed. Reg. 13,655 (1964) (consent order—covering only sales to competing beauty salons or distributors supplying them); Inland Rubber Corp., 62 F.T.C. 728, 733 (1963) (consent order—limited to discrimination between competing purchasers where those receiving lower prices "are permitted to combine their purchases with those of other purchasers . . . ."); Southwestern Sugar & Molasses Co., 61 F.T.C. 525, 532-33 (1962) (consent); Thompson Prods., Inc., 55 F.T.C. 1252, 1278 (1959).

325. *Ruberoid* orders have nearly always been upheld, often with little discussion apart from citation to other cases upholding them. *E.g.*, Purolator Prods., Inc., 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1967); Foremost Dairies, Inc., 348 F.2d 674 (5th Cir. 1965); Mueller Co., 323 F.2d 44 (7th Cir. 1963); E. Edelmann & Co., 239 F.2d 152, 156 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). *But see* William H. Rorer, Inc. v. FTC, 374 F.2d 622 (2d Cir. 1967), directing that *Ruberoid* order be limited to discrimination between competing "retail druggists."

326. 368 U.S. 360 (1962), discussed in text accompanying notes 91-94 *supra*. The only case to suggest a closer scrutiny of *Ruberoid* orders as such is William H. Rorer, Inc., 374 F.2d 622 (2d Cir. 1967). Respondent had, over an eight-year period, discriminated between retail druggists classified as "chains" and those classified as "independents." It asked that the order be limited to discriminations based on such classifications. In rejecting the request, the court stressed the magnitude, duration and clear illegality of the violation, which in turn suggested a likelihood of other violations. Hence, the order was justified to prevent easy evasion, although the court

The crucial question, then, is the propriety of the *Ruberoid* order in given cases. The FTC position, in the few cases where it has felt called upon to explain the entry of such an order, is that it has the responsibility for determining the likelihood of anticompetitive effect, a responsibility which it cannot delegate to an enforcing court, and that where the discrimination is between competing purchasers such a likelihood exists. Within this framework, the order must prevent easy evasion. The FTC clearly feels that orders limited to use of quantity discount schedules, or to discriminations based on classifications as "chains" or "independents," are too easily evaded.[327]

In assessing the *Ruberoid* order, it should again be noted that it really is not vague, except insofar as it has been made so by recognition that statutory defenses are implicit. Objection to such an order can be made on two levels. First, it can be suggested that the order either prohibits lawful conduct—that not all discriminations between competing purchasers will injure competition—or that the order prohibits conduct which is not sufficiently related to the original to be governed by the same legal standards. Second, the FTC ought not in any event to prohibit conduct dissimilar in any significant way unless there is a demonstrated likelihood of evasion, a standard which the FTC has not adequately applied.

Both criticisms have some validity. The FTC has seldom demonstrated that there is a reasonable basis for believing that the respondent will repeat its initial violation in a different manner. In some cases, it probably could not do so. But in most secondary level cases some repetition of conduct in different forms *is* likely. Such discrimination often reflects pressure from large buyers, who are likely to expect and demand price concessions in some form even after the order is entered. In secondary level cases, violations are often clear and have continued over a long period of time. The record often *does* reveal use of variant forms of discriminatory pricing favoring particular purchasers. But these are simply generalizations, and the FTC should be called upon to support to a greater degree than it has in the past the alleged need for an order broader than the original violation.

But should the FTC, upon a showing of need for a broader order, always use the *Ruberoid* model? Does the order unduly prohibit law-

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indicated it would examine *Ruberiod* orders more carefully in the future. The order was modified in a different way, as indicated in note 325 *supra*.

327. *See, e.g.*, Purolator Prods., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,877 (FTC 1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); United Biscuit Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,799 (FTC 1964), *aff'd*, 350 F.2d 615 (7th Cir. 1965); Foremost Dairies, Inc., 62 F.T.C. 1344 (1963), *aff'd*, 348 F.2d 674 (5th Cir. 1965); Fruitvale Canning Co., 52 F.T.C. 1504 (1956).

ful conduct, even with the statutory defenses implicit in it? It has been said that the order is an "inaccurate partial paraphrase" of the statute,[328] and therefore that it prohibits discriminations which are not unlawful. But so long as the *substantive* standards of *Morton Salt*[329] and its progeny prevail, the "paraphrase" is accurate for most cases. Much of the real quarrel, if there is one, is with the substantive standard under which injury to secondary level competition is established when a producer sells at different prices to competing retailers whose markups or profit margins are small.[330] This so-called *Morton Salt* formula may have been somewhat eroded, but it is still with us. And it is the formula which the *Ruberoid* order reflects.

Yet the *Ruberoid* order does cover some lawful conduct, for even *Morton Salt* does not condemn *all* discrimination between competing purchasers. Temporary, sporadic, or insubstantial discriminations often do not injure competition.[331] Similarly, the order covers conduct the legality of which depends on consideration of dissimilar factors: for example, functional discounts.[332] Neither type of conduct should be prohibited unless prohibition is necessary to insure compliance in the face of demonstrably likely evasion, either because the exemption of such discriminations will provide a vehicle for evasion or because the order otherwise becomes unduly complex or imprecise.

The ease of granting price concessions to favored buyers in a variety of ways in itself suggests that the FTC in many cases is justified in using the *Ruberoid* order if evasion can be anticipated at all. For example, respondent can easily change from use of a quantity discount schedule to discounts which although described as "functional" really are not. While the *Ruberoid* order is thus appropriate in many cases, it is not legitimate when evasion cannot reasonably be anticipated, or when the anticipated evasion can itself be prohibited in narrower terms. In my judgment, the FTC should be required to make greater use of clauses exempting differentials of less than stated amounts, or exempting types of discrimination substantially different from those litigated. Evasion thus can be barred through the broad prohibitions, while legitimate conduct is still permitted. The FTC should not be excused from the use of such clauses because respondent has not established that the conduct it wants exempted will *not* injure competition. The FTC should be required to establish a reasonable basis for the belief that it *will*. Similarly, *Ruberoid*

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328. Ruberoid Co. v. FTC, 343 U.S. 470, 492 (1952) (dissent of Justice Jackson).
329. FTC v. Morton Salt Co., 334 U.S. 37, 46-47, 50 (1948).
330. *See generally* F. ROWE, *supra* note 293, at 181-95 (1962).
331. *See, e.g.*, FTC v. American Oil Co., 325 F.2d 101 (7th Cir. 1963).
332. *See* note 260 *supra*.

orders should more frequently be limited to specified classes of competing purchasers. If a seller has discriminated only among competing direct-buying retailers, there is ordinarily no justification for an order covering wholesalers as well.[333]

Section 2(a) orders predicated on primary level injury. Although price discriminations in various forms may injure competition at the seller (primary) level, the practice most commonly challenged on this basis is the charging of different prices to purchasers in different geographic areas. The basic assumption underlying these cases is that sustained area price discrimination by a large seller can severely injure competition in the low price area while higher prices are maintained elsewhere, particularly if the low prices are at or below cost. Simultaneously, it has been recognized that area price discrimination may be a strong and desirable competitive force.[334] Hence in cases where secondary level injury is absent, the FTC and courts have applied more rigorous standards of injury to competition than those governing discrimination among competing purchasers. Findings of

333. William H. Rorer, Inc. v. FTC, 374 F.2d 622 (2d Cir. 1967). The Rorer order, together with the order in American Motors Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,297 (FTC 1965), *set aside*, 384 F.2d 247 (6th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3390 (April 8, 1968), contain additional features which may represent a significant development and warrant brief discussion. Both cases involved established discount practices among specified classes of purchasers. In both cases, cost justification was unsuccessfully attempted. The order in *American Motors* prohibited respondent from discriminating between customer groups by means of any price system or schedule which "purportedly" reflected cost differences unless a written statement in support of the cost justification, together with evidence that purchasers were advised of the basis of the discrimination, was submitted to the FTC *in advance* and FTC approval was secured. The FTC explained that such an order was desirable in order to enable respondent to pass on cost savings and at the same time to prevent relitigation of issues. Notification to purchasers was necessary to permit the FTC to determine whether they were really victims of discrimination. The advance-approval requirement was disapproved by the reviewing court as beyond the FTC's enforcement powers; the FTC may not require advance approval to do that which is lawful.

The *Rorer* order was a standard *Ruberoid* order with a proviso that if respondent adopted a discriminating price schedule in the belief that it was cost-justified, the FTC was to be notified and the basis of the differentials was to be publicized to purchasers. The court of appeals upheld this portion of the order, though indicating that it might not where the underlying violation was less clear or of lesser magnitude. The *American Motors* order was distinguished on the ground it called for advance *approval*.

Both decisions seem correct to me. Notification of the FTC is not unlike the filing of a compliance report, and serves a legitimate function. But a requirement of advance approval, which is presumably an attempt to circumvent the "changed circumstances" rules of *Ruberoid*, is unwarranted, particularly if *notification* can be required.

334. *See generally* F. ROWE, *supra* note 293, at 141-71 (1962); Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773, 775-93 (1968). Note, *Unlawful Primary Line Price Discriminations: Predatory Intent and Competitive Injury*, 68 COLUM. L. REV. 137 (1968). The standards discussed in the text are much more fully developed, with citation to supporting authorities, in these sources. For a penetrating analysis of the area price discrimination problem, the reader should also see the dissenting opinion of Commissioner Elman in Dean Milk Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,357, at 22,554 (FTC 1965).

violation have usually rested on direct or indirect proof of predatory intent, which has been broadly defined as "the intent to destroy one's competition with resort, if necessary, to means not justified by one's short-term self interest."[335] While such intent has on occasion been established by the seller's own statements, it is more commonly inferred from the fact that the seller's low prices are below cost or considerably below those of his competitors. In the absence of predatory intent, actual competitive injury at the primary level must be established. This determination rests on factors such as the relative size of the discriminating seller, significant changes in the structure of the local market, and the duration and amount of the discrimination.[336] Such standards, resting as they do on examinations of particular markets and sellers, are necessarily uncertain.

The FTC's orders in primary level cases reflect this uncertainty. In recent years, the FTC has been cautious about the entry of broad orders and has experimented a good deal with several different kinds of prohibitions. A number of early FTC orders, most entered by consent, prohibited the seller from discriminating in price "where respondent, in the sale of such products, is in competition with any other seller."[337] There is no conceivable justification for an order of such breadth, which permits discrimination only where the seller is a monopolist. When such an order in an area pricing case was first attacked,[338] the FTC itself proposed that the order be modified to prohibit discrimination only where the "lower price undercuts the price at which the purchaser charged the lower price may purchase

335. Note, *supra* note 334, at 141.

336. The effect on these standards of the recent unilluminating decision in Utah Pie Co. v. Continental Pie Co., 386 U.S. 685 (1967), the Court's first primary line case in recent years, is unclear. All three defendants had sold in the local market below cost, although one had done so for only two weeks. The Court's suggestion that injury to competition could be found in the fact that respondents had contributed to "a drastically declining price structure" (386 U.S. at 703) may mark a significant departure from existing standards, but only time will tell. *See* reliance on *Utah Pie* in National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,419-21 (FTC 1967). The *Utah Pie* case is severely criticized in Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967); Note, *supra* note 334.

337. Page Dairy Co., 50 F.T.C. 395, 399 (1953). Another example is Aeration Processes, Inc., 50 F.T.C. 994, 1004-05 (1954) (consent). If secondary level injury was also alleged, such orders often further prohibited any discrimination between competing purchasers. *E.g.*, Graham Co., 58 F.T.C. 77, 80-81 (1961) (consent); General Natural Gas Corp., 57 F.T.C. 85, 92 (1960) (consent); Empire Plastic Corp., 55 F.T.C. 103, 106 (1958) (consent); Western Grain Co., 49 F.T.C. 983, 988-89 (1953) (consent).

338. Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957). Respondent had employed a twenty-five per cent price reduction in the area in which a smaller competitor did business, with the purpose of driving him out. In an earlier case of a similar nature, the order prohibited sales in one "general trade area" at prices different from those "in any other trade area." The order was upheld on appeal. FTC v. E .B. Muller & Co., 142 F.2d 511 (6th Cir. 1944). *See also* American Brake Shoe Co., 52 F.T.C. 484, 489 (1955) (consent).

... from another seller."[339] On this basis, the order was affirmed, the court noting that it did not require nationwide uniform prices. Similar orders have been entered in a number of subsequent cases.[340] Such orders are clearly preferable to the earlier broad orders for injury to competition is surely more likely when prices undercut those of competitors than when there is simply price discrimination with competitors in the same market. But they are still too broad, at least in area price discrimination cases. The particular evil of area price discrimination is the ability of a seller operating in a number of markets to reduce prices in one to the detriment of competitors whose operations are more closely confined to the low price market. But the simple "undercutting" order is not confined to that practice, and can be violated by any discrimination which "undercuts" competitors, large or small. For example, such an order would prohibit a respondent from selling goods under private label at a lower price than the same goods bearing its advertised label, whenever the lower price undercut the prices of the seller's competitors. While such a discrimination may in some cases injure competition at either the primary or secondary level, this practice—and the factors determinative of its legality—bears little resemblance to area price discrimination.[341] Similarly, an "undercutting" order prohibits sporadic or nonsystematized discriminations which are not geographic in nature, and which do not entail injury to geographically confined competitors. Finally, an "undercutting" order is most easily complied with simply by being a price follower, initiating price reductions only when the seller can do so on a uniform nationwide basis. These severe handicaps on the seller's pricing flexibility can hardly be justified by the need to prevent area price discrimination.[342]

Some of these deficiencies in the simple "undercutting" order have been remedied in the most recent area pricing cases, in which the orders condemn only discrimination among purchasers at the same level of distribution[343] where the lower price "undercuts the

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339. Maryland Baking Co. v. FTC, 243 F.2d 716, 719 (4th Cir. 1957).

340. *E.g.*, Faber Bros., Inc., 58 F.T.C. 513, 516-17 (1961) (consent); Kelly Creamery Co., 57 F.T.C. 1460, 1464 (1960) (consent); Arkansas City Cooperative Milk Ass'n, Inc., 54 F.T.C. 246, 251 (1957) (consent).

341. *See* Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967).

342. The *Maryland Baking*, or simple "undercutting" order, is criticized in Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U.L. REV. 173, 182-83 (1962).

343. This makes the order inapplicable to most bona fide functional discounts. Forster Mfg. Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,455 (FTC 1965). *Cf.* the order *originally* entered in Forester Mfg. Co., 62 F.T.C. 852, 920-21 (1963), *reversed on merits*, 335 F.2d 47 (1st Cir. 1964), where the FTC expressly declined

lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales" of the covered products than respondent.[344] The FTC thereby prohibits discrimination only where the seller has undercut *all* of its smaller competitors in a given market, claiming that in such a case, it is "virtually certain" that competition will be injured.[345]

These more sophisticated orders, the prototype for which was found in *Forster Mfg. Co.*,[346] are not expressly limited to area price discrimination, although most cases involving undercutting of a smaller competitor's lowest price will in fact be that. But the order could also be violated by selling at a low price to any purchaser or purchasers for whom other smaller *national* sellers also compete. Similarly, the use by a national seller of a single quantity discount schedule in all markets would violate the order if the lowest price on the schedule were lower than the lowest price of a smaller competitor in one or more local markets. In neither of these cases is the respondent systematically attacking a particular competitor or group of com-

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so to limit the order, on the theory that respondent could injure small competitors by selling primarily to wholesalers at one price, but selling directly to retailers or users served by the smaller competitor at a much lower price.

344. Forster Mfg. Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,455 (FTC 1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Lloyd A. Fry Roofing Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,303 (FTC 1965), *aff'd*, 371 F.2d 277 (7th Cir. 1966). Both orders were upheld against attack on review. Similar orders were entered in Dean Milk Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,357 (FTC 1965), *set aside*,—F.2d—(7th Cir. 1968) and National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 (FTC 1967). The *Dean* order was further limited to discrimination among purchasers in different "market areas" or within a single "market area" by "the same processing plant." (Dean had a number of plants, but was not charged with interplant discrimination.) In *National Dairy*, where the violation consisted of giving a free case of goods with each case purchased in certain areas but not in others, the order prohibits discrimination between purchasers in different trading areas unless the lower price (1) does not undercut "the lowest price concurrently offered throughout the same trading area" by any smaller seller *or* (2) was the result of a "promotional" offer which did not undercut a promotional offer made by a competitor to the same purchaser within the twelve preceding months.

Compare the orders in Anheuser-Busch, Inc., 54 F.T.C. 277, 303 (1957), *set aside*, 289 F.2d 835 (7th Cir. 1961) (prohibiting price reduction in market where respondent competes with others unless accompanied by proportional reduction everywhere else) and Borden Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,776 (FTC 1964) (prohibiting discrimination between purchasers at the same level of trade in different "trading areas," but permitting sales at any price "not less than the regularly established price of any competitor in that area"). The *Anheuser-Busch* order is severely criticized in Shniderman, *supra* note 342, at 180-82.

345. Forster Mfg. Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,455 (FTC 1965). The FTC explained that its order was not "a substitution of another and arbitrary standard of competitive injury for the standard set forth in the Act; it is, instead, an express embodiment of that statutory standard into an order narrowly tailored to the facts of this particular case."

346. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 (FTC 1965).

petitors who are regionally confined. The order might therefore more appropriately prohibit only *systematic* discrimination between purchasers in different trading areas, where the lower price undercuts, and so forth.[347] But it must be recognized that the trading area concept interjects a good deal of ambiguity into the order: what is a "trading area" to one seller is not to another.

Is it reasonably certain that the conduct prohibited by the *Forster* order violates the statute? Short-term or insubstantial discriminations within the order will not. But the exemption of such discriminations may be more difficult in area pricing cases than in secondary line cases. Hopefully the FTC and courts will read some element of substantiality into the order. Systematic, discriminatory undercutting of a smaller competitor's lowest prices, where not cost-justified or done to meet competition, is likely to be anticompetitive under existing standards, except where done for promotional purposes in entering a new market or where prices in a particular market, including those of smaller competitors, are at monopolistic levels. Even in the latter instances, where entry by respondent at lower prices is desirable, undercutting of *all* smaller competitors may not be necessary.[348] Nevertheless, the order in such instances should either recognize the propriety of undercutting smaller competitors' prices to some extent, or it should be clearly recognized from the outset that in such cases the respondent is in a new competitive situation and can require the FTC to prove anticompetitive effect anew. The latter seems to me to be the better course; not all promotional pricing can be exempted, and the order can hardly attempt to define markets which are monopolistic.[349]

347. *Cf.* the order in Borden Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,776 (FTC 1964), *supra* note 344.

348. The difficulties with the *Forster* order are thoroughly considered by Commissioner Elman in Forster Mfg. Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,304 at 22,456-59 (FTC 1965) (concurring opinion). He apparently finds the FTC's order acceptable, though preferring an order prohibiting discrimination *intended* to injure or destroy a competitor. At the time the commissioner expressed the view that Forster would not need to undercut *all* of its competitors to enter new or monopolistic markets, and that the order was not therefore too broad. He has apparently changed his mind. *See* National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,436 (FTC 1967) (dissenting opinion).

349. In National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 (FTC 1967), the violation was in the use of a promotional offer in specified areas. Apart from whatever use of such offers is permitted by the provision permitting discrimination when the lower price does not undercut the price of all smaller competitors, the order permits such an offer only if it meets or is above a similar offer made by any other seller to the same purchasers within the twelve prior months. This proviso surely does little to recognize the desirability of the use of such promotional devices to enter new markets, for it makes respondent a follower. If this is the best the FTC can do, it is better off in cases like *Forster* not to deal with promotional offers at all. In *National Dairy*, where the order had to deal with the subject, any of the creative alternatives

These difficulties can be avoided, at least in cases where respondent has engaged in predatory pricing, by orders which prevent area price discrimination designed to injure, cripple, or discipline competitors. While this may seem vague, most respondents will undoubtedly know what it means. But where a seller's area price differentials are found in violation irrespective of predatory intent, a different order may be necessary. The *Forster* order is perhaps the best accommodation of conflicting goals we can expect in such cases, although a predatory pricing order would have been more appropriate in the *Forster* case itself.[350]

Section 2(c)—brokerage. Section 2(c) of the Robinson-Patman Act prohibits the payment of "brokerage" or "any allowance or discount in lieu thereof" to the buyer, its agent, or other intermediary subject to the control of the buyer, "except for services rendered" with respect to the purchase or sale.[351] As a practical matter, the statute, at least until very recently, has been held to prohibit *any* such payment to the buyer or any agent or intermediary controlled by him.[352] Violation does not rest on proof of anticompetitive effect,

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suggested by Commissioner Jones would clearly have been preferable. *Id.* at p. 20,442. See Austern, *supra* note 334, at 797-99.

350. One member of the FTC has been sharply critical of the *Forster* order, asserting that it is "ineffective" because not broad enough. His views, originally expressed in terse terms in separate statements in *Forster* and *Fry*, have since been amplified. Dean Milk Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,357 at 22,552 (FTC 1965) (separate statement of Commissioner MacIntyre); MacIntyre, *The Federal Trade Commission's Antitrust Functions: Some Practical Problems in Enforcement*, 14 UCLA L. REV. 997, 1023-26 (1967). Specifically, objection is made to the fact that the order in *Dean* is limited to discrimination by single processing plants, to the limitation in all three orders to purchasers at the same level of distribution, and to the "undercutting" provisions. Commissioner MacIntyre suggests that these orders require proof that respondents knew or should have known that they were undercutting smaller competitors. Even if this is so, such proof would probably not be difficult. He also fears that a national seller with a brand-name preference for its product could destroy smaller competitors without actually undercutting them. But surely if a brand premium in fact exists, that factor can be considered in determining whether a competitor has been "undercut."

He suggests use of an order requiring respondent to keep records demonstrating that its discriminations are cost-justified. Apparently such an order would prohibit any discrimination not so justified, without any consideration of anticompetitive effect.

351. 15 U.S.C. § 13(c) (1964), which provides in full:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therin where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

352. *See generally* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 331, 350 (1962). Until 1960, most of the standards of § 2(c) were thought perfectly clear, whatever else may be said about them. But the decision in Henry Broch & Co.,

and the cost justification and meeting competition defenses do not apply.[353] If such a payment is made, the statute is violated, both by the seller, the buyer, and the intermediary. Hence the transaction may result in entry of an order against one or all of these parties.

Most FTC section 2(c) orders have been entered either in cases where brokerage has been paid to brokers who as intermediaries took title to goods and thereby became "buyers," or to brokers who were in fact buyers' agents or controlled by buyers. Early FTC orders distinguished between these two transactions. In cases involving "buying brokers," the order prohibited only the payment of brokerage, or a discount in lieu thereof, on goods purchased for a buyer's own account.[354] Where brokerage was paid to a buyer's agent or controlled intermediary, the order typically prohibited, in addition, the payment of brokerage, or discounts in lieu thereof, to any "buyer's" broker.[355] The distinction apparently no longer exists. Even in cases where the violation consisted of payments to firms buying for their own account, recent FTC orders prohibit not only such payments but payments to brokers who are agents for or controlled by the buyer as well.[356] The result has been the entry of scores of virtually identical orders which simply recite statutory language.[357] Most are consent orders.

There have been some variations in these patterns, primarily in cases involving either cooperative buying organizations owned or con-

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363 U.S. 166 (1960) has made these standards less clear, by raising doubts about the long-accepted dogma that a buyer or buyer's agents cannot perform services for the seller within the "for services rendered" clause, and by suggesting that it was concerned with *discriminatory* brokerage. The case is discussed in detail in F. ROWE, *supra*, ch. 12.

353. F. ROWE, *supra* note 352, at 337.

354. *E.g.*, West Coast Packing Corp., 43 F.T.C. 111, 116-16 (1946); B. F. Shriver Co., 39 F.T.C. 397-400 (1944). Orders against the brokers were similar. *E.g.*, Southgate Brokerage Co., 39 F.T.C. 166, 170 (1944), *aff'd*, 150 F.2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945); Parker T. Frey Co., 31 F.T.C 1084, 1087 (1940).

355. *E.g.*, Thomas Page Mill Co., Inc., 33 F.T.C. 1437, 1440-41 (1941) (order against seller). Orders against buyers and brokers prohibited receipt in essentially the same terms. *E.g.*, Robert Rosoff, 43 F.T.C. 232, 236-37 (1946); Harry M. Bitterman, Inc., 35 F.T.C. 49, 57-58 (1942).

356. *E.g.*, Western Fruit Growers Sales Co., 61 F.T.C. 586, 595 (1962), *aff'd*, 322 F.2d 67 (9th Cir. 1963); Florida Citrus Exch., 53 F.T.C. 493, 501 (1956). Orders prohibiting receipt of brokerage on purchases for the buyer's account are basically the same. *E.g.*, Lannin Sales Co., 59 F.T.C. 1446, 1448 (1961) (consent); Eastern Canners, Inc., 55 F.T.C. 1986, 1989 (1959).

357. Thus the typical order now prohibits respondent from

> [r]eceiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of . . . products for its own account, or where respondent is the agent, representative, or other intermediary acting for or in behalf of, or is subject to the direct or indirect control of, any such buyer.

D. L. Piazza Co., 56 F.T.C. 611, 614 (1959) (consent).

trolled by groups of smaller buyers or other affiliated brokers. These orders tend to be far more complex, prohibiting in a number of cases receipt of commissions by the buying organizations or affiliated broker (often both on purchases for its own account and on purchases for any member or controlling party) and by the members or controlling buyers themselves.[358] Orders against members have on occasion been limited to receipt of commissions through controlled intermediaries.[359]

Orders in cases where the initial violation was a price reduction or discount "in lieu of brokerage" have varied considerably from those previously discussed. The obvious difficulty in these cases is to determine when a concession is "in lieu of brokerage." The typical case involves a price reduction in the setting of a reduced brokerage payment. The FTC has responded to this technique by framing orders prohibiting sales at prices which reflect a reduction from the prices charged other purchasers in an amount approximately equal to brokerage paid brokers in effecting sales to such other purchasers.[360]

Neither the FTC nor the courts have said much about section 2(c) orders. A large number are consent orders. Few litigated orders have been reviewed. It is clear, however, that section 2(c) is regarded

358. *See, e.g.,* the orders involving cooperative buying organizations in Clover Farm Stores Corp., 52 F.T.C. 1140, 1145-46 (1956) (consent) (intermediary order limited to purchases for own account or for "stockholder members"); Carpel Frosted Foods, Inc., 48 F.T.C. 581, 598-600 (1951) (intermediary order limited to purchases of "members" or for resale to "members"); Independent Grocers Alliance Distrib. Co., 48 F.T.C. 894, 929-32 (1952), *aff'd,* 203 F.2d 941 (7th Cir. 1953); Modern Marketing Serv., Inc., 37 F.T.C. 386, 407-09 (1943), *aff'd,* 149 F.2d 970 (7th Cir. 1945) (intermediary order limited to purchases by stockholders or jobber licensees). Such orders frequently prohibit transmission of brokerage, either directly or in the form of services, etc., from the intermediary to the buyer member. *See, e.g.,* Modern Marketing Serv., Inc., *supra;* Quality Bakers of America, 29 F.T.C. 1328, 1346-47 (1939), *aff'd,* 114 F.2d 393 (1st Cir. 1940). Orders involving other affiliated brokers are similar. *E.g.,* Dixie-Central Produce Co., Inc., 61 F.T.C. 67, 73-74 (1962).

359. In Central Retailer-Owned Grocers, Inc., 60 F.T.C. 1208, 1248-49 (1962), *set aside sub. nom.* National Retailer-Owned Grocers, Inc., 317 F.2d 410 (7th Cir. 1963), the FTC modified the hearing examiner's order against buyer-members to cover only purchases made through agents or controlled intermediaries. The orders have not generally been confined to purchases through the *specific* intermediary involved in the litigation.

360. *E.g.,* Florida Planters, Inc., 50 F.T.C. 349, 352-53 (1953); Ramsdell Packing Co., 32 F.T.C. 1187, 1191-92 (1941). Several later orders prohibit any reduction in the price charged other purchases where the reduction is accompanied by a reduction in the commission normally paid by the seller to its brokers. *E.g.,* Haskins Canning Corp., 53 F.T.C. 1160, 1163 (1957). And in Thomasville Chair Co., 58 F.T.C. 441, 443 (1961), *set aside,* 306 F.2d 541 (5th Cir. 1962), the other simply prohibited any price reduction reflecting any saving in all or part of a sales commission fee.

See also orders in cases where a broker eliminates payment of customary fees of subbrokers, and quotes prices reflecting this fact. *E.g.,* Puget Sound Brokerage Co., 55 F.T.C. 1242, 1247 (1959); Albert W. Sisk & Son, 31 F.T.C. 1543, 1549-50 (1940).

as "narrowly drawn" in itself, and this has been thought to justify the use of orders in statutory language.[361] It is therefore somewhat surprising that it was the propriety of a section 2(c) order which triggered the observations about the effect of the Finality Act in *FTC v. Henry Broch & Co.*[362] The order in *Broch* was based upon a finding that the broker-respondent, a seller's broker, had secured a particular purchaser for one of its principals by reducing the amount of its normal brokerage fee from five per cent to three per cent. Broch was prohibited from selling for any principal to any buyer at prices reflecting a reduction from current prices where the reduction was accompanied by a reduction in the commission normally paid Broch by the principal. The second portion of the order barred Broch "in any other manner" from granting brokerage, or any discount in lieu thereof, to any buyer directly or through any intermediary controlled by the buyer. Broch's assertion that the order should be limited to transactions between the same seller-principal and buyer involved in the FTC findings, a limitation virtually never found in FTC orders,[363] was summarily rejected by the Court. Objections to the breadth of the second portion of the order were also rejected, although the Court never stated why an order of such breadth was proper in a case involving an isolated transaction and uncertain law. It only stated that modification was "premature," because under the applicable pre-1959 enforcement procedures the order could be "tailored" to meet the needs of the case. But in upholding the order, the Court indicated that the "for services rendered" clause, long thought a dead letter, might be read into section 2(c) orders.[364] And its dictum intimated that the second portion of the order would not be upheld if Finality Act procedures were applicable.

But what specifically is wrong with the order in *Broch* and other brokerage cases? First, while all of the acts condemned by section 2(c)

361. *See, e.g.*, Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67, 69 n.8 (9th Cir. 1963).

362. 368 U.S. 360 (1962), discussed in text accompanying notes 91-94 *supra*.

363. Such limitations are common in NLRB cases, particularly with respect to orders prohibiting secondary boycotts. Some courts have limited such orders to the exertion of pressure against the particular primary employer through the particular secondary employer involved in the dispute before the Board, in the absence of proof of a generalized scheme encompassing other secondary employers or a record of past violations. *E.g.*, NLRB v. United Ass'n of Journeymen, Local 469, 300 F.2d 649 (9th Cir. 1962); Highway Truck Drivers and Helpers, Local 107 v. NLRB, 273 F.2d 815 (D.C. Cir. 1959). Query whether such decisions, to the extent they limit the order to a particular secondary employer, are consistent with International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694 (1951). Decisions limiting orders only to the particular primary employer are far more common. *E.g.*, NLRB v. Bangor Bldg. Trades Council, AFL-CIO, 278 F.2d 287 (1st Cir. 1960); NLRB v. United Bhd. of Carpenters, 276 F.2d 694 (7th Cir. 1960). *See also* Communication Workers of America v. NLRB, 362 U.S. 479 (1960).

364. 368 U.S. at 367 n.8.

are related, it cannot automatically be assumed that a firm which has violated the statute in one way will do so in another. For example, where an independent broker receives brokerage on purchases for his own account, what basis is there for prohibiting him from receipt of brokerage as a buyer's agent? To some extent, the *Broch* order presents the same question: on the basis of a single violation, where even the existing "black and white" standards of legality were uncertain, respondent was subjected to an order prohibiting virtually any violation of the statute.

The primary justification for statutory language orders in brokerage cases has been that the statute prohibits only one narrowly defined practice. While there may be different forms of violating conduct, they are all variants of the same theme, designed to do the same thing. Hence, unless all variants are prohibited, the order will be wholly ineffective. If a buyer cannot receive brokerage through an affiliate or "dummy" broker, he can, unless prohibited, simply receive a price reduction in lieu of brokerage. While there are obvious truths in these propositions if one assumes that such a buyer will attempt to evade the order, the FTC has seldom examined the question of intent to evade.

Moreover, the FTC seems to have proceeded, at least until recently, on the assumption that there was no reason not to use relatively broad orders. The standards were in fact reasonably clear, despite the apparent vagueness and complexity of the statutory language. Perhaps more important, none of the conduct covered by the statute was thought competitively desirable. The statute, with its absolute prohibitions, was designed to force disguised price concessions into the open, where they would be dealt with through section 2(a) on the basis of measured anticompetitive effect.[365] But growing restiveness with the absolute standards applied by the FTC has changed all this. Doubts about some of these standards were expressed by the Supreme Court when it passed on the merits of *Broch*.[366] It had suggested that the ban on price reductions "in lieu of brokerage" was limited to discriminatory reductions and intimated that even such reductions might be justified by demonstrated savings in distribution costs or rendition of services.[367] The Court had muddied the statutory standards, and it is hardly surprising that it should subsequently suggest that an order in statutory terms might be unduly vague, at least where a civil penalty was the sanction for

365. F. Rowe, *supra* note 352, at 330-31.
366. FTC v. Henry Broch & Co., 363 U.S. 166 (1960).
367. 363 U.S. at 173, 176.

violation. As both the courts and FTC depart from pre-1960 standards,[368] the need for more precisely formulated orders becomes greater.

Sections 2(d) and 2(e)—promotional and advertising allowances and services. Section 2(d) prohibits a seller from paying any promotional or advertising allowance to or for the benefit of a customer, unless the allowance is "available on proportionally equal terms" to all competing customers. Section 2(e) is violated if the seller directly furnishes such service or facilities "upon terms not accorded to all purchasers on proportionally equal terms."[369] Under neither section is illegality dependent upon adverse competitive effect. The meeting competition defense is applicable to both sections.[370] These sections, like section 2(c), were intended to force secret and disguised price concessions into the open, where they could be judged under section 2(a) standards.

Both sections have been employed against a wide variety of cooperative promotional and advertising practices, including payments for or furnishing of newspaper, radio and television advertising, in-store advertising or promotional displays, handbills and catalogues, demonstrator services, and materials for promotional demonstra-

368. *See* Central Retailer-Owned Grocers, Inc. v. FTC, 317 F.2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962); Edward Joseph Hruby, 61 F.T.C. 1437 (1962). In one way or another, all these decisions reflect increasing recognition of the propriety and desirability of price differentials based on genuine brokerage savings.

369. Clayton Act § 2(d), 15 U.S.C. § 13(d) (1964), which provides in full:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Clayton Act § 2(e), 15 U.S.C. § 13(e) (1964) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

While neither section specifically refers to "advertising" or "promotional" allowances or services, both have been regarded as so limited. *See* F. ROWE, *supra* note 352, at 377 (1962).

370. The meeting competition defense expressly applies to "discrimination in . . . services or facilities furnished." Clayton Act § 2(b), 15 U.S.C. § 13(b) (1964). It is therefore clearly applicable in § 2(e) proceedings. FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959). The defense has also been held available in § 2(d) cases, although the statute is less clear on this point. Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). The FTC now acknowledges the availability of the defense in § 2(d) proceedings. *E.g.*, Continental Baking Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,720 (FTC 1964).

tions.[371] Not all inequalities in such allowances or services are condemned. The statute requires proportional equality only among *competing* purchasers. As a result, the seller may use special promotional campaigns in particular local markets, so long as all purchasers *within* that market receive proportionally equal treatment.[372] This usually raises two subissues: (1) the proper criteria for measuring proportional equality; (2) the steps to be taken in making allowances "available." It is with respect to these questions that the statutory standards have been and remain most uncertain.

The statute does not define the basis upon which proportional equality is to be measured. The clearest measure of course is volume purchased: a purchaser who buys twice as much as another may be given twice as much in promotional allowances. This is not the sole measure, however. The FTC has been willing to take into account other factors measuring the contribution by the purchaser as an outlet for the seller's goods, so long as the seller applies these standards evenhandedly. All competing customers must be given an opportunity to participate, even if this requires formulation of alternative promotional plans. For example, a promotional program whereby the seller would pay up to fifty per cent of television advertising costs would be of no use to many small purchasers who cannot effectively use television advertising. To such smaller purchasers, these allowances are really not "available"; they must be given some alternative, on a proportional basis, in a form which they can use. Finally, the requirement of availability has been interpreted to require some form of notification to the purchaser about the terms of the promotional plan.[373]

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371. *See* cases referred to in F. Rowe, *supra* note 352, at 375-76.

372. While the language of § 2(e) makes no reference to competing buyers, it is apparently thought to embody the same geographic standards in this respect as § 2(d).

Another aspect of this same problem is whether allowances, etc., must be given to wholesalers whose purchasers compete with direct-buying retailers receiving such allowances. The FTC held that they must in Fred Meyer, Inc., [1961-1963 Transfer Binder] Trade Reg. Rep. ¶ 16,368 (FTC 1963), but was reversed. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966). The Supreme Court resolved the issue by holding that such allowances must be given directly to competing retailers who buy through wholesalers. FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

373. The aspects of the "proportionate equality" standards set out in this paragraph are discussed in far greater detail in F. Rowe, *supra* note 352, at 399-414.

The FTC's position on the availability of alternative, usable plans for smaller purchasers is apparently becoming more rigid. In House of Lord's, Inc., [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,437, at 22,672 (FTC 1966), the FTC stated that respondent, having elected to give promotional money to one customer in a community, "has a duty . . . to devise and communicate to each of its other competing customers in that community a promotional plan with at least one feature that can be used by each of them." In the particular case, the promotional offer was interpreted as limited to newspaper advertising and was not, therefore, "available" to customers unable to afford newspaper advertising.

There was a remarkable sameness about FTC orders under section 2(d) entered prior to 1962, without any noticeable difference between litigated and consent orders. With a few notable exceptions,[374] they incorporated statutory language simply to prohibit respondent from paying anything to or for the benefit of a customer as compensation for services or facilities furnished by the customer, unless such payments were "made available" on proportionally equal terms to competing customers.[375] The only relatively common variation from these recitations of statutory language has been to require the respondent "affirmatively" to offer or make available such payments.[376] It is not clear that the latter requirement will be interpreted as requiring anything more than what the statute already requires, although it has been held that such a requirement is proper even if it is *more* stringent than the statute, at least when respondent's violation was attributable in part to its failure to notify competing purchasers of allegedly "available" allowances.[377]

Such statutory language orders are still entered in most section 2(d) cases and are apparently still regarded as the norm to be followed unless there is a demonstrated reason for not doing so.[378] Since 1962,

374. *E.g.*, Bymart-Tintair, Inc., 53 F.T.C. 290, 293 (1956) (consent) (limited to allowances for "radio or television advertising"); General Baking Co., 38 F.T.C. 307, 310 (1944) (limited to "advertising services"); Curtiss Candy Co., 44 F.T.C. 237, 274-78 (1947) (limited to "advertising" and particularized "promotional activities"); Curtice Bros. Co., 30 F.T.C. 971, 978-79 (1940) (limited to "advertising services"). Other orders prohibited only allowances in specified amounts although such orders generally contained a catch-all paragraph in statutory language. *E.g.*, Life Savers Corp., 34 F.T.C. 472, 478-79 (1941); Lambert Pharmacal Co., 31 F.T.C. 734, 740-41 (1940). *See also* Henry Rosenfeld, Inc., 52 F.T.C. 1535, 1544 (1956), permitting allowances only "in amounts determined by the same percentage of the same measurable base."

375. Most of these orders are not expressly limited to "advertising or promotional" services or facilities, but simply recite the statutory language, set out in note 369 *supra*. *E.g.*, Kerr Glass Mfg. Co., 57 F.T.C. 1251, 1254 (1960) (consent); Groveton Paper Co., 54 F.T.C. 1490, 1501 (1958); Bulova Watch Co., 48 F.T.C. 971, 978 (1952); Holzbeierlein & Sons, Inc., 39 F.T.C. 82, 85 (1944). Others are limited to "advertising or promotional" payments. *E.g.*, Carpel Frosted Foods, Inc., 48 F.T.C. 581, 598-600 (1951). Still others prohibit payments for particular kinds of services, but then further prohibit payments in statutory terms. *E.g.*, Fieldcrest Mills, Inc., 54 F.T.C. 1306, 1310 (1960); Hudnut Sales Co., 56 F.T.C. 1064, 1067 (1956); Grabosky Bros., 36 F.T.C. 477, 480-81 (1943).

376. *E.g.*, H.S.D. Publications, Inc., 60 F.T.C. 1741, 1744 (1962) (consent) ("affirmatively offered and otherwise made available"); Marlun Mfg. Co., 56 F.T.C. 1232, 1235-36 (1960) (consent) ("affirmatively offered"); Atalanta Trading Corp., 53 F.T.C. 565, 573 (1956), *set aside*, 258 F.2d 365 (2d Cir. 1958) ("affirmatively offered or otherwise made available").

377. Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 488 (2d Cir. 1962).

378. *E.g.*, Beatrice Foods Co., [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,643 (FTC 1966) (consent) (order at 31 Fed. Reg. 11,750); National Dairy Prods. Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656 (FTC 1966) (order at 31 Fed. Reg. 11,719); United Biscuit Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,799 (FTC 1964) (consent) (order at 29 Fed. Reg. 3305); Abby Kent Co., 62 F.T.C. 1248, 1250-51 (1963) (consent) (same order simultaneously entered against 162 other wearing apparel manufacturers).

however, a larger number of more narrowly and precisely drawn orders have been entered by the FTC, both on its own volition and at the insistence of reviewing courts. Although there had been little disagreement or litigation over the scope of these orders previously, most of the debate within the FTC since *Broch* has occurred in section 2(d) cases. Out of these decisions, therefore, come many of the standards with respect to "anticipated recidivism" discussed earlier.

Apart from questions of product, corporate unit, and geographic coverage, the issue in these cases has always been the same: should the order be limited to payments for particular kinds of advertising or promotional services? In the first cases where this issue was raised after the passage of the Finality Act, the FTC continued its routine practice of entering statutory language orders, stating that it found nothing in the history of the Finality Act to indicate "that Clayton Act orders should prohibit only the specific acts engaged in . . . rather than the practices condemned by the statute."[379] But even before the decision in *Broch*, the FTC suffered a major rebuff in *Swanee Paper Corp. v. FTC*.[380] Swanee violated section 2(d) by making payments, at the request of one customer, for advertising of its products on an electric sign which permanently displayed the name of the customer. The Court of Appeals for the Second Circuit directed that the FTC's statutory language order be limited to the "particular practice" found to violate the statute, emphasizing that the violation was not "flagrant or extensive," was in an "uncertain" area of the law, and had been discontinued. Though the court also noted the passage of the Finality Act, and the legislative history calling for more "definitive" orders, its primary emphasis was upon undue breadth. The decision in *Swanee* and several related cases involving *inducement* of discriminatory allowances,[381] coupled with the dictum in *Broch*, provided the impetus for the dispute which followed.

The FTC's initial response to *Broch* and *Swanee* was to continue

379. Shulton, Inc., 59 F.T.C. 106, 111 (1961), *set aside*, 305 F.2d 36 (7th Cir. 1962); *cf.* Yakima Fruit & Cold Storage Co., 59 F.T.C. 693, 704 (1961).

380. 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

381. Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). In all these cases, the FTC had entered orders against the inducement of disproportionate allowances under § 5 of the FTC Act. In each case the FTC was ordered to modify the order to prohibit only inducement and receipt of allowances for particular types of services. Emphasis was placed on the uncertainty of governing standards, and on the fact the violations were not deemed flagrant. (The *Grand Union* case involved the same transaction involved in *Swanee*.) *Accord*, R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964).

its existing practices. In *Vanity Fair*,[382] respondent's violation consisted of making two 215-dollar payments to one purchaser for newspaper advertising and in-store displays in connection with special customer-promoted sales events. Respondent's regular program of paying allowances on a per-case basis was not attacked. The FTC issued a statutory order stating that respondent had a defined policy of complying with requests for participation in such events and these requests might take variant forms. The FTC expressed the view that section 2(d) is itself "a very narrow definition of an illegal trade practice,"[383] and that unlike that in *Swanee*, the violation here was clear. Commissioner Elman, in the first of his major dissenting opinions on scope of orders, attacked the order on vagueness grounds and suggested an affirmative order requiring respondent to notify competing purchasers of its "policy" in particularized ways. The reviewing court ultimately modified the *Vanity Fair* order to encompass only payments for "advertising or promotional display services or facilities and like or related practices," but was unwilling to restrict it to newspaper advertising and in-store displays,[384] since that would have made evasion easy. The court apparently viewed all advertising as fungible.

Orders entered immediately after *Vanity Fair* continued to be routinely broad.[385] Commissioner Elman continued to dissent. But in *Transogram Co.*,[386] with Commissioner Elman now writing for the FTC, a significantly narrower order was entered. Respondent toy manufacturers had unlawfully given allowances to wholesalers who published toy catalogues. The case was heard on a stipulated record, which divulged neither the magnitude of the violations nor whether

382. Vanity Fair Paper Mills, Inc., 60 F.T.C. 568 (1962).

383. This same idea was expressed in P. Lorillard Co. v. FTC, 267 F.2d 439 (3d Cir. 1959) in upholding a statutory § 2(d) order.

384. Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962). The court placed heavy reliance on the availability of an advisory opinion from the FTC. *See* note 182 *supra*.

385. This was particularly true of the order in Quaker Oats Co., 60 F.T.C. 798, 820-21 (1962), where the FTC over objection entered a statutory language order on the basis of a single $250 payment to a customer in connection with a special promotional event. Respondent's regular program of promotional allowances was not attacked. The order *was* limited to the offending corporate division, however. Commissioner Elman's call for an affirmative order, made again in dissent along with an even more persuasive argument that no order should be entered at all, was rejected categorically. *See also* J. A. Folger & Co., 61 F.T.C. 1166, 1191-92 (1962); Nuarc Co., 61 F.T.C. 375, 404 (1962), *set aside*, 316 F.2d 576 (7th Cir. 1963) (order was limited to "advertising," but the FTC reiterated its view that in any case where the practice is clearly illegal, a statutory-language order was proper); Tri-Valley Packing Ass'n, 60 F.T.C. 1134, 1182-83 (1962), *set aside*, 329 F.2d 694 (9th Cir. 1964). These orders are discussed in much greater detail in Long, *The Administrative Process: Agonizing Reappraisal in the FTC*, 33 GEO. WASH. L. REV. 671 (1965).

386. 61 F.T.C. 629, 703-04 (1962).

respondents ever gave other kinds of allowances. The type of allowance given was "unusual." There was no basis, therefore, for a finding of reasonable likelihood of violations in other forms. The order was accordingly limited to payments for advertising furnished by the customer in a catalogue or other publication "serving the purpose of a buying guide" distributed by the customer. At the same time, however, the FTC refused to limit the order to payment to wholesalers.

Subsequent section 2(d) cases have amplified the *Transogram* standards. In *All-Luminum Products, Inc.*,[387] a case involving catalogue and trade show payments, the FTC, again through Commissioner Elman, entered an order similar to that in *Transogram*, explaining that where the record "does not show a danger that the specific illegal practice will recur in some other difficult-to-define forms"[388] a narrow order may be sufficient. A dissenting commissioner suggested that the FTC was now asserting that unless the record *affirmatively* suggested an expectation of future violations in other forms, the order should be limited to the specific practice before the FTC. Whether this generalization is accurate depends on what is meant by affirmative evidence. The FTC has continued to enter broad orders over objection where respondent has given allowances on a regular basis to favored customers over an extended period of time, as well as in cases where the initial violation took more than one form.[389] But the unusual, inadvertent, or isolated violation is no longer likely to result in a statutory order.[390] In section 2(d) cases, at least, it can no longer be said that such orders are "routinely" entered.

Although the FTC has been both required and increasingly

387. [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,665 (FTC 1963).

388. *Id.* at p. 21,544.

389. *E.g.*, House of Lord's, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,-437 (F.T.C. 1966) (order at 31 Fed. Reg. 4397); Lovable Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,282 (FTC 1965) (order at 30 Fed. Reg. 12,351); Ace Books, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,273 (FTC 1965); Joseph A. Kaplan & Sons, Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,666 (FTC 1963), *modified*, 347 F.2d 785 (D.C. Cir. 1965). *See also* Atlantic Prods. Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,676 (FTC 1963), terminated by declaratory order, *id.* at ¶ 17,193 (FTC 1965).

The order in Ace Books is of interest because of Commissioner Elman's statement that the order, limited to payments to competing "customers," was too narrow, and that the order should require equal treatment of all purchasers whether or not they bought directly from respondent.

390. *See* Joseph A. Kaplan & Sons v. FTC, 347 F 2d 785 (D.C. Cir. 1965); Clairol, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,594 (FTC 1966) (order at 31 Fed. Reg. 10,262); Tri-Valley Packing Ass'n, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,657 (FTC 1966) (order at 31 Fed. Reg. 11,753, limited to payments "pursuant to a specially tailored or negotiated arrangement." *Id.* at 11,754).

willing to narrow its section 2(d) orders in cases where repetition in variant forms is not likely, there has seldom been explanation. The reasons are the same as those for orders under any other section. A statutory order is not as likely to inhibit lawful conduct as an order reformulating statutory standards, perhaps inaccurately. But the standards of "availability" and "proportionate equality" are singularly vague and difficult to apply, and for that reason alone a seller ought not be placed under threat of civil penalty any more than is necessary to prevent evasion. Here, as elsewhere, it is undesirable to place a seller in jeopardy with respect to conduct which has not been held unlawful, as the FTC has sometimes done. For example, there is little justification for placing a seller's regular promotional program under order, when such a program has been lawfully conducted over an extended period, simply because it makes a payment to one purchaser for a special promotional event. Nor should the civil penalty court be required to resolve statutory factual questions different from those passed upon by the FTC, unless there is strong justification for doing so. The proportionate equality standard is elusive and may well involve different determinations depending upon the type of service or facility for which the payment is made. To the extent precise definition is possible, therefore, the order should be limited to the specific kinds of payments held unlawful and, *if* the record indicates likely repetition in variant forms, to payments legally similar thereto.

One recent development, of a considerably different nature, warrants further discussion, for the order may well become a standard pattern for the future. In *House of Lord's, Inc.*,[391] the FTC found that some, but not all, competing purchasers had received advertising allowances, rejecting testimony that such allowances were *orally* offered to all. In addition, allowances were given only for newspaper and magazine advertising, without alternative programs for smaller purchasers who could not purchase such advertising. The FTC's order prohibited any payment for promotional or advertising services unless all competing purchasers are advised, *in writing*, of the terms of the plan under which the payments are made, the availability of such payments on a proportionally equal basis, and alternative services which the buyer can provide and be paid for if it would not be feasible for all competing purchasers to furnish such services. This order is a radical departure from earlier practices and seems, to some extent, to be the type of affirmative order suggested earlier by Com-

391. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,437 (FTC 1966) (order at 31 Fed. Reg. 4397).

missioner Elman. The requirement that notification to purchasers be made *in writing* is justified by the peculiar facts in the case, but should not automatically become part of every order since, as the FTC itself recognized, an allowance program can properly be administered orally. The prescribed *content* of the notification presents greater difficulty, for it is not at all clear that the statutory standards which the order purportedly embodies are accurately paraphrased. The order does, however, demonstrate one more attempt by the FTC to make its orders more precise, at the possible price of undue breadth.

Orders under section 2(e) have paralleled those under section 2(d) and should be governed by the same considerations. While a few section 2(e) orders have been limited to specific services or facilities,[392] most have simply recited the language of the statute.[393] This is clearly inappropriate in many cases, just as it is with respect to section 2(d) orders.[394]

Section 2(f)—buyer's liability. Section 2(f) makes it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section."[395] This provision, dealing with buyers rather than sellers, is far more complex than it appears. For not only must the discriminatory price received be illegal, but the buyer must also have known or had reason to know of its illegality.[396] Thus, no liability can be imposed if the price discrimination has no adverse competitive effects, is cost-justified, or is within another statutory defense. Nor can the buyer be held liable unless he knew, or should have known, that the discrimination existed, that it was likely to injure competition, and was not cost-justified or otherwise within a statutory defense. How these questions are resolved depends in many cases upon who has the burden of coming forward with evidence and the ultimate burden of persuasion. These are the issues with which

392. *E.g.*, Yardley of London, Inc., 52 F.T.C. 1086, 1090 (1956) (consent) ("demonstrator services"); Simplicity Pattern Co., 53 F.T.C. 771, 775 (1957), *aff'd*, 360 U.S. 55 (1959) ("counter catalogs, cabinets or other equipment or facilities"); General Foods Corp., 52 F.T.C. 798, 818 (1956) ("products packaged in containers of a certain size and style"). A particularly detailed order under both §§ 2(d) and (e) was entered in American Greetings Corp., 49 F.T.C. 440, 452-55 (1952).

393. *E.g.*, Exquisite Form Brassiere, Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,753 (FTC 1964) (order at 29 Fed. Reg. 2451), *aff'd*, 360 F.2d 492 (D.C. Cir. 1965); Pittsburgh Plate Glass Co., 59 F.T.C. 785, 789 (1961) (consent); Helena Rubinstein, Inc., 52 F.T.C. 1267, 1270-71 (1956) (consent).

394. *See* Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F2d 785, 789-90 (D.C. Cir. 1965), directing modification of a § 2(e) order to cover only the specific practice engaged in by the seller and pointing out that § 2(e) "embraces an unusually broad range of prohibited services."

395. Clayton Act § 2(f), 15 U.S.C. § 13 (f) (1964).

396. Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

section 2(f) cases have become preoccupied, and any generalization is likely to be oversimplified. But for the present, it is enough to recognize that the FTC must initially establish that the price discrimination was prima facie illegal, as it must in any case against the seller, and must introduce some evidence that the discrimination was not justifiable and that this fact should have been known by respondent. The buyer seeking to escape liability must then establish the legality of the price received, or that he had no reason to believe the price to be illegal.[397]

Orders under section 2(f) have followed a pattern similar to those under section 2(a). Several early orders prohibited inducing or receiving discriminations substantially similar to those adjudicated unlawful in the case before the FTC.[398] Some in addition prohibited "knowingly inducing or receiving" any discrimination in price prohibited by section 2(a).[399] By 1950, the pattern had changed. Orders entered at this time prohibited knowingly inducing or receiving a net price from any seller known to be below the price at which such products were being sold to other customers in any case where the seller was competing with others for the respondent's business or where the respondent was competing with other customers of the seller. Such orders further provided that respondent could defend a charge of order violation by establishing that the seller's low price was cost-justified.[400] These orders embodied the simple evidentiary standard proposed by the FTC and rejected by the Supreme Court in the *Automatic Canteen* case[401] that violation was established by proof of knowing receipt of a price concession which was prima facie illegal—that is, likely to injure competition—unless the buyer could establish the actual legality of the concession

397. For general discussion of these standards, *see* F. ROWE, *supra* note 352, at 438-51 (1962) and *id.*, (1964 Supp.) 104-11; Frey, *The Evidentiary Burden on Affirmative Defenses Under Section 2 (f) of the Robinson-Patman Act: Automatic Canteen Revisited,* 36 GEO. WASH. L. REV. 347 (1967).

398. *See* Golf Ball Mfrs.' Ass'n, 26 F.T.C. 824, 848-51 (1938). *Cf.* Pittsburgh Plate Glass Co., 25 F.T.C. 1228, 1259-63 (1937).

399. *E.g.*, Curtiss Candy Co., 44 F.T.C. 237, 274 (1947); E.J. Brach & Sons, 39 F.T.C. 535, 548 (1944); A.S. Aloe Co., 34 F.T.C. 363, 376-77 (1941). All these orders also prohibited receipt of discriminatory prices "substantially similar" to those adjudicated unlawful. This portion of the order in *Curtiss Candy* and *Brach* also contained the *scienter* requirement. In *Aloe* it did not. *See also* American Oil Co., 29 F.T.C. 857, 866-67 (1939), which contained a general prohibition in the language of § 2(a) with a proviso covering the cost justification defense.

400. Atlas Supply Co., 48 F.T.C. 53, 67-71 (1951); Automatic Canteen Co. of America, 46 F.T.C. 861, 889-91 (1950), *rev'd*, 346 U.S. 61 (1953). *See also* National Tea Co., 46 F.T.C. 829, 834-35 (1950). The *Atlas* order contained a further proviso permitting respondent to defend by establishing that the seller's conduct was within the meeting competition defense.

401. Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

under one of the statutory defenses. More curious is that the order was applicable even to price concessions among noncompeting purchasers.

While one might have expected a change in the terms of section 2(f) orders after the holding in *Automatic Canteen* that the statute prohibits only inducement of discriminatory prices which the buyer knows or should know are unlawful, no such change has occurred. The recent series of consent orders against groups of small buyers in the automobile parts industry are exactly the same as the *Automatic Canteen* order, except that no reference is made to cost justification or the other statutory defenses, on the apparent assumption that these defenses are implicit in the order anyway.[402] In addition, the litigated orders against similar groups have generally prohibited the members from maintaining or operating the existing buying organization or any like organization as a means knowingly to induce or receive any such discrimination in price.[403]

Two questions should be asked about section 2(f) orders. First, is the order limited to the inducement and receipt of discriminatory prices which are in fact unlawful? Second, does the order properly define the additional elements of the buyer's liability? With respect to the former, most section 2(f) orders are unduly broad, even under the assumption that they include implicitly all statutory defenses, because they prohibit the receipt of discriminatory prices even when the purchaser paying the higher price does not compete with respondent. Perhaps section 2(f) can be violated by inducement of a discriminatory price injuring competition at the primary level, but most cases rest on a demonstration of prima facie illegality through injury at the secondary level. In such cases, the order should be limited to receipt of prices known to be below those charged *competing* pur-

402. *E.g.*, Evergreen Warehouse Distribs., Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,563 (FTC 1966) (order at 31 Fed. Reg. 9345); Nor-Cal Distribs., Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,524 (FTC 1966) (order at 31 Fed. Reg. 7960); Automotive Jobbers, Inc., 60 F.T.C. 19, 33-35 (1962); Warehouse Distribs., Inc., 55 F.T.C. 188, 198-200 (1958). The only variation is in Automotive Supply Co., 56 F.T.C. 192, 199-200 (1959), where the order applies only if respondent is competing with other customers of the seller. *See also* March of Toys, Inc., 57 F.T.C. 486, 496-97 (1960) (consent order against group membership buying organization in toy industry); Fred Meyer, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 (FTC 1963), *modified*, 359 F.2d 351 (9th Cir. 1966), *aff'd in part, rev'd in part*, 390 U.S. 341 (1968).

403. *E.g.*, Southern California Jobbers, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,410 (FTC 1962) (order at 31 Fed. Reg. 3339); National Parts Warehouse, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,700 (FTC 1963), *aff'd sub nom.* General Auto Supply, Inc., v. F.T.C. 346 F.2d 311 (7th Cir. 1965), *cert. denied*, 382 U.S. 923 (1965); D & N Auto Parts Co., 55 F.T.C. 1279, 1296 (1959), *aff'd sub nom.* Mid-South Distribs., 287 F.2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961). *See also* the more specific prohibitions in Associated Merchandising Corp., 40 F.T.C. 578, 593-94 (1945).

chasers. The FTC has come to recognize this overbreadth problem and in two recent cases has so limited its order.[404] The net effect is to make the order in this respect the same as the *Ruberoid* order. There are seldom instances when the order must be more narrowly confined to receipt of particular kinds of allowances, as suggested with respect to some *Ruberoid* orders, for the FTC is usually entitled to assume that a buyer who has "knowingly induced" a price concession in one form is likely to do so in a different form unless restrained.[405]

Section 2(f) orders make virtually no attempt to reformulate the additional elements of the buyer's liability, contenting themselves with simple statutory prohibition of "knowing" inducement or receipt. This is the only practical way of dealing with the problem. The order cannot effectively set forth the variety of circumstances in which the buyer should know of the illegality of the price received. This question must be left to the enforcing court.[406]

Section 3—tie-ins and exclusive dealing arrangements. An exclusive dealing arrangement—a sale or lease of goods on the condition that the buyer or lessee will not purchase or deal in the goods of a competing seller—may assume a number of different forms. These include the simple promise not to handle competing goods, requirements contracts, and tying agreements. Such arrangements are prohibited by section 3 of the Clayton Act whenever their effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce."[407]

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404. National Parts Warehouse, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,700 (FTC 1963), *aff'd sub nom.* General Auto Supply, Inc., v. FTC, 346 F.2d 311 (7th Cir. 1965), *cert. denied,* 382 U.S. 923 (1965); Fred Meyer, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 (FTC 1963), *modified,* 359 F.2d 351 (9th Cir. 1966), *aff'd in part, rev'd in part,* 390 U.S. 341 (1968).

405. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *aff'd in part, rev'd in part,* 390 U.S. 341 (1968); Southern California Jobbers, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,410 (FTC 1966) (order at 31 Fed. Reg. 3339) (order limited to "warehouse distributor discounts or similar price differentials.")

406. Section 2(f) orders may be compared with orders now entered under § 5 of the FTC Act in cases involving the knowing inducement and receipt of discriminatory promotional and advertising allowances. Such orders prohibit the inducement and receipt of any such allowance [defined in the language of § 2(d)] when the buyer knows that such allowances have not been made available to its competitors on proportionally equal terms. The first of these orders entered by the FTC were modified on review to prohibit receipt of only specific types of allowances. *See* cases cited in note 381 *supra.* Subsequent FTC orders have generally been so limited. *E.g.,* Individualized Catalogues, Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,873 (FTC 1964), *But see* Fred Meyer, Inc., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 (FTC 1963), where the order was not so limited and the reviewing court directed that it be modified. 359 F.2d 351 (9th Cir. 1966).

Reviewing courts have also limited such orders to "inducement and receipt," barring the condemnation of "inducement" alone. Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). The FTC has apparently agreed. Fred Meyer Co., *supra.*

407. Clayton Act § 3, 15 U.S.C. § 14 (1964), which, in more complete form, provides·

Tying arrangements are virtually per se illegal under section 3 as well as under section 1 of the Sherman Act.[408] The per se terminology must be used cautiously, for the courts have not categorically condemned all tie-in arrangements. Illegality is commonly said to rest on proof (1) that the seller has some degree of market power with respect to the tying product, either by virtue of his position in the market or because of the distinctiveness of the product, and (2) that a "not insubstantial" amount of commerce is affected.[409] But these standards are easily met in most cases. And while there has been some expressed willingness to permit a seller marketing a new product to insist that the product be used only in conjunction with services or other products purchased from him if the tying product will not function properly without proper servicing or if products used with it are defective, such cases are unusual.[410] Hence, under prevailing standards *most* tie-in agreements can be condemned out of hand.

This is not the case with the other exclusive dealing arrangements, particularly requirements contracts, where legality has come to depend upon a more detailed examination of relevant markets, the strengths and needs of the parties, and the percentage of the market foreclosed to competition of the seller by the arrangement.[411] Such arrangements may be of long or short duration and may embrace all, some, or very little of the relevant market; they may involve new products, new firms, or purchasers with a peculiar need for assured

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It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

408. 15 U.S.C. § 1 (1964).

409. *See* United States v. Loew's, Inc., 371 U.S. 38, 44-46 (1962). While Loew's involves § 1 of the Sherman Act, it now appears that the standards under § 1 and 3 of the Clayton Act have in large part coalesced. *See generally* Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552 (1965); Pearson, *Tying Arrangements and the Antitrust Laws*, 60 NW. U.L. REV. 626 (1965); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

410. This so-called "integrity of the product" defense is discussed in detail in Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials and Exclusives*, 18 STAN. L. REV. 457 (1966); Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense*, 62 MICH. L. REV. 1413 (1964).

411. *See* Tampa Electric Co. v. Nashville Co., 365 U.S. 320 (1961). *See generally* Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267.

supply. Pressure for such an agreement may have been exerted by either the buyer or the seller. These are all relevant factors, although the primary emphasis continues to be on the share of the relevant market represented by the goods sold subject to the exclusive dealing arrangement. About all that can be said with confidence is that such an arrangement is suspect if it covers a substantial share of a properly defined market.

Orders in tie-in cases have generally prohibited only repetition of the specific practice adjudicated unlawful: tie-in sales involving the same tying and tied products.[412] Such orders have never been conditioned upon any showing of anticompetitive effect, but given the virtual per se illegality of tie-ins and given that these orders have been confined to the products involved in the original findings, such an omission is unobjectionable. The FTC is obviously entitled to assume that repetition of the same conduct with the same products is unlawful.

The FTC's orders in other exclusive dealing cases have been as broad as its tie-in orders have been narrow. From the FTC's very first orders to its most recent ones, these orders simply prohibit respondent from making any sale or contract for sale on the condition, agreement, or understanding that buyer will not sell or deal in the goods of any competitor of the respondent, and from enforcing any such existing contract.[413] Many of these orders further prohibit the fixing of any price or the granting of any discount on such a condition.[414] Thus, most section 3 orders simply recite the language of the statute without reference to the statutory anticompetitive effect re-

412. *E.g.*, Underwood Corp., 49 F.T.C. 1123, 1130-31 (1953); Judson L. Thomson Mfg. Co., 38 F.T.C. 135, 142-43 (1944); A.B. Dick Co., 1 F.T.C. 20, 28-29 (1917). *See* Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 388-90 (1948), *aff'd in part, rev'd in part*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952); R.T. Vanderbilt Co., 34 F.T.C. 378, 392-93 (1941).

Several FTC orders contain express provisos permitting respondent to insist that the buyer not handle or sell certain products or service which would adversely affect the operation of respondent's primary product. *E.g.*, Culligan, Inc., 53 F.T.C. 1072, 1073 (1957) (consent); Harley-Davidson Motor Co., 50 F.T.C. 1047, 1061 (1954); Automatic Canteen Co. of America, 46 F.T.C. 861, 889-91 (1950); General Motors Corp., 34 F.T.C. 58, 84-86 (1941).

413. *E.g.*, International Staple & Mach. Co., 59 F.T.C. 1080, 1088-89 (1961); Mytinger & Casselberry, Inc., 57 F.T.C. 717, 738-40 (1960), *enforced*, 301 F.2d 534 (D.C. Cir. 1962); Anchor Serum Co., 50 F.T.C. 681, 693-94 (1954), *enforced* 217 F.2d 867 (2d Cir. 1954); Dictograph Prods., Inc., 50 F.T.C. 281, 290-92 (1953), *aff'd*, 217 F.2d 821 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Standard Elec. Mfg. Co., 5 F.T.C. 376, 382-84 (1923). Several orders also prohibit specific means of policing or implementing exclusive dealing arrangements. *E.g.*, Harley-Davidson Motor Co., 50 F.T.C. 1047, 1061 (1954); R.B. Semler, Inc., 42 F.T.C. 372, 383-85 (1946).

414. *E.g.*, Cross Baking Co., 52 F.T.C., 54, 57-58 (1955) (consent); Champion Spark Plug Co., 50 F.T.C. 30, 51-53 (1953); Horlicks Corp., 47 F.T.C. 169, 175-76 (1950); National Biscuit Co., 28 F.T.C. 99, 106-07 (1939); Fleischmann Co., 1 F.T.C. 119, 135-38 (1918).

quirements. In the latter respect, they resemble orders now entered under section 2(a). But unlike section 2(a) orders, orders entered under section 3 do not reformulate anticompetitive effect standards in any other terms: they simply condemn all exclusive dealing arrangements with respect to the covered products.

There are obvious difficulties with such orders, which on their face condemn absolutely conduct which is not absolutely unlawful. If upon a proper showing of changed circumstances or new competitive conditions a seller subject to a section 2(a) order can require the enforcing court to examine anew the question of anticompetitive effect, the same should be true when a section 3 order is involved. But even if this is so, this ultimate safeguard does not justify the use of such orders in the first instance, as noted earlier in the section 2(a) context.[415] Such orders are unduly broad not only because they condemn conduct irrespective of anticompetitive effect, and thus may prohibit lawful and perhaps competitively desirable conduct, but because they prohibit all types of exclusive dealing arrangements, whether or not they are similar to that found unlawful. For example, a firm which violates section 3 through exclusive dealing arrangements with its entire network of dealers is prohibited as well from entering individual requirements contracts tailored to the needs of particular dealers or other purchasers. Such individual contracts *might* be unlawful, but such a conclusion hardly follows as a logical inference from the FTC's original findings. Much the same may be said about the duration of the agreement. Should the FTC condemn all exclusive dealing arrangements, whatever their duration, on the basis of a finding that five-year arrangements are anticompetitive?[416]

The problems inherent in these section 3 orders are similar to those discussed with respect to area price discrimination orders. In both kinds of cases, the governing statutory standards are flexible and highly uncertain. But in area pricing cases the FTC's orders have been far more narrowly drawn and have attempted to prohibit only those discriminations which are likely to be anticompetitive. The same can and should be done in section 3 cases.

b. Product coverage. Any FTC order can proscribe conduct with respect to one, some, or all products sold by the respondent. Obviously the fewer products covered, the narrower the total restriction placed upon the respondent's operations. It is not my purpose to

415. *See* discussion at pages 1169-70 *supra*.

416. *See* FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953), an exclusive dealing case brought under § 5 of the FTC Act, where the order prohibited only those contracts exceeding one year in duration.

catalog what FTC orders have done in the past,[417] for this would be an interminable and valueless task. Hence this discussion will be confined to an examination and criticism of the FTC's stated standards with respect to product coverage, as those standards have developed in litigated cases.

The problem is easily identified. A seller has engaged in unlawful conduct with respect to product *X*. The record contains evidence that respondent sells other products, but there is either no finding that the seller has engaged in the same conduct with respect to such other products or, if there is, there is no finding that such conduct is unlawful. To what extent can or should the order cover any or all of the products other than those involved in the findings of illegality?

The FTC has asserted in several recent section 2(a) cases that its authority to "frame its order broadly enough to prohibit a respondent from using identical illegal practices in the sale of any and all products" is "clearly established."[418] If this means that such an order is always permissible, in the sense that it should not be modified on review, and that *any* decision with respect to product coverage is a matter solely within the discretion of the FTC, the assertion is an unwarranted generalization from a group of section 5 cases upon which the FTC has persistently relied but which involve somewhat different considerations.[419] And even if the assertion is accurate, the rule which it recites is unacceptable.

The question of product coverage is really no different from the questions of conduct prohibition already discussed. Where a seller markets a line of products in the same manner to the same purchasers, an order prohibiting specified pricing conduct on but one product within the line can easily be circumvented by engaging in the same conduct, with the same effect, on another product. When an order covering products other than those involved in the original findings is considered, the first question must be whether there is a reasonable likelihood that respondent will engage in the same activity with other products. This is simply another facet of the "anticipated recidivism" standards developed by the FTC in determining the appropriate breadth of conduct prohibitions, and it involves consideration of the

417. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT 147, n.174(e) (1964 Supp.) for some examples of FTC practice.

418. National Dairy Products Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,429 (1967). *See also* United Biscuit Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,799 at 21,750 (1964), *aff'd*, 350 F.2d 615 (7th Cir. 1965). Reviewing courts have on occasion said much the same thing. *See id.*, 350 F.2d at 623; Mueller Co. v. FTC, 323 F.2d 44, 47 (7th Cir. 1963).

419. Primary reliance has been placed on Niresk Industries, Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960), and also upon FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); Eugene Dietzgen Co. v. FTC, 142 F.2d 321 (7th Cir. 1944); Hershey Chocolate Corp. v. FTC, 121 F.2d 968 (3d Cir. 1941).

same factors. The question is not whether the order *can be* circumvented if limited to a particular product or products: respondent ought not be placed under restraint unless there is a reasonable likelihood that such circumvention *would* occur. The second and perhaps more important question is whether the FTC may reasonably infer from its original findings that the conduct which it has prohibited on the basis of its findings involving one product would be unlawful even if a different product were involved. If the FTC fails to apply these standards properly, the order should be modified.

Some FTC decisions limiting orders to particular products seem virtually unprincipled, representing simple compromises to take the sting out of orders that prohibit types of *conduct* in very broad terms.[420] It is of course easier to narrow an order in product terms than by redefining prohibited conduct. A respondent may in fact be more likely to commit different violations with respect to the same product than the same violation with other products. If the reverse were true, an order prohibiting only the specific types of violation but covering all products would be appropriate. But the FTC seldom explains its orders on such grounds. Obviously, the breadth of the prohibitions in conduct terms and product coverage are related questions. This does not mean, however, that these two factors are simply to be balanced off against each other.

When the FTC has actually addressed itself to the problem, the determinative factor has been the relationship between the product involved in the findings of violation and the other products sold by the respondent. The same basic standards have been applied by reviewing courts.[421] If other products are marketed through the same distribution system to the same purchasers, the order will normally cover those products.[422] Conversely, if the FTC record fails to reveal that respondent makes other products, or it contains no data about

420. The order in Nuarc Co., 61 FTC 375, 403-04 (1962) seems to represent such a compromise.

421. Orders covering products other than those involved in the original violation have been consistently upheld by the courts. Some of these cases suggest that the question is completely in the discretion of the FTC. *See* United Biscuit Co. of America v. FTC, 350 F.2d 615, 623 (7th Cir. 1965); Mueller Co. v. FTC, 323 F.2d 44, 47 (7th Cir. 1963). Other cases emphasize the fact that all products covered are marketed through the same distribution channels to the same customers or are otherwise "similar." *See* Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); Moog Industries, Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

422. *E.g.*, National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,429 (1967); National Dairy Prods. Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656 at 22,930 (FTC 1966), *aff'd*, — F.2d — (7th Cir. 1968); Atlantic Prods. Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,676 at 21,590 (FTC 1963), *terminated by declaratory order, id.* at ¶ 17,192 (FTC 1965); Moog Indus., Inc., 51 F.T.C. 931 (1955), *aff'd*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). *See* United Biscuit Co. of America, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,799 at 21,750 (FTC 1964), *aff'd*, 350 F.2d 615 (7th Cir. 1965).

the marketing and pricing practices, orders have been confined to the particular products involved in the violation.[423] The same has been true when other products are marketed through different corporate divisions with different distributions systems, or through different channels to different purchasers.[424]

The relationship between products is of considerable importance, as the FTC's own decisions recognize. For if products are wholly unrelated, evasion of an order by repeating the same conduct with another product is not likely to occur. But it does not follow that such evasion is likely if products are related. If respondent has acted in good faith in an uncertain area of the law, or the basic violation is isolated or aberrational, there is no more justification for extending the order to related products than there is for an order prohibiting every possible type of violative conduct. Nevertheless, the FTC drafts its orders to cover related products almost automatically, apparently on the assumption that the relationship alone establishes a reasonable likelihood of circumvention. Seldom is the question examined.[425]

But now let us suppose that the FTC determines that respondent, having discriminated in the price of product X, is likely to discriminate in the price of product Y. Does it automatically follow that the order should cover product Y? The FTC clearly believes it does.[426] The difficulty is that the same discrimination on sales of product Y may not be unlawful. This is seldom a problem with orders under section 2(c), (d), or (e), but sections 2(a) and 3 are violated only if the conduct in question has an anticompetitive effect. The original find-

423. *E.g.*, Tung-Sol Elec., Inc., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,562 (FTC 1963) (charges on other products dismissed); Vanity Fair Paper Mills, Inc., 60 F.T.C. 568 (1962), *modified*, 311 F.2d 480 (2d Cir. 1962) (no evidence of other products). *See* Cairol, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,594 (FTC 1966).

424. In several cases, the FTC has limited its orders to products of respondent's offending division, when those products are marketed through separate distribution systems, with different trademarks and separate advertising, and the division is separately managed. National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,429 (1967); National Dairy Prods. Corp., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656, at 22,930 (FTC 1966), *aff'd*, — F.2d — (7th Cir. 1967); Royal Crown Cola Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,707 (FTC 1963); Quaker Oats Co., 60 F.T.C. 798, 807-08 (1962).

425. *But see* American Oil Co., 60 F.T.C. 1786 (1962), *set aside*, 325 F.2d 101 (7th Cir. 1963) (order limited to gasoline because record did not indicate "that respondent may discriminate in the price of other products").

426. In United Biscuit Co. of America, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,799 (FTC 1964), *aff'd*, 350 F.2d 615 (7th Cir. 1965), the FTC's order covered "food products," although respondent insisted that only "biscuit products" should be covered. The FTC explained that one of respondent's competitors sold potato chips, and it was therefore "not improbable that respondent might similarly expand its line." *Id.* at p. 21,751. The FTC made no inquiry into the likelihood of discrimination in the price of such a product, if it was introduced, or into the likelihood of anticompetitive effect which might follow from such a discrimination. It was enough that the product "might" be sold.

ings of violation often rest on the market power of the seller, the size and strengths of his competitors, or other facets of the market for the product in question. Even though other products may be related, the seller's position in the market for those products, the size and power of his competitors, and the needs and strengths of his customers for those products may all be markedly different. The FTC may therefore have no basis for inferring anticompetitive effect, even if the conduct is similar. A standard based simply upon whether products are related is therefore erroneous.

This same difficulty manifests itself in a somewhat dissimilar way in the relationship between the breadth of the conduct prohibition and product coverage. The FTC is entitled to make certain assumptions about the effect of conduct involving the original product, and its prohibitions may be based on these assumptions. But if other products are covered, such assumptions may be unwarranted, and the order must be drafted differently. For example, if respondent is the dominant seller, operating in all markets, it may be assumed that its conduct will have certain anticompetitive effects. The order need not be concerned with possible inhibition of entry into new markets, and so forth. But if the order covers other products, where respondent is not dominant or does not have market power, the conduct may need to be prohibited in different *terms* in order to assure that only anticompetitive conduct is prohibited.[427]

The FTC has not considered such questions, relying as it does on section 5 cases where no such issues are involved. It is for this reason that such reliance is misplaced. *Niresk Industries,*[428] frequently cited by the FTC for the broad proposition that it has authority to extend its orders to all products, is a case in point. *Niresk* conducted a mail order business and had misrepresented the price of a particular product. An order covering all products was upheld on review. No one would deny that *misrepresentation* of the same type with respect to other products would be just as deceptive. But, by contrast, the effect of a *price discrimination,* for example, *may* vary significantly with the product involved. This is a question to be examined: it will not go away nor is it answered by simply citing *Niresk.*

c. *Geographic and corporate unit limitations.* The FTC has persistently refused to confine its orders to the seller's operations in one or more defined geographic areas, although such limitations have been requested in a number of cases.[429] As a practical matter, any

427. This problem was recognized by Commissioner Jones in National Dairy Prods. Corp., 3 TRADE REG. REP. ¶ 18,027 at 20,442 (FTC 1967) (dissenting in part).

428. Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960), *cert. denied,* 364 U.S. 883 (1960).

429. *E.g.,* Lloyd A. Fry Roofing Co., [1965-1967 Transfer Binder] TRADE REG. REP.

violation, however geographically confined, has resulted in an order nationwide in scope. The FTC and reviewing courts have not denied that such limitations might be appropriate or necessary in a given case, but such a case has apparently not come along.[430]

The FTC clearly proceeds on the premise that its findings of specific violations are simply illustrative, reflecting the seller's conduct in all areas where it operates. The burden is upon the respondent to demonstrate that the violations found are not typical of its operations elsewhere.[431] In most cases where this question has been raised, the FTC has not been hard pressed to justify its basic premise, for the record has contained affirmative evidence to justify a finding that repetition of the same type of conduct in other areas is likely, and respondent has offered little or no *additional* evidence to demonstrate that its violating conduct was geographically atypical.[432]

The critical question in these cases, then, is not whether respondent is likely to repeat the same kind of conduct in other areas, although cases may be envisaged where such a finding would not be justified and the order should be geographically limited for this reason alone.[433] The question is whether such conduct in other markets will be unlawful. This is primarily relevant to orders under sections 2(a) and 3, where illegality rests on an assessment of competitive effects. While respondent's conduct may be typical of its conduct else-

¶ 17,303 at 22,443 (FTC 1965), *aff'd*, 371 F.2d 277 (7th Cir. 1966); Universal-Rundle Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,948 at 22,009 (FTC), *set aside*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244 (1967); Borden Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,776 at 21,721-22 (FTC), *set aside*, 339 F.2d 953 (7th Cir. 1964); Foremost Dairies, Inc., 62 F.T.C. 1344, 1362 (1963), *aff'd*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965); Anheuser-Busch, Inc., 54 F.T.C. 277 (1957), *set aside*, 289 F.2d 835 (7th Cir. 1961); Maryland Baking Co., 52 F.T.C. 1679 (1956), *modified*, 243 F.2d 716 (4th Cir. 1957).

430. Since the text was originally written, the order in the *Dean Milk* case, insofar as it covered discrimination between competing purchasers, has been directed modified to cover only those markets in which the discrimination occurred, on the ground that there was no evidence of similar unlawful conduct in other markets. Dean Milk Co. v. FTC, — F.2d — (7th Cir. 1968); *cf.* National Dairy Prods. Corp. v. FTC, — F.2d — (7th Cir. 1968).

431. *E.g.*, Universal-Rundle Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,948 (FTC 1965). *See generally* Kintner, *Scope of Federal Trade Commission Orders in Price Discrimination Cases*, 14 BUS. LAWYER 1053, 1057-58 (1959).

432. In some of these cases, there was evidence of similar conduct in other areas, although such conduct was either lawful or its legality not adjudicated. This was true in the *Borden*, *Foremost* and *Lloyd A. Fry* cases, cited in note 429 *supra*. In Maryland Baking, 52 F.T.C. 1679 (1956), *modified*, 243 F.2d 716 (4th Cir. 1957), the violation was particularly flagrant.

433. The *Anheuser-Busch* case seems to me to present such a situation. Respondent had reduced its price in St. Louis, its home market, while maintaining higher prices elsewhere. The facts suggest that its conduct was peculiarly related to the fact that St. Louis was its home market, and hence such conduct afforded little basis for a finding of likelihood of repetition in other markets. But the FTC refused to limit the order geographically. Anheuser-Busch, Inc., 54 F.T.C. 277 (1957), *set aside*, 289 F.2d 835 (7th Cir. 1961).

where, the market in which the violation occurred may not be. Findings of competitive injury in a market with clearly peculiar characteristics are not a legitimate basis for generalizations about all markets. The FTC cannot be required to examine all markets in which a seller operates. But where the violation rests on market conditions which are clearly unique, either as a matter of common sense or because respondent so demonstrates, or where similar conduct elsewhere has been challenged and not found unlawful, limitation of the order to the area in which the violation occurred should be required.[434]

The FTC has been somewhat more willing to limit its orders to the products of the particular corporate division committing the original violation,[435] although limitations to particular plants or management units are more common in NLRB orders.[436] The FTC apparently views such limitations as a form of product limitation, appropriate in cases where the products of a given corporate division or plant are marketed through separate distribution channels, using different trademarks, and so forth. But more may be involved than simple product limitation. Within a given corporate structure, responsibility for pricing decisions may be placed in the manager of a particular plant or division. Where it is clear that the offending plant or division has autonomy in pricing matters, and there is nothing to suggest that similar practices have been used by other plants or divisions (even plants making the same products), there may be little basis for believing that such other corporate units are likely to engage in such conduct, and an order limited to the offending unit

434. In the few instances where the FTC has discussed the problem, it has rested on the fact the record failed to establish anything unique about the market or competitive conditions where the violation occurred. *See* Borden Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,776 at 21,722 (FTC), *set aside*, 339 F.2d 953 (7th Cir. 1964); Foremost Dairies, Inc., 62 F.T.C. 1344, 1362 (1963), *aff'd*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). This finding seems debatable in the *Borden* case, where the primary line order was predicated solely upon a two-week period of reduced and below cost prices in a small Indiana community and the primary party injured was both an independent seller and a distributor for Borden. (At this point, I should note that I was one of several counsel for Borden in this litigation.)

435. *See* cases cited in note 424 *supra*.

436. *See, e.g.*, NLRB v. Thompson Ramo Wooldridge, Inc., 305 F.2d 807 (7th Cir. 1962); Perry Coal Co. v. NLRB, 284 F.2d 910 (7th Cir. 1961), *cert. denied*, 366 U.S. 949 (1961); Shell Oil Co. v. NLRB, 196 F.2d 637 (5th Cir. 1952); Reliance Mfg. Co. v. NLRB, 125 F.2d 311 (7th Cir. 1942); NLRB v. Ford Motor Co., 119 F.2d 326 (5th Cir. 1941). Orders against unions have on occasion been geographically limited. *See, e.g.*, NLRB v. Miscellaneous Drivers & Helpers Local 610, 293 F.2d 437 (8th Cir. 1961); *cf.* NLRB v. United Mine Workers, 202 F.2d 177 (3d Cir. 1953); NLRB v. United Mine Workers, 195 F.2d 961 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953), where the courts refused such geographical limitations. The Third Circuit apparently no longer follows the views expressed in the former of these two cases. *See* NLRB v. Lexington Elec. Prods., 283 F.2d 54 (3d Cir. 1960).

would be appropriate.[437] It is of course true that corporate structures can be changed, and that managerial personnel can be transferred. But the FTC is capable of assessing the likelihood of such changes. It has not done so in the past; it should do so in the future.

III. CONCLUSION

Calls for a thorough re-examination of the Robinson-Patman Act have become increasingly frequent during the past two years. The FTC's enforcement of the Act has been severely criticized. During the same period, and perhaps at least in part because of these outcries, the FTC has issued few Robinson-Patman complaints. It would be irrational to believe that this reflects full compliance. But whatever the reason for the moratorium, the fact that it exists may suggest that the present study is only of historical interest. Like others who have observed this phenomenon, I believe the existing moratorium will continue only if a thorough reconsideration of the statute and the economic and social policies which it purportedly implements results in significant *statutory* changes.[438] Such a reconsideration is called for and must encompass questions of remedy and enforcement.

It is easy enough to point out that the 1959 changes in enforcement procedures are significant to the order-drafting process. The FTC itself has shown some recognition of this fact. It is equally easy to be critical of particular orders, as I have been, and broadly to exhort the FTC to exercise greater care than it has in the past. Specific recommendations for changes do not come as easily. For if one assumes that FTC enforcement is to continue, the number of practicable alternatives is small.

To the extent compliance can be secured without the use of formal adjudicative procedures, through the use of such devices as industry guides, trade regulation rules, advisory opinions, and voluntary compliance procedures, the dangers inherent in the use of cease and desist orders can and should be avoided.[439] But for the most part, Clayton Act violations must be handled on a case-by-case basis. Advisory opinions will not and cannot always be sought. The backbone of enforcement will continue to be adjudicative proceedings. The following suggestions, then, are directed toward such proceedings.

437. Such arguments were rejected in Borden Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,776, at 21,722 (FTC), *set aside*, 339 F.2d 953 (7th Cir. 1964) and in J. A. Folger & Co., 61 F.T.C. 1166, 1189 (1962); *cf.* Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961) (§ 5 order).

438. *See* Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. ANTITRUST SECTION 9, 14-17 (1966), which includes figures on complaints filed.

439. The background, use, and utility of all these devices is described and discussed in detail in Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 449-65 (1964); Baum & Baker, *Enforcement, Voluntary Compliance, and the Federal Trade Commission*, 38 IND. L.J. 322 (1963).

Initially the FTC must disabuse itself of the notion that a cease and desist order must be entered whenever a technical or isolated violation is found. This does not necessarily mean that the complaint must simply be dismissed: the proceeding may be terminated by entry of a declaratory order, which is subject to no immediate sanctions but affords a basis for compliance reports. If further misconduct occurs, the proceeding can be reopened and a cease and desist order entered, primarily on the basis of the original findings.[440] Entry of a cease and desist order should be limited to those cases where repeated violation is demonstrably likely. Once it is determined that an order should be entered, the FTC is under a duty to enter the least restrictive order adequate to prevent evasion, within the standards suggested earlier. It is not wholly unreasonable to place some of this responsibility on the respondent, to require him to indicate why the order is improper and to suggest how it might be changed. But the basic responsibility is that of the FTC, which, after all, is supposed to be the expert at order-drafting. The FTC must also exercise particular care with consent orders, for the pressures to accept such orders may be very great, and be more willing than it has been to negotiate over their terms.

The reviewing courts have been far too willing in the past to defer to FTC "discretion." Little change at the FTC level is likely to come about unless the courts insist upon it. Orders must be justified *upon the record* and not simply upon FTC predictions of impending disaster, and it is the job of the reviewing courts to assure that this is so. Perhaps most important, reviewing courts must be impressed with the impact of the order itself as a restriction on conduct, both undesirable and desirable.

The final question is whether the statutory enforcement procedures should be changed. There are several available alternatives. FTC orders could be enforced as NLRB orders are, through contempt of the court of appeals after entry of an enforcement order secured by the FTC *without* proof that its order has been violated. This would interject the flexibility of the contempt procedure without requiring the so-called "second bite at the apple." This is, in my

440. Such a procedure was followed in *Atlantic Prods. Corp.*, where entry of a cease order was initially withheld pending industry-wide compliance proceedings. The case was ultimately terminated by entry of a declaratory order, with the explanation that the practices had been discontinued and were not likely to be resumed. [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,676 (FTC 1963); *id.* ¶ 17,192 (FTC 1965). *See also* Furr's, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,352 (FTC 1965).

On a few occasions, the FTC has simply dismissed complaints when there appeared to be no likelihood that the unlawful conduct would be resumed. *See* Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 485 n.186 (1965).

judgment, the most advisable course: while it would perhaps create fact-finding difficulties, since the court of appeals cannot operate effectively as a trial court, these are not insuperable. (These difficulties could be resolved by permitting the FTC to secure an enforcement order in district court, but this would create more problems than it solves, unless the district court is also to be made the reviewing court, which, in turn, would presumably add another possible step to the review process.)

Second, the enforcement procedures could distinguish between orders which are reviewed and those which are not. As to the former, upon affirmance the court of appeals would enter an enforcement order, as it now does, and contempt of the court of appeals would be the only sanction for violation. Other orders would become final upon expiration of a stated period for seeking review, and violation would result in the imposition of civil penalties in district court.

Third, the FTC might be given authority to impose relatively small administrative fines for violations of final orders. The only role of the judiciary in such an enforcement scheme would be to review the FTC sanction proceedings. Such fines, with accompanying publicity, might have an important deterrent effect, and the procedure would eliminate many of the "administrative-judicial" difficulties inherent to the present system. In order to provide an effective deterrent to hard-core violators, the FTC might at the same time be permitted to seek enforcement orders from the court of appeals. Any procedure permitting the FTC itself to impose fines would work a far-reaching change and might also be deemed an improper delegation of judicial power to an administrative body. I would not favor such a proposal, for in my judgment it would strengthen the FTC's hand when it does not need strengthening. But it surely merits some consideration.

Finally, at a bare minimum the "$5,000 per day" penalty should be removed from the statute. There is no demonstrated need for a penalty which can, in the eyes of a given respondent, amount to an astronomical sum. Admittedly, a maximum penalty of $5,000 might not be much of a deterrent, and an increase in the maximum penalty would be necessary. If it is thought desirable to retain a penalty on a per-day basis, the figure should be substantially reduced. But some change must be made in order to reduce the bargaining strength of the FTC.

Statutory changes in enforcement procedures are advisable. Ultimately, however, reliance must be placed on the good judgment of the FTC. It has come a long way since 1962, and is to be commended. But it cannot rest on its oars: there is still a long way to go.