1961

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Recommended Citation

S. C. Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961).

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MICHIGAN LAW REVIEW

Vol. 59

APRIL 1961

No. 6

GUIDES TO HARMONIZING SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT WITH THE SHERMAN AND CLAYTON ACTS*

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I. THE PROBLEMS PLACED IN CONTEXT

THIS topic is a constellation of antitrust highlights. Within the past five years the Federal Trade Commission has ventured into borderlands of its claim of jurisdiction under section 5 of the Federal Trade Commission Act¹ in testing the scope of section 5 itself and its relation to the Commission's jurisdiction under the Sherman and Clayton Acts.²

My inquiry into these interrelated problems was sparked by the challenging observations of Mr. Justice Frankfurter in his dissenting opinion in *Motion Picture Advertising Service Company*:

"I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate and not altogether harmonious."³

The Justice also referred to "the legal puzzles these statutes raise." He stressed the judicial review obligation of the Court to

* This article is based on a paper originally delivered before the American Bar Association Section of Antitrust Law. It has been revised to include developments since its publication in the Report of that Section, 17 A.B.A. ANTITRUST SECTION REP. 231 (1960).

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¹ The pertinent provision reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." In this paper we are not concerned with the Commission's jurisdiction over deceptive acts or practices as such. The jurisdictional problems discussed are confined to restraints of trade and monopolistic practices of the Sherman Act type, discriminatory practices under the Robinson-Patman Act, and the practices covered by §§ 3 and 7 of the Clayton Act, and their relation to § 5 of the Federal Trade Commission Act.

² See also, Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161 (1960); Rahl, *Does Section 5 of the FTC Act Extend the Clayton Act?* 5 ANTITRUST BULL. 533 (1960).

³ *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 405 (1953).

avoid rubber-stamping the Federal Trade Commission either in leaving it "at large" on questions of fact or in determinations of law which are ultimately for the courts to decide. "It is also incumbent upon us," he continued, "to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law."

In *Automatic Canteen*,⁴ the same Justice again emphasized the Court's "duty to reconcile" interpretations of the Robinson-Patman Act "with broader antitrust policies that have been laid down by Congress" when alternative constructions are "fairly open."

There is no doubt that Mr. Justice Frankfurter's observations underscore the dilemma frequently faced by antitrust counselors in their attempt to solve the "legal puzzles" in the body of antitrust laws to which the Justice referred. Antitrust appears to have swinging doors. The antitrust counselor may be successful in absolving his client from liability under one antitrust law only to find the same client faced in the same situation with the legal hazard of violation of another antitrust statute.

In 1955 the Attorney General's Antitrust Committee Report pointed out that:

"Adherence to the essence of antitrust leaves us not unmindful of the risks in oversimplifying the variant statutory formulations and their judicial construction. The three major statutes—the Sherman, Federal Trade Commission, and Clayton Acts—have been interpreted and enforced . . . with varying degrees of autonomy. And the Sherman Act itself has gone through several cycles of judicial construction."⁵

Until recently Federal Trade Commission complaints have generally segregated and identified offenses arising under each of these major antitrust enactments. No jurisdictional problem concerning the appropriate statute is raised in the mass of Commission complaints brought under the Clayton Act where the charges are particularized and confined solely to Clayton Act offenses indisputably within the coverage of that act. Similarly, resort to section 5 generally raises no jurisdictional issue where the charges readily identify conventional Sherman Act offenses clearly within the Commission's authority.

⁴ *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

⁵ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 2 (1955).

In the past few years, however, complaints, Hearing Examiner Initial Decisions and Commission rulings have caused concern that section 5 is regarded as a congressionally-designed catch-all provision for conduct embracing hybrid and duplex charges without regard to the jurisdictional limits of these several statutes.

Perplexities of rationalization and harmonization of the policies expressed in this body of principal antitrust laws come into focus in several main categories of jurisdictional questions. Section 5 has been used to attack practices of the type covered by sections 2, 3 and 7 of the Clayton Act but not deemed by the Commission to be within the purview of that statute. Respondents have contended that this jurisdictional deficiency bars a section 5 proceeding. Likewise, jurisdictional issues are presented when the Commission complaints combine in a single section 5 count, or in several counts under section 5 and specified Clayton Act counts, charges which appear to disregard or gloss differentiations in jurisdiction, statutory standards and tests of violation. There may also be the question whether section 5 is being used as a substitute or alternative provision for attacking practices directly covered by the Clayton Act.

These jurisdictional issues are of primary concern in this paper. Beyond that, it is also necessary to synthesize the Commission's statutory authority in the conventional types of cases since the purpose is to suggest guides for harmonization of the three statutes. To what extent can this reconciliation be made within the existing framework of these antitrust laws? To what extent is congressional amendment required to eliminate what is believed to be at odds with the common goal of maintaining effective competition under national antitrust policy?

II. STATUTES IN PARI MATERIA AND EVOLUTION OF JUDICIAL INTERPRETATION OF SECTION 5

In seeking to rationalize and harmonize the Sherman, Federal Trade Commission and Clayton Acts, as Mr. Justice Frankfurter defined this aim, a backdrop of statutory interpretation and judicial interpretations of section 5 is essential to inquiry into congressional intention.

The fundamental proposition is that statutes related to the common end of maintaining effective competition should be construed together as interlaced expressions of national antitrust policy. This canon of statutory interpretation, known under the des-

ignation statutes *in pari materia*,⁶ applies where, as here, the generality of the standards of the Sherman Act and section 5 must be accommodated to the specific provisions of the Clayton Act.

This process of statutory construction, however, is not "an exercise in logic or dialectic." Canons of construction are axioms of experience and not rigid rules of law.⁷ Construing statutes *in pari materia* requires the Commission and the courts to probe below the surface of the statutory words to capture the meaning of the public policy of these three statutes fairly within congressional intention. Determination of whether there is ambiguity or conflict between a general and a specific statutory provision is not a matter of abstraction. Statutory words are vessels into which frequently many meanings can be poured. Search for congressional intention may range from clear mandates to elusive weasel words. If "what Congress has written permits" alternative constructions, ambiguity or apparent conflict should be resolved in making the three major statutes a unified and harmonious national antitrust policy.

We do not dwell here on the details of the familiar legislative history of these statutes.⁸ The Supreme Court has passed upon much of this legislative history in its interpretations. It is indisputable that the Federal Trade Commission and Clayton Acts were designed to supplement the Sherman Act.⁹ It is equally clear that the particularizations of the Clayton Act have the purpose of counteracting the generality of the Sherman Act¹⁰ and section 5 of the Federal Trade Commission Act by bolstering enforcement against the specific transactions and practices singled out by Con-

⁶ See CRAWFORD, *THE CONSTRUCTION OF STATUTES* §§ 231, 232 (1940); SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 5201-02 (3d ed. 1943). Cf. comment of Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945): "In *United States v. Hutcheson*, 312 U.S. 219 . . . , a later statute *in pari materia* was considered to throw a cross light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court."

⁷ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529, 544 (1947).

⁸ For this legislative background, see my *UNFAIR TRADE PRACTICES* 624-28 (1950); Howrey, *supra* note 2, at 161-64; HENDERSON, *THE FEDERAL TRADE COMMISSION*, ch. I (1924).

⁹ *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

¹⁰ In *Motion Picture Advertising*, *supra* note 3, at 405, Justice Frankfurter's dissenting opinion recognized this: "The vagueness of the Sherman Law was saved by imparting to it the gloss of history. . . . Difficulties with this inherent uncertainty in the Sherman Law led to particularizations expressed in the Clayton Act. . . . The creation of the Federal Trade Commission . . . made available a continuous administrative process by which fruition of Sherman Law violations could be aborted."

Note that this merely refers to the Clayton Act as a supplement to the Sherman Act and to § 5 as a means of curbing Sherman Act violations. To what extent § 5 supplements the Clayton Act is a different question, as the text of this paper *infra* demonstrates.

gress as evils to be curbed under that statute when the specified adverse competitive effects are proved. Elementary also is the Supreme Court's interpretation that section 5's general phrasing sanctions the Commission's use of that provision as a flexible and expansive instrument not restricted to common law proscriptions or previously adjudicated Sherman Act violations.¹¹

It cannot be denied that the incipient violation doctrine vests in the Commission authority to "nip in the bud" conduct which might ripen into the consummated evils at which Congress aimed in the Clayton Act. The Commission need prove only a reasonable probability¹² of the anticompetitive effects under section 2 (a) of the Robinson-Patman Act and under sections 3 and 7 of the Clayton Act.

Confusing dicta of the Supreme Court,¹³ however, becloud the reach of the Commission's zone of power under section 5 to strike down incipient violations. When section 5 is used as a supplement to attack traditional Sherman Act offenses, it is clear that the Commission may arrest such violations in their incipiency, since the Sherman Act as such ordinarily reaches only actually achieved violations with the exception of proof of a specific intent to monopolize under section 2 of that act.¹⁴ But, as other writers have prop-

¹¹ *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304 (1934), changing the restrictive interpretation in *FTC v. Gratz*, 253 U.S. 421 (1920); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1940); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). In the recent opinions of the majority and dissenting Commissioner Tait in *Grand Union Co.*, F.T.C. Dkt. 6973 (1960), there is no disagreement on this particular point.

¹² The Commission has not shown any inclination to take advantage of the "reasonable possibility" test as stated in the majority opinion in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

¹³ Particularly in this passage from Mr. Justice Douglas' majority opinion in *Motion Picture Advertising* (344 U.S. at 395):

"It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, *would violate those Acts*, as well as to condemn as 'unfair methods of competition' existing violations of them." (Emphasis supplied.)

In his dissenting opinion in the same case, Mr. Justice Frankfurter referred to the Sherman and Clayton Acts in the disjunctive (at 392): "The Federal Trade Commission Act was designed, doubtless, to enable the Commission to nip in the bud practices which, when full blown, *would violate the Sherman or Clayton Act.*" (Emphasis supplied.)

In a subsequent part of the text of my paper there is discussion of the extent to which § 5 may be considered as a supplement to the Clayton Act.

¹⁴ In *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948), Justice Reed's majority opinion noted that "... even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act. Compare *United States v. Griffith*, 334 U.S. 100. . . ." This, of course, may raise baffling questions of the relation of §§ 1 and 2 of the Sherman Act.

erly pointed out,¹⁵ the incipency violation doctrine is compounded if section 5 is used to stop in its incipency a violation of incipient Clayton Act offenses. The competitive effects clause of section 2 (a) of the Robinson-Patman Act and of sections 3 and 7 of the Clayton Act itself embodies an incipency test of violation in the words "where the effect may be."

Admittedly a broad grant of authority, section 5 is nevertheless not a roving jurisdiction "unconfined and vagrant." Congress appears to have "canalized" section 5 "within banks that keep it from overflowing" into the area covered by the Clayton Act.¹⁶

III. SECTION 5 CASES INVOLVING ONLY CONVENTIONAL SHERMAN ACT OFFENSES

The contours of the interrelation of section 5 and the Sherman Act have been reasonably well defined. The Supreme Court has correctly reiterated that the Commission has jurisdiction under section 5 to attack incipient or consummated Sherman Act offenses. It is therefore pointless to dispute the Commission's resort to section 5 with respect to the variety of conventional Sherman Act offenses equally familiar in the exercise of the Department of Justice Sherman Act proceedings. The Commission is also empowered to question as Sherman Act offenses conduct not yet adjudicated under that act but this may raise borderland novel issues.¹⁷ In this area, harmonization of the Commission's exercise of section 5 jurisdiction requires the Commission to be held to the same substantive criteria as those established by judicial interpretations of the Sherman Act. This will require, for example, distinctions between unreasonable *per se* restraints and those demanding an extended Rule of Reason examination.¹⁸ Moreover, in the latter types

¹⁵ Howrey, *supra* note 2; Hodson, *Exclusive Dealing*, 1954 CCH ANTITRUST LAW SYMPOSIUM 140 (N.Y. State Bar Ass'n); Butler, *Federal Trade Commission Jurisdiction Under the Incipency Doctrine*, UNIVERSITY OF MICHIGAN INSTITUTE ON FEDERAL ANTITRUST LAWS 154 (1953).

¹⁶ The quoted words in this analogy come from the concurring opinion of Mr. Justice Cardozo in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), where he compares the unlawful delegation of legislative power in the National Industrial Recovery Act with the limitations in the power committed to the Federal Trade Commission in § 5.

¹⁷ A leading writer has said that "the Federal Trade Commission Act may be viewed not merely as being as basic, but as being even more far-reaching than the Sherman Act." He further emphasized that "... the general practitioner who advises a client on compliance with the antitrust laws would do well to bracket together the Sherman and Federal Trade Commission Acts, and to view their collectively broad commands as a flaming sword which turns every way to guard the competitive tree of life of our economy." VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* 17, 18 (1958 ed.).

¹⁸ See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) and my comments thereon, 15 A.B.A. ANTITRUST SECTION REP. 37-42 (1959).

of cases, the Commission should sustain the burden of proving substantially adverse effects upon competition in the relevant product and geographic market. In all cases in this category, the Commission's complaint should identify with reasonable definiteness the charges it has reason to believe constitute consummated or incipient violations of the Sherman Act.

*Motion Picture Advertising*¹⁹ exemplifies resort to section 5 as a Sherman Act supplement. At issue were contracts for exclusive dealing in the display of advertising films. The majority of the Court held that the Commission's findings of fact, supported by substantial evidence, made it plain "that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of Section 5 (a) of the Federal Trade Commission Act." It should be noted that Mr. Justice Frankfurter's dissenting opinion, joined by Mr. Justice Burton, does not question this scope of section 5. Rather, Mr. Justice Frankfurter was concerned with the basis and scope of judicial review of the Commission's orders as disclosed in the following:

"My primary concern is that the Commission has not related its analysis of this industry to the standards of illegality in Section 5 with sufficient clarity to enable this Court to review the order."

"In any event," he said, "the Commission has not found any Sherman Law violation."

IV. COMMISSION CASES INITIATED IN COMPLAINTS SOLELY UNDER CLAYTON ACT

This category, of course, does not raise issues under section 5. Here we deal with Commission proceedings where it claims jurisdiction solely under specified provisions of the Clayton Act. This area, however, requires evaluation to ascertain the extent to which the Commission's approach and Clayton Act interpretations of the courts reveal either harmonization within the congressional design or dissonances curable only by congressional action. My evaluation is here made only in summary form.

¹⁹ *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1944). The Commission did not resort to § 3 of the Clayton Act since it believed that the contracts did not come within the transactions specified in that section. See *infra*, "Section 5 in Relation to Jurisdictional Deficiencies in Section 3 of the Clayton Act."

A. *Robinson-Patman Act*²⁰

Section 2 of the Clayton Act, the Robinson-Patman Act, presents some of the most troublesome deviations from a consistent over-all antitrust policy. *Simplicity Pattern's*²¹ decision and unequivocal dicta make plain that sections 2 (c),²² (d) and (e) cannot be construed in harmony with the burden of proof requirement of substantial injury to competition under section 2 (a). Only Congress can convert these illegal *per se* violations into a Rule of Reason approach.²³ If this is not done, the resulting disharmony will remain contrary to national antitrust policy. It is contended that the illegal *per se* approach protects against coercion by powerful buyers of special or secret rebates. It nevertheless cannot be denied that illegal *per se* violations forestall inquiry into the market effects of the discriminatory practices. To that extent, they are out of tune with antitrust standards.²⁴

Interpretations of 2 (a) tend in part toward reconciliation with antitrust and in part away from it. The Commission has only partially fulfilled its words of promise to require proof of the "substantiality of effects reasonably probable" in section 2 (a) injury to competition proceedings.²⁵ Commission decisions, especially those involving buyers' line competition, have reflected only part of the Rule of Reason method of inquiry into competitive effects. In the automotive parts buyers' line cases,²⁶ the courts of appeals

²⁰ For fuller discussion, see my analysis in 15 A.B.A. ANTITRUST SECTION REP. 56-69 (1959).

²¹ *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

²² Cf. the majority and dissenting opinions in the five-to-four Supreme Court decision in *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

²³ Apparently Mr. Justice Frankfurter joined in the unanimous decision of the Supreme Court in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), because he was persuaded that Congress left no alternative to the *per se* illegality approach to § 2 (c), (d) and (e) of the Robinson-Patman Act. But compare Mr. Justice Frankfurter's concurrence in the dissenting opinion of Mr. Justice Whittaker in *FTC v. Henry Broch & Co.*, *supra* note 22.

²⁴ See perceptive analysis of Corwin Edwards, former Chief Economist of the Federal Trade Commission in *THE PRICE DISCRIMINATION LAW* (1959), where he proposes revisions in the Robinson-Patman Act which "would bear little resemblance" to the existing statute.

²⁵ *General Foods Corp.*, CCH TRADE REG. REP. ¶ 25,172 (F.T.C. Dkt. 5675) (1954).

²⁶ This line of decisions is cited in footnote 79 of my paper in 15 A.B.A. REP. 58 (1959). But compare the majority opinion of Chairman Kintner in *Fred Bronner Corp.*, F.T.C. Dkt. 7068 (1960), stating that in the automotive parts cases, relied on by the Commission counsel in support of the complaint, "there were additional factors pertinent to the price discriminations there involved which are not shown to exist in this case." The majority held that, "Under the circumstances, it is our opinion that the evidence of record fails to establish that the effect of the price difference here involved may be substantially to lessen competition between competing purchasers." Commissioners Secrest and Anderson agreed with the result and filed concurring opinions. Commissioner Kern dissented, stating that the majority holding "constitutes a retreat from the position taken by the Commission and sustained by the courts in the automotive parts cases, an act of

have generally sustained the Commission's findings of fact based on this partial Rule of Reason approach. The Seventh Circuit's insistence in *Minneapolis-Honeywell*,²⁷ that in both sellers' and buyers' line cases, the Commission must prove injury to competition by showing substantial interference with competition has not been completely observed by the Commission and the courts of appeals in buyers' line 2 (a) cases. In *Yale and Towne*,²⁸ however, the Commission's opinion is a shining example of a genuine Rule of Reason analysis of competitive effects in the relevant market on the sellers' line. The Commission nevertheless has more frequently stressed injury to individual competitors, or a group of competitors, in the buyers' line proceedings.

In my opinion, these discrepancies are inconsistent with anti-trust concepts, and are not dictated by the *Morton Salt*²⁹ rationale of the Supreme Court. They can still be corrected in 2 (a) cases by the Commission itself without congressional amendment, and thus bring 2 (a) into proper relation to over-all antitrust policy. The Supreme Court's recent unanimous *Anheuser-Busch*³⁰ opinion repeatedly cautioned that the Court was merely deciding that price discrimination in 2 (a) is equated with price differentiations having the proscribed anticompetitive effects and not within the 2 (a) and 2 (b) absolute defenses. *Anheuser-Busch*, therefore, in no way forecloses inquiry into competitive effects on the sellers' line or buyers' line by use of a full-scale Rule of Reason probe.

In the words of the Attorney General's Antitrust Committee Report, the Commission's analysis of statutory injury should "center on the vigor of competition in the market rather than hardship to individual businessmen."³¹

B. Section 3 of the Clayton Act

Section 3 of the Clayton Act is applicable to exclusive arrangements and tying clauses. When this article was completed, *Tampa Electric Company*³² was pending in the Supreme Court. At that

retrogression which will adversely affect enforcement of the Robinson-Patman Act in a most critical and important area."

²⁷ *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951).

²⁸ *Yale & Towne Mfg. Co.*, F.T.C. Dkt. 6232 (1956).

²⁹ *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

³⁰ *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

³¹ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 164 (1955).

³² *Tampa Electric Co. v. Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *rev'd and remanded*, 365 U.S. 320 (1961).

time this writer stated that *Standard Stations*³³ and subsequent court decisions³⁴ relied primarily upon quantitative measures in determining the anticompetitive impact of exclusive dealing and requirement contracts. We further stated that so long as that trend continued, it must be considered as falling short of accommodation to over-all antitrust policy. It was also asserted that nothing Congress has written precludes a full Rule of Reason examination in section 3 cases based upon a qualitative substantiality test of violation.³⁵

This position is confirmed by the *Tampa Electric* seven-to-two decision (Justices Black and Douglas dissenting without opinion) of the Supreme Court.³⁶ *Tampa's* rationale illuminates the practical application of the statutory standards and tests of violation of section 3.

"Following the guidelines of earlier decisions," said Mr. Justice Clark, "certain considerations must be taken." What are these considerations in any given case? On its facts *Tampa* involved a requirements contract for purchase from Nashville, a Kentucky coal company, of all the coal Tampa, a public utility, would require over a twenty-year period as boiler fuel for a generating station Tampa was constructing in Tampa, Florida. Tampa was given an option of buying coal from suppliers other than Nashville if it converted other equipment using oil to coal. Tampa was also free to purchase up to fifteen percent of its fuel requirements from a by-product of a local supplier. After vast expenditures by Tampa to install coal burning equipment at the new station, Nashville informed Tampa that the contract was illegal under the antitrust laws and would not be performed. Tampa brought suit for a declaration that the contract was valid and enforceable.

The Supreme Court assumed the contract is an exclusive dealing arrangement and that the relevant line of commerce is bituminous coal alone. Decisive in reversal of the judgment below was the failure of the lower courts to give "the required effect to a controlling factor in the case — the relevant competitive market

³³ *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

³⁴ *Richfield Oil Corp. v. United States*, 343 U.S. 922 (1952); *United States v. Sun Oil Co.*, 176 F. Supp. 715 (E.D. Pa. 1959); *Dictograph and Anchor Serum cases*, *infra* notes 41 and 42; and *Tampa Electric Co.*, *supra* note 32.

³⁵ My version of the quantitative versus the qualitative substantiality test of violation is set forth in 15 A.B.A. ANTITRUST SECTION REP. 70-71 (1959).

³⁶ *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). The original contract was signed with another company but that interest was assigned to Nashville and later to West Kentucky Coal Company.

area." The Court reversed judgment for Nashville and remanded the case to the district court.

Reviewing its prior section 3 decisions, the Court specifies the considerations which must be taken to determine whether it is "probable that the performance of the contract will foreclose competition in a substantial share of the line of commerce affected." First, the relevant product line of commerce must be carved out "on the basis of the facts peculiar to the case." Second, the area of effective competition must be charted, *i.e.*, the geographic market area in which the seller operates and to which the buyer "can practicably turn for supplies." Third, "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." In weighing the various factors, "particularized considerations of the parties' operations are not irrelevant."

In this writer's view *Tampa Electric* calms — indeed, should remove — the alarm that the Court's previous exclusive dealing decisions under section 3, particularly *Standard Stations*, in effect erected a mechanical illegal *per se* market foreclosure rule. It is gratifying — though doubtless surprising to those who interpreted *Standard Stations* to the contrary — that the Court now lays a foundation for an extended Rule of Reason examination of the competitive effects of exclusive dealing under section 3 in any given case.³⁷ If *Standard Stations* seemed to give too much weight to quantitative measures of adverse effects upon competition, the Court now expressly states that "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence" and "the dollar-volume by itself, is not the test." The twenty-year period of the contract was "singled out as the principal vice," but in the case of a public utility assurance of a steady and ample supply of fuel is in the public interest.

³⁷ Even more surprising is the Court's citation of *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), which arose under the Sherman Act but, unlike the incipency test of violation under § 3, requires proof of a consummated unreasonable restraint of trade. Mr. Justice Clark's listing of the factors which must be weighed under § 3 to determine substantiality of foreclosure of competitor is strikingly like those mentioned in *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). In *Tampa*, Mr. Justice Clark said (at 329): "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."

Mr. Justice Clark's opinion in *Tampa*, however, warns against assuming that prior section 3 cases before that Court should or would have been decided differently. The Justice distinguishes the dominant market position of the seller in *Standard Fashions*,³⁸ the myriad substantial sales volume outlets and industry-wide use of exclusive contracts in *Standard Stations*, and restrictive tying arrangements as in *International Salt*.³⁹

The crucial issue of the relevant geographic market was a question of fact the district court should not have resolved by judicial notice on a motion for summary judgment without presentation of evidence. The Supreme Court observed that both courts below seemed to have been satisfied with inquiry into competition only within "Peninsular Florida." The Court concluded that neither that latter area nor the entire state of Florida nor Florida and Georgia combined constituted "the relevant market of effective competition." Rather the appropriate area is bounded by that in which the respondents and 700 other companies in the producing area effectively compete in marketing their coal of which the overwhelming tonnage is sold outside Florida and Georgia. Taking note of statistical data on this phase, the Court concluded:

"From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1% is, conservatively speaking, an insubstantial amount. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year, would be .77%."

This minimal pre-emption, the Court concluded, would not tend substantially to foreclose competition in the relevant coal market.

Tampa Electric also requires the Federal Trade Commission to revise its approach to section 3 cases on exclusive dealing. Before the Court's decision in *Tampa Electric*, we noted that in *Maico*⁴⁰ the Commission professed that, as an administrative tri-

³⁸ *Standard Fashion Co. v. Magrane-Houston Co.*, 253 U.S. 346 (1922).

³⁹ *International Salt Co. v. United States*, 332 U.S. 392 (1947).

⁴⁰ *Maico, Inc.*, 50 F.T.C. 485 (1953). See also and compare *Harley-Davidson Motor Co.*, 50 F.T.C. 1047 (1954); *Revlon Products Corp.*, 51 F.T.C. 260 (1954); *Outboard Marine & Mfg. Co.*, 52 F.T.C. 1553 (1956). While he was General Counsel of the Commission, the former Chairman Kintner wrote an article espousing the extended Rule of Reason inquiry under § 3. Kintner, *Exclusive Dealing*, 3 PRACTICAL LAWYER 69 (1957). He stated his belief that this method was used in the above-cited cases. The court decisions in *Dictograph* and *Anchor Serum*, he asserted, did not foreclose the Commission's discretion as an administrative tribunal to make an extended market inquiry beyond that in *Stand-*

bunal intended by Congress as one equipped to explore all relevant market facts, it is not necessarily bound by the *Standard Stations* strictures. The Commission might have continued to regard itself as having the discretion to undertake a broader market inquiry were it not for the Second Circuit and Eighth Circuit decisions affirming Commission orders in *Dictograph*⁴¹ and *Anchor Serum*⁴² on the basis of *Standard Stations*.

Tampa Electric should create, or restore, as the case may be, the Commission's belief that it is not cabined by restrictive quantitative measures of adverse competitive effects in weighing the factors pertinent to substantiality of foreclosure of competition in section 3 exclusive arrangement cases.

Hereafter the Commission would be wise in giving heed to guidelines and considerations specified in *Tampa Electric* as an extended Rule of Reason method of adjudicating section 3 exclusive dealing issues. For the Supreme Court majority has at long last made pronouncements apparently intended to bring the incipency test of violation of section 3 into harmony with over-all antitrust policy.

In tying clause cases, the Commission is confronted with Supreme Court constructions which still leave uncertain where to draw the

ard Stations applicable to Department of Justice cases. See also footnote 13 of Mr. Justice Frankfurter's opinion for the majority in *Standard Stations*, *supra* note 33.

The recent decision of the Commission in *Mytinger & Casselberry, Inc.*, F.T.C. Dkt. 6962 (1960), involving a count charging violation of § 3 of the Clayton Act and two counts charging violation of § 5, adopted the Initial Decision of the Hearing Examiner which included a holding that § 3 was violated. Commissioner Kern's opinion declared that since the date of the Commission's action in *Maico*, the court of appeals decisions in *Dictograph* and *Anchor Serum*, *infra* notes 41 and 42, and in the private suit in *Tampa Electric*, *supra* note 36, *Standard Stations* is to be applied by the Commission in § 3 cases. It may be that Commissioner Tait's concurrence only in the result indicates he was unwilling to join the Commission majority in overruling in practical effect the Commission's approach in *Maico*. On the particular record in *Mytinger & Casselberry*, it is possible to infer that the same holding of illegality might have been reached via either the *Standard Stations* or *Maico* approach. In any event, *Mytinger & Casselberry* placed the Commission on record as bowing to the commands of *Standard Stations*. To the same effect, see *Timken Roller Bearing Co.*, F.T.C. Dkt. 6504 (1961), where respondent was held in violation of § 3 in a complaint charging violation only of that section.

The Supreme Court's rationale in *Tampa Electric*, as analyzed in the text of this article, calls upon the Commission to re-assess its approach to § 3 cases. The REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 148 (1955), takes a sound position that identical criteria should govern a § 3 case irrespective of whether it initially is tried before a court or the Commission. The Report states (n. 77): "Chaotic consequences might attend the anomaly of subjecting identical trade practices to different legal principles due to fortuitous circumstances determining whether a District Court or the Commission sits as the initial arbiter, in either event subject to appellate judicial review."

⁴¹ *Dictograph Products, Inc. v. FTC*, 217 F.2d 821 (2d Cir. 1954).

⁴² *Anchor Serum Co. v. FTC*, 217 F.2d 867 (7th Cir. 1954).

line between the test of violation applicable to a section 3 Clayton Act proceeding and the test applicable to a Sherman Act proceeding.⁴³ The Supreme Court has approved the apparently lesser burden under section 3 of proving that a substantial volume of interstate commerce in the tied product may be restrained and to this the quantitative substantiality test of violation has been applied.⁴⁴ In *Northern Pacific*⁴⁵ under section 1 of the Sherman Act, the Supreme Court majority has reduced to *virtual per se* illegality any tying clause where there is proof of sufficient economic power over the tying leverage to impose an appreciable restraint over "not insubstantial" interstate commerce in the tied article or service.⁴⁶

In a proceeding under section 3 of the Clayton Act the Commission would appear to be justified in heeding the Supreme Court's warning that, unlike requirements contracts or other exclusive dealing arrangements, "tying agreements serve hardly any purpose beyond suppression of competition" and "fare harshly" under the antitrust laws. This axiom, expressed in Supreme Court opinions, in effect tends to create a presumption of antitrust illegality, subject to the legally permissible exception of good will protection by prescribing reasonable specifications for the tied product or service.⁴⁷

C. Section 7 of the Clayton Act

Last year this writer evaluated the Commission's rulings and some of the Initial Decisions of Hearing Examiners in cases arising solely under amended section 7 of the Clayton Act.⁴⁸ The conclu-

⁴³ Compare the Commission's § 3 tying clause cases in *Insto Gas Corp.*, 51 F.T.C. 363 (1954) and *Signode Steel Strapping Co. v. FTC*, 132 F.2d 48 (4th Cir. 1942); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F.2d 952 (1st Cir. 1945).

If a § 5 proceeding should be brought by the Commission in a tying clause case where there is lack of jurisdiction under § 3 of the Clayton Act, such as one involving services not within the commodities clause of § 3, novel questions would arise. Would the Commission attack the tying clause as an incipient or consummated Sherman Act violation governed by the *Northern Pacific* Sherman Act test, or would the Commission apply the Clayton Act test under § 3? Compare approach taken by the Commission in a Robinson-Patman Act type of situation in *Grand Union Co.*, F.T.C. Dkt. 6973 (1960), discussed at length *infra*.

⁴⁴ See especially *International Salt Co. v. United States*, 332 U.S. 392 (1947) and *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

⁴⁵ *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958). See distinctions made in dicta in *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960).

⁴⁶ For fuller discussion, see my paper in 15 A.B.A. ANTITRUST SECTION REP. 39-41 (1959).

⁴⁷ See limitations indicated in *International Business Machines v. United States*, 298 U.S. 131 (1936); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Standard Oil of California v. United States*, 337 U.S. 293 (1949).

⁴⁸ See 15 A.B.A. ANTITRUST SECTION REP. 69-72 (1959). This, of course, does not imply approval of seepage into amended § 7 of the mechanical quantitative test in the manner

sion then stated still stands, namely, that the Commission is applying a full-scale Rule of Reason method of adjudicating amended section 7 merger issues. In general, the Commission is applying a qualitative rather than mere quantitative substantiality test of violation, namely, an examination of all relevant market facts and factors in determining whether or not there is a reasonable probability of a substantial lessening of competition or tendency to create a monopoly in line of commerce in the relevant product and geographic market.

This is a proper method of accommodating amended section 7 of the Clayton Act to the national antitrust policy expressed by Congress in that act and as a supplement to the Sherman Act.

V. SECTION 5 CASES INVOLVING JURISDICTIONAL DEFICIENCIES
UNDER THE CLAYTON ACT AND COMBINED SECTION 5 AND
CLAYTON ACT CHARGES

A. *Preliminary Observations*

This is the category which brings into sharp focus "the legal puzzles" presented by the interrelations of section 5 and the Clayton Act.

In this borderland, jurisdictional deficiencies under the Clayton Act may be found in the Robinson-Patman Act, or in section 3 or section 7. In Commission complaints combining section 5 and Clayton Act charges, the issues may become more complicated because they may concern not only jurisdictional deficiencies but also failure to segregate section 5 charges from those under the Sherman and Clayton Acts, and claims of jurisdiction under section 5 over practices within Clayton Act coverage.

We do not underrate the tortuous path the Commission and the courts must travel in any attempt to bring the Sherman, Federal Trade Commission and Clayton Acts into a concordant whole compatible with congressional intention. Before analyzing particular cases, we first suggest some general principles for a synthesis of the statutory pattern in this category of cases.

While alternative constructions may be gleaned from congressional legislative history, it seems that, on balance, the Commission has authority under section 5 to proceed against *equivalent types* of practices not within the jurisdictional bounds of the coverage specified in the Clayton Act.

it was applied under old § 7 in the majority opinion of the Supreme Court in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

This was the position taken by the Attorney General's Antitrust Committee.⁴⁹ Its Report recognized that the Commission is legitimately entitled to challenge under section 5 conduct economically equivalent to the anticompetitive practices in Clayton Act provisions but not reachable thereunder due to lack of technical prerequisites. In accord is the Commission's pronouncement in its interlocutory ruling in *Foremost Dairies* that ". . . practices not technically within the scope of a specific section of the Clayton Act may nevertheless constitute a violation of Section 5 of the Federal Trade Commission Act."⁵⁰

In this connection, certain qualifications must be kept in mind. Section 5 should impose upon the Commission the same burden of proof as the particular Clayton Act provision covering the "economically equivalent" anticompetitive transaction or practice.

Furthermore, as the Attorney General's Antitrust Committee Report adds, section 5 should not be invoked as a substitute for attacking a transaction or practice which is covered by the Clayton Act.

Still another caveat should be noted. In *Foremost Dairies, supra*, the Commission's interlocutory ruling further stated that "facts indicating a violation of section 7 of the Clayton Act, as amended, may also indicate a violation of section 5 of the Federal Trade Commission Act."

This does not warrant the Commission's use of pleadings in its complaints which, by use of a single section 5 count,⁵¹ or plural

⁴⁹ REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 148-149 (1959).

⁵⁰ *Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956).

⁵¹ At the time this article was first published, we stated that the single blunderbuss § 5 count in the sales commission TBA complaints reveals great lack of clarity in these respects. *Goodyear Tire & Rubber Co. & Texas Co.*, F.T.C. Dkt. 6485 (1956); *Goodyear Tire & Rubber Co. & Atlantic Refining Co.*, F.T.C. Dkt. 6486 (1956); *Firestone Tire & Rubber Co. & Shell Oil Co.*, F.T.C. Dkt. 6487 (1956). On March 9, 1961, the Commission (four members participating and the opinion of the Commission written by Chairman Kintner) found that § 5 was violated and entered cease-and-desist orders in the *Goodyear-Atlantic* and *Firestone-Shell* cases. The *Goodrich-Texas* proceeding, however, was remanded to the Hearing Examiner for reception of further evidence concerning the competitive effects of the respondents' practices.

All three cases involve the legality of contracts between the respective tire and oil companies calling for payment of a sales commission to the oil company in return for assistance in promoting sales of the tire company's automotive tires, batteries and accessories (known as TBA products) to the retail and wholesale outlets of the oil company.

We do not purport here to go into the merits of these cases. Viewing them simply from the standpoint of the jurisdictional scope of § 5 in relation to the Sherman and Clayton Acts, we still believe that at their inception the Commission's complaints failed to identify with reasonable definiteness the charges therein. At that time, the respondents were entitled to know whether the "unfair methods of competition" or "the unfair acts and practices" within the reach of § 5 comprehended only charges of Sherman Act types

counts combining in one complaint section 5 and other sections of the Clayton Act, do not identify with reasonable definiteness charges related to the particular statutory provision. Otherwise the Commission would be claiming jurisdiction over composite or hybrid offenses in pleadings that would not enable a respondent to contest the issue whether the Commission is staying within the metes and bounds of each statute and its supplementation as allowed by congressional intent.

Most important of all, this attempted accommodation of the several statutes in this antitrust pattern should not be viewed as an invitation to invoke section 5 whenever the Commission believes that the conduct "runs counter" to or is contrary to "the spirit" of any one of these statutes.⁵² Such vague grasping for jurisdiction would be a misconceived and uncontrolled administrative discretion of the Commission neither intended by Congress nor supportable

of violation, or whether the charges were also aimed at conduct within §§ 2 and 3 of the Clayton Act, or economically equivalent thereto but technically lacking in jurisdictional requisites for Clayton Act coverage.

A fair reading of the complaints as of the time of their issuance reveal that they allowed for a hybrid of Sherman, Robinson-Patman and Clayton Act § 3 charges in a breadth of allegations and generality of language that left at large the possible defenses respondents might have to meet. Such clarification regarding the theory and scope of the complaints as may have resulted from the hearings, or at the time of the Initial Decision of the Hearing Examiner, or now in the Commission's findings, conclusions and opinion, is beside the point. As a matter of fairness, the complaint itself should perform the minimal function of informing a respondent with reasonable specificity of the charges and their relation to § 5 as distinct from the Clayton Act. Otherwise respondent's counsel, as of the time of the complaint, is not in a position to know whether the Commission is seeking to substitute § 5 in challenging conduct covered by the Clayton Act or is claiming jurisdiction under § 5 over conduct not technically covered under the Clayton Act but equivalent in economic nature and effect.

This latter hazard is now illustrated by the inclusion in the Commission's orders in the *Goodyear-Atlantic* and *Firestone-Shell* cases of paragraphs which on their face are in significant part in the tenor of the Commission's orders in brokerage cases under § 2(c) of the Robinson-Patman Act. The complaints in these TBA cases did not give reasonable notice of this phase nor did the Commission's opinion discuss violation from this standpoint. It was merely mentioned in passing in the appeal brief at p. 97 of counsel supporting the complaint. Admittedly, the Commission's order, as indicated in note 100 *infra*, may include any injunctive provision reasonably related to prevention or correction of the violation found to exist. This does not, however, absolve the Commission from a failure to make an order responsive to what the complaint and the record evidence as a whole warrant, both in giving respondents notice of what they must be prepared to meet, and in not leaving a reviewing court in the dark as to relation of the remedy to the substantive violation. Otherwise an excessively broad order may ban lawful conduct which is separable from that found to be unlawful.

Also beside the point, so far as the notice-giving function of the initial complaint pleadings is concerned, would be the hindsight view that respondents are now apprised by the detailed analysis in the Commission's opinion that the contracts are illegal under § 5 as basically a Sherman Act type of violation stemming from substantial anticompetitive effects at the manufacturing, wholesale and retail levels.

⁵² See extended discussion *infra* of *Grand Union Co.*, F.T.C. Dkt. 6973 (1960).

on judicial review.⁵³ *Motion Picture Advertising*,⁵⁴ it should be remembered, sustained the Commission's section 5 order in a case involving the equivalent of an exclusive dealing practice covered by section 3 of the Clayton Act. The *Shell Oil*, *Socony Mobil* and *Ice Cream* cases,⁵⁵ discussed later in this paper, were also brought under section 5 on charges of equivalence to exclusive dealing within section 3. *Grand Union*, also discussed below, was a section 5 case attacking a discriminatory practice equivalent to that covered in 2 (d) of the Robinson-Patman Act. These are far removed from nebulous charges of practices "contrary to the antitrust laws" or in violation of "the spirit" of the Clayton Act.

In the discharge of their task of judicial review of the Commission's orders, the courts are the ultimate safeguards in assessing the record in any given case to determine whether there is substantial evidence to support the Commission's findings of fact and in deciding what, as a matter of law, is encompassed within section 5 or the Sherman and Clayton Acts.⁵⁶ Mr. Justice Frankfurter's dissenting opinion in *Motion Picture Advertising* is a constructive essay on these aspects of administrative law applicable to the Commission.⁵⁷ It provides a guiding frame of reference for many of the issues here discussed.

⁵³ Note the interesting analogies found in the opinion of Mr. Chief Justice Hughes and in the concurring opinion of Mr. Justice Cardozo in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), discussing the differences between the unconstitutional delegation of legislative power under the Codes of Fair Competition plan of the National Industrial Recovery Act and the limitations on the powers of the Federal Trade Commission under § 5. The opinions emphasize the difference between prohibiting unfair methods of competition and the affirmative power to regulate fair and lawful methods of competition.

⁵⁴ *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1944).

⁵⁵ *Shell Oil Co.*, F.T.C. Dkt. 7044 (1959); *Socony Mobil Oil Co.*, F.T.C. Dkt. 6915 (1960); *Carnation Co.*, F.T.C. Dkts. 6172-6179 and 6425 (1959); and see *infra* for further references to these proceedings.

⁵⁶ As flexible and expansible as § 5 may be within the interpretations of the Supreme Court, the landmark opinion of then Mr. Justice Stone in *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304 (1934), warned it was not intimated that "the Commission may prohibit every unethical competitive practice regardless of its character or consequence." In *Motion Picture Advertising* the Court differed on the assessment of the record but *FTC v. Gratz*, 253 U.S. 421 (1920), still stands for the proposition that it is for the courts, and not the Commission, ultimately to determine, as a matter of law, what § 5 includes.

In the following illustrative cases the Commission has also issued complaints under § 5 alleging knowing inducement or receipt of payments or allowances similar to the allegations in *Grand Union*: *Foster Publishing Co.*, F.T.C. Dkt. 7698 (1959); *J. Weingarten, Inc.*, F.T.C. Dkt. 7714 (1960); *American Radiator and Standard Sanitary Corp.*, F.T.C. Dkt. 7835 (1960); *Benner Tea Co.*, F.T.C. Dkt. 7866 (1960); *Individualized Catalogues, Inc.*, F.T.C. Dkt. 7971 (1960); *ADT Catalogs*, F.T.C. Dkt. 8100 (1960). Cf. *R. H. Macy & Co.*, F.T.C. Dkt. 7869 (1960), containing novel allegations under § 5 of use of the leverage of purchasing power to induce contributions from suppliers in connection with the centennial celebration of Macy in New York.

⁵⁷ Among his points are these: determination of the scope of § 5 is a matter of law to be defined by the courts; this "was not entrusted to the Commission for *ad hoc*

Even when the Commission stays within the bounds of its authority, decisions in conflict with over-all antitrust policy may be attributable in some instances to the Congress, as we have previously shown in the effect of the Supreme Court's interpretations of congressional intention in *Simplicity Pattern*⁵⁸ with respect to 2 (c), (d) and (e) of the Robinson-Patman Act, and in the subsequent *Broch*⁵⁹ interpretation of 2 (c) by the majority of the Court. If Congress is dissatisfied with the Court's reading of its intention, the responsibility for correction of resulting deviations from desired national antitrust policy rests with that legislative body.

We now turn to an analysis of the recent utilization of section 5 by the Commission in this category of cases, considering the jurisdictional deficiencies in the Robinson-Patman Act and sections 3 and 7 of the Clayton Act in the order named.

B. *Jurisdictional Deficiencies for Robinson-Patman Act Proceeding*

The recent four-to-one decision of the Commission in *Grand Union*⁶⁰ squarely joins the issue whether the Commission can resort to section 5 where a discriminatory practice does not come within the Robinson-Patman Act because of a technical jurisdictional omission in that statute.

The complaint alleged and the Hearing Examiner found knowing inducement or receipt by respondent of promotional allowances not made available by the respondent's suppliers on proportionally equal terms to the respondent's competitors.

This, in effect, amounts to knowing inducement of a violation of section 2 (d) of the Robinson-Patman Act. The complaint appears to be drawn on the theory that buyer liability under section 2 (f) of the Robinson-Patman Act applies only to a direct or indirect price discrimination under section 2 (a), and therefore does not embrace a 2 (d) promotional allowance or a 2 (e) services or

determination within the interstices of individualized records but was left for ascertainment by this Court"; otherwise "the curb on the Commission's power . . . would be relaxed, and unbridled intervention into business practices encouraged"; ". . . he is no friend of administrative law who thinks that the Commission should be left at large."

⁵⁸ *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

⁵⁹ *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

⁶⁰ *Grand Union Co.*, F.T.C. Dkt. 6973 (1960). *Accord*: *American News Co.*, F.T.C. Dkt. 7396 (1961). In a similar case pending on appeal before the Commission, the Initial Decision of the Hearing Examiner held there was a violation of § 5. *Giant Food Shopping Center, Inc.*, F.T.C. Dkt. 6459 (1960). See also consent settlement order in a much earlier § 5 case in *United Cigar-Whelan Stores Corp.*, F.T.C. Dkt. 6525 (1956).

facilities violation. Section 5 was therefore used to bridge a gap in jurisdiction the Commission believed to exist even though the Commission's statutory interpretation of 2 (f) as not covering 2 (d) or 2 (e) was left open in *Automatic Canteen*.⁶¹

The majority opinion of Commissioner Secrest might have been narrowed to precisely what was the issue on the particular record of the case if it had been confined to the following ground:

"In the absence of evidence of Congressional intent not to render unlawful practices related to those specifically prohibited by the Robinson-Patman Act, there is no substance to respondent's argument that the Federal Trade Commission Act cannot be extended to proscribe discriminatory practices which do not come within the purview of the Robinson-Patman Act. The rule of statutory construction is that general and specific statutes should be read together and harmonized, if possible, and that the specific statute will prevail over the general only to the extent that there is conflict between them. There is no dispute as to whether the specific provisions of the Robinson-Patman Act are controlling insofar as they specifically prohibit certain practices. There is nothing in the Act itself, however, which conflicts with the Commission's broad authority under Section 5 to define and proceed against practices which it deems to be unfair, including those which may come within the periphery of the later Act, although not within its letter."

The majority, however, was not content with this statutory interpretation which, in my opinion, would in itself have been a rational reading of congressional intention for harmonizing section 5 and the jurisdictional defect in 2 (f) as applied to 2 (d). Instead the majority used the occasion for arriving at a sustainable result on the facts of the case by announcing a rationale with a much deeper potential thrust.

⁶¹ In footnote 14 of the majority opinion of Mr. Justice Frankfurter in *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1952), the Court said regarding its interpretation of the ambiguous language of § 2 (f): "We of course do not, in so reading 2 (f), purport to pass on the question whether a 'discrimination in price' includes the prohibitions in such other sections of the Act as §§ 2 (d) and 2 (e)."

It might be argued that in cases like *Grand Union* the Commission should have tested this issue by an administrative interpretation that § 2 (f) includes 2 (d) and 2 (e). We believe that where alternative constructions are fairly open (*cf. Automatic Canteen, supra*), the Commission has discretion to interpret 2 (f) as limited to price discrimination under 2 (a). In any event, the proper interpretation of congressional intention is ultimately for the Supreme Court to decide and *Grand Union* itself would offer an occasion for such a test case.

The majority opinion reviews the legislative history of the Robinson-Patman Act to demonstrate that one primary evil Congress sought to curb was the use of mass purchasing power of large buyers to induce discriminatory promotional concessions from suppliers. Commissioner Secrest then concluded:

"We think that the most that can be said on this point from the legislative history and from a reading of the Act itself is that the practice charged in the complaint is not specifically prohibited by the Act. Certainly it cannot be inferred from this fact that Congress countenanced a practice which so clearly violates *the spirit of the statute*.

"... it is our opinion that it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate *the spirit of the amended Act*." (Emphasis supplied.)

The words "the spirit of the statute" in part caused dissenting Commissioner Tait to say that he was "fearful of the implications of what it [the majority opinion] says." This is understandable and a timely warning that may prove to be prophetic if, in future section 5 cases, the Commission majority chases spirits instead of dealing with substance in supplementing the Robinson-Patman Act where the alleged omissions are not so clearly the flesh and blood of a Robinson-Patman type of violation as in *Grand Union*.⁶²

The issue in *Grand Union* on its particular record could have been resolved without ambiguous and disturbing language in the majority opinion if it had been limited to the ground that congressional omission of 2 (d) coverage in 2 (f) was inadvertent rather

⁶² Commissioner Tait, however, fears that "thousands of businessmen must first determine if the business practice is legal under the Robinson-Patman Act. Then they must also determine whether the practice is legal under a vague standard, herein stated to be 'the spirit of the amended Act.' I am in vigorous disagreement with an approach to the law which has too much sail and too little anchor, or too much supplement and too little bolster."

This fear would be justified if, unlike the particular facts of *Grand Union*, the practice is not the equivalent of the type prohibited by the Clayton Act. As stated *infra* in the principles suggested for this category of cases, absent this economically equivalent practice, businessmen would not be able to equate the business practice with the Robinson-Patman Act type of prohibition. If the Commission, in future cases under § 5, should fail to observe the limitations on § 5 jurisdiction, the reasonable definiteness in the complaint pleadings, and the proof requirements, all applicable to a § 5 proceeding based on a jurisdictional defect in omission of a prohibition equivalent to those in the Clayton Act, Commissioner Tait's apprehension will prove to be well founded. Certainly Congress did not intend, as Commissioner Tait contends, that "Any alleged gaps which may appear in the Clayton Act provisions . . . will not require legislation; the Commission merely has to declare them contrary to the spirit of the Clayton Act."

than deliberate, in other words, a *casus omissus*.⁶³ This was articulated in the opinion of Hearing Examiner Lewis accompanying his Initial Decision which the majority adopted. The majority noted this as a plausible argument advanced by counsel in support of the complaint, citing the late Charles Wesley Dunn, who took part in drafting the section.⁶⁴

In that context *Grand Union* does not stray from the orbit of the guides suggested below in this paper for reconciling section 5 and jurisdictional defects in the Robinson-Patman Act. It is arguable, of course, that what Congress has omitted even by inadvertence in one statute cannot be supplied in another statute, even when they are construed together as covering the same kind of subject matter. On this point, the *Grand Union* majority view of the Commission is preferable. No conflict between section 5 and 2 (d) of the Robinson-Patman Act results from the majority decision. Business counsel should have no difficulty equating the *Grand Union* practice with that covered in 2 (d).

With respect to the burden of proof of knowing inducement and receipt of discriminatory promotional allowances, the majority opinion in *Grand Union* holds that the Hearing Examiner's findings were supported by substantial evidence. *Automatic Canteen's* "rule of convenience" for apportioning the burden or producing evidence on this issue of the buyer's knowledge was applied.⁶⁵ Similarly, on other aspects, the *Grand Union* majority opinion is

⁶³ On the principles of statutory interpretation relevant to omissions in a statute, see CRAWFORD, CONSTRUCTION OF STATUTES § 169 (1940); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4924 (3d ed. 1943).

⁶⁴ Dunn, *Section 2(d) and (e)*, 1946 CCH ROBINSON-PATMAN ACT SYMPOSIUM 55 (N.Y. State Bar Ass'n).

⁶⁵ In his Initial Decision opinion, Hearing Examiner Lewis applied the *Automatic Canteen* principles regarding the burden of proof, saying:

"While there may be some question as to whether the Court's holding in that case with respect to the Government's burden of going forward with the evidence should be applied here in view of the manifest difference between expecting a buyer to know his seller's costs and expecting him to know whether his seller has made similar payments available to other buyers, the hearing examiner will nevertheless regard the rule in that case as being applicable here."

But in *Food Fair Stores, Inc.*, F.T.C. Dkt. 6458 (1957), in denying the respondent's motion to dismiss, Hearing Examiner Hier ruled that *Automatic Canteen* was not applicable to cases involving buyer inducement or receipt of discriminatory allowances. Balance of convenience, he stated, was not pertinent when, as contrasted with cost justification issues, a simple inquiry by the buyer addressed to his supplier, or, if necessary, a subpoena duces tecum, would disclose from the supplier's records the essential information regarding allowances. Even if this difference is conceded, it overlooks the risk entailed of impairment of competition and of arm's-length bargaining. Hearing Examiner Lewis' position on this point, followed by the majority in *Grand Union*, is more consistent with adaptation of *Automatic Canteen* to national antitrust policy.

in the tenor of and cites precedents under the Robinson-Patman Act.

Commissioner Tait's dissenting opinion also expresses concern that the majority decision makes *per se* illegal under section 5 a buyer's knowing inducement or receipt of allowances not proscribed by 2 (d). This, he said, "legislates a new antitrust prohibition" and "is beyond the authority of the Commission."

The majority opinion, however, as applied in the *Grand Union* record does not appear to open the door to an overall *per se* violation approach to section 5. There is nothing in the majority opinion that implies a backing away from the Commission's burden of proving substantial injury to competition, as exemplified in the *Shell* and *Socony Mobil* cases discussed in another part of this paper.⁶⁶

Having construed 2 (f) as not applicable to 2 (d), and having further decided there is no conflict in statutory policies in equating the *Grand Union* practice under section 5 with 2 (d), the Commission majority chose to apply the *per se* violation doctrine as the alternative best designed to harmonize the two statutes, instead of creating a conflict by requiring proof of substantial adverse effects on competition. Here again this should come as no surprise to business counsel inured to the *per se* violation approach applied not only to 2 (d) but to 2 (c) and (e) as well, as the Supreme Court has declared to be in accord with congressional intention.

This writer has inveighed against enlargement of the *per se* violation approach under the Sherman Act and the Robinson-Patman Act⁶⁷ and would be among the first to protest its expansion under section 5 of the Federal Trade Commission Act. In *Grand Union*, however, the Commission could hardly be expected to ignore Supreme Court rulings when its section 5 jurisdiction, so far as the facts of *Grand Union* are concerned, is based on an identical twin of a 2 (d) species the Commission believed to be omitted from 2 (f). As stated earlier in this paper, congressional amendment is needed if this *per se* approach is to be converted into a Rule of Reason inquiry into the competitive effects of 2 (c), 2 (d) and 2 (e) Robinson-Patman Act practices.

⁶⁶ See also § 5 proceedings in Roux Distributing Co., F.T.C. Dkt. 6636 (1959) and Columbus Coated Fabrics Corp., F.T.C. Dkt. 6677 (1959) and my comments thereon, 15 A.B.A. ANTITRUST SECTION REP. 47-49 (1959).

⁶⁷ Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

It nevertheless behooves the Commission to be mindful of the reservations expressed by dissenting Commissioner Tait.⁶⁸ Apart from the question of their relevance to *Grand Union*, Commissioner Tait's dissenting opinion serves notice on his colleagues that the Commission's own sense of self-restraint may become an

⁶⁸ One issue of paramount importance still needs clarification by the Supreme Court. As shown in the quoted passage from *Motion Picture Advertising*, *supra* note 13, Supreme Court dicta state that the Federal Trade Commission Act was designed to supplement and bolster the Sherman and Clayton Acts, including the application of the incipency violation doctrine to both statutes. This is an ambiguous statement and may portend an unwarranted scope of § 5 beyond congressional intention.

As shown in this and other parts of this paper, my position is that § 5 clearly supplements the Sherman Act. It also supplements the Clayton Act but only when § 5 is used to reach transactions and practices *economically equivalent* to those particularized by the Clayton Act but not within its coverage because of a jurisdictional deficiency. Section 5, however, does *not* supplement the Clayton Act when the practices are within the coverage of the Clayton Act. Resort to § 5 in such instances would constitute a substitution of § 5 for the statutory standards and tests of violation Congress prescribed and specified in the Clayton Act. Thus, the Clayton Act supplements § 5 but the broad proposition that § 5 supplements the Clayton Act is in conflict with congressional intention.

Construing the three statutes *in pari materia* requires that they be harmonized as a body of antitrust laws directed toward the maintenance of effective competition. It does not follow, however, that Congress was indifferent to the differentiation in jurisdiction, statutory standards and tests of violation in the several statutes.

The hard fact is that in 1914 Congress enacted two statutes. The Federal Trade Commission Act became law on September 26, 1914 and the Clayton Act took effect on October 15, 1914. Legislative history supports the conclusion that Congress intended the Commission to proceed solely under the Clayton Act against transactions and practices specifically covered thereby. At one critical stage, the Senate amended the proposed Clayton Act by striking out the sections on price discrimination and exclusive dealing and tying clauses on the theory they were already covered under § 5 of the Federal Trade Commission Act. 51 CONG. REC. 13849 (1914). Had these excisions been made, § 5 would have been broad enough to cover the specified practices. The Conference Committee, however, restored the specific Clayton Act provisions which later were enacted as §§ 2 and 3 of the Clayton Act of 1914. See S. Doc. No. 585, 63d Cong., 2d Sess. (1914) on H.R. 15657 and 51 CONG. REC. 15828-29, 16147, 16154, 16264, 16273 (1914).

Similar specifications were made with respect to the merger transactions in the 1914 § 7 of the Clayton Act and in the 1950 amendment thereto. Another parallel is found in the additional specifications of the 1936 Robinson-Patman Act amending § 2 of the 1914 Clayton Act. The legislative history of original § 7 [see HENDERSON, *THE FEDERAL TRADE COMMISSION*, ch. I (1924)], and amended § 7 [see my *FEDERAL ANTITRUST LAWS*, chs. 10 and 11 (2d ed. 1959)] and of the Robinson-Patman Act [see ROWE, *Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COL. L. REV. 1059 (1957)], substantiate that § 5 was not intended to be used as an alternate to reach what is specifically within the coverage of those Clayton Act provisions.

When these statutes are construed *in pari materia* in the light of the foregoing legislative history, the dicta of *Motion Picture Advertising* do not support the generalization that § 5 supplements the Clayton Act. Only when there is an omission from the Clayton Act of economically-equivalent transactions or practices is it proper to say that § 5 supplements the Clayton Act without creating a conflict between them.

The reader can trace the origin and repetition of the confusing dicta in *Motion Picture Advertising* in the following cases: *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

important safety valve against propensity for excessive claims of section 5 jurisdiction.⁶⁹

*C. Section 5 in Relation to Jurisdictional Deficiencies
in Section 3 of the Clayton Act*

In several recent section 5 cases,⁷⁰ the complaints alleged practices that in the aggregate or severally went beyond the transactions of lease, sale, or contract for sale specified in section 3 of the Clayton Act. In the *Shell Oil* and *Socony Mobil Oil* car dealer cases, the respondents were charged with furnishing lubrication equipment on loan as well as on lease or sale. Beyond section 3's transactions were also charges of making gifts of cash, equipment or facilities and of furnishing customer benefits such as construction, painting and paving. All of these were charged to be on condition that the recipient would handle the oil company's lubrication oil and greases preferentially.

In the *Ice Cream* cases the section 5 complaints also included transactions beyond section 3's ambit in coverage of transactions or practices. Furnishing of equipment without sale or lease, finan-

⁶⁹ In another class of cases the Commission has issued complaints with separate counts alleging violation of § 5 and specified sections of the Robinson-Patman Act. The suggested guides for these cases are summarized in the text of this article, *infra*. The illustrative cases cited below classify as follows:

(1) *Section 5 and Section 2(a) of the Robinson-Patman Act*: Grove Laboratories, Inc., F.T.C. Dkt. 6743 (1957) (consent settlement); Oxford Filing Supply Co., F.T.C. Dkt. (1958) (consent settlement); Maguire Industries, F.T.C. Dkt. 7090 (1958) (consent settlement); Sun Oil Co., F.T.C. Dkt. 6641 (1959) (final order and opinion of Commission) pending on appeal in the Fifth Circuit; Texas Co., F.T.C. Dkt. 6898 (1959); Southwestern Sugar & Molasses Co., F.T.C. Dkt. 7463 (1959); Dayton Rubber Co., F.T.C. Dkt. 7604 (1960); Northeast Capital Corp., F.T.C. Dkt. 7727 (1960) (consent settlement); Lloyd A. Fry Roofing Co., F.T.C. Dkt. 7908 (1960); Celotex Corp., F.T.C. Dkt. 7907 (1960); Logan-Long Co., F.T.C. Dkt. 7906 (1960).

(2) *Section 5 and Section 2(d) or 2(e) of the Robinson-Patman Act*: Knomark Mfg. Co., F.T.C. Dkt. 6264 (1955) (consent settlement); Dolcin Corp., F.T.C. Dkt. 6569 (1956) (consent settlement); Trifari, Krussman & Fischel, Inc., F.T.C. Dkt. 7119 (1958) (consent settlement); Longines-Wittnauer Watch Co., F.T.C. Dkt. 7117 (1958) (consent settlement); Keystone Mfg. Co., F.T.C. Dkt. 7118 (1958) (consent settlement); Marlun Mfg. Co., F.T.C. Dkt. 7516 (1959); Nibco, Inc., F.T.C. Dkt. 8074 (1960).

In *Fred Meyer, Inc.*, F.T.C. Dkt. 7492 (1959), the complaint alleges in Count I violation of § 2(f) (knowing inducement of discriminatory prices) and in Count II violation of § 5 (knowing inducement of discriminatory allowances).

⁷⁰ *Shell Oil Co.*, F.T.C. Dkt. 7044 (1959); *Socony Mobil Oil Co.*, F.T.C. Dkt. 6915 (1960); *Carnation Co.*, F.T.C. Dkts. 6172-6179 and 6425 (1959).

In *Motion Picture Advertising Service*, *supra* note 3, the jurisdictional shortcoming arose from the nature of the contracts. The court of appeals ruled they were agency relationships and hence not within § 3, citing *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568 (1923). Justice Douglas held that *Curtis* was not relevant because § 3 was not involved. In its Brief at p. 25 the Commission confessed doubts whether the transaction was a sale or lease of the advertising films and hence resorted to § 5.

cial assistance in money loans, performing or furnishing various type of services, and the granting of various discounts, rebates and allowances were alleged. Some of these practices may be within the Robinson-Patman Act but all were alleged in the amended section 5 complaints to be expressly or impliedly conditioned on exclusive dealing.⁷¹

Strictly from the standpoint of jurisdiction, it must be conceded that in the *Shell* and *Socony Mobil* cases, where the Initial Decisions of the Hearing Examiner dismissing the complaints were adopted by the Commission, and in the *Ice Cream* cases where the Commission recently remanded them to the Hearing Examiner, jurisdiction under section 5 was based on the theory that it encompasses practices of the type prohibited by, but not technically within, section 3. In all three cases the practices were considered on the theory that the complaints under section 5 attacked exclusive or preferential dealing parallel or comparable to practices within section 3 of the Clayton Act.⁷²

The Commission's affirmance of the dismissal of the complaints in *Shell* and *Socony Mobil* approves the extended Rule of Reason inquiry the Hearing Examiner in each of those cases made in resolving the issues. In both cases the dismissals were based on failure of counsel supporting the complaint to produce reliable, probative and substantial evidence of reasonable probability of substantial injury to competition resulting from the alleged exclusive arrangement.⁷³ This has the merit of applying to a section 5 pro-

⁷¹ The original complaints charged respondents with illegal practices only when used in connection with "switch" accounts, namely, those used to induce a dealer handling competitive products to "switch" to a respondent. The amended complaints were broadened to include new and retained accounts and only when the practices in question were used to induce exclusive dealing. The Initial Decision ordered dismissal of the complaint. On appeal, the Commission remanded the cases to the Hearing Examiner with a direction to receive further evidence. See note 73 *infra*.

⁷² In *Shell Oil* the Commission's decision upholding the Hearing Examiner's dismissal of the complaint deleted the finding that nothing in the contract prohibited the car dealers from buying from competitors and substituted the following: "Even so, the agreements, many of which are 90% requirement contracts, on their face indicate the possibility of a restriction of the market. There is, however, no direct evidence in this record to establish the probability of the required competitive injury."

⁷³ Among the factors considered and the facts found by the Hearing Examiners were these: there was no foreclosure of competitors from selling to car dealer customers; competitors did not suffer loss of business as a result of the alleged practices; certain competitors who lost accounts to respondent also took accounts from respondent; after the peak year 1955 there was a decline in new car sales and car dealers; certain competitors showed an increase in business in recent years; the size and financial resources of respondent do not in themselves justify inferences of illegality. In *Socony Mobil*, Hearing Examiner Piper additionally stressed that counsel in support of the complaint appeared to

ceeding a Rule of Reason similar to that applied by the Commission under section 3 in *Maico* which, at that time, gave the Commission an escape hatch from the constricted *Standard Stations* test of violation applied to section 3. *Tampa Electric*, as our previous analysis of the Supreme Court's opinion in that case shows, should restore the *Maico* approach in the Commission's adjudications under section 3. So far as section 5 is used to challenge practices corresponding to but technically beyond those comprehended under section 3, *Shell* and *Socony* tend to foster harmonization of those sections in a manner that holds greater promise than adherence to narrow interpretation of the *Standard Stations* rationale in section 3 cases.⁷⁴

contend that competing successfully is an unfair method of competition. "Such a contention," the Hearing Examiner observed, "is, of course, the antithesis of the Sherman Act. . . ." He also rejected the contention that lessening of competition in the Clayton Act sense can be proved merely by showing that the market shares of some competitors have been reduced. He relied heavily upon *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923), which he said was stronger on its facts than *Socony*, in concluding there was no violation of § 5.

In the *Ice Cream* cases, Hearing Examiner Lewis, in a lengthy opinion meticulously reviewing the evidence and analyzing the applicable law, qualitatively evaluated the competitive effects of the practices. He did not find it necessary to determine whether there is any valid distinction between the scope of inquiry under the injury to competition test applicable to § 3 and that applicable to § 5. He pointed out that counsel in support of the complaint had not presented the case "in the narrow frame of reference of the 'quantitative substantiality' test of a Section 3 Clayton Act proceeding" but added that there was no record basis for deciding the question of competitive injury "in terms of the somewhat mechanical quantitative substantiality test." At any rate he concluded that the record failed to establish that "there has been any substantial injury to competition by reason of" respondents' practices.

On March 24, 1961, the Commission remanded these Ice Cream cases to Hearing Examiner Lewis with a direction to receive "such further evidence as may be offered for the purpose of showing, for some reasonable time, the extent to which requirements contracts, 'trade agreements' or other exclusive dealing agreements have been used by the various respondents, their subsidiaries and affiliates in connection with, or ancillary to, the sale of ice cream and other frozen products, the identity and location of the customers with whom such arrangements have been negotiated, and the quantities and dollar volumes of the products which have been involved in the transactions." The Commission said that an informed disposition of the appeal requires an appraisal of all aspects of the competitive effects of the challenged practices.

See also complaint in *Swift & Co.*, F.T.C. Dkt. 8304 (1961).

⁷⁴In another class of cases the Commission has issued complaints with separate counts alleging violation of § 5 and § 3 of the Clayton Act. The suggested guides for these cases are summarized in the text of this article, *infra*. Illustrative are: *Fuelgas Corp.*, F.T.C. Dkt. 6362 (1955) (consent settlement); *Murray Space Shoe Corp.*, F.T.C. Dkt. 7476 (1959); *Rayco Mfg. Co.*, F.T.C. Dkt. 7734 (1960) (consent settlement); *J. R. Prentice*, F.T.C. Dkt. 7450 (1960); *Int'l Staple & Machine Co.*, F.T.C. Dkt. 8083 (1960). See *Mytinger & Casselberry, Inc.*, F.T.C. Dkt. 6962 (1960). Cf. *Brown Shoe Co.*, F.T.C. Dkt. 7606 (1959). Cf. *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923) and *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923), where the Commission's orders under § 5 were set aside and where the practices under the additional count charging violation of § 3 of the Clayton Act were held not to be within the coverage of § 3.

D. *Section 5 in Relation to Jurisdictional Deficiencies Under Amended Section 7 of Clayton Act and Combined Section 5-Section 7 Proceedings*

Complaints in another group of Commission proceedings combine in one⁷⁵ or in several⁷⁶ counts charges of violation of both

⁷⁵ Barbara Burt assisted me on this topic.

Foremost Dairies, Inc., F.T.C. Dkt. 6495 (1956) (see *infra* for later developments); Scott Paper Co., F.T.C. Dkt. 6559 (1956) (see *infra* for later developments); National Dairy Products Corp., F.T.C. Dkt. 6651 (1956); The Borden Co., F.T.C. Dkt. 6652 (1956); Beatrice Foods Co., F.T.C. Dkt. 6653 (1956); National Tea Co., F.T.C. Dkt. 7453 (1959); The Kroger Co., F.T.C. Dkt. 7464 (1959); and Crane Co., F.T.C. Docket 7833 (1960).

In *Foremost Dairies*, *supra*, the Hearing Examiner's Initial Decision ruled that § 7 had been violated but also ruled that the Commission has no authority under § 5 to proceed against acquisitions alleged in the complaint as means of "the constant and systematic elimination of actual and potential competitors." Some of the acquisitions alleged were of unincorporated firms and included asset acquisitions prior to the amendment of § 7 in 1950. The complaint did not allege any specific unlawful acts beyond the acquisitions. The Hearing Examiner's opinion relied heavily upon prior cases dealing with the Commission's power to order a divestiture under § 5, a remedy denied by the majority of the Supreme Court (Justices Stone and Brandeis dissenting) in *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927). Admittedly, as the Hearing Examiner properly stressed, the Commission's powers under § 5 are limited to those granted by the Federal Trade Commission Act. The Hearing Examiner's opinion in *Foremost*, however, does not deny that the Commission could enter an order under § 5 restricted to enjoining unfair methods or practices. But the question of the Commission's power as to remedies under § 5 is not necessarily the same as the question of the scope of the Commission's jurisdiction under § 5. At any rate, the Hearing Examiner's conclusion in *Foremost* appears to be in conflict with the earlier interlocutory ruling of the Commission in the same case. See note 50 *supra* and my caveats in the text of this paper *supra*, which recognize the still unresolved perplexities in determining when the § 5 charge is improperly being used as a substitute for attacking acquisitions covered by § 7. Is § 5 being used to reach transactions economically equivalent to acquisitions embraced in § 7 but where the technical deficiency under § 7 nevertheless does not bar resort to § 5 on the ground that § 7 and § 5 may be construed *in pari materia* in harmony with congressional intention?

In *Scott Paper*, *supra*, the Hearing Examiner dismissed the complaint. The Commission set aside the Initial Decision and found that the acquisitions violated § 7. The charges under § 5, however, were dismissed. The complaint had alleged that respondent's constant and continuous acquisitions of companies engaged in the paper and pulp manufacturing industry and their conversion to the manufacture of sanitary paper produced by Scott, the dominant maker of such products, violated § 5. These charges were held to lack adequate support in the record. It should be noted that nothing in the Commission's findings of fact and conclusions questions the Commission's authority to use § 5 to reach practices not technically within the scope of § 7. This further indicates the Commission still adheres to its interlocutory ruling in *Foremost Dairies* and to that extent the Hearing Examiner's Initial Decision on that issue seems in conflict with the Commission's position. An appeal to the Commission in *Foremost* may throw further light on this difference of view. Note also the view expressed by me *supra* in questioning the extension of the *Grand Union* rationale regarding the scope of § 5 to practices either not economically equivalent to those covered by the Clayton Act or where filling a gap attributed to a jurisdictional deficiency is contrary to congressional intention.

⁷⁶ Luria Brothers and Co., F.T.C. Dkt. 6156 (1954); Union Bag and Paper Corp., F.T.C. Dkt. 6391 (1956) [consent settlement order affirmed by Commission (1961)]; Fruehauf Trailer Co., F.T.C. Dkt. 6608 (1956); Dresser Industries, Inc., F.T.C. Dkt. 7095 (1958); National Lead Co., F.T.C. Dkt. 7096 (1958); and Continental Baking Co., F.T.C. Dkt. 7880 (1960).

amended section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act. In seven of fourteen such combined complaints the lack of section 7 jurisdiction over either unincorporated firms⁷⁷ or asset acquisitions prior to the 1950 amendment of section 7⁷⁸ explains in part resort to section 5.

In other combined section 5-section 7 complaints the use of section 5 appears to be based on respondent's commission of unlawful practices other than the challenged acquisitions. In half of the fourteen combined complaints there are allegations that such additional specific practices transgress section 5.⁷⁹ Many of these additional practices, however, fall within the prohibitions of either the Robinson-Patman Act⁸⁰ or sections 3⁸¹ and 8⁸² of the Clayton Act. Others seem to constitute charges of incipient or full-blown Sherman Act offenses.⁸³ Finally, there are allegations of several types of unlawful practices which do not appear to be within any of the conventional wrongs covered by the Sherman or Clayton Acts.⁸⁴

In seven of the combined section 5-section 7 complaints the Commission has not alleged any specific unlawful acts in addition to the acquisitions.⁸⁵ However, there are indications that the Commission may be using the respondent's intent as a factor for bringing the acquisitions within its section 5 jurisdiction. Allegations in these seven complaints range from "acquisition for the purpose

⁷⁷ See *Foremost Dairies, Inc., National Dairy Products Corp., The Borden Co., Beatrice Foods Co.*, *supra* note 75; *Dresser Industries, Inc., National Lead Co.*, *supra* note 76.

⁷⁸ *Foremost Dairies, Inc., and The Kroger Co.*, *supra* note 75.

⁷⁹ See *Luria Brothers and Co., Union Bag and Paper Corp., Fruehauf Trailer Co., Continental Baking Co.*, *supra* note 76; *National Dairy Products Corp., The Borden Co., Beatrice Foods Co.*, *supra* note 75.

⁸⁰ See *National Dairy Products Corp., The Borden Co., Beatrice Foods Co.*, *supra* note 75, and *Continental Baking Co.*, *supra* note 76. Cf. *Fruehauf Trailer Co.*, *supra* note 76.

⁸¹ Cf. *Fruehauf Trailer Co.*, *supra* note 76.

⁸² *Union Bag and Paper Corp.*, *supra* note 76.

⁸³ See especially *Luria Brothers and Co.* and *Union Bag and Paper Corp.*, *supra* note 76. Also see weaker allegations in *Fruehauf Trailer Co.*, *supra* note 76; *National Dairy Products Corp., The Borden Co., Beatrice Foods Co.*, *supra* note 75, and *Continental Baking Co.*, *supra* note 76.

⁸⁴ See especially *National Dairy Products Corp., The Borden Co., and Beatrice Foods Co.*, *supra* note 75 (making loans of equipment and non-interest-bearing loans of money, selling equipment below market value, providing free services and gifts of money, making large advertising expenditures and hiring key employees of acquired competitors). Also see *Luria Brothers and Co.* (monetary loans to induce exclusive dealing), *Fruehauf Trailer Co.* (granting special financing and lease terms and providing favorable prices and other terms to induce substantially exclusive dealing), and *Continental Baking Co.* (cash payments for preferred display space), *supra* note 76.

⁸⁵ *Foremost Dairies, Inc., Scott Paper Co., Dresser Industries, Inc., National Tea Co., The Kroger Co., Crane Co.*, *supra* note 75, and *National Lead Co.*, *supra* note 76.

or with the effect of substantially lessening competition”⁸⁶ through “systematic elimination of competitors by acquisition,”⁸⁷ “a policy of expansion by acquisition,”⁸⁸ and “constant and continuous acquisition”⁸⁹ to the general statement that “the acquisitions tend substantially to lessen competition.”⁹⁰

There are factors or allegations supporting the Commission’s use of a section 5 attack upon acquisitions in eleven of the fourteen combined-charge complaints. In three cases⁹¹ there existed both jurisdictional defects barring section 7 action against part of the acquisitions and also specific additional practices as plus factors for the section 5 charge. In four complaints⁹² there were no jurisdictional defects as to any of the acquisitions but there were plus-factor practices for section 5, while in another four⁹³ there were no plus factors but there were acquisitions outside the Commission’s section 7 jurisdiction.

In three complaints⁹⁴ where the only apparent basis for a section 5 charge was the fact that the respondent had made a series of acquisitions, the Commission’s use of section 5 seems unauthorized. Since these complaints do not indicate the existence of any plus-factor practices or section 7 jurisdictional defects, the Commission appears to be treating section 5 as an alternative to section 7 for the condemnation of corporate acquisitions.⁹⁵ This “alternative jurisdiction” approach is also reflected in the fact that in some of the combined-charge complaints the corporate acquisitions challenged under section 7 were also questioned along with the non-corporate acquisitions in the section 5 allegations.⁹⁶

⁸⁶ Dresser Industries, Inc., and National Lead Co., *supra* note 76.

⁸⁷ Foremost Dairies, Inc., *supra* note 75.

⁸⁸ National Tea Co. and The Kroger Co., *supra* note 75.

⁸⁹ Scott Paper Co., *supra* note 75.

⁹⁰ Crane Co., *supra* note 75.

⁹¹ National Dairy Products Corp., The Borden Co. and Beatrice Foods Co., *supra* note 75.

⁹² Luria Brothers and Co., Union Bag and Paper Corp., Fruehauf Trailer Co. and Continental Baking Co., *supra* note 76. See also recent complaint in Campbell Taggart Associated Bakeries, Inc., F.T.C. Dkt. 7938 (1960).

⁹³ Foremost Dairies, Inc., *supra* note 75, Dresser Industries, Inc., National Lead Co., *supra* note 76, and The Kroger Co., *supra* note 75.

⁹⁴ Scott Paper Co., National Tea Co. and Crane Co., *supra* note 75.

⁹⁵ See also Hearing Examiner Pack’s indication in his Initial Decision dismissing the complaint in Scott Paper Co., *supra* note 75, January 13, 1960, that he could automatically determine whether or not there was a § 5 offense by determining whether § 7 had been violated.

⁹⁶ It should be noted that we are concerned here only with questions of jurisdiction. We do not explore the extent of the relief available to the Commission in litigated or consent settlement orders under § 5 as against amended § 7 or 11 of the Clayton Act. It is recognized that questions regarding the efficacy of § 5 would arise if the Commission should confine its complaint to an attack upon acquisitions of unincorporated firms with-

E. *Summary of Suggested Guides for Harmonizing Section 5 With the Clayton Act in Jurisdictional Deficiency and Combined Section 5 and Clayton Act Cases*

The following guides are suggested for the types of cases (a) where the Commission resorts solely to section 5 because of a jurisdictional deficiency arising from an omission of a transaction or practice not within the coverage of a Clayton Act provision; and (b) where the Commission combines in one proceeding section 5 and Clayton Act charges. We have previously suggested guides for section 5 cases covering only charges of conventional Sherman Act offenses⁹⁷ and cases involving only charges of violation of offenses clearly within the coverage of the Clayton Act provisions.⁹⁸

First, the Commission should proceed against transactions or practices *covered* by the specific provisions of the Clayton Act only under the relevant provisions of that statute. In such cases, proof under the particular Clayton Act count should be governed by the statutory standards and tests of violation applicable to that count.

Second, a section 5 count may be invoked when the transaction or practice is *equivalent* to that within the coverage of the Clayton Act but a jurisdictional deficiency bars resort to the Clayton Act. In such instances, the Commission should sustain the burden of proving violation in accordance with the statutory standards and tests of violation applicable to the particular Clayton Act provision to which the jurisdictional deficiency is pertinent.⁹⁹

out allegations of unlawful practices in addition thereto and should then order divestiture of the acquired stock or assets. Cf. *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927); *FTC v. Western Meat Co.*, 272 U.S. 554 (1926). See further, note 75 *supra*.

Compare the consent settlement orders in cases where the complaints charged only violation of amended § 7 and involving one key acquisition. *International Paper Co.*, F.T.C. Dkt. 6676 (1957); *Automatic Canteen Co. of America*, F.T.C. Dkt. 6820 (1958); *Diamond Crystal Salt Co.*, F.T.C. Dkt. 7323 (1960).

In considering enforcement aspects, it should be noted that Public Law 86-107, July 23, 1959, giving automatic finality, subject to judicial review, to the Commission's orders to cease and desist under the Clayton Act as in the case of § 5 orders, negates one previous advantage of resorting to § 5. Howrey, *supra* note 2, at 184. But a retroactive interpretation of the 1959 amendment to Commission orders entered prior thereto was invalidated in *Sperry Rand Corp. v. FTC*, 1961 Trade Cas. ¶ 69,920 (D.C. Cir. 1961); *Schick, Inc. v. FTC*, 1961 Trade Cas. ¶ 69,921 (D.C. Cir. 1961); *FTC v. Nash-Finch Co.*, 1961 Trade Cas. ¶ 69,929 (D.C. Cir. 1961). See Simon, *The Retroactivity of Amended Section 11 of the Clayton Act*, 1960 CCH ANTITRUST LAW SYMPOSIUM 85 (N.Y. State Bar Ass'n).

⁹⁷ See "Section 5 Cases Involving Only Conventional Sherman Act Offenses," *supra*.

⁹⁸ See "Commission Cases Initiated in Complaints Solely Under Clayton Act," *supra*.

⁹⁹ We have previously noted in the text of this paper that to the extent the *per se* violation approach under 2(c), 2(d) and 2(e) of the Robinson-Patman Act is at odds with national antitrust policy, congressional amendment is required. But compare my comments on § 2(a) of the Robinson-Patman Act and § 3 and amended § 7 of the Clayton Act, *supra*.

Third, in all cases where the Commission combines in one complaint charges of violation of section 5 and any of the specific provisions of the Clayton Act, the Commission should use separate unredundant counts which identify with reasonable definiteness the particular statutory provision to which that count relates. Section 5 should not be used as a dragnet single count which fails to give the respondent adequate notice of the ground on which the Commission claims jurisdiction under section 5 as distinct from particular sections of the Clayton Act.

Fourth, since the Commission is authorized to proceed under section 5 against consummated or incipient Sherman Act types of offenses, this raises no special problem if the section 5 count identifies with reasonable definiteness the Sherman Act type charges and the Commission sustains its burden of proof according to Sherman Act substantive criteria and tests of violation.

Fifth, in no case should the Commission use section 5 as a substitute for its jurisdiction over transactions and practices specifically covered by the Clayton Act.

*F. Prohibitions of Unlawful Conduct Distinguished From
Affirmative Regulation of Lawful Conduct*

These suggested guides also make pertinent the point that the Commission has authority only to prohibit section 5 or Clayton Act offenses. It has no authority under section 5 or the Clayton Act affirmatively to regulate acts and practices not within the conduct prohibited by Congress in its respective or interlaced statutory expressions of national antitrust policy.¹⁰⁰ In *Sinclair Refining*¹⁰¹ the Supreme Court stated a guidepost that has been frequently quoted in later cases:

"The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition."

¹⁰⁰ This does not overlook the initial broad discretion of the Commission in the formulation and reach of its orders to cease and desist but the remedy must have a reasonable relation to prevention or correction of the unlawful practices found by the Commission to exist, else the courts will find an abuse of administrative discretion. See principles stated in *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *FTC v. Mandel Bros.*, 359 U.S. 385 (1959). Cf. statutory provisions for affirmative disclosure in *Mandel Brothers*, *supra*, and *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950), where the majority of the court modified the Commission order by deleting paragraphs which included affirmative requirements beyond the negative function of the Commission in preventing false advertising.

¹⁰¹ *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 475-76 (1923).

Chief Justice Stone in *Keppel*¹⁰² emphasized in similar vein that the Federal Trade Commission Act "does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men."

There is thus a vast difference between the power vested in the Commission to enforce the prohibitions in the Sherman, Federal Trade Commission and Clayton Acts and its lack of power to prescribe and regulate lawful conduct.¹⁰³

In the *Ice Cream* cases, *supra*, counsel in support of the Commission's complaints under section 5 suggested a distinction between "beneficial competition" as fair competition and "worthless competition" as unfair competition. Hearing Examiner Lewis characterized this as "a somewhat esoteric standard" and rejected it in these revealing words:

"Much of counsel's arguments with regard to 'beneficial competition' suggests that it is the function of the Commission to select from among the broad spectrum of competitive practices, having varying degrees of desirability, those which it deems most wise and beneficial. This, however, misconceives the function of the Commission. It does not 'presume to run the economic railroad.' Its function is to *prohibit* practices demonstrated to be 'unfair,' not to *prescribe* 'fair' ones."

CONCLUDING OBSERVATIONS

My suggestions to bring into harmony, where Congress has permitted, the body of the three fundamental antitrust laws, undoubtedly leave ragged edges resulting from the imperfect congressional shears. My study persuades me that thus far the Commission has *not* shown a spirit of conquest beyond the bounds of its antitrust

¹⁰² *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304, 313 (1934).

¹⁰³ Pertinent in this connection are the caveats expressed by Mr. Chief Justice Hughes, and by Mr. Justice Cardozo in his concurring opinion in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935), regarding the limitations upon the authority committed to the Commission under § 5.

Senator Cummins, a leading advocate of the Federal Trade Commission Act, said: "... if I thought that the commission which we hope to create would sit down and attempt to write out an instruction to the business men of this country as to the things they could lawfully do and the things which it would be unlawful for them to do, there is no power that could induce me to favor it." 51 CONG. REC. 12917 (1914).

Another leading proponent, Senator Walsh, said in like tenor: "We are not going to give to the trade commission the general power to regulate and prescribe rules under which the business of this country shall in the future be conducted; we propose simply to give it the power to denounce as unlawful a particular practice that is pursued by that business." 51 CONG. REC. 13317 (1914).

authority, although it may not be uniformly circumspect in resolving doubts against its jurisdiction.

In the years ahead the Commission will have the continuing responsibility of balancing its legitimate claim to a flexible section 5 antitrust coverage against a disciplined disclaimer of jurisdiction when such expansion of authority is spurious. The line between the two cannot be drawn with slide-rule certainty. Nevertheless the Commission initially, and ultimately the courts, cannot avoid the exercise of informed judgment in separating jurisdiction that is granted from jurisdiction that is arrogated.

The congressional road map of directions and intended destinations for harmonization of the major antitrust laws does not compel travel over one statutory road. It would be exaggerating the uncertainties to read the congressional antitrust map as though agencies of antitrust enforcement can decide for themselves where to go and how to get there.

A government agency like the Federal Trade Commission is not shackled with a policy of conservatism. Congress allowed for exploration of new areas within the Commission's delegated authority. But Congress did *not* grant the Commission authority for *sheer conquest*.