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FTC Proceeding Without Industrywide Enforcement: Patent Abuse of Discretion

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RECENT DEVELOPMENTS

FTC PROCEEDING WITHOUT INDUSTRYWIDE ENFORCEMENT: PATENT ABUSE OF DISCRETION

The Federal Trade Commission issued a cease and desist order under section two of the Clayton Act[1] against petitioner, a manufacturer and distributer of plumbing supplies and equipment having 5.75 per cent of the national market. The gravamen of the FTC prosecution was price discrimination in the allowing by petitioner of a ten per cent price discount on "truck load" orders of its products. Petitioner requested the FTC to stay the cease and desist order until the FTC had investigated and instituted enforcement proceedings against the entire plumbing fixture industry. Petitioner alleged that enforcement of the order would put it at a competitive disadvantage and cause it loss of business, because other firms in the industry, having larger shares of the national market, were giving discounts ranging from thirteen to eighteen per cent on similar customer orders.[2] The FTC denied the request to hold the order in abeyance, and appeal was taken to the Seventh Circuit Court of Appeals, which set aside the FTC's refusal to stay the cease and desist order and remanded the case for enforcement proceedings against the entire industry. *Held*: It is a "patent abuse of discretion" for the Federal Trade Commission to proceed solely against a single manufacturer having 5.75 per cent of the national market and engaging in discriminatory pricing practices, without a similar enforcement proceeding against manufacturers in the same industry having a larger share of the national market and engaging in equal or greater discriminatory pricing practices. *Universal-Rundle Corp. v. FTC*, 352 F.2d 831 (7th Cir. 1965).

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[1] 38 Stat. 730 (1914), as amended by Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964).

[2] Petitioner's figures were:

Firm	*Market Share*	*Price Discount*
American Radiator & Standard Sanitary Corp.	32.0%	18.0%
Kohler Co.	15.0	18.0
Eljer Division of The Murray Corp. of America	10.0	18.0
Crane Co.	9.0	18.0
Briggs Manufacturing Co.	6.0	13.0
Universal-Rundle Corp.	5.75	10.0
Rheem Manufacturing Co.	5.0	17.5

Universal-Rundle Corp. v. FTC, 352 F.2d 831, 833-34 (7th Cir. 1965).

The federal courts have recognized that to compel the FTC to enforce legal pricing practices on an industry-wide basis would render its enforcement task practically impossible.[3] Thus it has been generally held to be no defense to an FTC enforcement proceeding for an individual firm to claim that other and larger firms in the same industry were also guilty of the practice condemned,[4] or to claim that its conformance to legal pricing patterns while the remainder of the industry continued illegal pricing would cause the single firm to lose much or all of its business.[5]

The court in the principal case reasoned that, to allow the FTC to proceed solely against petitioner while the remainder of the industry, including firms with a much larger share of the national market, continued to give larger discounts than petitioner, was a "patent abuse of discretion."[6] The court stated that the Clayton Act does not require approval of sanctions against only one small violator; if the rule were otherwise, larger firms would be the real beneficiaries of FTC action due to elimination of competition. In reply to the FTC's contention that an investigation by it would interfere with a current Justice Department investigation of the plumbing fixture industry, the court held that the FTC's duty to bring action against petitioner's competitors could not be excused by its assertion that a branch of the executive department had begun an investigation.

The court's action in the principal case appears to be a complete

[3] See United States v. Wabash R.R. Co., 321 U.S. 403 (1943); United Biscuit Co. of America v. FTC, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 86 Sup. Ct. 930 (1966). See generally JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 272 (1965); MacIntyre, *Some Criteria For Applying Industrywide Enforcement Measures Under the Robinson-Patman Act*, 41 NOTRE DAME LAW. 389 (1966). *But see* RESEARCH INSTITUTE OF AMERICA DISTRIBUTION REP'T (Dec. 23, 1952).

[4] Moog Industries, Inc. v. FTC, 355 U.S. 411 (1958); United Biscuit Co. of America v. FTC, *supra* note 3; Heavenly Creations, Inc. v. FTC, 339 F.2d 7 (2d Cir.), *cert. denied*, 380 U.S. 955 (1964); Independent Directory Corp. v. FTC, 188 F.2d 468 (2d Cir. 1951); National Candy Co. v. FTC, 104 F.2d 999 (7th Cir.), *cert. denied*, 308 U.S. 610 (1939); Butterick Co. v. FTC, 4 F.2d 910 (2d Cir. 1925).

[5] *E.g.*, W.M.R. Watch Case Corp. v. FTC, 343 F.2d 302 (D.C. Cir.), *cert. denied*, 381 U.S. 936 (1965); Dictograph Products v. FTC, 217 F.2d 821 (2d Cir. 1954).

[6] Judicial review of administrative action has generally been allowed to determine whether the administrative determination has been arbitrary, capricious, or an abuse of discretion. A reviewing court considers such factors as whether the remedy selected by the administrative agency has a reasonable relation to the unlawful practice found to exist, and whether the decision was motivated by extra-statutory considerations so that enforcement of the agency order would subvert the legislative purpose. Judicial review is considered to preserve due process by providing a check on administrative discretion, insuring that administrative proceedings are fair and nondiscriminatory. See Foremost Diaries, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965); U.S. *ex rel.* Beck v. Neelly, 202 F.2d 221 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 869-70 (1963); Kramer, *The Place and Function of Judicial Review in*

reversal of its position in *United Biscuit Co. of America v. FTC*,[7] decided two months before the principal case. The court in *United Biscuit* stated:[8]

> We agree with the Commission that the compliance or noncompliance of the other companies is a separate question.... The Commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected.

The court in *United Biscuit*, relying on *Moog Industries, Inc. v. FTC*,[9] further stated, "The decision as to whether or not an order against one firm ... should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission."[10]

In an earlier case, this same court had held an FTC cease and desist order in abeyance until proceedings were instituted against the entire industry when the petitioner claimed he would be put out of business if required to comply before the remainder of the industry.[11] The Supreme Court, in reversing, stated:[12]

> [W]hether orders such as those before us should be held in abeyance until the respondent's competitors are proceeded against is for the Commission to decide.... If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a *patent abuse of discretion.* [Emphasis added.]

United Biscuit followed *Moog* in refusing to hold an FTC cease and desist order in abeyance, even though the same defense as used by petitioner in the principal case was made by the respondent. However, *United Biscuit* is factually distinguishable from both *Moog Industries* and the principal case. In *United Biscuit*, the FTC had completed proceedings against two other firms in the same industry, but petitioner wanted a cease and desist order stayed until the FTC had made certain that the other firms had complied with the orders. In *Moog*

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the Administrative Process, 28 FORDHAM L. REV. 1, 10 (1959). See generally 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 28.01-.21, 29.01-.11, 30.01-.14 (1959); JAFFE, *op. cit. supra* note 3, at 264-65, 269, 320-27, 569-75, 586-89 (1965).

[7] 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 86 Sup. Ct. 930 (1966).

[8] *Id.* at 624.

[9] 355 U.S. 411 (1958).

[10] 350 F.2d at 624.

[11] C. E. Niehoff & Co. v. FTC, 241 F.2d 37, 41-43 (7th Cir. 1957) (discussing court's power to stay an order pending industry-wide enforcement in order to protect a single firm subject to the order from collapse).

[12] 355 U.S. at 413.

and in the principal case no FTC action had been taken against other manufacturers in the same industry. Whether these factual distinctions are sufficient to explain the court's change of position in the principal case is uncertain because the court failed to mention *United Biscuit*. At the very least, it is unclear whether *United Biscuit* or *Universal-Rundle*, or both, are limited to their particular factual context.

A more significant problem arising from the court's interpretation of *Moog Industries* lies in trying to identify the necessary elements of the defense of "patent abuse of discretion." No workable standard as to what constitutes "patent abuse of discretion" is established by the principal case, on which either the FTC or a business firm may rely in future proceedings. There are many elements which may be considered: the relative size of the individual firm proceeded against, the number of firms in the industry, the amount of economic harm a particular firm will suffer if required to cease an illegal pricing practice before others are similarly prohibited, and whether the FTC knows in advance that the condemned practice is industry-wide.

In the principal case petitioner held only 5.75 per cent of the market; its activities probably did not affect many competing dealers. However, if it had controlled a larger share of the market, so that its business activities were widely felt, the FTC would have had to balance considerations of damage to competition within the industry against damage to petitioner if required to stop its discriminatory pricing practices before the rest of the industry was similarly enjoined. The petitioner's small share of the market was apparently considered decisive by the court in the principal case: "We cannot, in the name of an anti-trust prosecution, lend our support to the sacrifice of a comparatively small manufacturer, when its larger and more guilty competitors are not prosecuted."[13] How large a firm may be before it, alone, can be proceeded against is a question left unanswered. A further problem not anwered by the principal case would arise if a firm having a small share of the national market had a large share of a regional market, so that it greatly affected regional competition.

The number of firms in the industry is another element to be considered. In the principal case there were few manufacturers in the industry, so that industry-wide enforcement appeared practical to the court. If, however, there were many firms in the industry, requiring

[13] 352 F.2d at 834.

the FTC to proceed against all or none would be impractical.[14] Long and complex proceedings would be necessary before any individual firm's abuses could be prevented. While a court might sympathize with a small firm's economic position in being forced to compete at a disadvantage with the rest of the industry, to compel the FTC to proceed against every other firm before enforcing an order against the small firm would hinder the FTC's operations, perhaps forcing it to concentrate on only one industry at a time.[15] "Commission orders would be forever pending and unlawful practices rarely, if ever, corrected."[16] "The purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer, and it is in the public interest to stop any deception . . ."[17] A requirement of industry-wide enforcement often would lead to *continuation* of unfair practices on an industry-wide basis, because the resources available to large violators would enable proceedings to be delayed for many years. Industry-wide enforcement would also eliminate a present FTC practice of proceeding against one firm in order to make an example for other firms to voluntarily cease their similar illegal practices without the need of direct action against them.[18]

Another possible element of the "patent abuse of discretion" defense is the amount of economic harm that the single firm being proceeded against might suffer if required to cease a certain pricing practice while other firms in the industry were allowed to continue the practice. In the principal case no evidence of the amount of such economic harm to petitioner was presented.[19] Whether the single firm must be forced out of business before the claim of "patent abuse of discretion" may be asserted, or whether it must lose a quarter, third, or half its sales is unclear from the court's opinion. It is submitted that a firm should be able to demonstrate that it will lose at least a majority of its business before a court, reviewing an FTC cease and

[14] JAFFE, *op. cit. supra* note 3, at 272; *Hearings Before the Subcommittee on 1966 Independent Offices Appropriations of the Senate Committee on Appropriations*, 89th Cong., 1st Sess. 323 (1965) (testimony of Paul Rand Dixon, FTC Chairman).

[15] See H.R. REP. No. 2967, 84th Cong., 2d Sess. 58 (1956).

[16] United Biscuit Co. of America v. FTC, 350 F.2d 615, 624 (7th Cir. 1965).

[17] Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963). See also Tait, *Equitable Treatment of Competitors*, in *New Theories of Federal Trade Commission Enforcement*, 1960 CCH ANTITRUST LAW SYMPOSIUM 75, 77.

[18] See MacIntyre, *supra* note 3, at 393. See also Note, 72 HARV. L. REV. 129, 133 (1958).

[19] *Accord*, Clinton Watch Co. v. FTC, 291 F.2d 838, 841 (7th Cir. 1961) (refusing to hold a cease and desist order in abeyance because the petitioner failed to show that it would be substantially harmed if the other firms were allowed to continue the practice).

desist order would hold such order in abeyance because of economic hardship. If less than a majority loss was established, the public interest in stopping violations should be held to be of greater weight.

The court in the principal case held the cease and desist order in abeyance solely upon the petitioner's assertions that the discriminatory practice was industry-wide, although the FTC did not deny such allegations.[20] The Federal Trade Commission Act[21] provides that the FTC's findings of fact are conclusive if supported by substantial evidence. The court in the principal case went far beyond the FTC's record, taking as fact the assertions of petitioner. It is submitted that an order should be stayed only when a petitioner can show that the FTC actually knew of other violations by larger firms in the industry, but failed to prosecute. If the FTC is without knowledge of violations by other firms, it should not be required to hold in abeyance the proceedings against one firm until it investigates such allegations. While this practice may have an adverse economic effect on the initial firm proceeded against, the firm should not be able to obstruct the correction of its own abuses by accusations against others, however well-founded.

The court in the principal case held that a current Department of Justice investigation of the plumbing fixture industry did not excuse the FTC from delaying its action against other manufacturers in the industry. Apparently the FTC must also conduct such an industry-wide investigation once action against an individual firm has been initiated. This appears to be an unrealistic approach in light of the financial and manpower resources available to the Justice Department, as opposed to the smaller staff of the FTC,[22] which must allocate its limited resources to cover abuses in many industries. Some courts have recognized that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress,"[23] and refused to require industry-wide enforcement.

It may be argued that the FTC, if not required to proceed only on an industry-wide basis, will engage in "selective law enforcement," proceeding against only small firms because it does not have the resources necessary to attack the larger firms. Nevertheless, the FTC

[20] *Cf. Moog Industries*, 355 U.S. at 413, in which the Court stated: "[A]lthough an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact ... call for discretionary determination by the administrative agency."

[21] 38 Stat. 717, 720 (1914), 15 U.S.C. § 45c (1964).

[22] See MacIntyre, *supra* note 3, at 389; Tait, *supra* note 17, at 76.

[23] Heavenly Creations, Inc. v. FTC, 339 F.2d 7, 9 (2d Cir.), *cert. denied*, 380 U.S. 955 (1964). See also Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963).

should be allowed to prosecute smaller firms and then use the results of these cases, if favorable, against larger firms who may be less recalcitrant after the earlier successful action. As the Supreme Court stated in *Moog Industries*, "[W]hether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency."[24] The "patent abuse of discretion" defense allowed by the court in the principal case will, if generally recognized, severely limit the broad enforcement discretion previously granted the FTC.

CRIMINAL LAW: RIGHT TO COUNSEL—CRITICAL STAGE TEST IN NON-CONFESSION CASES

Defendant was arrested for driving under the influence of alcohol, a misdemeanor. After being taken to jail, his requests to call an attorney were denied in accordance with a police department regulation.[1] Defendant's counsel submitted that, if contacted, he would have ordered a chemical, blood-alcohol test administered by a physician. Convicted in police court and superior court, defendant appealed to the Washington Supreme Court, which reversed and dismissed the charges. *Held:* The time immediately following arrest for driving under the influence

[24] 355 U.S. at 413. See also Tait, *supra* note 17, at 76, 81.

[1] Tacoma Police Dep't Reg. 46, which provides: "No person charged with an offense, an element of which is intoxication, shall be denied the right of making such a telephone call after four hours have elapsed from the time of his arrest." The majority declared the Tacoma regulation to be in conflict with the mandate of WASH. REV. CODE § 9.33.020(5) (1956):

> No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats *for the purpose of exhorting from such person incriminating statements or a confession.* Any person violating the provisions of this section shall be guilty of a misdemeanor. (Emphasis added).

Judge Finley, in dissent, felt that the italicized phrase limits the section's operative effect to denials of opportunity to communicate for the purposes enumerated. 67 Wash. Dec. 2d at 747, 409 P.2d at 882. The section has only been applied previously to challenge the admissibility of confessions when defendant alleged denial of communication for the purpose of inducing incriminating statements. State v. Haynes, 58 Wn. 2d 16, 364 P.2d 935 (1961), *rev'd*, 373 U.S. 503 (1963) (reversal based in part upon § 9.33.020(5)); State v. Miller, 68 Wash. 239, 112 Pac. 1066 (1912). Nevertheless, it may be argued that the legislature intended not only to penalize coerced confession practices, but to encourage communication between prisoners, family, and counsel. This inferred policy is effectuated by the majority's assertion of conflict between the police regulation and § 9.33.020(5).