Unfairness without Deception: Recent Positions of the Federal Trade Commission

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As a result of the Supreme Court's decision in *Federal Trade Commission v. Sperry & Hutchinson Co.*, the "unfairness doctrine" has received considerable attention. Nevertheless, practical application of the doctrine has been rare and directed at extremely diverse areas of trade regulation law. This judicial hesitancy may indicate uncertainty on the part of a cautious Federal Trade Commission (FTC), but it is equally likely that the FTC is seeking to carefully develop a doctrine which not only strengthens its powers but also stays within the legislative confines of section 5 of the Federal Trade Commission Act.

This note will analyze three areas in the development of the unfairness doctrine: (1) statutory and case law background; (2) current legal applications; and (3) validity and legal utility of the doctrine as a tool of the FTC.

**HISTORICAL DEVELOPMENT**

**Statutory and Case Law Background**

Section 5 of the present Federal Trade Commission Act, as well as the FTC itself, traces its origin to the Federal Trade Commission Act of 1914. The original version of section 5 was drafted to remedy the ineffectiveness of the Sherman Antitrust Act by seeking to place some responsibility for control of anti-competitive activity in the hands of the Commission. The relevant portion of section 5 reads: "Unfair methods of competition in commerce are hereby declared unlawful."

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1. 405 U.S. 233 (1972).
5. *See* note 2 supra.
The term "unfair" was used purposefully because of its vagueness. In the House of Representatives' debate on H.R. Bill No. 15613, the House version of the 1914 Act, Representative Morgan stated:

It is well enough to prohibit certain acts—to make certain things unlawful—but we should do more than this. We should by law promulgate a rule of business morality, create a standard by which the methods and practices of industrial corporations shall be judged.7

Nevertheless, some members of Congress felt that the term had already been defined by the common law courts and that failure to further define "unfair" within the Act would either unduly restrict the power of the Commission or, in the words of Senator Reed:

[confer] upon the commission the power practically to make the law, to declare that which, in their opinion, is right to be right, and that which, in their opinion, is wrong to be wrong. Thus we will have substituted, for the Government of the people by a law of the land, the rule of the people by the opinion of three or five men.8

Despite these ominous warnings and the apparent uneasiness about the term "unfair," the bill was passed with section 5 intact.

The first serious challenge and restriction on the FTC's authority came in FTC v. Gratz.9 The case involved a practice which is now commonly called a "tying arrangement" whereby a seller refuses to sell one item without the purchase of another item. In this instance the respondent sold steel ties used for binding cotton bales, "tying" the sales of the steel ties to the concurrent purchase of jute bagging used to wrap the bales. Without further explanation the FTC labeled this practice an "unfair" method of competition and issued a cease and desist order.10 The Supreme Court, in affirming the court of appeals reversal of the Commission's order, held that since the term "unfair method of competition" was not defined within the statute,

7. 51 CONG. REC. 8856 (1914) (remarks of Representative Morgan).
8. 51 CONG. REC. 8979 (1914) (remarks of Representative Murdock).
9. 51 CONG. REC. 12023 (1914) (remarks of Senator Reed). Senator Reed argued that since the common law had already attached a meaning to "unfair competition," the new Commission would be limited in its authority to the narrow meaning ascribed to this term by the numerous cases he cited. In rebuttal, Senator Hollis maintained that even if future courts felt bound to rely on the common law definition rather than construe a colloquial or common sense meaning, there were an equal number of cases which adopted a broad definition of "unfair." 51 CONG. REC. 12148 (1914) (remarks of Senator Hollis).
11. This is the standard remedy employed by the FTC and is authorized by 15 U.S.C. § 45(b) (1970).
12. 258 F. 314 (2d Cir. 1919).
its determination was a matter of law rather than fact and, consequently, required judicial rather than administrative construction.

[The words] are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.\textsuperscript{10}

Since the tying arrangement was not one which was “heretofore regarded as opposed to good morals,” the FTC could not declare it to be one now. In essence, the Court was restricting the FTC’s role to that of fact-finder,\textsuperscript{14} and since the Commission was not authorized to develop a body of unfair practices, it would apparently be limited to regulating those practices already recognized by case or statutory law.\textsuperscript{15}

The second major restriction on the FTC’s authority to regulate unfair practices came in \textit{FTC v. Raladam Co.}\textsuperscript{16} The FTC had issued a cease and desist order against the manufacturer of an obesity cure who had represented his product as safe and scientifically developed. Despite findings of fact sufficient to support the Commission’s conclusions, the Supreme Court, affirming the court of appeals\textsuperscript{17} which had again overruled the FTC, questioned whether the manufacturer’s advertisements had any effect on competition.\textsuperscript{18} In the absence of an express finding that a competitor’s business was diverted as a result of the defendant manufacturer’s “unfair methods of competition,” the Court held that the Commission was powerless to issue a cease and desist order. Section 5 of the Act was, in the Court’s view, a law concerned with competitors and the public’s interest in free competition, and any FTC action without this concern was unauthorized.

The case which is often cited as the progenitor of the unfairness

\begin{itemize}
  \item \textsuperscript{13} 253 U.S. at 427 (1920).
  \item \textsuperscript{14} This view of the FTC as little more than a specialized trial court was continued in \textit{FTC v. Curtis Publishing Co.}, 260 U.S. 568 (1923), involving exclusive dealing contracts, and \textit{FTC v. Sinclair Refining Co.}, 261 U.S. 463 (1923), involving a nominal leasing arrangement tied to the sale of gasoline. Both cases considered section 5 of the \textit{FTC Act} and section 3 of the Clayton Act jointly.
  \item \textsuperscript{15} In his dissent, Justice Brandeis maintained that it was unnecessary for the Commission to set forth its reasons for declaring a practice unfair because it was an issue of fact which, if supported by sufficient evidence, was conclusive. 253 U.S. at 431. The determination of whether a method of competition was unfair was, in Justice Brandeis’ view, initially an \textit{administrative} decision. \textit{Id.} at 436-37.
  \item \textsuperscript{16} 283 U.S. 643 (1931).
  \item \textsuperscript{17} \textit{FTC v. Raladam Co.}, 42 F.2d 430 (6th Cir. 1930).
  \item \textsuperscript{18} 283 U.S. at 646-47. The Supreme Court defined three distinct prerequisites to the issuance of a cease and desist order: (1) that the complained methods are unfair; (2) that they are methods used in competition in commerce; and (3) that the Commission’s proceeding was in the public interest. The Court assumed the existence of the first and third requisites here.
\end{itemize}
doctrine is FTC v. R.F. Keppel & Bros.\textsuperscript{19} The respondent was a candy manufacturer engaged in the selling and distribution of package assortments of candy commonly known as "break and take" packages. The assortments were offered for sale with an element of chance involved in the purchase price. Some pieces of candy were wrapped with pennies included; others had the price tag, which varied in amount, concealed in the wrapper; and another group had concealed centers with different colors, the color determining the prize which would accompany the purchase. The FTC issued a cease and desist order against the respondent on the ground that the practice employed a lottery device which, as a form of gambling, was counter to public policy. Competitors who refused to employ such practices, for moral or other reasons, were thereby placed at a competitive disadvantage.

The Third Circuit overturned the Commission's order, since other competitors were free to use the same sales method if they wished.\textsuperscript{20} In reversing the court of appeals' decision, the Supreme Court recognized that:

Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception.\textsuperscript{21}

The Court stated that the Act had a broader purpose than regulating only those methods of competition in violation of the Sherman Act: \textsuperscript{22}

[H]ere the competitive method is shown to exploit consumers, children, who are unable to protect themselves. . . . [I]t is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. . . . It would seem a gross perversion of the normal meaning of the word which is the first criterion of statutory construction, to hold that the method is not "unfair." \textsuperscript{23}

Significantly, in upholding the Commission's order, the Court deferred to the FTC's expertise as possessing considerable weight in determining what methods of competition were unfair, being careful not to overstep the boundaries of Gratz.\textsuperscript{24} The case is important in that it

\textsuperscript{19} 291 U.S. 304 (1934).
\textsuperscript{20} 63 F.2d 81 (3d Cir. 1933).
\textsuperscript{21} 291 U.S. at 309 (emphasis added).
\textsuperscript{22} Id. at 310.
\textsuperscript{23} Id. at 313 (emphasis added).
\textsuperscript{24} The Court cautiously stated: "We do not intimate either that the statute does
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freed the term "unfair" as used in section 5 from the confines of fraud and deception and also recognized a certain amount of judicial reliance upon the FTC's determination of "unfair methods of competition." 28

The Public Interest

In addition to expanding the definition of the phrase "unfair methods of competition," early decisions also expressed an increasing concern for the "public interest" apart from the jurisdictional requirement, 26 considering the impact that these "unfair methods" would have upon the consumer as well as the competitor. In FTC v. Winsted Hosiery Co., 27 a manufacturer who sold underwear with labeling implying that the garment was all wool when in fact it was only part wool, was held to be employing deceptive and misleading acts in violation of section 5. The significance of the case lies in the fact that this labeling practice was so commonly used in the trade that the manufacturer's direct customers, the retailers, were clearly not deceived. The Court based its support of the FTC's cease and desist order on the Commission's finding that the labels were calculated to deceive and did in fact deceive a substantial portion of the public. 28

Continuing this line of reasoning, later court decisions sought to protect the public from deceptive trade names. 29 Various sales practices were deemed unfair by the Commission and the courts, not because competitors who were trained and experienced would be misled, but because the "trusting public" consisting of "teachers, doctors, college professors, club women, and business men" would be and were misled. 30

not authorize the prohibition of other and hitherto unknown methods of competition or . . . that the Commission may prohibit every unethical competitive practice . . . ." Id. at 314.
25. In Wolf v. FTC, 135 F.2d 564 (7th Cir. 1943), the court again upheld the FTC's finding of unfairness (absent fraud and deception) in another lottery arrangement involving the purchase price of various articles selected from the distributor's catalogue. These "lottery cases" have prompted an FTC Trade Regulation. 34 Fed. Reg. 218 (1969).
26. FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934). In FTC v. Klesner, 280 U.S. 19 (1929), the Supreme Court held that "the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial." Id. at 28.
27. 258 U.S. 483 (1922).
28. For a decision on similar facts involving a manufacturer of marble products, see Marietta Mfg. Co. v. FTC, 50 F.2d 641 (7th Cir. 1931).
29. FTC v. Royal Milling Co., 288 U.S. 212 (1933). The FTC found that the use of the word "Milling" in the company's name implied that the company actually milled their grain when in fact the grain was bought already milled. The Supreme Court reversed the Commission's order to suppress the use of the trade name and instead required only that qualifying language be used.
Despite this concern with the public interest, the express language of section 5 required that the FTC demonstrate some actual or potential danger to competition. Deception of the public was important only in the fact that competitors not employing the unfair practices were at a commercial disadvantage.

The Wheeler-Lea Amendment and The Emphasis On Deception

The expansion of section 5 to include concern for the consumer occurred in 1938 with the adoption of the Wheeler-Lea Amendment to the FTC Act. The amendment to section 5 made "unfair or deceptive acts or practices," as well as "unfair methods of competition," unlawful. To a large extent, the passage of the amendment was due to the Supreme Court's decision in FTC v. Raladam Co. As Senator Wheeler stated:

The object of the bill is to obviate the necessity of spending thousands of dollars . . . in running down a case to see whether or not injury [to competition] has been done.

Other legislators such as Representative Lea, felt that "the primary object [of the bill] is to protect the consumer." The House Report on the amendment concluded:

This amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

In either case, the effect of the amendment was to permit the FTC to proceed against persons who employed unfair or deceptive acts or practices in interstate commerce.

Despite the use of the disjunctive word "or" in the phrase "unfair or deceptive," courts which were called upon to construe the amendment considered the phrase as a unit. Although proof of an inten-
tion to deceive was not required under the Act, a finding of actual deception or a tendency to deceive can be found in virtually every case relying principally upon the amended portion of section 5.

Nevertheless, "proof of falsity is often the most difficult, time consuming, and expensive element of the agency's case." In order to make out a cause of action for deception under section 5, complaint counsel must show falsity by at least one of the following methods:

1. The product or service is not as effective as claimed and as understood by the hypothetical consumer at the selected intelligence level.
2. The product's performance is different from the claimed performance.
3. The claim cannot be verified.

Inherent in proof of falsity is the problem of the consumer's intelligence level. Is the consumer an ignorant, unsophisticated person who accepts all that he perceives as true, or is he a reasonably intelligent "average member of the public" who takes everything "with a grain of salt"? In considering false advertising, is the advertisement to be judged by its general impression, or is literal truth a valid defense to a charge of deception?

In addition to proving falsity or deception, the FTC may also have to contend with several defenses available to the defendants. The defendants may argue:

1. The customers with whom they deal are aware of the acts precisely as he would voice his disapproval of sin, but I should be very much more comfortable if I knew just what acts or practices we are making unlawful. . . . 80 CONG. REC. 6597 (1936).
37. Gimbel Bros. Inc. v. FTC, 116 F.2d 578 (2d Cir. 1941).
38. This is especially true in false advertising cases. See L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971); FTC v. Sterling Drug Inc., 317 F.2d 669 (2d Cir. 1963); Korber Hats Inc. v. FTC, 311 F.2d 358 (1st Cir. 1962). As a practical matter the FTC has often included the allegation of "unfair method of competition" as well as "unfair or deceptive acts or practices" in false advertising cases, since the false advertising, in addition to being misleading, may also be a prohibited method of competition. See Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919).
41. Judge Augustus Hand, in General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940), made the solemn proclamation that "if the Commission, in its discretion, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein', it is not for the courts to revise their judgment." Id. at 36.
42. Ward Laboratories Inc. v. FTC, 276 F.2d 952 (2d Cir. 1960).
43. Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1943).
44. Generally this has not been permitted. See Sebrone Co. v. FTC, 135 F.2d 676 (7th Cir. 1943); Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943).
falsity and therefore not misled or deceived. 45
(2) The challenged advertisements are merely “puffing” or opinion. 46
(3) The ads are protected forms of speech under the first amendment. 47
(4) They have no financial interest in the product being advertised. 48
(5) The challenged representation has a secondary meaning other than the one allegedly misleading, and that it is the former meaning which is commonly understood. 49

In summary, successful prosecution of a deception case under section 5 of the Act is not necessarily an easy task for the FTC. It is not surprising that recent judicial recognition of unfairness as a doctrine separate and independent from deception has been greeted by the Commission with great enthusiasm.

Recent Developments

In FTC v., Sperry & Hutchinson Co., 50 the FTC issued a cease and desist order to prohibit the Sperry & Hutchinson Company from using injunctions and threats of injunctions to prevent unauthorized exchange and redemption of its trading stamps. The FTC maintained that such tactics prevented independent promoters from dealing in the trading stamps, constituting “unfair methods of competition and unfair or deceptive acts or practices” in violation of section 5. The Court of Appeals for the Fifth Circuit reversed the Commission on the the ground that no demonstration of any antitrust violation had been made. 51 This result was not surprising since the FTC’s unfairness argument to the Court, as well as its written opinion at the administra-

45. Where a watch manufacturer used the word “ruby” to describe certain synthetic parts of his watches and the ads were addressed only to the trade and not the general public, no deception was found. Waltham Precision Instrument Co., Inc. v. FTC, 1964 Trade Cas., § 70,992, issue not raised on appeal, 327 F.2d 427 (7th Cir. 1964).
46. Carlay Co. v. FTC, 153 F.2d 493 (7th Cir. 1946); Bristol Myers v. FTC, 185 F.2d 58 (4th Cir. 1950). “Puffing” is a variable concept. “What was considered puffery twenty years ago might not be puffery today.” Statement of R. Pitofsky, Director of Bureau of Consumer Protection of the FTC, N.Y. Times, Nov. 21, 1971, § 3 at 15, col. 1.
47. See note 116 infra.
48. In Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941), the Commission was held to be without authority to issue a cease and desist order forbidding the sale of pamphlets describing the purported dangers resulting from the use of aluminum cooking utensils where the publishers had no financial interest in the cooking utensil trade, despite the fact that the pamphlets were false and misleading.
49. Although this defense has long been recognized, it has rarely been sustained. FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).
50. 405 U.S. 241 (1972).
51. Sperry & Hutchinson Co. v. FTC, 432 F.2d 146, 150-51 (5th Cir. 1970).
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tive level, rested on a classical antitrust foundation. On appeal to the
Supreme Court, the FTC shifted its argument and stated that practices
of the respondent were unfair to consumers, and as such the Commis-
sion had authority to regulate these practices regardless of their com-
petitive impact. The Court, in accepting this argument as legally
sound, considered the impact of FTC v. R.F. Keppel & Bros. and
the Wheeler-Lea Amendment as replacing the earlier perspectives of
FTC v. Gratz and FTC v. Raladam Co. The Court stated:

Thus, legislative and judicial authorities alike convince us that the
Federal Trade Commission does not arrogate excessive power to
itself if, in measuring a practice against the elusive, but congress-
ionally mandated standards of fairness, it, like a court of equity,
considers public values beyond simply those enshrined in the letter
or encompassed in the spirit of the antitrust laws.

The Court reversed the court of appeals on the issue of the scope
of section 5 and the FTC's authority thereunder, but it refused to sus-
tain the Commission's order on the ground that its arguments focusing
on injury to the consumer differed materially from its written opinion
based upon the injury to competitors. The judgment of the lower
court was modified and remanded accordingly.

The uncertainty which surrounds the case lies in the fact that al-
though the Court held that unfairness can be found outside the letter
of the antitrust laws, no boundary or limitation on the Commission's
authority in this area was determined. At least since FTC v. Brown
Shoe Co., the Supreme Court has considered the Commission to pos-
se "broad powers to declare trade practices unfair." Yet, Sperry &
Hutchinson involved neither the deception nor unfair sales practices
which had marked the previous signposts of unfairness. In a footnote,
the Sperry & Hutchinson Court cited three factors which the Commis-
sion had published concerning the determination of whether a practice
which is neither in violation of the antitrust laws nor deceptive is
nevertheless unfair:

(1) Whether the practice, without necessarily having been prev-
iously considered unlawful, offends public policy as it has been
established by statutes, the common law, or otherwise—whether
in other words, it is within at least the penumbra of some common
law, statutory, or other established concept of unfairness; (2)
Whether it is immoral, unethical, oppressive, or unscrupulous;

52. 405 U.S. at 246.
53. Id. at 244 (emphasis added).
55. Id. at 320-21.
(3) Whether it causes substantial injury to consumers (or com-
petitors or other businessmen). 56

Although the Court apparently cited these guidelines with approval, it is not clear whether they mark the boundaries of FTC authority. The comparison of the FTC to a "court of equity" suggests authority in the regulation of unfair trade practices limited only by equitable principles. The Commission has proceeded cautiously in several di-

rections since Sperry & Hutchinson Co. and evidently is not confident of its powers in the unfairness area. 57

Even prior to Sperry & Hutchinson Co., the FTC had considered and used the allegation of "unfair" against business practices which were not necessarily deceptive. Presumably, the concept of unfairness includes deception, 58 so it was often expedient for the FTC to make the charge of unfairness when the practice was also clearly deceptive.

In order to determine how the FTC will utilize the unfairness doctrine in the future, it will be helpful to examine the Commission's past consideration of unfair sales and advertising practices.

Unfair Sales Practices

The types of sales practices which have been found unfair by the FTC have been limited only to the extent of the sellers' imaginations. 59

Some of the more prevalent practices warrant brief consideration:

(1) Lottery Sales—As discussed previously in FTC v. R.F. Keppel & Bros. 60 and as also found in FTC v. Wolf, 61 the use of lottery devices to encourage or create sales has long been declared "immortal" and in violation of public policy. Regardless of the fact that the lottery device was supplied without consideration and the recipients could determine their own course of action towards the device, they "are a species of gambling which . . . is unethical, unfair, and in violation of the law." 62

56. 405 U.S. at 244 n.5. These guidelines were published as: Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and La-

57. See the remarks of R. Pitofsky, Director of the FTC Bureau of Consumer Pro-
tection, 595 Antitrust and Trade Regulation Reporter: AA-5 (1973) [hereinafter cited as ATRR].

58. 2 TRADE REG. REP. ¶ 7500, at 12,012.

59. See 2 TRADE REG. REP. ¶ 7503-7560.

60. 291 U.S. 304 (1934).

61. See note 25 supra.

62. Chicago Silk Co. v. FTC, 90 F.2d 689, 690 (7th Cir. 1937). The manufac-
turer of silk stockings distributed punch cards containing the numbers from 1 to 60.
(2) **Shipping Unordered Merchandise**—The shipment of unordered goods or the shipment of larger amounts of goods than were actually ordered has been prohibited by the FTC as a means of “dealing unfairly with . . . customers in devious ways.” The customer may or may not be deceived in such cases depending upon whether he becomes legally bound to pay for the unrequested merchandise. In either case, the practice of intentionally shipping unordered merchandise is unfair, and allegations that the size of operations, clerical errors, or malfunctioning of electronic equipment caused the improper shipment are not sufficient to overcome proof of a deliberate course of action.

(3) **Substitution of Goods**—The selling of goods different from those ordered without the buyer’s knowing consent has been held to be in violation of section 5. The leading case in this area is **FTC v. Algoma Lumber Co.**, where the seller was found to be involved in an unfair practice by selling ponderosa pine under the label of white pine. Despite the failure of the Commission to find that white pine was clearly superior to ponderosa pine, the Court stated that the “consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.”

Often, the substitution of goods is part of an organized plan to misrepresent the merchandise in hopes that upon learning of the substitution, the buyer, rather than suffer lengthy delay and nuisance in awaiting reimbursement or replacement, will be satisfied with the substituted goods. In **Algoma**, the Commission found the practice to be deceptive as well as unfair.

(4) **Coercion, Harassment, and Scare Tactics**—These practices are clearly unfair to the extent that a buyer is compelled to make a purchase in contravention to his will. Thus, threats to institute suit in order to coerce buyers to accept goods in excess of the quantity ordered, or to publicly criticize in a written publication the goods of any merchant who fails to contribute financially to the publication,
have been held to be unfair practices. Similarly, falsely representing that furnaces manufactured by competitors are defective and likely to result in fires or asphyxiation, so as to frighten the buyer, has also been found unfair.\textsuperscript{70}

The FTC and the courts recently examined negative option sales plans and traditional concepts of the holder in due course in light of the unfairness doctrine. A negative option sales plan is utilized when a seller, pursuant to a contractual arrangement with a buyer, periodically sends an announcement to the buyer identifying merchandise that he proposes to ship. The buyer must thereafter accept and pay for this merchandise or send written instructions within a specified period to withhold the shipment. In May, 1970, the FTC initiated a rule-making procedure relating to the use of these plans, and proposed a trade regulation rule prohibiting their use.\textsuperscript{71} The rule was proposed because the Commission believed that sellers who use negative option plans have:

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\item[(9)] Constructed and operated a merchandising technique which is inherently unfair in that it relies . . . on exploitation of subscribers' natural preoccupations . . . and on traits of human character such as procrastination . . . in order to impose liability upon subscribers for (undesired) merchandise . . . .
\item[(10)] Constructed and operated a merchandising technique which is inherently unfair in that it permits sellers to take advantage of . . . the uncertainties of postal service, computer "errors" of the seller's own doing, and centralized methods of credit administration and debt collection.\textsuperscript{72}
\end{enumerate}

In response to this proposal, various industry and trade association groups, notably the Association of American Publishers Inc. and the Recording Industry of America, Inc., submitted an alternate proposed rule to the FTC which did not prohibit but rather regulated the use of the plans. The Commission perceived the issue to be "whether the negative option plan is so oppressive to consumers and so lacking in redeeming virtues that an outright ban would be justified."\textsuperscript{73} Despite strong consumer protest,\textsuperscript{74} the revised rule was proposed and

\textsuperscript{70} Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961).
\textsuperscript{72} \textit{Id}.
\textsuperscript{73} 38 Fed. Reg. 4907 (1973).
\textsuperscript{74} Included among the opponents of the regulatory rule were the National Consumer Law Center and the Attorney General for the State of Wisconsin, who argued that the practice is inherently unfair and that no amount of regulation short of total prohibition would cure its evils.
finally promulgated by the FTC on February 15, 1973. The rule concentrates on the seller’s duties in advance of shipment and within the promotional material, and the buyer’s rights and duties in relation to the merchandise shipped. The rule does not ban the use of the plan, nor does it define the buyer’s rights pertaining to merchandise not received or of an inferior quality.

The second practice in which the Commission’s reliance upon the unfairness doctrine is particularly evident involves the holder in due course doctrine. This concept allows the assignee in good faith of a negotiable instrument to be vested with the rights of collection and payment on the note while, at the same time, remaining free from most defenses based on the contract between the buyer and the seller-assignor. Consequently, if the buyer is unsatisfied with the merchandise or subject matter of the sales contract, he may be precluded from asserting his dissatisfaction as a claim or defense based on the contract and be required to complete payment to the holder in due course. This practice is especially distasteful when, as is often done, it is coupled with misrepresentations as to the product itself.

This was the case in All-State Industries of North Carolina, Inc. The defendant was charged with a violation of section 5 by engaging in the illegal advertising, sale, and installation of various home improvement products. The defendant employed a “bait and switch” technique whereby inexpensive products were promoted and sold, but after the sale, were criticized as inferior by the same dealer who sold them, and a more expensive product was demonstrated to the buyer. The Commission declared this bait and switch technique to be in violation of section 5. However, the defendants had also employed a standard practice of negotiating the customer’s instrument of indebtedness to third parties, thereby extinguishing the consumer’s contract defenses. The FTC held that the failure to disclose this routine assignment to prospective purchasers was “first . . . inherently unfair . . . and second, . . . deceptive.” The Commission cited its responsibility:

not only with preventing well-understood, clearly defined, unlawful conduct but [also] with utilizing its broad powers of investi-

75. 38 Fed. Reg. 4896 (1973). However, because of the uncertainty surrounding the Commission’s substantive rulemaking authority, the effective date for the rule has been deferred pending litigation. See note 86 infra.
76. See Uniform Commercial Code § 3-305.
gation and its accumulated knowledge and experience in the field of trade regulation to investigate, identify, and define those practices which should be forbidden as unfair because contrary to the public policy declared in the Act.79

A case with similar facts has recently reached the Commission with similar results. In *Southern States Distributing Co.*80 the defendant was charged with violating section 5 by employing a bait and switch technique in conjunction with the assignment of sales contracts to a holder in due course finance company. Although the administrative law judge found no violation concerning the assignments since the respondents did not affirmatively represent that they would handle their own financing, the Commission, citing *All-State Industries*, reversed and stated that “unfairness and deception in the use of holder-in-due-course do not arise only when express misrepresentations are made.”81 The Commission then ordered that the respondents eliminate this potentially injurious deception by affirmatively disclosing the possibility of assignment in the sales contract.82

Unsatisfied, complaint counsel sought to go one step further, arguing that the act of assigning consumer contracts to a holder in due course was inherently unfair, and that in order to equalize the seller-buyer relationship, the respondent should be prohibited from negotiating the contracts in such a fashion. In respect to the particular respondent at bar, this argument was rejected by the Commission:

Whatever the validity of this argument when applied on an industry wide basis, standing alone, without evidence of its peculiar applicability to the case at bar, it cannot justify depriving respondents alone of the fruits of unhindered negotiability. What must be shown for this to be warranted, we think, is some evidence of actual or imminent injury from operation of the doctrine in practice, beyond the deception noted above.83

Despite the fact that the respondents failed to perform many of their contracts, the Commission refrained from using its power to declare specific acts unfair and to order the respondent to cease and desist from this practice. The FTC noted that the respondents might be

79. *Id.* at 21,105.
80. 3 *TRADE REG. REP.* ¶ 20,507, at 20,440 (FTC 1973).
81. *Id.* at 20,445.
82. On the ability of the FTC to order affirmative disclosure, see *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950), as compared with *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).
83. 3 *TRADE REG. REP.* ¶ 20,507, at 20,445. In a footnote included with its opinion, the Commission suggested that it would not be necessary to show that every company in the industry had used the holder in due course technique in order to justify an industry-wide prohibition on such negotiability pursuant to the Commission’s rule-making powers. *Id.* at 20,446 n.5.
Unfairness Doctrine

at a competitive disadvantage if they were not able to use this technique, and stressed the fact that there was no evidence that consumers had actually been injured through deprivation of a contract claim or defense. The stance was similar to that taken in regard to the negative option sales plans where regulation of disclosure was preferred over total prohibition. If the practice is inherently unfair, there would appear to be no reason why the FTC, pursuant to its "broad powers... and . . . accumulated knowledge and experience . . . to investigate, identify, and define those practices which should be forbidden as unfair," could not have prohibited the practice.

Unfair Advertising Practices

As one FTC official has pointed out, the use of the unfairness theory in the interest of consumers has been largely restricted to commercial practices rather than commercial advertising. Recently, however, the Commission has examined its use in two advertising applications: (1) as a basis for the advertising substantiation program; and (2) as a standard governing the manner or focus of advertising.

The FTC first asserted its authority to require advertisers to substantiate their product claims in June, 1971. The intent of the Commission was apparently twofold: to deter unfair or deceptive acts by revealing unsupportable claims and encouraging self-regulation by advertisers; and to educate the public and allow it to make its own intelligent choices.

84. All-State Industries of North Carolina, Inc., [1967-1970 Transfer Binder] Trade Cas. ¶ 18,740, at 21,105 (FTC 1969). In a third case involving the transfer of notes of indebtedness, Certified Building Products Inc., [1970-1973 Transfer Binder] Trade Cas. ¶ 19,924, at 21,937 (FTC 1972), the Commission chose not to make an express unfairness allegation. On the issue of deception the administrative law judge dismissed the charges because: (1) there was no evidence that the defendants were in substantial competition with anyone; (2) the interstate business of the defendants was minimal; and (3) there was no substantial, credible evidence of false, misleading, or deceptive statements. [1970-1973 Transfer Binder] Trade Cas. ¶ 20,241 (FTC 1973).

85. Thain, Consumer Protection: Advertising—The FTC Response, 26 FOOD DRUG COSM. L.J. 609, 616-20 (1971). At the time of this article, Mr. Thain was Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection of the FTC.

86. 2 TRADE REG. REP. ¶ 7573. The statutory basis for the FTC's substantive rule-making authority has been litigated in National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3485 (U.S. Feb. 26, 1974).

87. In an address before the American Association of Advertising Agencies in Santa Barbara, California on October 17, 1973, Chairman Lewis Engman of the FTC expressed disappointment with the lack of public interest in using the advertising substantiation documents on file with the FTC. Chairman Engman noted the overwhelming volume and complexity of these reports and expressed dissatisfaction with the problem of delay between the time in which the documents are requested and the time in which the data are evaluated.
This intent was put to the test in *The Matter of Pfizer, Inc.*\(^8\) where the FTC challenged Pfizer's advertising for "Unburn" suntan lotion which was claimed to "stop pain fast." The FTC, alleging that the advertising claims were not substantiated by adequate and well-controlled scientific studies or tests prior to their release, charged that this practice violated section 5 because it was not only deceptive but also unfair.

The full Commission rejected the deception charge on the ground that the evidence showed no implied representation that the claims were substantiated by adequate evidence. However, relying principally upon *All-State Industries* and *Sperry & Hutchinson Co.*, the Commission sustained complaint counsel's allegation of unfairness. The Commission noted the imbalance of knowledge and resources existing between a business and its customers, holding that an affirmative advertising claim made without prior substantiation was unfair.\(^9\) "Fairness to the consumer, as well as fairness to competitors, dictates this conclusion."\(^9\) The Commission discussed the "economic gamble" involved in a consumer's reliance upon affirmative product claims and the "minimal cost and burden on vendors" caused by requiring a reasonable basis of substantiation.\(^9\)

Given the broad powers granted the FTC as discussed in *Sperry & Hutchinson Co.* and the manner in which the unfairness doctrine was applied in *All-State Industries* and *Southern States*, it would seem reasonable for the Commission to condemn Pfizer's advertisements for their failure to disclose the lack of pre-claim data. However, by stating that advertising in the absence of pre-claim data is itself unfair, the FTC appears to be taking a further step which it refused to take in the sales practice cases: that is, prohibiting a practice as opposed to merely regulating the failure to disclose.\(^9\)

The requirement of advertising substantiation received judicial notice in *Firestone Tire & Rubber Co. v. FTC*\(^9\) The Commission charged Firestone with being both unfair and deceptive in its claims

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89. The Commission did reject complaint counsel's substantiation standard of "adequate and well-controlled scientific studies or tests" in favor of a "reasonable basis" for the claim. 572 ATRR: D-5 (1972).
90. 572 ATRR: D-3 (1972).
91. Id. However, the complaint was dismissed because complaint counsel failed to prove that respondent lacked a reasonable basis for its claims.
92. Even the presence of pre-claim data does not immunize the advertiser from a section 5 violation. Clearly, an advertisement which makes claims beyond those supported by the pre-claim data could be found unfair or deceptive.
that its tires could stop 25% quicker, were free from defects, and were safe under all conditions of use. The basis for the allegation was that Firestone's advertisements were "without substantial scientific data to support them" and were claims "which consumers themselves cannot verify." On appeal, the Sixth Circuit Court of Appeals affirmed the Commission's order, but preferred to phrase its decision in terms of deception rather than unfairness. The court relied upon Firestone's own customer surveys to show that some of its customers were deceived by the advertisements. The apparent reluctance of the court to stress the somewhat novel unfairness theory to the same extent as did the FTC in Pfizer could perhaps be attributed to the presence of these surveys and their clearly deceptive implications.

The FTC explored a somewhat different application of the unfairness doctrine in The Matter of ITT Continental Baking Co., Inc. That case involved a television advertisement for Wonder Bread in which a child was depicted in a "magical growth sequence" while various claims as to the bread's nutritional qualities were made. The complaint charged allegations based on three issues: uniqueness, deception, and unfairness. It was urged that respondent had represented its product as superior and unique from all other enriched breads and that, in fact, Wonder Bread did not deserve this claim.

The FTC dismissed this charge on the basis that the record did not indicate that the representation was made. However, the Commission did find a representation that Wonder Bread was an "extraordinary food" and concluded that this claim was false and deceptive. The majority opinion refused to accept the unfairness allegation which was based on "the portrayal of Wonder Bread as an extraordinary and necessary growth producing food [which] unfairly exploits children's aspirations and parental concerns about their healthy growth and development." The Commission construed the unfairness argument as resting almost entirely on the false promises made by the advertisement and therefore had difficulty in seeing how the injuries stemming from the falsity constituted a separate charge of unfairness.

In his dissent, Chairman Engman supported complaint counsel's separate charge of unfairness. Engman constructed his argument with four premises which he found substantiated in the record:

94. 481 F.2d at 250.
96. Id. at E-5.
97. Id. at E-6.
98. Id. at E-7.
99. Id. at E-11.
(1) That the advertisements portraying Wonder Bread as an extraordinary growth-producing food were either specifically directed at children or seen by a substantial number of children;

(2) That children under the age of six tend to perceive the magical growth sequence as a promise of reality;

(3) That children do not fully understand their physical growth process and have strong aspirations for rapid healthy growth; and

(4) That children under the age of six are highly vulnerable to the type of psychological claim promising rapid growth.

In conclusion, Engman found unfairness in that the advertisements tended to "capitalize on children's anxiety about growth and exploit their difficulty or inability to differentiate between reality and fantasy."100

The application of the unfairness doctrine to protect the psychological vulnerability of the advertising audience has often been discussed but never specifically relied upon by a court of law.101 The legislative history of the Wheeler-Lea Amendment makes only a passing reference to the problem:

[W]e cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements.102

The primary area of concern, as illustrated in Chairman Engman's dissent in ITT Continental Baking Co. and his comments before the American Bar Association,103 lies with television advertising directed at children. Although children are not usually the direct consumers, their preferences undoubtedly influence their parents' buying habits. The use of the unfairness doctrine on their behalf is premised on the assumption that advertising specifically directed at a segment of the population, using methods which appeal to the distinguishing traits which make that segment of the audience particularly sensitive or vulnerable to the advertised claims, should be prohibited. On this basis, not only should children's inability to distinguish fantasy from reality be protected, but teenagers' desire for "sex appeal" and the elderly's search for "lost youth" arguably qualify for protection. The difficulty with an approach of this type appears to be the necessity of relying

100. Id.
101. See Note, Psychological Advertising: A New Area of FTC Regulation, 1972 Wisc. L. Rev. 1097. Also see the comments of G. Thain, note 85 supra.
103. 625 ATRR: A-16 (1973); see also 626 ATRR: A-19 (1973).
on the FTC's expertise in the area of psychological and motivational research rather than trade regulation.

Summary

The unfairness doctrine has been exposed to several areas of trade regulation within the scope of section 5 of the Federal Trade Commission Act. Although the notion of unfairness has been utilized in several cases involving sales practices, unfairness as a concept distinct from deception has been primarily restricted to cases of negative option selling and regulation of the holder in due course doctrine. In these areas, failure to disclose the existence of the negative option or the assignee has been held unfair. In advertising cases, the practice itself, including advertising without pre-claim data or focusing upon the particular vulnerabilities of the audience, has been attacked as unfair. The uncertainty under which the FTC has proceeded stems directly from the uncertainty surrounding the term "unfair." The scope and utility of the power to prohibit unfair trade practices deserves careful scrutiny.

UNFAIRNESS AS AN ADMINISTRATIVE STANDARD

The consideration of "unfairness" as a legal standard for the regulation of trade necessarily involves the threshold question of whether the term "unfair" as used in section 5 is to serve as a *per se* standard or, alternatively, whether more explicit and consequently limiting standards must be devised by the FTC as it interprets and defines "unfairness." The distinction is relevant to the determination of whether an adjudicatory analysis on a case-by-case basis or a rulemaking procedure is the proper application of the standard. With either approach two additional factors must be considered: (1) constitutional limitations and (2) utility.

Constitutional Considerations

The application of an administrative definition and interpretation approach to the unfairness standard brings the non-delegation doctrine into play. Implementation of the unfair *per se* approach potentially involves a vagueness or due process problem. When applied to advertising, either approach could result in first amendment freedom of speech objections on behalf of the regulated party. Each of these factors will be briefly considered.
The non-delegation doctrine stands for the proposition that the legislative power of Congress cannot be delegated.104 The objection to the definitional approach is that the role of interpreting the legislative standard of unfairness properly belongs to the courts, and the FTC’s act of promulgating more specific guidelines constitutes a usurpation of legislative authority.105 However, as Professor Davis has noted, this doctrine has largely been ignored by both the legislature and the courts.106 In fact, only two decisions still stand upholding this doctrine, and their utility as sound law is in grave doubt today.107 The question has usually been determined by the presence or absence of a legislative standard by which the agency may guide its quasi-legislative authority. History has shown that these standards may be extremely broad and vague.108 Given the legislative authority to regulate “unfair methods of competition and unfair or deceptive acts or practices,” the problem of the non-delegation doctrine would appear to be more theoretical than real.109

The vagueness problem may also be insubstantial. The argument that the term “unfair” is so indefinite that parties cannot be sufficiently certain of the Commission’s regulatory authority was discredited soon after the inception of the FTC. In Sears Roebuck & Co. v. FTC,110 it was held that the term is “no more indefinite than ‘due process of law,’ ”111 and that the “general ideas of dishonesty and fraud are so well . . . understood that the general terms . . . are sufficiently accurate measures of conduct.”112 It might be argued that while “unfair” is not vague in respect to methods of competition because of the antitrust laws, it is vague in reference to “acts or practices,” because no overriding purpose or expression of federal intent is present.

104. Field v. Clark, 143 U.S. 649 (1892).
105. This question may also involve the scope of the FTC’s rulemaking powers. See note 86 supra.
110. The “unconscionable” contract has been adopted as a standard in the Uniform Commercial Code § 2-302.
111. Id. at 311.
112. Id.
The rebuttal to this contention lies in the apparent satisfaction of Congress with the standard as it stood after twenty-four years of application to methods of competition, and the absence of any intention to further restrict the Commission's authority in the Wheeler-Lea Amendment. The reference to the FTC's equity powers in FTC v. Sperry & Hutchinson Co. suggests judicial recognition of the legislative right to endow an administrative agency with broad and flexible powers. Thus, the objection to an unfairness per se standard on vagueness grounds would probably meet with little success.

When section 5 has been applied to advertising, a first amendment defense has occasionally been forwarded. This defense has also met discredit in the courts. The argument that advertising as a form of speech should be protected has been rejected when the ads were fraudulent or misleading. The question becomes whether unfair advertising which is neither fraudulent nor misleading is similarly unprotected. In Valentine v. Chrestensen, a case involving the distribution of handbills advertising a submarine open for public exhibition, the Supreme Court, in upholding a municipal ordinance forbidding such distribution, stated that "the Constitution imposes no... restraint on government as respects purely commercial advertising." Similarly, first amendment protection was not held absolute in respect to door-to-door sales of periodicals. On the other hand, "... statements [which] would otherwise be constitutionally protected... do not forfeit that protection simply because they were published in the form of a paid advertisement." Consequently, it appears that any first amendment protection for advertisements which are found to be unfair hinges upon the commercial or non-commercial context in which they are used.

113. See note 35 supra.
114. 405 U.S. 241, 244 (1972).
116. Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189-90 (1948), where the use of the mails for fraudulent advertising purposes was prohibited; Regina Corp. v. FTC, 322 F.2d 765, 770 (3d Cir. 1963), prohibited misleading "suggested list prices" distributed through newspaper advertisements; E.F. Drew & Co. v. FTC, 235 F.2d 735, 739 (2d Cir. 1956), where the mails and interstate commerce were used to misrepresent oleomargarine as a dairy product.
117. 316 U.S. 52 (1941).
118. Id. at 54.
121. For the distinction between commercial and non-commercial advertising, see note 124 infra.
A recent potential application of the first amendment to "advertising speech" involves so-called "image ads" sponsored by the major oil companies. The advertisements, which have run on television, radio, and in the newspapers, express concern about the energy crisis and emphasize the roles which the oil companies are playing to minimize its impact. Several members of Congress have petitioned the FTC to investigate these advertisements and require backup data to substantiate any claims made.\textsuperscript{122} Interestingly, the advertisements could possibly provide a new testing ground for the unfairness doctrine as well as present serious first amendment questions. Aside from deception considerations, the advertisements may be "playing on the anxieties of the American people."\textsuperscript{123} However, the fact that public or political issues are involved may be sufficient to provide a first amendment defense.\textsuperscript{124}

\textit{Utility of the Standard}

The unfairness doctrine, whether approached from the per se or definitional perspective is valuable to the FTC only to the extent that it is workable. In order to be useful, a standard generally must satisfy at least three requirements: (1) fulfill a need; (2) afford predictability and guidance for a given set of facts; and (3) be easily determinable within the capabilities of the agency.

It is obvious that the unfairness doctrine fulfills a need of the FTC. Both sales and advertising practices have been developed which, though not necessarily deceptive or false, accentuate the difference in bargaining position and factual knowledge which exists between the manufacturer-seller and the consumer-buyer. To the extent that one

\textsuperscript{123} 645 ATRR: AA-3 (1974) (remarks of J.T. Rosch, new Director of FTC's Bureau of Consumer Protection). Mr. Rosch's comments suggest an application of the unfairness doctrine along the lines of \textit{ITT Continental Baking Co.} in which it was alleged to be unfair to play upon the psychological vulnerability of the audience.

Also, since a claim for advertising substantiation is involved, advertising in the absence of pre-claim data may be unfair under a \textit{Pfizer} approach. Alternatively, it might be argued that the unavailability or non-existence of oil supply and demand statistics to the government or the general public precludes advertising which builds the corporate image.

\textsuperscript{124} In \textit{N.Y. Times v. Sullivan}, 376 U.S. 254 (1963), the Court distinguished non-commercial advertising from commercial advertising in that the former "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support in behalf of a movement whose existence and objectives are matters of the highest public interest and concern." \textit{Id.} at 266.

Chairman Engman of the FTC has stated that the FTC should proceed against image advertisements only in clear-cut cases of commercial appeal or effect. "Personally, I would conclude in a close case that the wisest course is to give the benefit of the doubt to an advertiser's rights—indeed, to every citizen's rights—under the first amendment." 651 ATRR: A-1 (1974).
party is not fully aware of all the facts or capable of evaluating them, the unfairness doctrine supplies the FTC with an additional weapon.

Whether or not the unfairness doctrine satisfactorily affords predictability and guidance for both the FTC and the potential violator in a given set of facts is a more difficult question. The Supreme Court, in Red Lion Broadcasting Co. v. Federal Communications Commission,\(^\text{125}\) was called upon to consider a specific application of the Federal Communications Commission’s (FCC) fairness doctrine. The case arose because of Red Lion’s refusal to grant equal time to an author who had been personally attacked in an editorial broadcast by the station. The FCC had ordered the station to comply with the author’s request for a tape of the editorial and equal time under the fairness doctrine and certain codified regulations published thereunder. The Supreme Court, in upholding the lower court’s finding of the doctrine’s constitutionality despite first amendment arguments,\(^\text{126}\) noted that “the fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions . . . and is approvingly reflected in legislative history.”\(^\text{127}\)

Obviously, the first\(^\text{128}\) and arguably the third\(^\text{129}\) requirements of the workability test are present in the case of the unfairness doctrine. In discussing the requirement of “explicit statutory provisions,” the Court stressed the long series of FCC rulings involving the fairness doctrine, the publication of precise substantive regulations on the subject, and the fact that “Congress has not just kept its silence by refusing to overturn the administrative construction [of the doctrine], but has ratified it with positive legislation"\(^\text{130}\) in the form of the Equal Time Act.\(^\text{131}\) Although the Wheeler-Lea Amendment arguably could qualify as “positive legislation” in an FTC context, the unfairness doctrine is deficient through lack of numerous FTC rulings and, other than the cigarette regulations mentioned in Sperry & Hutchinson Co.,\(^\text{132}\) in “precise substantive regulations on the subject.” Nevertheless, the Court went on to state in Red Lion:

It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than section 315 [the Equal Time Act], which prohibits the broadcaster from taking such a step [as

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\(^{126}\) Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967).
\(^{127}\) 395 U.S. at 380.
\(^{128}\) See note 2 supra.
\(^{129}\) See notes 3-9, 31-36 supra.
\(^{130}\) 395 U.S. at 381-82.
\(^{132}\) See note 56 supra.
refusing equal time].\textsuperscript{133} Given the "public interest" requirement long demanded of the FTC,\textsuperscript{134} the unfairness doctrine conceivably would find similar favor with the Supreme Court if it were refined and clarified by decisions and regulations. Predictability, which would necessarily result from such decisions and regulations, would appear to favor a definitional approach to the unfairness standard.

The third requirement of a useful standard demands that the standard be easily determinable within the capabilities of the agency. The expertise of the FTC in trade regulation matters has repeatedly been recognized and relied upon by reviewing courts,\textsuperscript{135} however, in the final analysis, section 5 sets forth a legal standard which must derive its meaning from judicial construction.\textsuperscript{136} The areas of unfair sales and advertising practices are two regions in which the Commission's expertise is particularly applicable. However, this is not to say that the agency is qualified to regulate or prohibit all sales or advertising practices. In regard to those practices which have already been attacked through the unfairness doctrine, the \textit{ITT Continental Baking Co.}\textsuperscript{137} case and Chairman Engman's emphasis upon the psychological vulnerability of the audience seem least appropriate for unfairness applications. The apparent necessity for psychological and motivational studies, which are generally not within the Commission's expertise, deprives all parties concerned of the important qualities of predictability and easy determination of the outcome. If the unfairness doctrine is to be satisfactorily developed, it must be based on useful and workable standards.

\textbf{CONCLUSION}

Traditionally, the FTC has concentrated its efforts in two categories of authority under section 5 of the FTC Act:

\begin{enumerate}
\item Unfair methods of competition under the letter or spirit of the antitrust laws; and
\item Deceptive acts or practices in respect to consumers.
\end{enumerate}

Recent litigation and other expressions of FTC authority have indicated a third area of concern:

\begin{itemize}
\item \textsuperscript{133} 395 U.S. at 383.
\item \textsuperscript{134} See note 109 supra.
\item \textsuperscript{135} Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).
\item \textsuperscript{136} FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1933).
\item \textsuperscript{137} 637 ATRR: E-1 (1973).
\end{itemize}
(3) Acts or practices which are unfair to consumers. Although this new emphasis represents a significant advance for consumerism, the FTC must not forget its mandate to administer the law under legal standards. Only time will tell whether the Commission is capable of implementing the complex unfairness standard which such a mandate requires.

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