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Section 5 of the Federal Trade Commission Act: An Elastic Anti-Trust Supplement

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SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT: AN ELASTIC ANTI-TRUST SUPPLEMENT

In recent years, Section 5 of the Federal Trade Commission Act, which authorizes the Commission to prohibit "unfair methods of competition" and "unfair or deceptive acts or practices,"[1] has become one of the most controversial sections in antitrust law. The controversy concerns the scope of the terms "unfair methods of competition" and "unfair trade practices." This note will be confined to an examination of the Federal Trade Commission's authority to declare business practices "unfair methods of competition;" it will not cover the Commission's authority over deceptive trade practices. In particular, emphasis will be placed on the use of Section 5 to supplement the other antitrust statutes.

In the past, Section 5 illegality has been based upon a close analysis of these other antitrust statutes.[2] On this analysis, Section 5 violation would be found if the alleged illegal practice was similar in form to an infringement of the other antitrust statutes.[3] The common practice has been to scrutinize these other antitrust statutes to determine whether their letter or spirit had been violated; if so, then a violation of Section 5 might be found. This approach has led to considerable uncertainty in choosing the proper criteria which the Commission is to employ in de-

1. In pertinent part, Section 5 of the Federal Trade Commission Act provides:

Section 5(a)(1): Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful.

Section 5(a)(16): The Commission is empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

2. These other antitrust statutes include the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Section 1 of the Sherman Act (15 U.S.C. § 1) declares contracts, conspiracies, and combinations in restraint of trade to be illegal. Section 2 (15 U.S.C. § 2) of the Sherman Act prohibits monopolizing, attempting to monopolize, and combining or conspiring to monopolize. Section 3 of the Clayton Act (15 U.S.C. § 14) declares that it is unlawful for any person engaged in commerce to sell or contract on the condition that the purchaser shall not deal with the goods of a competitor where the effect would be to substantially lessen competition. The Robinson-Patman Act, which is found at 15 U.S.C. § 13, prohibits various practices deemed injurious to competition, such as discriminatory pricing (§ 2(a) of the act) and the payment of discriminatory advertising allowances (§ 2(d) of the act).

3. *See* Statutes cited note 2 *supra*.

termining what practices will be deemed "unfair methods of competition."

A recent case highlighting this uncertainty is *In the Matter of Sperry and Hutchinson Company.*[4] In this case the Commission attempted to break away from the confines of the other antitrust statutes. The alleged unfair practice involved efforts, normally suits for injunction, by Sperry and Hutchinson to prevent unauthorized trading in its green stamps. In part, the activities to which Sperry and Hutchinson objected were carried on by independent trading stamp exchanges. These exchanges engaged in the practice of trading for a fee stamps issued by competitors of Sperry and Hutchinson for those issued by Sperry and Hutchinson; they also engaged in the purchase and sale of S & H green stamps for cash. Sperry and Hutchinson justified its suppression of these exchanges on the ground that this trafficking in trading stamps would destroy its franchise system by removing the incentive for green stamp savers to return to Sperry and Hutchinson licensees.

The Commission rejected this contention, and held that this suppression of the operation of trading stamp exchanges constituted an unfair method of competition within the meaning of Section 5.[5] In so deciding, the Commission found that the practice unfairly burdened the consuming public and had a severe anticompetitive effect in that it restricted trade at the retail level and tended to eliminate a class of small businessmen.[6] Significantly, the Commission did not show any resemblance of the challenged activity to previously established violations of the Sherman or Clayton Acts.[7] Under this interpretation, it would seem that the Commission need not conclude that challenged activities are analogous to other recognized antitrust violations.

The Fifth Circuit in a two to one decision rejected this broadened interpretation of Section 5.[8] The court pointed out that, under prior law,

4. For the Commission's opinion, see FTC Docket 8671 (1968). The subsequent decision of the Fifth Circuit Court of Appeals may be found at 432 F.2d 146 (5th Cir., 1970).

5. FTC Docket 8671, pp. 40-42 (1968).

6. *Id.*

7. In the course of its opinion, the Commission discussed in general terms the other antitrust statutes, concluding with the following liberal statement of its authority under Section 5:

> We will look to comparable statutes, if any, for guidance, but not as to establishing essential criteria for a finding of a violation of the practices here challenged. Supra.

It is notable, however, that in the course of its opinion, the Commission made no reference—even for guidance—to the other antitrust statutes in discussing the legality of the efforts of Sperry-Hutchinson to suppress the operation of competing trading stamp exchanges.

8. Sperry & Hutchinson Company v. FTC, 432 F.2d 146, 151 (5th Cir. 1970).

violations of Section 5 have been predicated upon violations of either the letter or the spirit of the other antitrust laws. The Commission failed to establish a violation, because in the court's words:

> Although fairly challenged to do so in S & H's main brief, the Commission has been unable to point to any antitrust law which S & H has violated either in letter or spirit.[9]

The Sperry and Hutchinson controversy is still unsettled, however, because the Supreme Court has granted certiorari.[10] Thus, the question remains as to whether the Commission will be permitted to expand the reach of Section 5 beyond its present scope. An anlysis of past judicial interpretations of Section 5 offers a guide to an understanding of the problems presented.

Prior Litigation Under Section 5

The earliest case decided under Section 5 was *FTC v. Gratz*,[11] where the United States Supreme Court narrowly restricted the powers of the Commission. The Court intimated that a Section 5 violation would never arise unless the Commission established that the practice was (1) a violation of the Sherman Antitrust Act; or (2) a violation of the Clayton Act; or (3) that the arrangement was an unfair trade practictice.[12] The Court stated that it was for the courts, not the Commission, to ultimately determine, as a matter of law, what the words "unfair methods of competition" or "unfair trade practices" included.[13] The Court perceived that a different interpretation of Section 5 would confer upon the Commission excessive authority to interfere with ordinary business methods and to prescribe arbitrary standards to competitors which would compel them to a common level of competition.[14]

The Supreme Court has repudiated the narrow position it took in *Gratz*.[15] It was, perhaps, inevitable that it do so, since Congress had

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9. *Id.*, at 151.
10. 401 U.S. 992 (1971).
11. 253 U.S. 421 (1920).
12. *Id.* at 427. In the Court's language,

> [T]he words unfair methods of competition are not defined by the statute, and their exact meaning is in dispute. . . . They 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 to hinder competition or create monopoly* (emphasis supplied).

For further discussion of the restrictive position taken by the Court in Gratz, see Pearson, Section 5 of the Federal Trade Commission Act as Antitrust Law A: Comment, 47 Boston University Law Review 1 (1967).

13. FTC v. Gratz, 253 U.S. 421, 427 (1920).
14. *Id.*, at 428. *See also*, FTC v. Sinclair Refining Company, 258 U.S. 463 (1922).
15. FTC v. Keppel & Bros., 291 U.S. 304 (1933) and FTC v. Brown Shoe Company, 384 U.S. 316 (1966), where the Supreme Court expressly overruled Gratz.

intentionally empowered the Commission with a flexibility that would enable it to cope with a myriad of unfair practices. Congress deemed it desirable not to have any specific definitions as to what unfair methods of competition are, but rather to have each case determined upon its own facts owing to the multifarious means by which businessmen sought to subvert the policies of the antitrust statutes.[16]

The case which first departed from the confining approach of *Gratz* and more closely followed the intent of Congress was *FTC v. Keppel & Bros.*[17] In choosing the broad language "unfair methods of competition," Congress had adopted a phrase, the Court reasoned, which does not "admit to precise definition but the meaning and application of which must be arrived at by what the Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' "[18] The Court attached great significance to the expertise of the Commission in the area of unfair trade practices. By continuous contact with the business and economic conditions of the industries that would be affected by unfair practices, the Court pointed out, the Commission is better equipped than the courts to deal with these problems.[19]

The *Gratz* decision had left Section 5 a useless appendage of antitrust law and even the subsequent liberalization by *Keppel* left considerable freedom in the courts to overrule Commission determination. However, *Keppel* had liberated Section 5 and the trend was set for a gravitation toward the notion that Section 5 could reach conduct, which while it does not violate the letter of the other antitrust statutes, conflicts with the policies embodied in them. This approach is commonly called the incipiency approach.

Under an incipiency approach, it appears that Section 5 as an antitrust law will reach and suppress conduct which would not violate the other antitrust laws. However, an analysis must be made to determine the standards for measuring the illegality of a practice which constitutes an incipient violation, and therefore is illegal under Section 5.

As the Supreme Court held in *Fashion Originators' Guild v. FTC*[20] one standard for measuring an "incipient" violation prohibited by Section 5 is based upon a threatening potential for monopolization. In *Fashion Originators' Guild* a group of garment manufacturers entered

16. S. Rep. No. 592, 63d Cong. 2d Sess. (1913).
17. 291 U.S. 304 (1933).
18. FTC v. Keppel & Bros., 291 U.S. 304, 312. The statement "elsewhere" to which the Court refers was made in FTC v. Raladam Co., 283 U.S. 643, 648 (1931).
19. 291 U.S. 304, 314 (1933).
20. 312 U.S. 457 (1940).

into an agreement with manufacturers of textiles who furnished material for dresses. This agreement provided that the garment manufacturers would sell their dresses only to retailers who agreed to refrain from dealing in garments that had been copied from the designs of members of the manufacturers' group. In return the textile manufacturers agreed to sell only to those garment manufacturers on the condition that they not use or deal in textiles which were copied from the designs of the textile members of the association.

In holding that the Commission had authority to declare this combination an unfair method of competition within the meaning of Section 5, the Court emphasized the danger that the association's power might achieve monopolistic proportions. Significantly, there was no finding that the Association constituted an illegal monopoly within the prohibition of Section 2 of the Sherman Act. But complete monopolization was not determinative, for Section 5 of the Federal Trade Commission Act was designed:

> [T]o reach not merely in their fruition, but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable. In this case, the Commission found that the combination exercised sufficient control and power in the women's garments and textile businesses "to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents *and thus tend to create in themselves a monopoly*."[21] (emphasis supplied)

In addition to outlawing combinations which might eventually grow into monopolies, Section 5 has been held to prohibit combinations which could develop into trade restraints prohibited by Section 1 of the Sherman Act.[22] In *Cement Institute*, a group of cement manufacturers formed an association for the purpose of pricing their goods on a multiple basing point system. Under this system the price of cement was always the mill price at the basing point plus freight to the place of delivery, irrespective of the location of the mill. The Commission held that this concerted maintenance of the basing point delivered price system was an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act.[23] In upholding the Commission, the Supreme Court pointed out that this system, if left untouched, would result in the impairment of competition in the cement industry. The Court stated:

> The new Commission was an aid to . . . [the Justice Department]

21. *Id.* at 466-467.
22. FTC v. Cement Institute, 333 U.S. 683 (1947).
23. *Id.* at 720.

> in drafting of appropriate decrees in antitrust litigation. All of the committee reports and statements of those in charge of the Federal Trade Commission reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every practice, then existing or thereafter contrived, which restrained competition or might tend to such restraint if not stopped in its incipient stages.[24]

Besides prohibiting practices which resemble or might otherwise develop into Sherman Act violations, Section 5 of the Federal Trade Commission Act also gives the Commission authority to halt business conduct similar to practices which have been declared illegal by Section 3 of the Clayton Act.[25] Section 3 of the Clayton Act provides in part that it is unlawful for a person engaged in commerce to participate in "tying arrangements," whereby one party agrees to sell goods to another on the condition that the purchaser buy a "second, distinct product (the tied product) or refrain from purchasing that product from any other seller."[26] A practice not constituting a tying arrangement, but simulating the characteristics of such a scheme, was involved in *Atlantic Refining Company v. FTC.*[27] Under this agreement, Atlantic would sponsor the sale of Goodyear products to its wholesale and retail outlets in return for a commission on all sales made to its wholesalers and dealers. The Court and the Commission discovered that Atlantic used direct methods of coercion upon its dealers in the inauguration and promotion of the plan. However, the Court recognized that because Atlantic was not required to "tie" its sale of gasoline and other petroleum products to purchases of Goodyear tires, batteries, and accessories, this was not a tying arrangement within the meaning of Section 3 of the Clayton Act:

> At the outset we must stress what we do not find present here. We recognize that the Goodyear-Atlantic contract is not a tying arrangement . . . But neither do we understand that either the Commission or the Court of Appeals held that the sales-commission arrangement was a tying scheme. What they did find was that the central competitive characteristic was the same in both cases—the utilization of economic power in one market to curtail competition in another . . . As our cases hold, all that is necessary in Section 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the Act (citation omitted) . . . [The Commission's] use as a guideline of recognized violations was entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations. (citations omitted). When

24. *Id.* at 693.
25. 15 U.S.C. 14.
26. Comment, 1 Loy. L.J. (Chi.) 132, 134 (1970).
27. 381 U.S. 357 (1965).

> conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.[28]

In *Atlantic* the Court found that the challenged scheme bore the characteristics of a tying arrangement. The unresolved question implicit in the *Atlantic* decision is whether an arrangement which is anticompetitive in an economic sense can be considered to violate Section 5, even though that arrangement bears none of the characteristics of a recognized antitrust violation.[29]

That the sweep of Section 5 may be broad enough to encompass anticompetitive business conduct having none of the earmarks of a well-established antitrust violation is suggested by the 1966 Supreme Court decision in *FTC v. Brown Shoe Company*.[30] This case involved a situation in which a shoe manufacturer entered into franchise agreements with retailers requiring them to concentrate their business in shoes at certain grade and price levels and not to handle shoes of competitors. This arrangement, though similar to an exclusive dealing contract made illegal by Section 3 of the Clayton Act, did not actually violate that section.[31] After first overruling its decision in *FTC v. Gratz*,[32] the Supreme Court proceeded to hold that the scheme of *Brown Shoe* contravened Section 5, stating:

> It is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. . . . This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market . . . [O]ur cases hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.[33]

The question presented by this broad language is whether the Commission's authority under Section 5 has been signifciantly extended.[34] At least some commentators have concluded that *Brown Shoe* did expand

28. *Id.*, at 369. *See also*, FTC v. Texaco, 393 U.S. 223 (1968).
29. This is the question raised by the Sperry-Hutchinson case, *supra*, note 8.
30. 384 U.S. 316 (1966).
31. 15 U.S.C. 14 (1964).
32. 384 U.S. 316, 320-321 (1966).
33. *Id.*
34. Justice Wisdom, dissenting in Sperry & Hutchinson Company v. FTC, 432 F.2d

the scope of Section 5, and have criticized that expansion on the ground that it has cast Section 5 into a realm of ambiguity.[35]

THE DESIRABLE LIMITS OF SECTION 5

The basis for criticism of the *Brown Shoe* decision[36] has been its failure to set forth a meaningful standard for measuring incipiency. Because of this lack of a meaningful standard, it has been pointed out that "almost any conduct, if magnified enough, is capable of violating [the other antitrust laws],"[37] and therefore might be found to violate Section 5.

Further criticism has come from Professor Handler, who argued that the apparent absence of any guiding standard of Section 5 illegality might lead to an abuse of administrative power.[38] He felt that if the "exclusive dealing" arrangement in *Brown Shoe* was so inherently anticompetitive as to be without justification, it should have been prosecuted under Section 3 of the Clayton Act. He pointed out that Congress in 1914 specifically legislated on the problem of exclusive dealing in Section 3, and thereby showed an unwillingness to leave the legality of such arrangements to the uncontrolled discretion of the Federal Trade Commission. In further support of his position, Handler emphasized that the purposes of the Clayton Act itself was to reach incipiently anticompetitive practices. Therefore, it struck him as incongruous to consider Section 5 as prohibiting a practice which is "incipiently incipient."[39]

Furthermore, Handler viewed the present interpretation of Section 5 as sanctioning an administrative usurpation of legislative power by the Federal Trade Commission. According to Handler,[40] a particularly blatant example of this administrative legislating, was the decision in *Grand Union Company v. FTC*.[41] In this case, the operator of a large chain of supermarkets entered into a cooperative advertising ar-

146, 153 (5th Cir., 1970), has interpreted the Brown Shoe decision as broadening the scope of Section 5. See pages 307-08 and note 8, *supra*, for a discussion of the majority decision in Sperry & Hutchinson.

35. Pearson, Section 5 of the Federal Trade Commission Act as an Antitrust Law: A Comment, 47 Boston University Law Review 1 (1969).

36. 384 U.S. 316 (1966).

37. Pearson, *supra* note 35, at 7.

38. Handler, Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review, 76 Yale L.J. 92 (1966).

39. *Id.*, at 99.

40. For his discussion of Grand Union, see his earlier article, Handler, Recent Antitrust Developments, 71 Yale L.J. 75 (1961). At the time Handler wrote this article, the Court of Appeals had not yet affirmed the decision of the Commission. Subsequently, however, the Second Circuit adopted the position of the Commission, expressly rejecting the criticism of Professor Handler. *See* 300 F.2d 92 (2d Cir., 1962).

41. 300 F.2d 92 (2d Cir., 1962).

rangement with a group of its suppliers to participate in the use of a "spectacular" advertising sign. The suppliers were unaware that their buyer had paid less for its space on the sign and had received substantial payments from the advertising agency for its participation in the scheme. Section 2(d) of the Robinson-Patman Act prohibits a seller from paying advertising allowances to his competing customers, unless he does so on a proportionately equal basis. However, in *Grand Union*, the Commission was proceeding against a buyer and not a seller. The Commission was therefore unable to maintain that Grand Union had violated Section 2(d). However, it concluded that Grand Union's conduct conflicted with the spirit of Section 2(d), and that this was enough to constitute a violation of Section 5 of the Federal Trade Commission Act. The Second Circuit agreed with the Commission's decision, and upheld its cease and desist order. The court rationalized that the legislative omission of buyers from the coverage of Section 2(d) was more "inadvertent than studious."[42]

In commenting upon this decision, Handler recognized that the Commission has some flexibility under Section 5. Nevertheless, he objected that "where Congress has spoken on the general subject but what it has said does not go as far as the Commission would like,"[43] the Commission cannot circumvent the limitations imposed in statutes by labelling the practice an unfair method of competition within the prohibition of Section 5.[44]

On the other hand, in defense of the present broad interpretation which has been given to Section 5, it may be observed that the nature of the social problem covered by Section 5 requires that the Commission have considerable flexibility. The inventiveness of individuals and the numerous possibilities that exist for forming combinations that might easily be deemed "unfair methods of competition" resulted in a broad legislative enactment. Since one purpose of Section 5 is to prevent unlawful concentrations of economic power or other restraints of trade, practices which resemble other antitrust violations become suspect. A determination of whether a business practice will develop into a full blown violation of one of the other antitrust laws necessarily involves the exercise of a great deal of economic expertise not possessed by the courts. Therefore, it has been generally held that a reviewing court should only have the power to decide whether the Commission's deci-

42. 300 F.2d 92, 96 (2d Cir., 1962).
43. Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 95 (1961).
44. *Id.* at 95.

sions have support in the record and a reasonable basis in law.[45] The policies embodied in the other antitrust laws provide a useful guide for determining whether a Federal Trade Commission order has a "reasonable basis in law."

Nevertheless, the question remains as to whether the line has been fairly drawn between the need for objective criteria and the necessity for administrative flexibility. Perhaps, it is impossible to have a more definite line. The Commission could, of course, formulate a set of rules enumerating practices which would constitute unfair methods of competition in violation of Section 5. Thereafter, any complaint issued against an alleged violator would specify the particular rule or rules he violated. However, it must be considered that the purpose of Section 5 is to serve as a flexible tool for meeting new schemes which might become monopolies. Thus, if the standards are too narrow, there is a possibility that the legislative purpose in enacting Section 5 might be defeated. At the other extreme, it is possible to adopt the approach implicit in the Commission's opinion in the *Sperry-Hutchinson* case.[46] Under this approach, the Commission could find a Section 5 violation on the discovery of an anticompetitive effect, without making a specific finding that the letter, spirit, or policy of one of the other antitrust laws had been infringed. But this approach may also be criticized on the ground that it broadens and makes more indefinite an already ambiguous statute.

It is regretful that there are no more definite criteria to determine what constitutes unfair practices, but experience teaches that such practices cannot be readily catalogued. They must take their meaning from each case and the impact of particular practices on competition and monopoly.[47]

THE APPLICATION OF SECTION 5 TO CONGLOMERATE MERGERS

A current business practice which may have an illegal anticompetitive effect within the meaning of Section 5 is the conglomerate merger. A conglomerate merger is a merger of corporations which are neither competitors nor potential or actual customers or suppliers of each other.[48] The traditional vehicle for challenging mergers and acquisi-

45. FTC v. Keppel & Bros., 291 U.S. 304 (1933) and FTC v. Brown Shoe Company, 384 U.S. 316 (1966).
46. *Supra*, note 5.
47. LaPeyre v. FTC, 366 F.2d 117 (5th Cir., 1966); Shell Oil Company v. FTC, 360 F.2d 470 (5th Cir., 1966).
48. United States v. General Dynamics Corporation, 258 F. Supp. 36, 56 (S.D.N.Y., 1966).

tions deemed anticompetitive has been Section 7 of the Clayton Act.[49] Section 7 proscribes corporate acquisitions:

> where in any line of commerce in any section of the country the effect . . . may be substantially to lessen competition, or to tend to create a monopoly.[50]

In the past, Section 7 has been most often used to attack vertical and horizontal mergers. A merger is considered to be horizontal if the companies are engaged in a similar business and may therefore compete for the same customers.[51] A merger is classified as vertical when the companies are in a supplier-customer relationship.[52] The leading case on mergers is *Brown Shoe Company v. United States*.[53] In that case, the government alleged that a contemplated merger between the G. R. Kinny Co., Inc. and the Brown Shoe Company, Inc. was violative of Section 7. To ascertain the impact of the projected merger upon competition, the Court reasoned, it is first necessary to define the relevant market which will be affected by the merger. The concept of a relevant market was viewed as having two dimensions: the section of the country or geographic market and the line of commerce or product market. A violation of Section 7 occurs when the merger results in a substantial lessening of competition in these relevant markets. Factors to be used in determining whether there has been a lessening of competition are the trend towards concentration in the industry and the size and share of the market that would be foreclosed by the merger. Applying this approach to the Brown-Kinney merger, the Court held that it violated Section 7.[54]

Although Section 7 has frequently been applied to horizontal and vertical mergers,[55] the courts appear reluctant to impose a Section 7 sanction upon a conglomerate merger. The farthest the United States

49. 15 U.S.C. 18 Sections 1 and 2 of the Sherman Act may also be used to challenge corporate mergers. See Lemke, *Use of Section 5 of the Federal Trade Commission Act in Conglomerate Merger Cases,* 3 Loyola Law Review 333 (1970).
50. 15 U.S.C. 18.
51. *Supra,* note 48.
52. *Id.*
53. 370 U.S. 294 (1962).
54. In particular, Brown Shoe held that both the horizontal and vertical aspects of the proposed merger violated section 7. 370 U.S. 294, 334-336, 323-334 (1962).
55. *See,* for example, United States v. Von's Grocery Company, 384 U.S. 270 (1970). In this case the government charged that the acquisition by Von's of Shopping Bag Food Stores, a direct competitor, was illegal under Section 7. In ordering divestiture, the Court broadly construed Section 7, stating:

> [C]ongress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before the trend developed to the point that the market was left in the hands of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers.

Supreme Court has gone in applying Section 7 to a situation which is neither horizontal nor vertical occurred in *FTC v. Procter and Gamble Company*.[56] In that case, Procter & Gamble, a large, diversified manufacturer of low priced, high-turnover household products sought to acquire Chlorox, the leading manufacturer in the liquid bleach industry. The Court first observed that:

> [I]t does not particularly aid analysis to talk of this merger in conventional terms, namely horizontal or vertical or conglomerate. This merger may most appropriately be described as a "product extension merger," as the Commission observed.[57]

The Court then found this merger to be violative of Section 7, noting two possible anticompetitive effects:

> (1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm.[58]

It is notable that this attempted merger possessed all the characteristics of a conglomerate merger, and yet the Court conspicuously refused to use that term. Since the Court disallowed the merger on a "product extension" basis, there is no clear holding that Section 7 applies to conglomerate mergers where the product-extension factor is not present.[59]

Although Section 7 of the Clayton Act has not been extended to cover all anticompetitive conglomerate mergers, the possibility of an attack on them under Section 5 of the Federal Trade Commission Act exists. The policy of Section 7 is to prohibit trends towards concentration of economic power. Conglomerate mergers are at least potentially violative of this policy.

It has been shown that when business conduct conflicts with the policies but not the letter of Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act, it may nevertheless be held violative of Section 5 of the Federal Trade Commission Act.[60] A similar analysis would seem warranted in the area of conglomerate mergers, and if the merger violates the spirit but not the letter of Section 7 for technical or other rea-

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56. 386 U.S. 568 (1967).
57. *Id.*, at 570.
58. *Id.*, at 578.
59. Notably, a contrary position was taken by Justice Harlan, who wrote a concurring opinion in Procter & Gamble. He stated by way of dictum that conglomerate mergers might be found violative of Section 7. *See* concurring opinion of Harlan, J., 386 U.S. 568, 587 (1967).
60. See discussion at pages 309-11 *supra*.

sons, it should nonetheless be held to contravene Section 5 of the Federal Trade Commission Act. An illustrative Commission opinion is *Beatrice Foods Company.*[61] In this case the Commission charged Beatrice Foods with Section 7 and Section 5 violations on account of the acquisition by Beatrice of 175 independent dairy companies. The problem encountered by the Commission in applying Section 7 was that many of the acquired dairies were not corporations, and Section 7 specifically applies to corporations but not partnerships or sole proprietorships. The Commission overcame this barrier by employing Section 5, rationalizing that such an approach effectuates Congress' policy with respect to the prevention of anticompetitive acquisitions.[62]

The *Beatrice Foods* decision suggests the possibility that Section 5 may be increasingly used to attack conglomerate mergers which do not constitute technical violations of the other antitrust laws. As one commentator has observed:

> It appears certain that Section 5 of the Federal Trade Commission Act will continue to be used in merger cases where Section 7 of the Clayton Act would normally be applicable except for the technical jurisdictional deficiencies which are in that statute. It is conceivable that Section 5 may also be applied in conglomerate merger cases in such a way as to go beyond the Clayton and Sherman Acts to reach acquisitions which would not be affected by either of these statutes.[63]

A final question is whether a decision by the Supreme Court against the Commission in the currently pending *Sperry-Hutchinson*[64] case will affect the use of Section 5 to reach conglomerate mergers if the Supreme Court upholds the Commission's view that it has broad authority under Section 5. On the other hand, if the Supreme Court should reject the Commission's efforts to expand its authority under Section 5, as did the Fifth Circuit Court of Appeals,[65] that section may still be available to invalidate conglomerate mergers.

It is clearly established that Section 5 prohibits conduct which resembles an established antitrust violation. Anticompetitive horizontal and vertical mergers are recognized violations of Section 7 of the Clayton Act. Conglomerate mergers having anticompetitive effects are simi-

61. [1965-1967 Transfer Binder] Trade Reg. Rep. 17, 244 (FTC, 1965).
62. Note the similarity of this interpretation to that in the Grand Union case, *supra*, note 42.
63. Lemke, *Use of Section 5 of the Federal Trade Commission Act in Conglomerate Merger Cases,* 3 Loyola Law Review, 333, 347 (1970).
64. *Supra*, note 5 and the discussion at pages 307-08.
65. 432 F.2d 146 (5th Cir., 1970).

lar to Section 7 violations, and on that basis should be held to contravene Section 5 of the Federal Trade Commission Act.

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