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Julian O. von Kalinowski
General Editor

WORLD LAW OF COMPETITION

**Unit A
NORTH AMERICA
Volume A2**

UNITED STATES (II)

by

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**MATTHEW
BENDER**

235 E. 45TH STREET, NEW YORK, N.Y. 10017

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Table of Contents

VOLUME A1

Preface	xxi
Biographical Notes	xxv

Chapter 1

SCOPE, JURISDICTION AND ENFORCEMENT OF THE ANTITRUST LAWS

§ 1.01	Introduction	U.S. 1-3
§ 1.02	The Sherman Act: An Overview	U.S. 1-8
§ 1.03	The Clayton Act	U.S. 1-17
§ 1.04	The Robinson-Patman Act	U.S. 1-45
§ 1.05	Section 5 of the Federal Trade Commission Act	U.S. 1-61
§ 1.06	Governmental and Private Enforcement	U.S. 1-65
§ 1.07	Jurisdictional Reach of the Antitrust Laws: Interstate and Foreign Commerce; Subject Matter and Personal Jurisdiction	U.S. 1-70

Chapter 2

THE SHERMAN ACT

§ 2.01	Introduction	U.S. 2-3
§ 2.02	Section One of the Sherman Act: Restraints of Trade	U.S. 2-5
§ 2.03	Section 2 of the Sherman Act: Monopoly Offenses; Actual Monopolization	U.S. 2-47

TABLE OF CONTENTS

vi

§ 2.04	Section 2 of the Sherman Act: Attempts to Monopolize . .	U.S. 2-89
§ 2.05	Section 2 of the Sherman Act: Combination or Conspiracy to Monopolize	U.S. 2-105
§ 2.06	Section 2 of the Sherman Act: Defenses	U.S. 2-123
§ 2.07	Sherman Act: Sections 3-7	U.S. 2-134

Chapter 3

THE CLAYTON ACT

§ 3.01	Introduction	U.S. 3-3
§ 3.02	Section 3 of the Clayton Act	U.S. 3-5
§ 3.03	Sections 7 and 7A of the Clayton Act: Mergers, Acquisitions and Joint Ventures	U.S. 3-31
§ 3.04	Sections 8 and 10 of the Clayton Act: Interlocking Directorates	U.S. 3-121
§ 3.05	Section 6 of the Clayton Act: Antitrust Exemption For Labor and Agricultural Organizations	U.S. 3-134
§ 3.06	Section 20 of the Clayton Act: Restriction on Injunctive Relief in Certain Labor Cases	U.S. 3-137
§ 3.07	Provisions of the Clayton Act Relating to Private and Government Enforcement	U.S. 3-139
§ 3.08	Section 12 of the Clayton Act: District in Which to Sue .	U.S. 3-183
§ 3.09	Section 13 of the Clayton Act: Suits by United States: Subpoenas for Witnesses	U.S. 3-189

Chapter 4

THE ROBINSON-PATMAN ACT: DISCRIMINATION IN PRICE AND TERMS

§ 4.01	Introduction	U.S. 4-4
§ 4.02	Discrimination in Price: Jurisdictional and Statutory Elements	U.S. 4-13

(Rel.19-4/84 Pub.831)

TABLE OF CONTENTS

§ 4.03	The Gravamen of a Section 2(a) Offense: Direct or Indirect Price Discrimination	U.S. 4-41
§ 4.04	Competitive-Injury Requirement: Basic Concepts	U.S. 4-55
§ 4.05	Price Discrimination: Primary Line Injury	U.S. 4-64
§ 4.06	Competitive Injury at the Customer Level	U.S. 4-89
§ 4.07	Injury to Competition at the Customer Level: Secondary, Third, and Fourth Line Injury	U.S. 4-110
§ 4.08	Defenses to Section 2(a)	U.S. 4-122
§ 4.09	Brokerage: Clayton Act, Section 2(c)	U.S. 4-135
§ 4.10	Promotional Allowances and Services: Clayton Act, Sections 2(d) and 2(e)	U.S. 4-161
§ 4.11	Buyer Liability: Clayton Act, Section 2(f)	U.S. 4-181
§ 4.12	Criminal Liability for Price Discrimination: Robinson-Patman Act, Section 3	U.S. 4-187

Chapter 4A
EXEMPTIONS; DEFENSES TO THE ANTITRUST LAWS

§ 4A.01	Introduction	U.S. 4A-3
§ 4A.02	Statutory Exemptions	U.S. 4A-7
§ 4A.03	Judicially Created Exemptions	U.S. 4A-19
§ 4A.04	Exclusive and Primary Jurisdiction	U.S. 4A-21
§ 4A.05	Lobbying and Other Joint Efforts to Influence Government Action; The <i>Noerre-Pennington</i> Doctrine	U.S. 4A-44
§ 4A.06	State-Approved Transactions: The <i>Parker v. Brown</i> Doctrine	U.S. 4A-60.1
§ 4A.07	Affirmative Defenses	U.S. 4A-79
§ 4A.08	Violations of Antitrust Laws as a Defense to Actions on a Contract	U.S. 4A-115
§ 4A.09	Religiously Motivated Conduct	U.S. 4A-120

TABLE OF CONTENTS

viii

VOLUME A2

Chapter 5

THE FEDERAL TRADE COMMISSION ACT

§ 5.01	Introduction	U.S. 5-2
§ 5.02	Section 5 of the Federal Trade Commission Act	U.S. 5-15

Chapter 6

BUSINESS PRACTICES SUBJECT TO THE ANTITRUST LAWS

§ 6.01	Pricing Practices	U.S. 6-4
§ 6.02	Distribution Practices; Franchising	U.S. 6-33
§ 6.03	Acquisitions and Corporate Takeovers	U.S. 6-69
§ 6.04	Joint Ventures	U.S. 6-99
§ 6.05	Trade Associations	U.S. 6-106

Chapter 7

ANTITRUST LAWS AND PATENT, COPYRIGHT, TRADEMARK AND TRADE SECRET EXEMPTIONS

§ 7.01	Introduction	U.S. 7-3
§ 7.02	Scope of Exemptions	U.S. 7-6
§ 7.03	Acquisition of Natural Monopoly Power	U.S. 7-12
§ 7.04	Antitrust Aspects of Non-Use	U.S. 7-23
§ 7.05	Fraud on the Patent Office as a Violation of Section 2 of the Sherman Act	U.S. 7-25
§ 7.06	Antitrust Aspects of Licensing	U.S. 7-34
§ 7.07	Pooling	U.S. 7-61
§ 7.08	Infringement Suits	U.S. 7-67

TABLE OF CONTENTS

Chapter 8

ENFORCEMENT OF THE ANTITRUST LAWS; INTRODUCTION

§ 8.01	Introduction	U.S. 8-1
§ 8.02	The Department of Justice and Creation of Its Antitrust Division	U.S. 8-4
§ 8.03	Creation of the Federal Trade Commission	U.S. 8-7
§ 8.04	The Enforcement Provisions of the Sherman Act	U.S. 8-10
§ 8.05	The Enforcement Provisions of the Clayton Act	U.S. 8-13
§ 8.06	The Federal Trade Commission Act	U.S. 8-22
§ 8.07	Private Antitrust Actions	U.S. 8-25

Appendix I	U.S. GA1-1
Appendix II	U.S. GA2-1
Appendix III	U.S. GA3-1
Appendix IV	U.S. GA4-1
Appendix V	U.S. GA5-1
Appendix VI	U.S. GA6-1

Table of Cases	T-1
Unit A Index	AI-1

CHAPTER 5

The Federal Trade Commission Act

SYNOPSIS

- § 5.01 Introduction**
 - [1] Section 5**
 - [2] An Overview of Statutory Provisions**
 - [a] Section 1: The Federal Trade Commission**
 - [b] Section 4: Definitions; Private Actions Unavailable**
 - [c] Section 5: The Public Interest Requirement; Provisions Relating to Cease and Desist Orders**
 - [d] Section 6: Additional Powers**
 - [i] Investigations; Subsection (a)**
 - [ii] Reports; Subsection (b)**
 - [iii] Investigation to Ensure Compliance With Antitrust Decree; Subsection (c)**
 - [iv] Investigation Pursuant to Presidential or Congressional Direction; Subsection (d)**
 - [v] Recommendations for Readjustment of Corporations Violating the Antitrust Acts; Subsection (e)**
 - [vi] Publication of Information; Legislative Recommendations; Subsection (f)**
 - [vii] Classification of Corporations; Regulations**
 - [viii] Foreign Trade; Investigations and Reports**
 - [ix] Confidentiality of Line-of-Business Reports**
 - [e] Section 8: Information in the Possession of Other Agencies**
 - [f] Section 9: Subpoena Power**
 - [g] Section 10: Criminal Offenses and Penalties With Respect to Reports and Publication of Information**
 - [h] Sections 12 and 15: False Advertising**
 - [i] Section 16: Commission Representation in the Courts**
 - [j] Section 18: Rulemaking Regarding Unfair or Deceptive Acts or Practices**
 - [k] Section 19: Consumer Redress**
 - [l] Section 20: Civil Investigative Demands**
 - [m] Section 21: Confidentiality**
 - [n] Section 23: Good Faith Reliance on the Federal Reserve**
 - [2] Jurisdictional Elements**
- § 5.02 Section 5 of the Federal Trade Commission Act**
 - [1] Jurisdictional Elements**

- [a] The Commerce Requirement
 - [b] The Public Interest Requirement
 - [2] Section 5 as a Competition Law
 - [a] Section 5 and Actual Antitrust Violations
 - [b] Section 5 and Practices That Fall Short of Antitrust Violations
 - [i] Characteristic or Incipient Violations
 - [ii] Practices That Are Not Characteristic of Traditional Antitrust Violations
 - [3] Section 5 as a Consumer Protection Law
-

§ 5.01 Introduction

The Federal Trade Commission Act¹ is a trade regulation law that is administered solely by the Federal Trade Commission. The Act, which was designed to supplement the antitrust laws, has become an increasingly important instrument for the implementation of United States competition policy.

[1]—Section 5

Section 5 is the heart of the Federal Trade Commission Act. It prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” The jurisdictional reach of Section 5 was recently expanded by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975² to include activities “affecting” commerce. In view of this broad jurisdictional scope, and the broad substantive terms of the provisions, Section 5 is one of the most important of United States competition laws.

Section 5 plays a dual role in United States competition policy. On the one hand, it is a vehicle for attacking conduct that *adversely affects competition*. In this respect, Section 5 is analogous to the antitrust laws. On the other hand, Section 5 may be used to challenge conduct that *adversely affects consumers*.³

¹ The Act is codified as 15 U.S.C. §§ 41-46 and 47-58. It is reprinted, in relevant part, in Appendix.

² P. L. No. 93-637, 88 Stat. 2183 (1974), codified in sections of 15 U.S.C. amending sections of the Federal Trade Commission Act.

³ The focus of the discussion in Section 5.02[2] *infra* will be on the antitrust aspects of Section 5. Since the consumer protection aspects of the provision are

[2]—An Overview of Statutory Provisions

The Federal Trade Commission Improvements Act of 1980^{3.1} makes major changes in several areas of the Federal Trade Commission's responsibility and authority, including: (1) altering the rules regarding publication of information and reports (expanding restriction on disclosure from "trade secrets and customers lists" to any "trade secrets or any commercial or financial information"); (2) new provisions with respect to small business (requiring a plan to eliminate the need for many small businesses to file quarterly financial reports and allowing those that do to use a simplified form); (3) modifying the statute defining what constitutes a failure to obey Commission process (making failure to obey a district court order of compliance the offense); (4) major changes in the area of rulemaking (providing for expanded Congressional and public participation in the rulemaking process and eliminating *in camera* communications within the Commission unless they are made public); (5) provisions for the issuance of civil investigative demands similar to those currently authorized for use by the Department of Justice; (6) new rules concerning the confidentiality, custody and return of documents; (7) establishing good faith reliance on the Federal Reserve Board as a defense in administrative and judicial proceedings alleging violations of the Federal Trade Commission Act; (8) limitation on the Commission's activities in specific industries (children's advertising, the funeral industry and agricultural cooperatives); (9) new authority for Congressional review of Commission rules and oversight of the Commission itself (giving Congress 90 legislative days to modify or veto Commission rules and providing for semiannual Senate oversight hearings during fiscal years 1980-1982).^{3.2}

only incidental to an antitrust analysis, they will be considered briefly in Section 5.03[3] *infra*.

^{3.1} Pub. L. No. 96-252, 94 Stat. 374 (1980).

^{3.2} Pub. L. 97-377, Title I, § 101(d), Dec. 21, 1982, 96 Stat. 1870 provided that section 21 of the Federal Trade Commission Improvements Act be extended until Sept. 30, 1983. Section 21 provides for a bicameral veto of an FTC rule.

The legislative veto power over FTC rules appears to have been rendered unconstitutional by the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*, 51 U.S. Law Week 4907 (1983). The decision of the

The Foreign Trade Antitrust Improvements Act of 1982 amended Section 5(a) of the Federal Trade Commission Act by adding a new paragraph.^{3.3} The amendment creates an exemption for conduct involving export trade on commerce with foreign nations.^{3.4} In addition, provision has been made for the issuance of "Export Trade Certificates of Review", which grant limited protection from civil and criminal antitrust claims.^{3.5}

Ninth Circuit reviewed by the Court, *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), had held a unicameral Congressional veto of deportation suspensions by the Attorney General to be an unconstitutional violation of the separation of powers doctrine. The Supreme Court ruled not only that the unicameral veto was unconstitutional, but also that the veto violated the presentment clause of the Constitution that requires every "legislative act" to be presented to the President for signature before becoming law.

Based on its decision in *Chadha* the Supreme Court affirmed without opinion the decision of the District of Columbia Circuit in *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), holding Section 21(a) of the Federal Trade Commission Improvements Act to be an unconstitutional violation of the separation of powers doctrine as well as the presentment clause. *United States Senate v. FTC*, 103 S. Ct. 3556 (1983).

See also *Consumers Energy Council of Am. v. Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd without opinion* 103 S. Ct. 3556 (1983).

^{3.3} 15 U.S.C. § 45(a)(3).

The new paragraph reads as follows:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless —

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect —

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States."

^{3.4} For further discussion, see § 2.07[5], *supra*.

^{3.5} Further discussion of the topic may be found at § 4A.02[b](1)(a), *supra*.

[a]—Section 1: The Federal Trade Commission. The Federal Trade Commission was established by Section 1 of the FTCA. A major consideration in creating the Commission was the widely felt need for an impartial body with a specialized knowledge of business and economic conditions.⁴

The Commission has the sole responsibility for enforcing the provisions of the Federal Trade Commission Act, and shares responsibility with the Justice Department for enforcing provisions of the Clayton Act.⁵

[b]—Section 4: Definitions; Private Actions Unavailable. Section 4 defines various terms for the purposes of the FTCA. “Commerce” is defined by Section 4 to mean both interstate and foreign commerce. The term “corporation” as used in the Act includes any company, trust or association, incorporated or unincorporated, organized to carry on a business for its own profit or that of its members. All such organizations, are subject to the statute, whether they are foreign or U.S. entities.

Section 4 defines the terms “antitrust acts” to include the Sherman Act, portions of the Wilson Tariff Act which deal with restraints on import trade, and the Clayton Act. Thus, popular usage notwithstanding, the FTCA is not classified as an antitrust act. Therefore, it has been held that a private party action for treble damages, available under Section 4 of the Clayton Act for all “antitrust” violations, cannot be brought for a violation of the FTCA’s key substantive provision—Section 5.⁶ Section 5 can only be enforced by the Federal Trade Commission; it cannot be enforced through private treble damage actions.

[c]—Section 5: The Public Interest Requirement; Provisions Relating to Cease and Desist Orders. Section 5, in addition to its substantive prohibition of unfair acts and practices, which is embodied in Section 5(a), provides for various procedural and enforcement mechanisms.

Under Section 5(b), the Commission is authorized to under-

⁴ The Commission’s role as a regulatory and enforcement agency is discussed further in Section 8.03, *infra*.

⁵ von Kalinowski, 13 *Antitrust Laws and Trade Regulation*, § 80.03.

⁶ See, e.g., *Carlson v. Coca-Cola Co*, 483 F.2d 279 (9th Cir. 1973).

take administrative enforcement proceedings for violations of Section 5(a), whenever these proceedings “would be in the interest of the public.” The public interest requirement reflects the general policy intentions behind the Act. The FTCA, unlike the Sherman and Clayton Acts, is not intended to provide direct redress for private grievances or for competitive injury suffered by individuals.⁷ Rather, it is designed only to protect the overall interests of the public. The public interest requirement is, in essence, a jurisdictional element of a Section 5 action. Since most enforcement actions to prevent unfair acts and practices are inherently in the public interest, there is little difficulty in meeting the requirement.⁸

Pursuant to Section 5(b),^{8.1} the Commission is authorized to serve a complaint upon persons, partnerships or corporations that it has “reason to believe” are violating the Act. The challenged party is entitled to notice and a hearing. If the Commission determines that a violation has occurred, it will issue a “cease and desist order.” Any order issued by the Commission is subject to being reopened and modified or altered by the Commission if changed conditions so require on notice and after opportunity for a hearing. The Commission is also required to consider alteration or modification of any order upon request of the person affected if the request makes a satisfactory showing of changed conditions.

Section 5(c) provides that such orders are subject to review in a court of appeals of the United States.⁹

⁷ *FTC v. Klesner*, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929); *FTC v. Gratz*, 253 U.S. 421, 40 S. Ct. 572, 64 L. Ed. 993 (1920).

See § 5.02 [1][b] *infra*, for a full discussion of the public interest requirement.

⁸ See § 5.02[1][b] *infra*.

^{8.1} 15 U.S.C. § 45(b).

⁹ Judicial review of a Federal Trade Commission cease and desist order is available in the United States Court of Appeals. The petition for review must be filed within sixty days of the service of the Commission's order. See 15 U.S.C. § 45(c).

The Court may affirm, modify, or set aside the order of the Commission, and may order the additional taking of evidence by the Commission. The findings of the Commission, if supported by substantial evidence, are binding upon the court.

Other Section 5 provisions provide for the finalization of Commission cease and desist orders and for substantial civil penalties for failure to comply with final orders.¹⁰

(Text continued on page U.S. 5-5)

See, e.g., *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139 (5th Cir. 1973), *cert. denied* 414 U.S. 1004 (1973).

¹⁰ Section 5(1) of the Federal Trade Commission Act, as amended in 1973, provides that anyone violating a final order of the Commission is to forfeit to the United States a civil penalty of up to \$10,000 per violation. The penalty is to be

(Footnote continued on page U.S. 5-5)

[d]—Section 6: Additional Powers. Section 6 of the Federal Trade Commission Act lists eight “additional powers” of the Commission. Those powers fall into three broad categories:

- (1) general powers of investigation and inquiry to facilitate administration of the Act;
- (2) powers to conduct investigations on its own initiative and to recommend additional legislation to Congress;
- (3) powers to maintain investigations of persons, partnerships, or corporations decreed in violation of the antitrust acts, or suspected of engaging in practices violative of the antitrust acts.

The Commission’s stated policy is that it conducts investigations and other activities “only in the public interest” and does not act when an alleged violation is “merely a matter of private controversy . . .” which “does not tend adversely to affect the public.”¹¹ This position is consistent with the Commission’s mandate to take action under Section 5 only in matters deemed to be “in the interest of the public.” With that restriction, the Commission has stated further that any individual, partnership, corporation, association, or organization may request it to institute an investigation with regard to any matter within the Commission’s jurisdiction.¹²

[i]—Investigations; Subsection (a). The Commission is granted the general power to “gather and compile information concerning and to investigate” all aspects of the operation of any person, partnership, or corporation engaged in or whose business affects commerce and its relation to other corporations, and to individu-

recovered in an action brought by the Attorney General. Each violation is deemed to be a separate offense and in the case of a continuing failure to comply with an order, each day of continuance is deemed a separate offense. The district court in such actions may also grant mandatory injunctions and any other appropriate equitable relief to aid in the enforcement of the order.

See, e.g., *United States v. ITT-Continental Baking Co.*, 420 U.S. 223, 95 S. Ct. 926, 43 L. Ed.2d 148 (1975).

See, e.g., *United States v. Ancorp Nat’l Serv., Inc.*, 516 F.2d 198 (2d Cir. 1975).

¹¹ 16 C.F.R. § 2.3.

¹² 16 C.F.R. § 2.2