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I. INTRODUCTION

Commissioner Joshua Wright has started his tenure as Commissioner by stepping into the long-running debate over the scope of the Commission's authority. Section 5 of the FTC Act gives the Commission the power to prevent "unfair methods of competition in commerce, and unfair or deceptive acts or practices." The FTC and the courts have been arguing over the scope of that power since the Act's passage in 1914, but the argument has attained new vitality in recent years as the Commission has made an effort to resuscitate its ability to move beyond straight antitrust in carrying out its competition mission. Commentators have pushed back; the courts and Congress have yet to weigh in.

The legal lure for the revival of a Section 5 approach to competition issues is a 1972 Supreme Court decision, *FTC v. Sperry & Hutchinson Co.*[2] In *S&H* the Court wrote: "[The] Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard 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's language is broad, bounded only by a footnoted reference to a Commission statement of basis and purpose in support of a cigarette health labeling rule that provides a slightly elaborated view of unfairness. The Commission has been gagging on the Court's language ever since.

Commissioner Wright recognizes that *S&H* is the most recent Supreme Court decision defining the breadth of Section 5, but he sets the Court's language aside by invoking some of the *bête-noirs* from the Warren Court. "No serious antitrust scholar," Commissioner Wright says, "argues that merger law would better serve consumers by relying exclusively upon the language in *Brown Shoe, Von's Grocery,* and *Pabst Brewing* rather than the updated economic thinking provided by the Horizontal Merger Guidelines." Why, then, he implies, should we bother with *S&H*? Instead, he puts forward an interpretation of Section 5 of his own devising: "[A]n unfair method of competition is an act or practice that (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies."

But before we abandon *S&H* (along with other Supreme Court cases that at least pay some attention to what Congress intended when enacting the antitrust laws) for the embrace of

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[2] 405 U.S. 233 (1972).

the latest "updated" thinking from today's economists, it might be helpful to take another look at the *S&H* case itself. A better understanding of the case, and what the Court was saying about the Commission's Section 5 authority, might even put the Commission on the right path for carrying out its competition mission.

II. THE *S&H* CASE

Green stamps were small pieces of gummed paper about the size of postage stamps that you got from retailers when making a purchase. You usually received one stamp for each ten cents you spent (yes, that's ten cents, not a dollar) and then pasted them into books. You took your full books to "redemption centers" where you could buy merchandise whose price was stated in numbers of books. A full book had 1200 stamps. A book had an average "retail value" of $3.00 (the average cost to the retailer was $2.68).

Stamps were a big deal by the mid-1960s. Thirty-five million U.S. households saved trading stamps. In 1964, trading stamp companies issued approximately 400 billion stamps (that's about $40 billion worth of retail sales, at a cost to retailers of about $800 million) to more than 200,000 retail establishments. About 50 percent of those stamps were issued in connection with grocery store sales; 47 percent of grocery store sales involved trading stamps and all major supermarket chains dispensed stamps in at least some of their stores. In "stamp-saturated" markets food retailers were found to have increased their margins by the cost of the trading stamps, an effective tax on groceries.

S&H began its business at the turn of the twentieth century. By the mid-1960s it was the dominant trading stamp firm, with annual gross receipts of over $300 million and 40 percent of the U.S. market by dollar volume (although its market position varied by state). Six companies had nearly 90 percent of the U.S. market, but S&H's market share was nearly three times that of its closest rival. Indeed, S&H was valuable enough to form the principal holding in Justice Lewis Powell's "substantial" stock portfolio, requiring him to recuse himself from the *S&H* case when it came before the Court.

In 1965 the Commission issued a three-count complaint against S&H. Counts I and II focused on S&H's effort to force retailers to issue one stamp (and only one stamp) for each ten cents worth of consumer purchases—no free stamps, no double stamps, no bonus stamps. Count I involved agreements between S&H and its retailers; Count II alleged a conspiracy between S&H and its trading stamp competitors, to the same effect. Count III involved an effort by S&H (allegedly in concert with its competitors) to suppress the sale and exchange of green stamps through outlets other than S&H's redemption centers. The main tool for suppressing these sales was the use of, or threatened use of, litigation against the firms that violated the terms on which S&H had issued (sold, really) its stamps. The targets of S&H's effort were stamp exchanges (companies that bought and sold trading stamps and would exchange one brand of stamps for another) and a wide variety of stores (department stores, clothing stores, food stores) that wanted to sell their merchandise for stamps.

Count III is the most interesting part of the Commission's case. Consumers had many reasons for wanting to sell or exchange the stamps they had collected. Some consumers had multiple brands of stamps and wanted to consolidate them for a better purchase. Different stamp companies sometimes charged different amounts for similar items; by exchanging stamps

consumers could buy more cheaply. Redemption centers were not ubiquitous (S&H had 850 redemption stores nationwide) and their merchandise was limited (S&H stocked only about 2000 articles, most of which were staple gift-type items); exchanging stamps allowed consumers to find items they wanted closer to where they were. Some consumers moved to areas where there were no redemption centers for their brand of stamps, but redemption centers for others; military personnel left the United States and wanted to sell their stamps. Some consumers didn't have cars and couldn't easily get to a redemption center, but S&H allowed mail redemption only if you lived more than 25 miles from a center. And some consumers preferred using their stamps at stores that would accept them instead of cash. But S&H wouldn't allow it, even when food stores wanted to provide food for the needy who lacked cash but had stamps. Perhaps not surprisingly, even with the exchanges, a large number of stamps went unredeemed (about 156 billion, worth nearly $400 million, over a 50-year period).

The Commission alleged that the effect of S&H's conduct was to suppress independent exchanges, "unfairly to the detriment of the persons engaged in such business or activity and unfairly to the detriment of the members of the consuming public" and to "interfere unjustly, oppressively, and unreasonably with the right of the consuming public to enjoy the full use of their personal property." It further alleged (in boilerplate language) that acts set out in Count III "are in unreasonable restraint of trade, are to the prejudice and injury of the public, have restrained and hindered, or have a dangerous tendency to restrain and hinder, competition unduly, and thereby constitute unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act."

When the case came before the Commission (the Hearing Examiner had found that S&H's concerted conduct violated Section 5, but its unilateral conduct had not), the Commission focused its analysis on competitive effects. With regard to Count III, complaint counsel urged that the suppression of stamp exchanges and stamp trading "tends to eliminate a class of small businessmen" and "is a restraint on alienation contrary to public policy."

The Commission resisted the invitation to rely on a general public policy against restraints on alienation. It even resisted relying on *Schwinn*, which had held that non-price post-sale restraints were illegal *per se* under Section 1 of the Sherman Act, based in part on the "ancient rule against restraints on alienation."[3] Rather than deciding the "broad competitive questions" on the "narrow and technical basis of a restraint on alienation," the Commission chose to examine whether there had been "an impairment of competition" by examining "the substance" of the practice.

The Commission pointed to two anticompetitive effects: suppressing the exchanges ("small" was not mentioned) and disadvantaging "stamp collecting consumers" who lost their "freedom of choice in the disposition of trading stamps." The Commission then proceeded to expound further on the "anticompetitive effects"—the elimination "of a whole class of businessmen who provided . . . a useful and valuable function" plus the removal of a method of price competition for retailers who offered to redeem stamps for goods. But the Commission made no more mention of specific injury to consumers.

[3] United States v. Arnold Schwinn & Co., 388 U.S. 365, 380 (1967).

S&H petitioned for review in the Fifth Circuit (only with regard to the Commission's decision on Count III) and the case took an unexpected turn. In a 2-1 decision, the court chose to review the Commission's decision under an extremely narrow standard.[4] Pointing out that the "traffickers" in S&H stamps had been enjoined 43 times by state and federal courts, no doubt to their injury, the court wrote that "the Commission cannot rest its case solely on the determination that injury to a competitor exists." Rather, to be "unfair" the practice must be "a *per se* violation of antitrust policy," or a violation of "the letter" of the antitrust laws, or a violation of the spirit of the antitrust laws "as recognized by the Supreme Court of the United States."

Judge Wisdom, in a strong dissent, argued that the majority's decision blessed unfair and anticompetitive practices that hurt stamp exchanges, independent retailers, and consumers, who were denied the beneficial effects of the services provided by the exchanges and independent retailers. Reviewing Supreme Court cases that approved "an expansive concept" of the Commission's authority in defining unfair methods of competition, Wisdom added: "I am particularly concerned over the Court's lack of consideration of the consumer's interest."

The court of appeals' narrow view of the Commission's authority forced it to seek Supreme Court review. The government's brief, written by the Antitrust Division and the Solicitor General's Office (at the time the FTC had no authority to represent itself in the Supreme Court), emphasized two major points. First, the 1938 Wheeler-Lea amendment to the FTC Act, which added the phrase "unfair or deceptive acts or practices," was intended to make clear that the Commission's authority could be exercised not just to protect competitors but also to protect consumers (earlier court decisions had confined the Act to practices that competitively disadvantaged competitors). In so doing, Wheeler-Lea did not limit the Commission to deceptive acts that hurt consumers; it covered unfair *or* deceptive acts. Second, the government pointed to the many ways in which S&H's practices prevented consumers from getting the "full value" of the stamps they received. "[T]here is no reason for arbitrarily suppressing this [exchange] market to the consumers' detriment," the government wrote.

What the government did not advance, either by brief or in oral argument (presented by Richard McLaren, then head of the Antitrust Division), was a test for the outer limits of Section 5 or a clear articulation of what it might mean to protect consumers from injury that was not related precisely to a recognized anticompetitive effect. This failure was not surprising, given the emphasis that the Commission had given in its opinion to the impact of S&H's practices on competition and to the Commission's unwillingness even to rest on some right of consumers to do what they wanted with their own property. McLaren admitted as much in oral argument, stating that the Commission's decision was fully supported on "the anticompetitive ground." For the government, though, the case was all about reversing the Fifth Circuit's narrow legal view of the Commission's authority; it was not about delineating the precise contours of the Commission's authority beyond the antitrust laws.

Justice White's unanimous opinion for the Court confirmed the government's view of Section 5, drawing on prior Supreme Court cases that had rejected a narrow approach protecting

[4] *See* 432 F.2d 146 (5th Cir. 1970).

only competitors, and underscoring Congressional intent in the Wheeler-Lea amendment to protect "consumers as well as competitors." But the Court then went on, almost casually if that is possible in a Supreme Court opinion, to enunciate its "like a court of equity" test, using language not suggested by the Commission in its decision, briefs, or on oral argument and drawing only loosely on language from the Commission's cigarette health labeling rule that was actually referenced by S&H in its brief.

I say "almost casually" because the Court's opinion, and much of oral argument, seems more concerned with whether the Court could affirm the Commission on the record that was presented. Writing that "[w]e cannot read the FTC opinion . . . as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition," the Court decided not to affirm the Commission, but to return the case to the Fifth Circuit with instructions to remand it to the Commission for further proceedings to explain how the restrictions were unfair to consumers. (The Commission never did so, instead settling the case a year and a half later.)

If we look at the whole story of the real *S&H* case, what we see is a case that was not the extreme detour into undisciplined "fairness" that the Court's test might lead one to believe. The Court's language was expansive, of course, and perhaps ill-considered, but the core of the case was strong. The Commission's decision on Count III seems eminently supportable on the facts and as a matter of good competition policy. The Court correctly held that Congress intended the Commission to exercise its unfair methods of competition jurisdiction in a way that takes account of the impact of the practice on consumers, not just competitors.

III. BROADER LESSONS

I think there are some broader lessons to be drawn from *S&H* as well.

First, the FTC can exercise its authority to reprehend "unfair methods of competition" quite well without plumbing the outer boundaries of that authority. *S&H* confirms that the Commission is freed from slavishly adhering to judicial views of the scope of the antitrust laws. There is plenty of room for the Commission to think about competition somewhat differently than the courts do without going wild.

Second, the Commission's view of "methods of competition" should take account of the impact of competition on consumers. Here we need to remember that the Court in *S&H*, and Congress in the Wheeler-Lea amendment, meant actual, real consumers ("housewives," as they were often referred to in *S&H*) not "consumer welfare," the misappropriated stand-in that refers to maximizing society's wealth. Consumer sovereignty—the freedom of consumers to choose what they want—was important in *S&H* and was an important benefit of the creation of a market for transferring trading stamps. Perhaps courts have downgraded this as a value of marketplace competition when deciding antitrust cases, but the Commission does not have to do so.

Third, the Commission's competition mission is about competition in markets. This is the anchor for Section 5; it can anchor future decisions much as it anchored the Commission's analysis in the *S&H* case itself. The Court's decision in *S&H* leaves the Commission free to consider other benefits that consumers get from marketplace competition; innovation is one that comes to mind. By keeping touch with marketplace competition, the Commission can both avoid spinning too far out of the control of Section 5 while staying true to the Congressional purpose of

giving the Commission the authority to articulate its own expert view of how competition helps consumers.

Finally, we can use *S&H* to interrogate new tests for the application of Section 5 that try to go beyond "straight antitrust." So let me try. How would Commissioner Wright's proposal fare in light of the facts in *S&H*?

First, Commissioner Wright would require a "significant harm to competition as that term is understood under the traditional federal antitrust laws." That's meant to keep us away from "public morals" and to focus us on price and output effects (incentives to innovate gets a mention too). Consumer choice doesn't seem to rate. So maybe all those benefits that consumers got from trading stamp exchange markets (plus the ability to avoid S&H's merchandise and buy items that consumers preferred) would not count when asking whether S&H's market suppressing efforts were a "significant harm to competition."

Even more puzzling is that Commissioner Wright would not extend "unfair methods of competition" to cases where there is "well-forged case law under the traditional federal antitrust laws." For *S&H* this would likely mean that Commissioner Wright would decide the non-price post-sale restrictions as if this were an antitrust case. Today there would likely be no Section 1 violation (S&H, at best, had only 40 percent of an ill-defined national market). So, no Section 5 case at all?

Second, Commissioner Wright would apply a "cognizable efficiencies" screen—advance a cognizable efficiency and the Commission has the burden of proving that it doesn't exist, but after that there is no balancing. It's hard to say how this one would come out. S&H did advance an efficiency argument (it was called a "business justification" then). Its restrictions were designed to keep consumers coming back to an S&H dispensing retailer; this exclusivity was important because retailers were willing to buy S&H stamps so as to promote customer loyalty.

Cognizable? Provable? There was little evidence one way or the other. There were no complaints from retailers about stamp exchanges, but S&H had been pretty successful in stamping them out, so it's hard to know what to make of the lack of complaints. Consumer surveys showed that trading stamps didn't necessarily drive consumers' decisions on which grocery store to patronize, but the data didn't show they were unimportant either.

Could the Commission have disproved the efficiency argument? Maybe not. In the actual case, the Commission rejected the efficiencies defense, both as unproved and as outweighed by the evidence of effect on consumers, trading stamp exchanges, and other retailers. Probably not the result under Commissioner Wright's approach.

II. CONCLUSION

It would be cruel irony if *S&H*—a case that was actually focused on competition and consumers, in which the Supreme Court emphasized that Congress intended to give the Commission authority to go beyond the antitrust laws and, in particular, to protect the interests of consumers in marketplace competition—could not be the subject of Section 5 under a proposed new test, one intended (in Commissioner Wright's words) "to save Section 5, and to fulfill the vision Congress had for this important statute."

If Section 5 could talk, it might say, "please save me from those who would save me."