

1964

# The Federal Trade Commission and the Public Interest

John D. French

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

French, John D., "The Federal Trade Commission and the Public Interest" (1964). *Minnesota Law Review*. 1638.  
<https://scholarship.law.umn.edu/mlr/1638>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## The Federal Trade Commission and the Public Interest

*The language of Section 5 of the Federal Trade Commission Act provides that the Commission should act to prevent unfair competition when such a proceeding "would be to the interest of the public." This article concerns the necessity of adherence to the public interest limitation in light of the heavy procedural and substantive burdens that Commission proceedings usually impose upon private litigants. Interference in essentially private disputes, the issuance of ineffective Commission orders, and the imposition of great harm upon individual respondents incommensurate with their misdeeds and in the face of only a remote possibility of any public injury raise the likelihood of undesirable consequences from unnecessary Commission action. The author contends that continued proper recognition of this jurisdictional requirement can prevent inflexible Commission action which, untempered by any "rule of reason," could produce results which in reality are adverse to the public interest.*

John D. French\*

### I.

The Federal Trade Commission Act empowers the Commission to issue a complaint when it has reason to suspect the use of an unfair method of competition or unfair or deceptive act or practice in commerce, "if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public."<sup>1</sup> The purpose of this paper is to consider the significance of this enigmatic public-interest clause.

Two fundamental propositions will be taken as given. First, the public-interest clause places a limitation of some sort upon the authority of the Commission to commence an adjudicative proceeding. Second, the question whether the Commission has stayed within the bounds of that limitation is subject to judicial review.

---

\*Member of the Minnesota and the District of Columbia Bars.

1. Section 5, as amended, 52 Stat. 112 (1938), 15 U.S.C. § 45(b) (1958)

The truth of these propositions will be assumed for two reasons. The first, and most important from a practical viewpoint, is that they accurately reflect the law as it has stood for 36 years since its initial enunciation in *FTC v. Klesner*.<sup>2</sup> In *Klesner*, Mr. Justice Brandeis announced that "to justify filing a complaint the public interest must be specific and substantial."<sup>3</sup> If the facts establish that this requirement is not satisfied, the Commission should dismiss the complaint; if the Commission neglects this duty, the reviewing court should dismiss the Commission's suit for enforcement of its order.<sup>4</sup>

There is considerable evidence that the interpretation placed on the public-interest clause in *Klesner* was not in accord with the intent of the draftsmen of section 5, and the decision has not gone uncriticized.<sup>5</sup> On the other hand, as Judge Friendly recently pointed out, Mr. Justice Brandeis, the author of the opinion, "more than any other man, was the begetter' of the Federal Trade Commission."<sup>6</sup> Further, his result in *Klesner* coincided with the views of Gerard Henderson, the early leading student of the Commission.<sup>7</sup> In addition, the Court reached its decision in the face of several clearly known, contrary lower court decisions.<sup>8</sup>

Of still greater importance, the public-interest propositions advanced in *Klesner* have stood the test of time. Later decisions have confirmed the view that the public-interest clause is a jurisdictional limitation.<sup>9</sup> Fundamental statutory amendment has left it unimpaired.<sup>10</sup> The Commission itself has agreed that the clause places a judicially reviewable limitation on its authority.<sup>11</sup> Recent

---

2. 280 U.S. 19 (1929).

3. *Id.* at 28.

4. *Id.* at 30.

5. See, e.g., Note, 43 HARV. L. REV. 285 (1929).

6. *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961) (dissenting opinion), quoting in part from MASON, BRANDEIS: A FREE MAN'S LIFE 402 (1946).

7. HENDERSON, THE FEDERAL TRADE COMMISSION 228-29 (1924).

8. See *Moir v. FTC*, 12 F.2d 22, 23 (1st Cir. 1926); *Hills Bros. v. FTC*, 9 F.2d 481, 483 (9th Cir. 1926). Both cases were cited by Commission counsel to the Court in *Klesner*. Brief for Petitioner, p. 45, *FTC v. Klesner*, 280 U.S. 19 (1929).

9. *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956); *FTC v. Royal Milling Co.*, 288 U.S. 212, 216 (1933); *FTC v. Raladam Co.*, 283 U.S. 643, 648-49 (1931).

10. See *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 876 (2d Cir. 1961) (Friendly, J., dissenting); Wheeler-Lea Amendment of 1938, 52 Stat. 111, 15 U.S.C. § 45(b) (1958).

11. See, e.g., *Premier Pillow Corp.*, 52 F.T.C. 1417-19 (1956); *Florida Citrus Mutual*, 50 F.T.C. 959, 961, 971 (1954).

Supreme Court decisions have cited *Klesner* with approval,<sup>12</sup> and it can fairly be said that no subsequent decision of the Court has questioned its authority.<sup>13</sup> Thus, to repeat, by virtue of *Klesner* and its progeny, the two preliminary assumptions of this inquiry are the law.

The second reason for accepting these assumptions is that they are "good" law in the sense that it is more desirable than not that they be followed. Even at the time of its decision, the substantive opinions expressed in *Klesner* squared with the congressional view that the Commission should not waste its time arbitrating petty personal squabbles.<sup>14</sup> Subsequent developments, discussed at length below, have brought to light other sound reasons for approving the general significance which the Court there attached to the public-interest clause.

## II.

Although 36 years have passed since the existence of public interest in an FTC proceeding was first recognized as a jurisdictional question, the scope and content of the clause remain substantially undefined. After *Klesner's* initial reverberations the courts have gradually become less strict in their interpretation of the requirement. A number of decisions can be read without distortion to suggest that the public interest in the prohibition of any deceptive practice or unfair method of competition is sufficient to justify a Commission proceeding.<sup>15</sup> This line of authority

---

12. *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 n.4 (1959); *American Airlines, Inc., v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956).

13. The reliance of the court in *Northern Feather Works, Inc. v. FTC*, 234 F.2d 335, 338 (3d Cir. 1956), on the *American Airlines* case, *supra* note 12, as weakening the public-interest requirement is clearly erroneous in view of the extended discussion in *American Airlines* of *Klesner* and the other public-interest cases. See text accompanying notes 24-25 *infra*. The statement in *American Airlines* that a finding of public interest "is not a prerequisite to the issuance of a cease and desist order as such," 351 U.S. at 83, is followed by the statement that "consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair." *Ibid.* In other words, the public interest is not a prerequisite to issuance of an order "as such," not because the Commission may disregard the public-interest clause, but because it must treat the presence of public interest as a prerequisite to commencing a proceeding.

14. See 51 CONG. REC. 14930 (1914).

15. *E.g.*, *Keller v. FTC*, 132 F.2d 59, 61 (7th Cir. 1942); *L. & C. Mayers Co. v. FTC*, 97 F.2d 365, 367 (2d Cir. 1938); *FTC v. Real Prods. Corp.*, 90 F.2d 617 (2d Cir. 1937).

has given rise to the opinion that "the requirement of public interest imposes no substantial limitation on the Commission's jurisdiction."<sup>16</sup> This conclusion and the cases lending support to it seem erroneous.

Let us begin at the beginning, namely, *Klesner*. That case held, if it held anything, that proof of consumer deception without more does not satisfy the public-interest requirement.<sup>17</sup> To be sure, *Klesner* accorded the Commission "broad discretion" in making its public-interest determination.<sup>18</sup> It indicated adequate public interest was present in a proceeding to prohibit an unfair method which threatened the existence of competition, or involved flagrant oppression of the weak by the strong, or tended to produce widespread injury that no private suit would be likely to redress.<sup>19</sup> But it also emphatically held that at least one "interest of the community" — "that private rights shall be respected" — "is not enough to support a finding of public interest."<sup>20</sup>

The latter-day erosion of this position in the lower federal courts has derived largely from emphasizing *Klesner's* grant of discretion to the Commission at the expense of its caveat to that discretion. Supreme Court decisions for the corresponding period fail to justify this trend. *FTC v. Raladam Co.* reiterated the requirement that the public interest be "specific and substantial."<sup>21</sup> Similarly, *FTC v. Royal Milling Co.* stated, "It is true, as this court held in *Federal Trade Commission v. Klesner*, . . . that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not enough."<sup>22</sup> That the Court there found the public-interest requirement satisfied is not surprising, for the evidence showed that a large number of buyers had been deceived into purchasing something they did not want or intend to buy and apparently no countervailing economic value in the practice was shown. The public interest was also obviously present in *FTC v. R. F. Keppel & Bros.*,<sup>23</sup> where the practice involved, "break-and-take" candy packaging, was carried on by 40 or more manufacturers, was the subject of many pending cases, resulted in sales by the respondent of \$234,000 per year,

---

16. Note, 56 COLUM. L. REV. 1018, 1025 (1956).

17. See 280 U.S. at 27.

18. *Id.* at 28.

19. *Ibid.*

20. *Ibid.*

21. 283 U.S. 643, 649 (1931).

22. 288 U.S. 212, 216 (1933).

23. 291 U.S. 304, 308-09 (1934).

and had a significant effect on competing manufacturers, retailers, and consumers.

The point is that nothing in these cases required a retreat from the standards erected in *Klesner*. Rather, even a strict construction of the public-interest clause would have permitted the proceedings in these situations. Unless these later cases are so read — as complementary to, rather than contradictory of, the *Klesner* decision — the remarks of the Court in *American Airlines, Inc. v. North American Airlines, Inc.*<sup>24</sup> are impossible to understand. There the Court explained that it “has held that, under § 5, the Federal Trade Commission may not employ its powers to vindicate private rights and that whether or not the facts, on complaint or as developed, show the public interest to be sufficiently ‘specific and substantial’ to authorize a proceeding by the Commission is a question subject to judicial review.”<sup>25</sup> The Court cited *Klesner*, *Keppel*, and *Royal Milling* in support of these observations, apparently viewing the holdings as harmonious rather than discordant.

Moreover, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,<sup>26</sup> the Court took pains to contrast the Sherman Act, into which Congress had already built a public-interest determination, with the Federal Trade Commission Act, into which it had not. The Court had noted in *Standard Oil Co. v. United States*<sup>27</sup> that under the Sherman Act, as to some restraints, “Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred.”<sup>28</sup> Then it added, “in this regard the Sherman Act should be contrasted with § 5 of the Federal Trade Commission Act . . . which requires that the Commission find ‘that a proceeding by it . . . would be to the interest of the public’ before it issues a complaint for unfair competition.”<sup>29</sup>

Therefore it seems clear beyond question that the Commission is still required to find something more than an unfair method of competition or a deceptive practice before it may enter an order. That “something more” is a “specific and substantial” public interest.

---

24. 351 U.S. 79 (1956).

25. *Id.* at 83.

26. 359 U.S. 207 (1959).

27. 221 U.S. 1 (1910).

28. 359 U.S. at 211.

29. *Id.* at 211-12 n.4.

## III.

One must take care, however, in formulating the problem, not to put matters in the wrong order. After all, the object of section 5 is to authorize the Commission to stamp out unfair methods of competition and unfair or deceptive acts or practices in commerce. The public interest would be thwarted, rather than furthered, if many of these practices were allowed to slip through a public-interest-clause loophole in the Commission's net. The point of *Klesner* is not that the Commission must make an exhaustive showing of public interest in each case, but that it must not proceed in the face of evidence showing that public interest is lacking.<sup>30</sup> In most instances Commission action against unfair competition and deceptive practices in commerce will further the interest of the public. The policy of the statute dictates this conclusion. Accordingly, the exceptions, not the rule, require elucidation. The question is, under what circumstances may the public interest better be served by finding a lack of public interest in a Commission proceeding than by the issuance or affirmance of an order.

Again we may commence our inquiry with *Klesner*. It has been said that that case may be "put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission."<sup>31</sup> Though this interpretation seems inadequate, for the moment let us accept it. Is the triviality of a controversy a legitimate consideration in the determination of the presence or absence of public interest in a Commission proceeding?<sup>32</sup> I think it is. True, the courts obviously are not equipped to act appropriately as watchdogs over the frivolous expenditure of Commission funds. Rather, justification for the criterion of triviality exists because an FTC proceeding

---

30.

The specific facts established may show, as a matter of law, that the proceeding which . . . [the Commission] authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without inquiry into the merits, dismiss the suit.

280 U.S. at 30.

31. *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942).

32. The *Klesner* Court obviously thought so. Judge Friendly agrees. *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961) (dissenting opinion). For the contrary view see Judge Lumbard's opinion for the majority in *Exposition Press, supra* at 873, and Judge Hand's opinion for the court in *Moretrench Corp. v. FTC, supra* note 31.

may work a hardship on a respondent entirely out of proportion to his misdeed.

This result may come about in several ways. For one thing, the great cost of actively defending against a Commission complaint<sup>33</sup> may force many a litigant to forego the luxury of an adequate defense in minor controversies.<sup>34</sup> For another, although the respondent's violation may be isolated, perhaps unique, and not likely to be repeated, the order engendered is likely to be broad in scope and permanent in duration, or there will be little point in issuing any order at all.<sup>35</sup> In these cases of sporadic and individual acts, "the Commission's powers are so defective that they should be invoked only where no other remedy exists."<sup>36</sup>

This raises a second and related point. Clearly Mr. Justice Brandeis' objection to the Commission proceeding in *Klesner* was not merely that the subject matter was too trivial but that the Commission was the wrong sort of forum in which to try the controversy. He thought an essentially private dispute should be tried in a court.<sup>37</sup> Similarly, before him, Henderson considered customary passing-off cases, for example, subject to a faster and more effective remedy in a court than through the "cumbersome procedure" of the Commission.<sup>38</sup> The two themes, procedural unsatisfactoriness and potential undue severity, coalesce in the Fourth Circuit's opinion in *Flynn & Emrich Co. v. FTC*:<sup>39</sup>

The case here is rather a controversy of a private and personal nature between the petitioner and the Perfection Company, and could have been readily settled in the courts, and if a proper case were made an injunction would have issued against the petitioner. Certainly Con-

33.

A competent lawyer is practically indispensable to someone dealing with the Commission, and the legal fees involved even for negotiating a settlement may exceed \$25,000. Antitrust litigation before the Commission may cost each firm involved more than \$175,000 per year in legal fees, exclusive of the cost of the record.

Note, 62 COLUM. L. REV. 671, 704 (1962).

34. "As it is, the cost and expense of travel and counsel are such that a small respondent with limited means really cannot afford to defend a Federal Trade Commission complaint." Howrey, *The Federal Trade Commission—Present Problems and Suggested Changes*, 10 ABA SECTION ANTITRUST L. 40, 46 (1957); see *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 875 n.1 (2d Cir. 1961) (dissenting opinion).

35. Compare the majority with the dissenting opinions in *Gimbel Bros.*, 60 F.T.C. 359 (1962), and *Quaker Oats Co.*, 60 F.T.C. 798 (1962).

36. HENDERSON, *op. cit. supra* note 7, at 232.

37. 280 U.S. at 28-30.

38. HENDERSON, *op. cit. supra* note 7, at 228.

39. 52 F.2d 836 (4th Cir. 1931).

gress never intended that the machinery of the Federal Trade Commission, severe as its operation can be made, should be set in motion for the settlement of private controversies, when the courts can act. The official character of the Commission makes it all the more necessary that it act only when the public interest is involved. It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce.<sup>40</sup>

These observations seem sound not only for the reasons stated but for others as well. Where the Commission intervenes in an essentially private controversy, it effectively relieves one of the prospective parties of the financial burden of the litigation and presents the other party with an adversary of practically unlimited means. The public thus subsidizes some private litigants at random to the detriment of others, and sometimes in the pursuit of unmeritorious causes. Moreover, the course of the litigation is distorted. What the Commission may see as an appropriate remedy may well differ from what a court would have imposed or what the private parties would have accepted in settlement.

Reversal of unduly severe Commission action is already an accepted principle in a related context. A Commission order unnecessarily drastic in view of the offense may be modified to suit the situation. For example, in the *Royal Milling* case the Commission order would have required the excision of the word "Milling" from respondents' trade names, since they did not in fact mill grain. The Court stated:

[The trade names] . . . constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and the public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names.<sup>41</sup>

Similarly, instances will arise, and have arisen, in which the very commencement of a Commission proceeding is a sanction of excessive magnitude in view of the triviality of the matter in issue. Just as a stringent order may be undesirable, sometimes no order is needed at all. Certainly this teaching is found in the numerous decisions involving abandonment of an unfair practice by a respondent before an order is entered. It would, of course, be unsound to require the Commission to dismiss every such proceeding, for often "no assurance is in sight that petitioner, if it could

---

40. *Id.* at 838.

41. *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933).

shake [the Commission's] . . . hand from its shoulder, would not continue its former course."<sup>42</sup> All the same, the object of a Commission order is remedial rather than penal,<sup>43</sup> and with nothing to remedy, an order is unwarranted.<sup>44</sup> No one has recognized this fact better than the Commission, and dismissals are frequent in cases in which the allegedly unlawful practice has been discontinued.<sup>45</sup>

Dismissal of a proceeding for lack of need of an order also is appropriate in other situations. The same result may obtain when the danger of significant public injury seems slight. Thus, the court in *Burton-Dixie Corp. v. FTC*<sup>46</sup> saw no need for an order to protect consumers from confusing items as to which, the evidence indicated, they had no preference and no basis for a preference. In *S. Buchsbaum & Co. v. FTC*,<sup>47</sup> a Commission order prohibiting the use of the tradename "Elasti-Glass" and the word "glass" to describe articles made of synthetic resins was reversed because nothing in the findings showed any deception having a tendency to result in detriment to the purchasing public.<sup>48</sup>

In *Arnold Stone Co. v. FTC*,<sup>49</sup> petitioner's "cast stone" was sold primarily to architects, contractors, and builders, who knew it was manufactured rather than natural. The chance that some unsophisticated buyer might sometime be deceived was considered so remote that public interest was deemed lacking. The Commission's own recent decision in *Heinz W. Kirchner*<sup>50</sup> supports the correctness of this approach. There the advertising

42. *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307, 310 (7th Cir. 1919).

43. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960).

44. E.g., *Stokely-Van Camp, Inc. v. FTC*, 246 F.2d 458 (7th Cir. 1957).

45. See *United States Rubber Co.*, TRADE REG. REP. (1964 Trade Cas.) ¶ 17006 (FTC July 31, 1964); *Chesebrough-Ponds, Inc.*, TRADE REG. REP. (1964 Trade Cas.) ¶ 17007 (FTC July 27, 1964); *Oneida, Ltd.*, 55 F.T.C. 1669 (1959); *R. H. White Corp.*, 54 F.T.C. 1734 (1958); *Phillip Morris & Co.*, 51 F.T.C. 857 (1955); *Argus Cameras, Inc.*, 51 F.T.C. 405 (1954); *Harrison Mills, Inc.*, 50 F.T.C. 1044 (1954); *Denver Chem. Mfg. Co.*, 50 F.T.C. 837 (1954); *Wildroot Co.*, 49 F.T.C. 1578 (1953); *Hollywood Athletic Co.*, 44 F.T.C. 1234 (1948).

46. 240 F.2d 166, 174-75 (7th Cir. 1957).

47. 160 F.2d 121 (7th Cir. 1947).

48. The Commission acquiesced in the *Buchsbaum* decision by dismissing a battery of cases on its authority. *Saks & Co.*, 44 F.T.C. 1142 (1948); *Hickok Mfg. Co.*, 44 F.T.C. 1145 (1948); *Pioneer Suspender Co.*, 44 F.T.C. 1145 (1948); *A. Stein & Co.*, 44 F.T.C. 1146 (1948); *Rohm & Haas Co.*, 44 F.T.C. 1147 (1948).

49. 49 F.2d 1017 (5th Cir. 1931).

50. 3 TRADE REG. REP. ¶ 16664 (FTC Nov. 7, 1963).

claim was that a "Swim-Ezy" device to aid the beginning swimmer was "invisible" when worn. The Commission stated, "The possibility that some persons might believe that 'Swim-Ezy' is, not merely inconspicuous, but wholly invisible or bodiless, seems to us too far-fetched to warrant this Commission's intervention in the public interest."<sup>51</sup>

Thoroughgoing support for the dismissal of a proceeding, when there is slender likelihood of public injury and other considerations countervail, is provided by the Commission's opinion in *Modern Methods, Inc.*<sup>52</sup> There, in dismissing the complaint for lack of a fair hearing, the Commission stated:

We conclude, therefore, that the complaint in this proceeding should be dismissed. The Commission unquestionably has the power to remand this matter to a hearing examiner for further evidence in order to provide an adequate basis for review. *However, such a proceeding is costly, time consuming and, to some extent, harassing to respondents. The record is devoid of the testimony of dissatisfied customers claiming deception on the part of respondents.* Even though proof of actual deception is not prerequisite to a finding of violation, taking into consideration all the circumstances disclosed by this record we are satisfied that the public interest will be adequately protected by continuing a close scrutiny of respondents' operations.<sup>53</sup>

An even stronger case for withholding Commission action would seem to exist when the Commission proceeding is not only unlikely to redress any public injury but may actually work such injury itself. This is not a farfetched possibility. In *Standard Oil Co. v. FTC*,<sup>54</sup> gasoline refiners were furnishing retailers with pumps and tanks free of charge or at less than cost on the condition that the retailer agree to dispense only the donor-refiner's gasoline from the gift facilities. The petitioner argued a lack of public interest and the court agreed. Apparently the practice had not increased but decreased the cost of distribution, and its prevention would have decreased the number of filling stations and increased the price of gasoline.

In *John Bene & Sons v. FTC*,<sup>55</sup> the Commission had found that the respondent falsely disparaged a competitive product. However, the disparaged product was found by the reviewing court to have been misbranded, in that its label stated a medical use for which the product was unfit. The court also found evidence that a deci-

---

51. *Id.* at 21540.

52. 60 F.T.C. 309 (1962).

53. *Id.* at 341. (Emphasis added.)

54. 282 Fed. 81 (3d Cir. 1922), *aff'd sub nom.* *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923).

55. 299 Fed. 468 (2d Cir. 1924).

sion in the Commission's favor would restore public faith in the mislabeled product. The court, therefore, saw no public interest in upholding the Commission order.

The Commission's remarkable recent decisions in *Max Factor & Co.*<sup>56</sup> and *Shulton, Inc.*<sup>57</sup> reveal yet another set of reasons for finding an absence of public interest in a proceeding. In these cases the respondents were charged with violating Section 2(d) of the Robinson-Patman Act by granting disproportionate advertising and promotional allowances to a single supermarket chain. The Commission dismissed the complaints without inquiry into the merits. It observed that the factual pattern was a familiar one, *i.e.*, a large buyer soliciting an allowance from its suppliers for a special promotion and the suppliers faced with the necessity of complying to avoid a serious competitive disadvantage. In such a situation, the Commission reasoned, the policy of the statute is better served by proceeding against the offending buyer under section 5.

Accordingly, the Commission, in the exercise of its administrative responsibility to determine what enforcement policy, in the circumstances, is "best calculated to achieve the ends contemplated by Congress," has decided to dismiss the complaints in the present cases. The respondents are only two among a very large number of suppliers who participated in Weingarten's special promotional events during the period in question. *The entry of cease-and-desist orders against these particular respondents, therefore, would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged, along with many others, and would not be in the public interest.*<sup>58</sup>

The result is particularly striking in view of the apparent absence of a public-interest limitation on Commission jurisdiction under the Robinson-Patman Act.<sup>59</sup>

#### IV.

Thus, the substantial significance that the public-interest concept continues to have for the future of FTC proceedings is apparent. Whether or not, and even if, a deceptive practice or unfair method of competition in commerce is found to exist, it is still

56. TRADE REG. REP. (1964 Trade Cas.) ¶ 16992 (FTC July 22, 1964).

57. *Ibid.*

58. *Id.* at 22066. (Emphasis added.) Nestle-Lemur Co., TRADE REG. REP. (1964 Trade Cas.) ¶ 16995 (FTC Aug. 10, 1964), and Lanolin Plus, Inc., TRADE REG. REP. (1964 Trade Cas.) ¶ 16995 (FTC Aug. 10, 1964), were subsequently dismissed on the same grounds.

59. *Webb-Crawford Co. v. FTC*, 109 F.2d 268, 269 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940).

appropriate to consider dismissal of the proceeding for lack of public interest. Public interest is not served if an order would be ineffective or unfair, or the intervention of a public agency is undesirable, or the burden of a proceeding and order on the respondent are unduly severe, or the proceeding is unwarranted in view of the unlikelihood of public injury, or an order might affect the economy adversely rather than favorably, and so on.

Regard for these considerations is of fundamental importance, for they provide essential balance to the Commission's enforcement program. Without the public-interest proviso, the Commission's endeavors could be carried to uncritical, oppressive, even anticompetitive, extremes. In the false advertising field, for example, it is now axiomatic that the Commission may 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.'"<sup>60</sup> The exercise of such power in every trifling instance of possible consumer confusion could be unjustifiably stifling. In several types of cases it seems that it already has been.

Let us consider, first, the predicament of the re-refiners of automotive lubricating oil. These concerns acquire used motor oil, refine out the impurities, and sell the oil in competition with oil produced from virgin crude. Re-refined oil has been found as satisfactory for lubricating purposes as new oil.<sup>61</sup> Nonetheless, consumers prefer new to re-refined oil, and both the Commission and the courts have held that re-refined oil must be prominently labeled as such to give the buyer an opportunity to refuse it. This result has been challenged on the grounds that 1) the public is not prejudiced by the unknowing purchase of re-refined oil, 2) the requisite disclosure injures competition by placing re-refiners at a serious disadvantage vis-a-vis competing refiners, and 3) the assistance rendered the consumer in indulging his capricious prejudice against re-refined oil results in the unnecessary waste of a precious natural resource.<sup>62</sup> These arguments have been blandly dismissed in a manner that seems totally unsatisfactory.<sup>63</sup> If they were founded in fact, they so clearly outweighed the inconsequential deception involved, that dismissal of

---

60. *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940).

61. *Mohawk Ref. Corp. v. FTC*, 263 F.2d 818, 821 (3d Cir. 1959).

62. See the court's discussion of the arguments of the petitioner in *Kerran v. FTC*, 265 F.2d 246, 248-49 (10th Cir. 1959).

63. See *Kerran v. FTC*, 265 F.2d 246 (10th Cir. 1959); *Mohawk Ref. Corp. v. FTC*, 263 F.2d 818 (3d Cir. 1959).

the proceeding in the public interest was not merely proper but imperative.<sup>64</sup>

A less clear, but provocative, public-interest problem is posed by the so-called "skip-trace" cases. These involve the use of varying deceptive devices for finding people who are evading their creditors. The tracing agency may, for example, write, under a fictitious name, to a relative of the debtor or to his last known address, stating that it is holding a package for the debtor which it will forward to him if his address is supplied. The courts have flatly rejected the argument that the tendency of this practice to aid in ascertaining the whereabouts of delinquent debtors deprives the proceeding of public interest.<sup>65</sup> The correct resolution of the issue is less obvious. If evidence were introduced to show that bad-debt losses were a serious burden to the economy and that skip-tracers were instrumental in reducing this burden significantly, a finding of no public interest in preventing the practice would not seem unreasonable. At the least, the public-interest question deserves more serious consideration in these cases.

## V.

In sum, a danger exists that the Federal Trade Commission Act may be invoked in unworthy causes if the public-interest requirement is neglected. So far-reaching a statute simply cannot be construed to make every possible violation a per se offense. As with other antitrust laws of comprehensive scope and indefinite terminology, its application must be informed by a "rule of reason" or the consequences would be intolerable.<sup>66</sup> The public-

---

64. However, the Commission still refuses to accord any public-interest significance to these considerations. See the FTC trade regulation rule on *Deceptive Advertising and Labeling of Previously Used Lubricating Oil*, 29 Fed. Reg. 11650 (adopted July 28, 1964, effective Jan. 1, 1965).

65. *E.g.*, *National Clearance Bureau v. FTC*, 255 F.2d 102, 103 (3d Cir. 1958); *Rothschild v. FTC*, 200 F.2d 39, 42 (7th Cir. 1952); *Silverman v. FTC*, 145 F.2d 751, 753 (9th Cir. 1944).

66. It has been suggested that a "rule of reason" be read into the act by making public injury a necessary element of an unfair method of competition. Note, 43 HARV. L. REV. 285, 287-88 (1929). This seems less satisfactory than reliance on the public-interest clause. A practice may be deceptive within the meaning of the statute and yet not be an appropriate object of Commission action because public interest is lacking. The absence of public interest does not make the practice less deceptive, but it does make its prohibition

interest clause seems to have served implicitly in this role in the past. It has saved the statute — albeit less frequently than one would have wished — from an inflexibility which would have offended against common sense, procedural fairness, sound economics, and even the antitrust policy which the act was designed to promote. It must continue to serve in this capacity if the Commission is “to do what it . . . [has] been created to do, to get on with ‘the great purpose of the act.’”<sup>67</sup>

---

by the Commission undesirable. A “rule of reason” is not needed here to help define “deceptive practice” or “unfair method of competition,” but to help determine whether or not such practices and methods should be put to an end.

67. *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 877 (2d Cir. 1961) (Friendly, J., dissenting, quoting in part from *FTC v. Raladam Co.*, 288 U.S. 643, 650 (1931)). Of course, the Commission should continue, as the *Klesner* case points out, to have considerable discretion in determining whether or not there is public interest in a proceeding. But when one factor after another indicates its absence — as, for example, seems to have been true in the re-refined motor oil cases, see text accompanying notes 61–64 *supra* — judicial reversal is not only appropriate but essential to sound enforcement of the statute.