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FTC Unfairness: An Essay

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Recently the Federal Trade Commission pointed out that some of these entertainment companies have warned parents that the material is inappropriate for children, and then they turned around . . . and advertised that same adult material directly to children. That is an outrage.¹

Yes, but is it "unfair"?

* * * *

So much black letter law is simple. Time and again, torts students wonder how they could do poorly on a final examination when they had successfully recited that negligence requires duty, breach of duty, cause in fact, proximate cause, and damages. Almost all of antitrust law is based on three simple statutory provisions: Sherman Act Section 1 (agreements in restraint of trade are illegal); Sherman Act Section 2 (monopolization and attempted monopolization are illegal); and Clayton Act Section 7 (mergers and acquisitions that may substantially lessen competition are illegal).² It is easy to know the black letter law—yet knowing it answers few hard questions (and earns students few points).

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²Thanks to Lois Greisman for her valuable insight and Shawn K. Ohl, Wayne State University Law School class of 2001, for valuable research assistance.


The Federal Trade Commission (FTC, Commission) Act's original prohibition of unfairness was similarly spare: the Act "declared unlawful" "unfair methods of competition." Unhappy with a cramped Supreme Court interpretation of this prohibition in *FTC v. Raladam Co.*, Congress in 1938 supplemented this language by declaring that "unfair or deceptive acts or practices" are also "unlawful."

This spare language then became more intricate. In 1980, the Commission sought to make the general Congressional prohibition more precise by issuing an unfairness policy statement. In 1983 it added a deception policy statement. In 1994, Congress largely codified the former by adding FTC Act Section 5(n):

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely

to cause [1] substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.  

Section 5(n) added structure to the traditional generality of FTC prohibitions.

When examined closely, however, Section 5(n)’s three-part test added only an illusion of precision. Consumer law students get few points for being able to recite that three-part test, and the FTC staff, advocating a new case to Commissioners, should fare no better. It is too easy to claim that the three tests are met.

Recent years have seen a very tentative increased focus on consumer unfairness, changed in substantive emphasis and forum of application. In spite of the ease with which a complaint can recite the three-part test, the Commission has shied away from pleading it; but noteworthy exceptions are starting to occur. Unfairness is part of the Commission’s historic mandate, reaffirmed by Congress, and there is no reason why sound unfairness cases should not be brought. It is nonetheless important for the Commission to recognize how few questions are definitively answered by the three-part test, and to continue to work to establish precedents that advance legal clarity.

Two decades after the FTC issued its Unfairness Statement, this essay appraises where we are. After providing some illustrations of the existing uncertainty, the essay begins by looking backward, sketching out the path that brought us here. It then reviews FTC unfairness jurisprudence today, and how it has changed. Most FTC unfairness cases challenge theft and the facilitation thereof. Other

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cases can be categorized as challenging the breaking or causing of the breaking of other laws, the use of insufficient care, interference with the exercise of consumer rights, and advertising that promotes unsafe practices. The forum in which cases are brought also has changed, as administrative adjudication has dramatically declined in importance. In its observations and recommendations, the essay revisits recent cases and suggests that the Commission place less emphasis on simple injury and greater emphasis on balancing costs and benefits, and go beyond the three-part test in its examination of claimed unfairness (an illustration with possible considerations is offered). The essay also emphasizes the importance of administrative adjudication.

I. ILLUSTRATIONS

As an illustration of the indeterminacy of the three-part test, imagine that the Commission has asked an FTC General Counsel whether, as a matter of law, some practice is not "unfair." Imagine further that in each case, a memorandum from the Bureau of Consumer Protection (BCP) recites that the practice is likely to cause substantial injury to consumers that cannot be reasonably avoided and is not outweighed by countervailing benefits. In which of the following cases should the General Counsel declare that as a matter of law the practice is not unfair and cannot be challenged?

- An advertising campaign is conspicuously erotic, blatanty using sex to sell. BCP argues that the campaign coarsens public discourse and harms consumers, obviously cannot be avoided (it is everywhere), and has no benefits.

- Guns are sold without protective devices. BCP argues that this kills vulnerable consumers who obviously cannot avoid the harm,

9. See supra notes 5 & 8 and accompanying text.
and that lives outweigh any small expense.\textsuperscript{11}

- Violent and sexual movies, certain to earn an "R" rating, are test-marketed to children too young to patronize the movies without an accompanying parent or guardian.\textsuperscript{12} BCP argues that this harms families because underage children will be attracted to inappropriate movies, parents cannot prevent the harm (who can control teenagers?), and there is no cost to testing movies only on appropriate audiences.

- When one goes to certain web sites, a window pops open with a promotion urging one to make a purchase, play a game, or participate in a lottery. (Note: It would be unfair for the author of this article to single out one of the many sites that do this.) BCP argues that even if consumers can resist the blandishments of the pop-up window, each consumer is harmed by a lessened viewing experience as well as the expenditure of the time and mouse-control to move and close the pop-up window. BCP argues that this wasted time and effort may impose small costs on each consumer, but adds up to massive costs in time and increased risk of carpal-tunnel syndrome when multiplied by the potentially millions of hits each day.\textsuperscript{13} It cannot be avoided because the whole point is to make the

\begin{itemize}
\item \textsuperscript{13} See Ranking of Web Sites By Unique Visitors (visited Mar. 31, 2001) <http://us.mediametrix.com/data/thetop.jsp> (several sites had more than 30
pop-up unavoidable, and there is no benefit to it.\textsuperscript{14} 

\begin{itemize}
  \item Radio and television start to advertise distilled spirits.\textsuperscript{15} BCP argues that, especially when shown on shows with a substantial under-age audience,\textsuperscript{16} this is likely to harm consumers who obviously cannot avoid the harm, and with no societal benefit at all.\textsuperscript{17}
  \item Cigars do not have the same statutorily-required rotating warnings as cigarettes. BCP alleges that cigar companies have “failed to disclose that regular cigar smoking can cause several serious adverse health conditions including, but not limited to, cancers of the mouth (oral cavity), throat (esophagus and larynx), and lungs,”\textsuperscript{18} and that this is unfair because the three-part test is met.\textsuperscript{19}
  \item A restaurant popular with teenagers permits smoking on its outdoor patio. Although the law does not prohibit this, BCP argues that second-hand smoke seriously injures pedestrians who pass the restaurant and the still-developing lungs of teenagers unable to resist
\end{itemize}

\textsuperscript{14} This fact pattern is analyzed \textit{infra} text accompanying notes 203-04.

\textsuperscript{15} See Patricia Winters Lauro, \textit{Cocktail Hour Returns to TV}, \textsc{N.Y. Times}, Dec. 7, 2000, at C1 (radio and television—local and cable—advertising of distilled spirits is increasing rapidly after years of self-imposed ban).

\textsuperscript{16} The distilled spirits industry currently restricts advertising to shows for which at least half the audience is of drinking age. \textit{See id.} at C8.

\textsuperscript{17} In the Joe Camel case, \textit{In re R.J. Reynolds Tobacco Co.}, No. 9285, 1997 FTC LEXIS 1181 (complaint issued May 28, 1997; dismissed without prejudice Jan. 26, 1999), the Commission alleged that R.J. Reynolds ran an advertising campaign designed to make Camels more attractive to younger smokers, and either (a) knew or should have known that the campaign would substantially appeal to underage consumers, or (b) knew or should have known that by targeting “‘learning’ smokers,” “the Joe Camel campaign would cause many children and adolescents . . . to smoke Camel cigarettes.” \textit{R.J. Reynolds Complaint}, 1997 FTC LEXIS 118, at ¶¶ 6 & 10.

\textsuperscript{18} \textit{In re Swisher Int’l Inc.}, FTC Dkt. No. C-3964, 2000 FTC LEXIS 101 (Aug. 12, 2000) (consent order). Quoted language is in paragraph 4 of the Complaint that accompanies the consent order. \textit{See id.} at *101.

\textsuperscript{19} The Commission made this allegation and obtained a consent order requiring rotating warnings in a group of cases announced at \textit{FTC Announces Settlements Requiring Disclosure of Cigar Health Risks}, Aug. 12, 2000, \texttt{<http://www.ftc.gov/opa/2000/06/cigars.htm>}.
the peer pressure to patronize the restaurant, and that health concerns outweigh almost any costs.20

• An internet expert engages in “pagejacking” by making an exact copy of a legitimate web site with one hidden change that redirects surfers to its (illegitimate or unsavory) web site, and/or he or she uses “mouse trapping” by incapacitating surfers’ “back” and “close” buttons such that surfers trying to exit are sent to undesired web site after web site.21 BCP argues that the lost time, inconvenience, and annoyance (consumers often need to shut down computers) are a substantial injury that consumers cannot avoid, and there is no benefit.22

• An information broker engages in “pretexting” by calling financial institutions, pretending to be an account holder, obtaining account information, and then selling this information.23 BCP alleges that pretexting is likely to cause substantial unavoidable consumer injury not outweighed by countervailing benefits.24

• A beer commercial depicts adults on a schooner, with some of them, although not the pilot, drinking. BCP argues that this goes

20. Cf. Maryland Village Endorses A Ban on Outdoor Smoking, N.Y. TIMES, Nov. 25, 2000, at A9 (sixty jurisdictions nationwide have some kind of ban on outdoor smoking).


23. See infra text accompanying note 133.

24. This was the unfairness claim in FTC v. Rapp, Civ. No. 99-WM-783, 1999 LEXIS 112 (April 22, 1999) (stipulated consent judgment and final order released June 27, 2000), available at <http://www.ftc.gov/os/2000/06/touchtoneorder.htm> (The Rapps were sued individually and doing business as Touch Tone Information, Inc., and the case is referred to by both names.) Commissioner Swindle dissented from the settlement. See <http://www.ftc.gov/os/2000/06/touchtoneswindle.htm>. The case is discussed infra at notes 133-141 & 200-206.
against the Coast Guard’s recommendation not to have alcohol on board\textsuperscript{25} and that it is likely to cause substantial unavoidable consumer injury not outweighed by any benefits.\textsuperscript{26}

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Some of those judgment calls are easy, some hard, and several are ones for which there is no right answer. In very few, if any, could one declare that Section 5(n)’s three-part test makes it clearly unlawful for the FTC to proceed.

\section*{II. How We Got Here}

One is tempted to suggest that law-abiding businesses may want guidance about what practices are “unfair.” May an internet site increase or direct consumer “hits” through pop-up windows? Through page-jacking? At least in theory, businesses would benefit were there an expert body to separate the legitimate from the improper and, in a non-punitive way, to encourage businesses to pursue the former. This was, of course, part of the instinct behind the formation of the Federal Trade Commission.\textsuperscript{27}

\textsuperscript{25} See <http://www.uscgboating.org/saf/saf_bui.asp>.

\textsuperscript{26} In \textit{In re} Beck’s North America, Inc., No. C-3859, 1999 F.T.C. LEXIS 40 (1999) (consent order), the Commission’s complaint alleged (over Commissioner Swindle’s dissent) that it was “unfair” for a commercial to show young adults without life jackets drinking while sitting on the edge of a schooner bow or standing on a bowsprit. The case is discussed \textit{infra} at notes 176-182.

\textsuperscript{27} The FTC is, if anything, over-studied, and this essay does not purport to offer a thorough description of the origins and history of the agency; rather, it highlights points of particular relevance. The same vigor with which the FTC has been studied precludes the author from suggesting that all of his points are novel; and, indeed, some have been made before. The legislative history of the FTC is most conveniently collected in Volumes 5-8 of EARL W. KINTNER, \textit{The Legislative History of the Federal Antitrust Laws and Related Statutes} (1982). Particularly useful works for present purposes include KENNETH W. CLARKSON & TIMOTHY J. MURIS, \textit{The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior} (1981); TIMOTHY J. MURIS & J. HOWARD BEALES III, \textit{The Limits of
Especially for those new to the debate, it is instructive briefly to revisit how we arrived at our current understanding of "unfairness" through the work of Congress, the courts, and the Commission (and Congress's reaction thereto).

A. Congress

Early in 1914, President Wilson addressed a joint session of Congress and made the case for an interstate trade commission. Businesses, President Wilson said, "desire the advice, the definite guidance and information which can be supplied by an administrative body." Bills were promptly introduced thereafter.

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28. Address by President Woodrow Wilson Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (January 20, 1914, reprinted in KINTNER, supra note 27, at 3747-48:

Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.

And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

Id.
According to the key legislative (Senate) Report, legislators thought that a new commission would be "of material aid to the business world in building up a body of precedent in the matter of business practices."\(^{29}\)

This new commission's daunting assignment would be to identify and eliminate methods of competition that were "unfair." As conceded in its Report, the Senate Committee on Interstate Commerce decided that "there were too many unfair practices to define," so it "would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair."\(^{30}\) The Conference Committee substituted "unfair methods of competition" for the "unfair competition" that the bill prohibited in order to make sure that courts did not give the concept a crabbed reading limited to common law understandings.\(^{31}\) The House Managers returned from the Conference agreeing that "[i]t is impossible to frame definitions which embrace all unfair practices."\(^{32}\)

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29. S. REP. NO. 63-597, at 10 (1914) ("the committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world").

30. Id. at 13 ("The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.")

31. See FTC v. R.F. Keppel & Bro., 291 U.S. 304, 310-12 (1934); see also Raladam Co., 283 U.S. at 648 ("Undoubtedly the substituted phrase has a broader meaning . . . ."); cf. Senate Consideration of H.R. 15613, S. 4160, reprinted in KINTNER, supra note 27, at 4139 (Remarks of Senator Hollis) (recommending changing "unfair competition" to "unfair or oppressive competition" or "unfair methods of competition" to make sure that the statute not be given a narrow, common law reading). But cf. Conference Consideration of H.R. 15613, reprinted in KINTNER, supra note 27, at 4743 (remarks of Senator Stevens, one of the House managers) (change was made "because we wanted to cover the specific act which would be unfair, while the course of conduct by itself might be fair").

32. Conference Consideration of H.R. 15613, reprinted in KINTNER, supra
The Senate bill's author, Senator Newlands, defended both the necessity of relying on the Commission to determine what was unfair and the breadth of the concept of unfairness. In his speech introducing the newly-reported bill, Senator Newlands explained that "it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade." Unfair competition "covers every practice and method between competitors upon the part of one against the other that is against public morals . . . or is an offense for which a remedy lies either at law or in equity." When Senator Sutherland objected that "public morals" was a "pretty broad category," Senator Newlands responded, "I think it is a very good test. I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair."

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Note 27, at 4694:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

Id.

33. Senate Consideration of H.R. 15613, S. 4160, reprinted in KINTNER, supra note 27, at 3936 ("It is utterly impossible for such a commission to define all the practices that are against good morals in trade and that tend to give competitors unfair advantage and dishonest advantage."). Id.

34. Id. at 3968 (going on to refer to "rebates, preferential contracts, espionage, and the use of detectives, coercion, threats, intimidation, and the bribery of employees").

35. Id. at 4414.

36. Id. Senator Newlands added:

I do not see much difficulty, when you appeal to the conscience of mankind, in determining what is fair and what is unfair in business practices. . . .
Congress extensively debated the meaning of what was then called “unfair competition” during its deliberations. Partisans often agreed that the concept was broad, while disagreeing over whether it was well defined or hopelessly (or unconstitutionally) vague.\(^3\) A narrowing focus can be seen in the suggestions of advocates that “[t]he object of section 5 is to prevent the creation or continuance of monopoly through unfair methods,”\(^3\) but those same advocates seemed confident that, for instance, the Commission should consider industrial espionage “unfair” even if a small firm employed it.\(^3\) Representative Covington, a key House conferee, explained that “the term may be said now to embrace those unjust, dishonest,

\[\text{Id. at 4414-15.}\]

\(^3\) Conference Consideration of H.R. 15613, S. 4160, reprinted in KINTNER, supra note 27, at 4723; cf. Remarks of Representative Covington (one of the House Managers):

“I state quite candidly . . . that at the time this measure was first mooted in the House I held to the opinion that ‘unfair competition’ or ‘unfair methods of competition,’ . . . was so probably vague as to be unenforceable. But after having given some months of study to the subject I am able to say that there is in existence to-day a surprisingly well-defined class of declarations by the courts . . . . All the conferees were clear upon that.

\[\text{Id.}\]

\(^3\) Senate Consideration of H.R. 15613, S. 4160, reprinted in KINTNER, supra note 27, at 4141 (Remarks of Senator Hollis); see also Senate Report, supra note 29, at 18-19 (Statement of the Managers on the part of the House, Report of the Conference Committee) (“It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource . . . , is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition.”).

\(^3\) See Senate Consideration of H.R. 15613, S. 4160, reprinted in KINTNER, supra note 37, at 4141, 4135, 4146 (Remarks of Senator Hollis).
and inequitable practices by which one seeks to destroy or injure the business of a competitor." The Commission was entrusted with making the concept workable and sustainable in court.

B. In the Courts

The Commission received a rude awakening in its first visit to the Supreme Court. The Court would not abide by the Commission's condemnation of an inoffensive tying arrangement (jute bags were tied to steel ties used to bind bales of cotton). "It is for the courts, not the commission, ultimately to determine as a matter of law" what are "unfair methods of competition," the Court wrote in words that would haunt the Commission in later cases. "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 unduly to hinder competition or create monopoly." Within a handful of years, the Court rejected several other antitrust-related Commission orders as involving practices not "opposed to good morals because characterized by deception, bad faith, fraud or oppression." Things took a turn for the better for the Commission in early

42. Id. at 427.
43. Id. Justice Brandeis, with Justice Clarke, eloquently dissented and issued a panegyric to Commission flexibility that later Courts found persuasive. Id. at 429-42 (Brandeis, J., dissenting). See also Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) ("As we recently unanimously observed: 'Later cases of this Court . . . have rejected the Gratz view and 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.' FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966)."").
1924, one of two high-water marks in the history of Commission "unfairness" jurisdiction. First, in *FTC v. Algoma Lumber Co.*, the Court, in a ringing opinion by Justice Cardozo, upheld the Commission's condemnation of the use of a misleading trade name (lumber from Western Yellow Pine was labeled "California White Pine"). Consumers were entitled to have their preferences, however irrational, honored:

Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. . . . The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Comm'n was not organized to drag the standards down.

Second, in Justice Stone's opinion for the Court in *FTC v. R.F. Keppel & Bro., Inc.*, the Commission's "unfairness" mandate really blossomed. The case involved the Commission's campaign against the wide-spread use of "break and take" packages of inexpensive candy that used an element of lottery as a marketing gimmick. The court of appeals had ruled that this was not an unfair way to compete, because the technique involved no "deception, fraud, or bad faith" and it was available for use by any merchant. The Supreme Court disagreed:

[A] trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss

45. 291 U.S. 67 (1934).
46. See id. at 78.
47. Id. at 78-79. The Court reaffirmed *Algoma Lumber*'s principle, that misleading advertising is harmful to competition, only two years ago. See *California Dental Ass'n v. FTC*, 526 U.S. 756, 771 n.9 (1999).
49. See id. at 306-08.
51. See id.
of their trade. A method of competition which casts upon one’s competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.  

The Commission was not just engaged in “censoring the morals of business men;” rather, it was attacking a practice that “exploit[s] consumers, children, who are unable to protect themselves” and was widely condemned as “contrary to public policy.” Congress had deliberately chosen a broad, flexible phrase “the meaning and application of which must be arrived at by what this Court elsewhere has called ‘the gradual process of judicial inclusion and exclusion.’” The Commission’s “duty,” in the felicitous words with which Judge Learned Hand applied Keppel, was “to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.”

One small glitch remained. In 1931, the Court in Raladam had found that an unsavory practice could be “unfair” only if it “substantially injured or tended thus to injure the business of any competitor or of competitors generally.” Because it appeared that the quack obesity cure at issue in Raladam adversely affected no competitor, the Commission could not intervene.

Congress removed the Raladam glitch in 1938 by passing the

52. Keppel, 291 U.S. at 313.
53. Id.
54. Id. at 312 (quoting FTC v. Raladam Co., 283 U.S. 643, 648 (1931)).
56. Raladam, 283 U.S. at 652-53. The Court observed that in the Congressional debate “the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized.” Id. at 650.
57. See id. at 654.
Wheeler-Lea amendments.\textsuperscript{58} The amendments made "[u]nfair or deceptive acts or practices" as well as "unfair methods of competition" unlawful.\textsuperscript{59} The change was more jurisdictional than substantive: Congress merely empowered the Commission to proceed regardless whether the unfair act injured a competitor.\textsuperscript{60} Many viewed the principal consequence as saving the Commission the time and expense of proving the injury to a competitor or competition that the Commission almost always could establish.\textsuperscript{61}

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C. The Commission (and Congress's Reaction) ·
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True to its understanding of the impact of the Wheeler-Lea amendments, the Commission continued routinely to charge respondents with engaging in both unfair or deceptive acts or practices and unfair methods of competition.\textsuperscript{62} Although it

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  \item \textsuperscript{58} Act of March 21, 1938, ch. 49, 52 Stat. 111.
  \item \textsuperscript{59} 15 U.S.C.A. § 45(a)(1) (West 1997). Each is unlawful only if it is in or affecting commerce. \textit{See id.}
  \item \textsuperscript{60} \textit{See} H.R. \textit{Rep. No. 75-1613, at 3 (1987) reprinted in KINTNER, supra note 27, at 4879; see also S. REP. No. 75-221, at 2-3 (1937), reprinted in KINTNER, supra note 27, at 4873-74.
  \item \textsuperscript{61} House Consideration of S. 1077, \textit{reprinted in KINTNER, supra note 27, at 4879. There is some suggestion that an "act" was seen as something less systematic than a "method." S. REP. NO. 75-221, at 3-4, \textit{reprinted in KINTNER, supra note 27, at 4875. But that was not the principal thrust of the amendment. Cf. id. at 2, \textit{reprinted in KINTNER, supra note 27, at 4874-75 ("[W]here it is not a question of a purely private controversy, and where the acts and practices are unfair or deceptive to the public generally, they should be stopped regardless of their effect upon competitors. This is the sole purpose and effect of the chief amendment of section 5.") See id. at 2. Senator Wheeler further remarked: \textquote{The present act makes unlawful 'unfair methods of competition,' and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor. 83 CONG. REC. 3252, 3255 (remarks of Sen. Wheeler) \textit{reprinted in KINTNER, supra note 27, at 4924. \textit{62} See \textit{e.g., In re} Household Sewing Machine Co., 76 F.T.C. 207 (1969) ("bait
challenged a wide variety of practices, the first systematic examination of "unfairness" did not occur until 1964, when the commission issued its Cigarette Advertising Rule Statement of Basis and Purpose. Reviewing a long list of marketing practices that it had forbidden as "unfair," the Commission drew from those examples three factors that determine whether an act or practice is unfair: public policy, morality and ethics, and "substantial injury to consumers (or competitors or other businessmen)."

and switch tactics are unfair methods of competition and unfair or deceptive acts and practices). The Commission was inconsistent in its pleading, and there are counter-examples. The Cigarette Rule's Statement of Basis and Purpose lists a series of "unfairness" cases focused on consumers, several of which, but not a majority, featured this double pleading. See infra note 64.

63. Cf. FTC v. Bunte Brothers, Inc., 312 U.S. 349, 353-54 & n.4 (1941) (noting that Congress designed Section 5 "as a flexible concept with evolving content," the Court observed that the Commission's 1939 annual report "lists as 'unfair competition' thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition").

64. See Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355-74 (1964) (codified at 16 C.F.R. 408 (2000)).

65. Id. at 8355:

No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the examples should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable
The Cigarette Rule Statement's factors acquired talismanic status when the Supreme Court cited them with apparent approval in *FTC v. Sperry & Hutchinson Co.*, the second high-water mark for Commission unfairness. This FTC defeat offered the siren clause:

[T]he 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 FTC lost because the Commission, in its opinion, had failed to avail itself of this power, but had instead relied on antitrust-related notions of competitive effect that would not sustain its order.)

Exhilarated by the heady aroma of unfairness thinking, the Commission promptly brought a series of "unfairness" cases. It

and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others. Beyond this, it is difficult to generalize.

In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct. For while Section 5 "does not authorize regulation which has no purpose other than * * * censoring the morals of business men" (*F.T.C. v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934)), the Commission cannot shirk the difficult task of defining and preventing those breaches of the principles of fair dealing that cause substantial and unjustifiable public injury.

*Id.*

67. *Id.* at 244.
68. *See id.* at 247-50.
69. *See, e.g., In re Pfizer, Inc.*, 81 F.T.C. 23 (1972) (Kirkpatrick, Commissioner) (an important advertising substantiation opinion). The FTC noted that "[u]nfairness is potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing
won some important appellate decisions, and then, in a classic example of suffering immensely from having dreams fulfilled, it persuaded Congress formally to authorize rule-making in the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act. S&H emboldened the Commission to challenge practices as “unfair”; the Magnuson-Moss Act and accompanying enthusiasm for rule-making stimulated the agency to make industry-wide rule-making its weapon of choice.

The Commission redirected its efforts away from case-by-case adjudication to the crafting of sweeping rules with the force of law. Before long, the agency devoted more than half of its consumer protection resources to rule-making. The combination of unfairness and rule-making was deadly: the over-stimulated economy. Id (footnote omitted); see also In re Hudson Pharmaceutical Corp., 89 F.T.C. 82 (1977) (consent order) (advertising vitamins to children is unfair); In re Genesco, Inc., 89 F.T.C. 451 (1977) (unfair to transfer substantial consumer credit balances to corporation without informing consumers); In re Philip Morris, Inc., 82 F.T.C. 16 (1973) (consent order) (including razor blades in home-delivered newspapers unfair). Pfizer, Inc., drew substantially on the path-breaking opinion for the Commission by Commissioner Elman in In re All-State Industries, Inc., 75 F.T.C. 465 (1969), aff'd, 423 F.2d 423 (4th Cir. 1970). The Commission in All-State held that it was unfair not to inform consumers of the practice of routinely assigning notes of indebtedness to third parties against whom claims and defenses may not be available. See id. at 495-97. The Commission wrote of its “dynamic” responsibility “to create a new body of law—a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system.” Id. at 491.

70. See, e.g., Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976) (suing consumers in inconvenient forums is unfair); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976) (failure to disclose anticipated use of tax information in loan solicitations was an unfair method of competition).


72. See id.

73. See 41 Fed. Reg. 3322 (1976) (“The Federal Trade Commission intends to reconsider and, if appropriate, promulgate into Trade Regulation Rules the principles of consumer protection law which it has developed in the course of deciding individual cases and accepting individual consent agreements.”).
Commission reached too far; the press and business interests pilloried the agency as the “National Nanny” after it proposed a rule regulating advertising to children; Congress passed legislation cutting back on the FTC’s jurisdiction over a wide swath of the economy and preventing “unfairness”-based regulation of commercial advertising, and the Commission strategically (and hastily) retreated.

The upshot was that the Commission issued its December 17, 1980, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction. The Commission inverted the order of the Cigarette Statement’s factors, putting the immoral/unethical consideration last, noting that the agency had never relied solely on this factor, and promising to act only on the basis of the other two factors in the future. The commission also

74. See, e.g., Caswell O. Hobbs, Unfairness at the FTC—The Legacy of S&H, 47 ANTITRUST L.J. 1023 (1978); see also 140 CONG. REC. H6162, H6165, (daily ed. July 25, 1994) (remarks of Representative Oxley) (“During the Carter Administration, the FTC went amok. By endeavoring to categorize huge expanses of American advertising as unfair, the agency produced a bipartisan backlash . . . .”).


76. In his Spring 1980 comments to the ABA Antitrust Section, FTC Chairman Michael Pertschuk admitted having made mistakes and discussed the “bleak side” of the controversies that had weakened morale and hurt recruiting. See Panel Discussion: Interview with Michael Pertschuk, Chairman, Federal Trade Commission, 49 ANTITRUST L.J. 1079 (1980).

77. See Commission Letter to Senators Danforth and Ford, supra note 6. The letter did not discuss the Commission’s jurisdiction over “unfair methods of competition” except in a footnote that stated:

In fulfilling its competition or antitrust mission the Commission looks to the purposes, policies, and spirit of the other antitrust laws and the FTC Act to determine whether a practice affecting competition or competitors is unfair. In making this determination the Commission is guided by the extensive legislative histories of those statutes and a considerable body of antitrust case law.

International Harvester, 104 F.T.C. at 1072 n.4.

78. See id.
de-emphasized "Public policy," the second factor in both statements. It was to be relied on heavily only where widely shared and where "declared or embodied in formal sources." Primacy was given to injury (now labeled consumer injury), which itself was subject to a three-part test: "It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."

With criticism continuing (and a new Chairman in office), in spring 1982 the Commission, with one dissent, advised Congress that it viewed as appropriate the statutory codification of its unfairness standards. In fall 1983, the Commission issued a policy statement carefully setting out its approach to deception. In spite of this, the agency went without authorization from 1980 (when it was authorized for two years) until 1994. Also starting in 1980, Congress subjected the Commission to continuing prohibitions on the issuance of unfair advertising rules. Finally, in the 103d Congress, the House Committee on Energy and Commerce reported and the House passed a bill that ended the limitation on commercial advertising rulemaking (and left unfairness authority unaffected); the Senate Committee on Commerce, Science, and Transportation reported and the Senate passed a bill that prohibited commercial advertising "unfairness" rule-making and codified the Commission's existing "unfairness" standards as reflected in its 1980

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79. See id.
80. Id. at 1076.
81. Id. at 1073.
82. See Letter from FTC Chairman James C. Miller III to Senators Packwood and Kasten (Mar. 11, 1982) (former Chairman Pertshuk dissented from this part of the letter).
83. See Letter from James C. Miller III to the Hon. John D. Dingell, supra note 7.
84. See H.R REP. NO. 103-128 (June 17, 1993) (noting the hiatus).
85. See id.
86. See id. See also H.R. 2243, 103d Cong. (1993), 139 CONG. REC. H 3844 (1993).
and 1982 letters\textsuperscript{87} (the Commission testified that this codification was "unnecessary" but unobjectionable),\textsuperscript{88} and the Conference

\textsuperscript{87} See S. Res. 1179, 103d Cong., 139 CONG. REC. 12255 (1993) (enacted); S. REP. No. 103-130, at 12-13:

This section amends section 5 of the FTC Act to add a new subsection limiting the FTC's authority over "unfair acts or practices" to acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This limitation applies both to adjudications under section 5 and rulemakings under section 18. . . . This section is intended to codify, as a statutory limitation on unfair acts or practices, the principles of the FTC's December 17, 1980, policy statement on unfairness, reaffirmed by a letter from the FTC dated March 5, 1982. Since the FTC's policy statement itself is based on the FTC's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the FTC to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistent with the approach of the FTC and the courts in the past. The Committee believes that this codification is necessary in order to provide the FTC, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future FTC from abandoning the principles of the December 17, 1980, and March 5, 1982, letters. . . . Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the FTCs December 17, 1980, letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair. . . . In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

\textit{Id.}

\textsuperscript{88} See Hearing Before the Subcommittee on the Consumer of the Senate
Committee agreed to a bill that became law. Committee dropped the interference with commercial advertising rule-making and supplemented the Senate's language concerning consumer unfairness with the cautionary words about excessive reliance on public policy that now appear as the last two sentences of FTC Act Section 5(n). The import of the provision remained unchanged, however: to codify FTC practice.

Committee on Commerce, Science, and Transportation, 103d Cong. at 23 (1993) (statement of Janet D. Steiger, chairman, Federal Trade Commission) ("Section 10, which defines unfair acts or practices, is taken from the criteria articulated in the Commission's Policy Statement on Unfairness [hereinafter Unfairness Statement] and from subsequent Commission case law on unfairness in which the Unfairness Statement has been interpreted and applied. Because the definition in the bill is taken from the definition in Commission policy and case law, Section 10 is unnecessary, but for the same reason, the Commission does not oppose Section 10.") (footnotes omitted).

89. See CONF. REF. NO. H.R. 103-617 (1994).
90. See id.; see also supra note 8 and accompanying text.
91. Cf. 140 CONG. REC. S11316, S11317 (1994) (remarks of Senate Manager Senator Gorton) ("Fortunately, the conferees were able to reach a compromise by removing the absolute ban while retaining the definition of unfairness that the FTC has been using since it promulgated a policy statement on unfairness in 1980. We were also able to reach an acceptable middle ground on the role which public policy should play in determining unfairness."); 140 CONG. REC. H6162, daily ed. (July 25, 1994) (remarks of House Manager Representative Swift) ("[T]he report includes a definition of unfair acts or practices that closely parallels the 1980 policy statement of the Commission on the scope of the FTC's consumer unfairness jurisdiction. What the report does not include is a prohibition on rulemakings based upon the FTC's unfairness authority."); 140 CONG. REC. H6164, daily ed. (remarks of House Manager Representative Dingell) ("The compromise is premised on the 1980 policy statement of the FTC on unfairness, as applied and interpreted by the Commission since 1980. The compromise clearly allows the FTC to consider public policies in making a determination of unfairness."); 140 CONG. REC. H6165, daily ed. (remarks of House Manager Representative T.J. Manton) ("The conference report ends the unfairness rulemaking ban, but includes a precise and narrowly defined definition of unfairness. . . . The definition is derived from the 1980 policy statement of the Commission and a 1982 letter from the Commission regarding unfairness. The agreement also allows the Commission to consider public policies as evidence in determining whether an act is unfair. . . . The conference agreement clearly states that such public policy considerations may not serve as
FTC practice was not actually very well established when Congress legislated. The Commission testified that it had applied its 1980 Unfairness Statement in only 16 cases: five adjudicated orders, one case reviewing a trade regulation rule, and ten consent orders or district court complaints. Although, for an independent basis for a finding of unfairness.


93. See In re Orkin Exterminating Co., Inc., 108 F.T.C. 263 (1986) (company's unilateral modification of its contracts with consumers was determined to be unfair); Southwest Sunsites, Inc., 105 F.T.C. 7 (1985) (Commission found company's land sale practices unfair based on exploitative sales practices and non-negotiable forfeiture clauses similar to one in the Horizon and Amrep cases), aff'd, 785 F.2d 1431 (9th Cir. 1986); International Harvester Co., 104 F.T.C. 949 (tractor manufacturer's failure to adequately disclose the safety risk of "fuel geysering" in its tractors was deemed unfair); Amrep Corp., 102 F.T.C. 1362 (1983) (Commission found land sales company's sales practices unfair based on exploitative sales practices and non-negotiable forfeiture clauses similar to one in the Horizon case), aff'd, 768 F.2d 1171 (10th Cir. 1985); Horizon Corp., 97 F.T.C. 464 (1981) (Commission determined that company's land sales contracts were adhesive in nature and unfair because, among other things, they contained a non-negotiable forfeiture clause which was not clearly brought to the attention of consumers and, therefore, could not be avoided by consumers.) (all parentheticals by Commission).

94. See American Financial Servs., 767 F.2d at 957 (upholding Credit Practices Rule).

95. See In re Fone Telecommunications, Inc., 116 F.T.C. 426 (1993) (consent order) (unfair to induce children to place phone calls, and thereby incur a charge, without providing a reasonable means for those responsible for paying for the charges to exercise control over the transaction); Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order) (unfair to induce children to place phone calls, and thereby incur a charge, without providing a reasonable means for those responsible for paying for the charges to exercise control over the transaction); Audio Communications, Inc., 114 F.T.C. 414 (1991) (consent order) (unfair to induce children to place phone calls, and thereby incur a charge, without providing a reasonable means for those responsible for paying for the charges to exercise control over the transaction); Teleline Inc., 114 F.T.C. 399 (1991) (consent order) (unfair to induce children to place phone calls, and thereby incur...
unexplained reasons (probably simple oversight), this recitation omitted several trade regulation rules and ten consent orders, the

a charge, without providing a reasonable means for those responsible for paying for the charges to exercise control over the transaction); Credi-Care, Inc., Civ. No. 920-8000 (N.D. Ill. 1992) (consent judgment) (company's unfair billing practices which made consumers unknowingly delinquent with their payments deemed unfair), reported at <http://www.ftc.gov/opa/predawn/F93/credi-car5.htm>; Discount Travel Services, Inc., 88-113-CIV-FWC-15C (M.D. Fla. 1988) (Commission challenged unauthorized billing on credit cards as unfair); Creditcard Travel Services, Inc., of New York, No. 87C9443 (N.D. Ill. 1987) (Commission challenged company's unauthorized billing on credit cards and refusal to honor consumers' cancellation requests as unfair); C & D Electronics, Inc., 109 F.T.C. 72 (1987) (consent agreement) (complaint alleged that the sale of pirate cable television decoders to unauthorized users was unfair because it resulted in higher prices for cable services to consumers and lost municipal revenue from franchisee fees); J.C. Penney Co., Inc., 109 F.T.C. 54 (1987) (consent agreement) (unfair to bring debt collection lawsuits in judicial forums distant from where the consumer lives or where the contractual agreement was signed); Federal Sterling Galleries, Inc., Civ. 87-2072 PHX CAM (D. Ariz. 1987) (Commission challenged unauthorized billing on credit cards as unfair) (all parentheticals by Commission).


97. See In re Citicorp Credit Services, Inc., No. C-3413 (1993) (consent order) (unfair to process credit card transactions for several years when Respondent knew or should have known the card issuer was violating the law, by, for instance, billing customers after they had cancelled memberships); American Family Publishers, 116 F.T.C. 66 (1993) (consent order) (creditor's assisting, acting in concert with, or knowingly approving its debt collection agencies' sending unlawful collection material is unfair); Tower Loan of Mississippi, 115 F.T.C. 140 (1992) (consent order) (unfair to require borrowers to execute false declaration that credit insurance was voluntarily chosen); Budget Rent A Car Corp., 113 F.T.C. 1109 (1990) (consent order) (unfair not to disclose to renters
I. FTC UNFAIRNESS JURISPRUDENCE TODAY

The situation is little different today. The Supreme Court has not spoken. No new court of appeals has weighed in. No opinion of the Commission addresses FTC Act Section 5(n). The Commission has not based any new Trade Regulation Rule on the unfairness authority. New initiatives and new thinking are reflected only in consent orders and complaints (a couple of which have led to District Court decisions).

In part due to the dearth of binding precedent, the law of FTC unfairness remains indeterminate. This is not surprising. Observers recognized that the 1980 Unfairness Statement, while a significant analytic contribution, failed to draw bright lines delineating unfair

that rental company did not promptly inspect cars subject to recall); Consumer Direct, Inc., 113 F.T.C. 923 (1990) (consent order) (unfair not to disclose that exercise device could break and injure user); Jeep Eagle Corp., 113 F.T.C. 792 (1990) (consent order) (unfair to breach warranties by failing to effect successful repairs reasonably promptly); International Masters Publishers Inc., 109 F.T.C. 9 (1987) (consent order) (unfair for mail order seller of recipe cards to represent that it would honor cancellation requests and permit cards to be returned (to avoid payment), and then not to do so); Saab-Scania of America, Inc., 107 F.T.C. 410 (1986) (consent order) (complaint, ¶ 5) (automobile manufacturer's applying paint so that it later blisters and peels "in a significant number of instances," without disclosing this to consumers, is unfair); Sun Refining & Marketing Co., 104 F.T.C. 578 (1984) (consent order) (failing to honor a lifetime automotive battery warranty is unfair); Lomas & Nettleton Financial Corp., 102 F.T.C 1356 (1983) (consent order) (unfair to effect a merger of mortgage firms so ineffectually that insurance payments are not timely paid).

98. See Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988); American Financial Services Ass'n., 767 F.2d 957 (D.C. Cir. 1985); Harry and Bryant Co., 726 F.2d 993 (4th Cir. 1984).

99. The initial decision in In re Griffin Systems, Inc., 117 F.T.C. 515 (1994), found that the respondent had engaged in an unfair act or practice, but this finding was not challenged before the Commission. See id.
practices,\textsuperscript{100} and codification of those standards, even as elucidated by occasional application during ensuing years, was unlikely suddenly to bring clarity. Instead, it brought merely the illusion of clarity. What is clear, however, is that FTC unfairness jurisprudence has nonetheless changed substantively and procedurally.

\textbf{A. The Changed FTC Unfairness Jurisprudence: Substance}

FTC unfairness jurisprudence—if one can call complaints and consent orders jurisprudence—has changed. A traditional listing of unfair acts or practices would include four categories: (1) coercive or high-pressure selling, (2) withholding material information, (3) unsubstantiated claims, and (4) post-purchase rights and remedies.\textsuperscript{101} The Commission addressed wrongdoings in these categories in rule-makings and administrative adjudication, often litigated to a final decision.\textsuperscript{102}

Even by the time Congress enacted FTC Act Section 5(n) in 1994, this had changed. Of the 16 Commission-reported cases in which the agency had applied its 1980 Unfairness Statement,\textsuperscript{103} not one involved unsubstantiated claims; for two decades, advertising substantiation cases have been brought under the Commission's more robust "deception" authority. Only one case, \textit{International Harvester}, involved failure to give information (an adequate warning), and that was in essence a products liability case in which the Commission elected not to issue any corrective remedy.\textsuperscript{104} Several cases relate to post-purchase rights and remedies: \textit{Orkin}

\begin{thebibliography}{99}
\bibitem{100} See \textit{American Financial Services Ass'\'n.}, 767 F.2d at 980 \& n. 16 (citing both Gellhorn and Rice, \textit{supra} note 30).
\bibitem{101} See \textit{Peter C. Ward}, \textit{supra} note 27 (crediting Craswell and Averitt, \textit{supra} note 27).
\bibitem{103} See \textit{supra} notes 92-95 and accompanying text.
\bibitem{104} See \textit{International Harvester}, 104 F.T.C. at 949. Several other Commission cases had involved issues of disclosure and lack of adequate care, but the Commission omitted these from its report. See \textit{supra} note 96.
\end{thebibliography}
challenged a seller's unilateral breach of contracts; American Financial Services upheld the credit practices rule; J.C. Penney challenged suing consumers in inconvenient districts; and land sales cases objecting to non-negotiable forfeiture clauses and to pre- and post-purchase misrepresentations that induced consumers to enter into and then continue paying on contracts. The three land sales cases all featured high-pressure selling practices, and at least one made this the focus of the decision. However, more than half of the 16 cases fell into new categories. Four were "900-number" cases, typified by the television ads urging children to pick up the telephone and call Santa Claus at a certain 900 number (without mentioning the large expense involved). Five cases challenged practices that amounted to theft or the facilitating thereof.

Modern Commission unfairness cases fall into five categories: (1) theft and the facilitation thereof (clearly the leading category); (2) breaking or causing the breaking of other laws; (3) using insufficient care; (4) interfering with the exercise of consumer rights; and (5) advertising that promotes unsafe practices. Each category is considered in turn.

1. Theft and the Facilitation Thereof

The five Commission-identified cases challenging theft, or the facilitation thereof, established a pattern. Three challenged

105. See Orkin Exterminating Co., 108 F.T.C. at 263.
106. See American Fin. Servs. Assoc., 767 F.2d at 957.
108. See Amrep Corp., 102 F.T.C. at 1362 (forfeiture clause); Horizon Corp., 97 F.T.C. at 464 (forfeiture clause); Southwest Sunsites, Inc., 105 F.T.C. at 7 (misrepresentations).
109. See supra note 93.
111. See infra part III.A.1.
unauthorized billing of credit cards.\textsuperscript{112} The respondent in another case, \textit{FTC v. Credi-Care, Inc.},\textsuperscript{113} allegedly forced consumers to send payment checks on a round-a-bout route that caused 90 per cent of consumers to be in arrears, and subject to penalties, right from the start.\textsuperscript{114} Most interesting was \textit{C&D Electronics, Inc.}\textsuperscript{115} The Commission complained of Respondent's sale of cable system decoders and similar devices designed to permit unauthorized viewing of cable television signals. This satisfied the three-part test, the Complaint alleged, because lost revenues caused legitimate subscribers to pay higher prices or receive reduced services, and harmed all consumers by reducing franchise fees.\textsuperscript{116} Commissioner Azcuenaga protested that any injury really flowed from the unlawful acts of the purchasers of decoders, and the majority was "embark[ing] on a course of social engineering that brings a radical new meaning to the concept of consumer protection."\textsuperscript{117}

This emphasis on theft and its facilitation has continued since 1994; more cases fit within this category than any other. Many are

\begin{itemize}
\item \textsuperscript{114} See \textit{id}.
\item \textsuperscript{115} \textit{109 FTC 72} (1987) (consent order), discussed further \textit{infra} text accompanying note 210.
\item \textsuperscript{116} See \textit{id}.
\item \textsuperscript{117} \textit{Id.} at 78 (Dissenting Statement of Commissioner Mary L. Azcuenaga). Commissioner Azcuenaga also noted that Congress had already addressed the unauthorized use of decoders through legislation. See \textit{id}.
\end{itemize}
straightforward, others more intriguing. The FTC won a preliminary injunction against a web site that required a credit card number for a purportedly free tour and then surreptitiously ended the free tour and began unauthorized charging. In the "pagejacking"/"mouse trapping" case, the defendant succeeded in diverting web surfers to its unsavory sites and then kidnapping them by sending them to site after site despite their best efforts to


119. One case was more akin to extortion than theft. In FTC v. Amakraut, Civ. No. 97-0354 RSWL (BZRx) (C.D. Cal. 1997) (consent judgment), an attorney allegedly submitted "green card" lottery applications and then, when successful, refused to forward the government-issued case number and paperwork, but instead dunned consumers to pay additional fees. Complaint Count II, available at <http://www.ftc.gov/os/1997/9701/amakrautc.htm> (visited Mar. 31, 2001) (also alleging that the attorney submitted multiple lottery entries causing some consumers to be rejected from the lottery). Another case involved simple fraud. The defendant in it was charged with, among other things, shipping unordered office supplies to businesses and then invoicing the businesses as though the supplies had been ordered. See FTC v. MTK Marketing, Inc., Civ. No. 96-230 LHM (EEX) (C.D. Cal. 1996) (settlements), reported at <http://www.ftc.gov/opa/1996/9608/mtk2.htm> (visited Mar. 31, 2001). A similar case is In re Synchronal Corp., 117 F.T.C. 724 (1994), a deception case that charges that respondents committed unfair acts or practices when, after a customer ordered a health care product, the respondents would periodically and without authorization ship additional supplies and bill credit cards. See also 58 Fed. Reg. 32947, 32956 (1993); Complaint ¶¶ 32-39.


121. See supra note 21.
extricate themselves. In a world where web sites boast of and market the number of “hits,” the defendant managed to steal the quite precious commodity, surfer time. In another proceeding the Commission challenged as unfair the facilitating of theft through the sale of customer lists (including credit card information) to service companies that would make unauthorized charges. In *FTC v. Martinez*, the Commission alleged that it was unfair to sell computerized templates for the creation of fake identification, which can “facilitate fraudulent activity, including identity theft and underage drinking.”

Several cases involve what are arguably variations of theft or facilitating theft. Most noteworthy of these are the “cramming” cases. In *FTC v. Hold Billing Services, Ltd.*, defendants allegedly enticed consumers to enter sweepstakes, providing a telephone number to permit notification of an award. In fact, the entry forms were disguised contracts for voicemail services for the submitted

122. See id. This case is discussed further supra, text accompanying notes 21-22, and infra, text accompanying notes 202-204.
telephone number; and it is exceedingly difficult to terminate service. The complaint had two deception counts and an unfairness count: billing a line subscriber who had not submitted the form (for instance, if a child had submitted it) was alleged to be "unfair" because line subscribers "cannot prevent third parties from placing their telephone numbers on sweepstakes or price promotion entry forms." Another "cramming" case had three deception counts and one more problematic unfairness count: it was alleged to be unfair for a provider of audiotext to let 800-number callers choose among charging a credit/debit card, debiting a checking account, or billing the telephone line used to place the call, because the line subscriber may not have placed or authorized the call and "[c]onsumers cannot reasonably block telephone calls to 800 or other toll-free numbers." The Commission won a limited preliminary injunction in *FTC v. Verity International, Ltd.*, against a firm that sold pornographic content through charges to the telephone line used for the computer connection. The court ruled "at least at this preliminary stage" that the Commission was likely to prevail by showing the difficulty of parents preventing children and others from incurring substantial unauthorized charges, even though the Commission-recommended alternative of requiring pre-subscription agreements would harm defendants. The court revealed its ambivalence by its order,

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127. See id.
131. See id. at 203-04. The court recognized that consumers may benefit from having an alternative to supplying credit-card information, but suggested that the real harm to defendants would "be the product of preventing defendants from capitalizing on the inattention and fear of consumers or on the disparity of power between them and the persons they bill to extract payments." *Id.*
which required thorough disclosure but not an end to the challenged billing of telephone lines without advance agreement.\textsuperscript{132}

Concepts of theft (not formally, but by analogy) also form the underlying basis for two of the Commission's controversial cases, the \textit{Touch Tone/Rapp}\textsuperscript{133} "pretexting" case where an information broker impersonated customers and tricked financial institutions into disclosing valuable and private financial information,\textsuperscript{134} and \textit{FTC v. ReverseAuction.com}.\textsuperscript{135} The burden on the Commission to prove (rather than infer) injury was the focus of disagreement in the \textit{Touch Tone/Rapp}. The Commission charged that the respondent was in the business of obtaining confidential financial information (bank balances and the like) often by making false and misleading statements to financial institutions (such as by calling up a bank and pretending to be the customer).\textsuperscript{136} The complaint alleged that not only was this deceptive, but the secret selling of such information was unfair (reciting the three-part test).\textsuperscript{137} Commissioner Swindle, although pleased that the Commission was bring a wrong-doer to justice, protested the advancing of what he saw as "a new theory of consumer injury based solely on the disclosure of 'private' financial information."\textsuperscript{138} The other three Commissioners (there was one vacancy) disagreed:

\textbf{We have previously recognized that the misuse of certain...}

\begin{itemize}
\item[132.] See \textit{id.}. This case is further discussed \textit{infra} text accompanying notes 211-12.
\item[134.] These cases are further appraised \textit{infra} text accompanying notes 200-209.
\item[136.] See \textit{Verity International}, 124 F. Supp. 2d at 193.
\item[137.] See \textit{id.}, complaint at ¶¶ 14-15.
\item[138.] Statement of Commissioner Orson Swindle in the Matter of Touch Tone Information, File No. 982-3619 (Apr. 22, 1999) (statement issued when court complaint was filed, with the matter listed by the name under which Mr. Rapp was doing business), available at <http://www.ftc.gov/os/1999/9904/touchtoneswindlestatement.htm>.
\end{itemize}
types of private financial information can be "legally unfair," In re Beneficial Corp., 86 F.T.C. 119, 173 (1975), aff'd in part, remanded on other grounds, 542 F.2d 611 (3d Cir. 1976). Thus, no new theory of consumer injury is advanced here. Moreover, the Commission cannot be precluded from challenging new techniques by dishonest actors if the act itself satisfies general controlling principles. For purposes of finding reason to believe a complaint should be filed, it seems hardly a strain to posit that substantial consumer injury could flow from the use of false pretenses to obtain the unauthorized disclosure of private financial information.¹³⁹

Commissioner Swindle rejoined that "the concept of 'financial information' is extremely broad and may be construed to extend well beyond bank account numbers and balance;"¹⁴⁰ the case on which the majority relied was based on a fiduciary relationship, not on the undermining of one; and that case turned on public policy considerations that section 5(n) now precludes:

[T]he Commission has not been presented with any evidence that would create reason to believe that consumers are likely to suffer substantial injury—i.e., economic harm or a threat to health or safety—from defendants' actions. Merely to 'posit' that substantial injury 'could' flow from the disclosure of private financial information does not satisfy the statute's requirement ... .¹⁴¹


¹⁴⁰. Swindle statement, supra note 138.

¹⁴¹. Id. at 3. A month after the case was filed it was settled. Commissioner Swindle issued a shorter dissent in which he expressed pleasure that Congress had acted to make some (but not all) such pretexting illegal, but continuing to the complaint as unfounded because (for the unfairness count) "[t]here was no indication that consumers had suffered substantial injury—i.e., economic harm
In *ReverseAuction.com*, the Commission accused ReverseAuction of obtaining e-mail addresses of eBay users, and their user names and "feedback ratings," by becoming an eBay user itself and then breaching the user agreement; ReverseAuction then allegedly "spammed" the list with highly misleading e-mails. This was said to be not only deceptive but also unfair. The injury caused, according to Commissioner Thompson (the only member of the majority to amplify the uninformative complaint) "is a tangible misappropriation of personal protected information that enabled the company to send personalized deceptive e-mail messages to scores of consumers." Commissioners Swindle and Leary dissented and protested that “[m]erely obtaining consumers’ e-mail addresses without their explicit consent and sending them e-mail solicitations does not cause substantial injury,” and protested the lack of guidance on when unsolicited e-mail is unfair.

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or a threat to health or safety—from defendants’ actions.” Swindle statement, *supra* note 24. The four-Commissioner majority did not respond.

142. See *supra* note 133.

143. Complaint at ¶ 17 ("... ReverseAuction’s use of the e-mail addresses, eBay user IDs, and feedback ratings of eBay registered users for the purposes of sending unsolicited commercial e-mail, in violation of its agreement to comply with eBay’s User Agreement, is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition, and therefore was, and is, an unfair practice.")


145. Statement of Swindle and Leary, *ReverseAuction.com*, Civil Action No. 000032 at 2 (“Consumers do not have a substantial privacy interest in the e-mail addresses and other information that ReverseAuction harvested since consumers had already agreed to make this information available to millions of other eBay members (albeit with restrictions on using it for commercial solicitations). Moreover, a substantial portion of this information is available without restriction to non-members who visit eBay’s web site.”).
2. Breaking or Causing the Breaking of Other Laws

Several cases turned on other statutes. The Commission charged several department stores with unfairness when they allegedly collected consumer debts that bankruptcy proceedings had discharged, which violated bankruptcy law because no bankruptcy court had approved. Similarly, in American Family Publishers, the Commission charged a magazine seller with unfairness when the seller approved its debt collection agencies' use of dunning letters that were clearly unlawful under the Fair Debt Collection Practices Act.

Another example of using unfairness to reach those in control of an alleged law violator is provided by the Home Ownership and Equity Protection Act ("HOEPA") cases, which challenged sub-prime lending practices prohibited by that act. Among other things, the Commission charged lenders with making loans based on collateral without regard to ability to repay, which is prohibited by the Act, and with including in mortgages a "prepayment...

146. In addition to the cases discussed in the text, in the Joe Camel case, In re R.J. Reynolds Tobacco Co., No. 9285, 1997 FTC LEXIS 1181 (complaint issued May 28, 1997; dismissed without prejudice Jan. 26, 1999), see supra note 17, the Commission alleged that an advertising campaign would cause smoking by persons so young that most states make illegal the sale of tobacco products to them. In re R.J. Reynolds Complaint, 1997 FTC LEXIS 118, Complaint at ¶¶ 6 & 10.


151. See 15 U.S.C. § 1639(h); see also 12 C.F.R. § 226.32(e)(1).
penalty” prohibited by the Act. The Commission then alleged that these lenders and certain officers and directors who directed or controlled their acts—which individuals could not be reached by HOEPA—have engaged in unfair acts or practices. Although the defendants settled and the complaints included many counts that met universal approval, Commissioner Swindle protested that consumers could easily avoid any harm by simply not taking out a problematic mortgage, and it was wrong to surmount this hurdle by relying on the “public policy” of HOEPA because, in his view, that policy should extend only to the jurisdictional limits established by Congress.

3. Using Insufficient Care

Other cases seem to echo more in negligence or contracts than in intentional torts or criminal law. Typical of these is May Department Stores Co., a Truth in Lending Act case that included an unfairness count. The Commission charged May Department Stores, which had run into difficulties in converting credit accounts that had come to it when it purchased another retailer, with “fail[ing] to maintain reasonable procedures to

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152. See 15 U.S.C. § 1639(c); see also 12 C.F.R. § 226.32(d)(6).
154. Statement of Commissioner Orson Swindle Concurring in Part and Dissenting in Part in the Matters of Granite Mortgage, File No. 982-3167, et al., available at <http://www.ftc.gov/os/1999/9907/swindlestategranite.htm> (“If the underlying actions do not independently violate Section 5 without the inclusion of HOEPA’s “public policy,” I do not see how the Commission can rely on HOEPA’s policy to establish that the creditors’ actions are unfair but then disregard the clear limits on HOEPA’s applicability by stretching that policy to cover entities that are not creditors. By doing this, the majority creates a mechanism to strip a statute of its explicit jurisdictional limits and extend its reach—as well as that of the Commission—to those whom Congress has explicitly excluded.”). Id.
156. 15 U.S.C. § 1643; see also 12 C.F.R. § 226.12(a).
monitor, measure, or test its open end credit plan account acquisition, conversion, and maintenance systems to assure the accuracy of the account information it conveys to consumer reporting agencies.”\textsuperscript{157} This was said to be unfair because the three-part test was met. In \textit{Griffin Systems, Inc.},\textsuperscript{158} the Administrative Law Judge, in a part of his opinion that was not appealed, found that it was unfair for the issuer of an extended service contract to require prior authorization for repairs and then to make it “difficult for many of these consumers to get through on the telephone lines to obtain the required authorization.”\textsuperscript{159} The Judge found “no countervailing benefits to consumers or competition.”\textsuperscript{160}

This kind of unfairness analysis peaked in 1990, when the Commission issued three unfairness decisions that it did not include in the list of unfairness cases it submitted to Congress. In \textit{Budget Rent A Car Corp.},\textsuperscript{161} the complaint alleged unfairness when a rental car company did not disclose to customers that it did not promptly inspect cars subject to recall; in \textit{Consumer Direct, Inc.},\textsuperscript{162} the complaint alleged that it was unfair not to disclose that an exercise device could break and injure the user; and in \textit{Jeep Eagle Corp.},\textsuperscript{163} the Commission charged an automobile company with unfairness through breaching warranties by failing to effect successful repairs reasonably promptly. (Jeep Eagle, now succeeded by first Chrysler and then Daimler Chrysler, was successor to the ill-fated American

\textsuperscript{157} 122 F.T.C. at 2, Complaint ¶ 12; see also Analysis of Proposed Consent Order to Aid Public Comment, 61 Fed. Reg. 19064, 19066 (1996) (“The complaint alleges that respondent’s reporting of inaccurate information constitutes an unfair practice in violation of Section 5 of the Federal Trade Commission Act.”). The Complaint at ¶ 14, also alleged that it was unfair to initiate debt collection activity for delinquencies created when Respondent mistakenly posted payments to wrong accounts.

\textsuperscript{158} 117 F.T.C. 515 (1994).

\textsuperscript{159} \textit{Id.} at 517. The ALJ also found it unfair to unilaterally cancel thousands of service contracts without a contractual right to do so. \textit{See id.}

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} 113 F.T.C. 1109 (1990) (consent order).

\textsuperscript{162} 113 F.T.C. 923 (1990) (consent order).

\textsuperscript{163} 113 F.T.C. 792 (1990) (consent order).
Motors Corporation, which had sold and warranted the cars at issue.) In *Jeep Eagle*, the sin was ineptitude: "authorized dealers on a significant number of occasions failed to repair successfully automatic transmission fluid or engine oil leaks and related problems within a reasonable time." This breached the warranty and was unfair because the three-part test was said to be met. The Commission ordered redress of payments of $40 per repair visit, starting with the fourth visit. Commissioner Azcuenaga dissented, saying without explanation that she lacked reason to believe the defendant violated a law. Commissioner Machol dissented from issuance of the proposed settlement (her term had ended before the final order was issued), arguing that consumer injury was insubstantial because fewer than one percent of purchasers had made more than three repair visits, and because the case involved neither safety, as in *International Harvester*, or a unilaterally shifting of costs, as in *Orkin*. She noted that American Motors had no incentive to fail at making repairs and that the Market Place had punished them. Commissioner Strenio responded that a breach of warranty to 2,000 consumers on a critical automotive system (the transmission) did cause substantial injury.

4. Interfering with the Exercise of Consumer Rights

Two different kinds of cases involve interference with the exercise of consumer rights. In *The Money Tree, Inc.* and *Tower Loan of Mississippi* the Commission charged respondents with unfairness when they required the purchase of credit insurance in

164. Id. (complaint at ¶ 9).
165. See id.
166. See id.
168. See id. (Commissioner Margot E. Machol, dissenting).
169. See id. (Commissioner Andrew J. Strenio, Jr., concurring).
Commissioner Strenio voted for the final order without issuing a statement.
connection with the extension of credit and then required consumers to execute false statements that the purchase was voluntary. The allegedly substantial consumer injury, which is not detailed in the complaint, is presumably the interference with consumers' ability to challenge the coercive linking of credit and insurance under the Truth in Lending Act.\textsuperscript{172} \textit{Dillard Department Stores, Inc.}\textsuperscript{173} was principally a Truth in Lending Act case charging that a department store's erection of hurdles to the removal of unauthorized charges (notarized affidavits and the like) violated that act, but the complaint also charged that this practice was unfair. That claim may not have had much independent significance, because after the Federal Reserve Board amended the official staff commentary to make clear that these practices did not violate the Truth in Lending Act, the Commission dismissed the complaint at complaint counsel's request.\textsuperscript{174}

5. Advertising that Promotes Unsafe Practices

Although at one time challenges to the depiction of unsafe practices in advertisements was a staple of Commission unfairness enforcement,\textsuperscript{175} that day has passed. The principal recent example

\textsuperscript{172} 15 U.S.C. §§ 1605, 1606 & 1638.
\textsuperscript{173} No. 9269, 1994 F.T.C. LEXIS 172 (complaint filed Sept. 14, 1994).
\textsuperscript{174} See 1996 F.T.C. LEXIS 49 (March 7, 1996).
\textsuperscript{175} See AMF Inc., 95 F.T.C. 310 (1980) (consent order) (unfair method and practice to show a youth riding a bike over rough ground, turning into an alley without looking both ways, and entering street a little without stopping and looking); Mego Int'l, Inc., 92 F.T.C. 186 (1978) (consent order) (unfair method and practice to show a girl using a child hair dryer near a sink of water without adult supervision); Uncle Ben's, Inc., 89 F.T.C. 131 (1977) (consent order) (unfair method and practice to show a child very close to a stove without close adult supervision); Hudson Pharmaceutical Corp., 89 F.T.C. 82 (1977) (consent order) (advertising vitamins to children—here, using Spiderman—is unfair method and practice because children may over-consume); General Foods Corp., 86 F.T.C. 831 (1975) (consent order) (unfair method and practice to advertise cereal with a naturalist saying that parts of a pine tree are edible and bush cranberries are tasty, since it may encourage children to eat plants without supervision).
of such a challenge is *Beck's North America, Inc.*,\(^{176}\) in which the Commission's complaint alleges that it was "unfair" for a commercial to show young adults without life jackets drinking beer while sitting on the edge of a schooner bow or standing on a bowsprit (but not piloting the schooner). The Complaint thoroughly reviews the risks associated with drinking while boating,\(^{177}\) and then recites the three-part test.\(^{178}\) The Analysis to Aid Public Comment\(^{179}\) does the same and adds ominously, "The Commission has substantial concern about advertising that depicts conduct that poses a high risk to health and safety. As a result, the Commission will closely scrutinize such advertisements in the future."\(^{180}\) Commissioner Swindle dissented because he believed that consumers could easily avoid injury simply by having the common sense not to engage in the "rather stupid and dangerous" activities portrayed in the commercial.\(^{181}\) (His reasoning would suggest with equal force that the advertisements were unlikely to cause substantial injury.) The real disagreement is over the burden of proof the Commission should face when it brings a case—must it have empirical proof of causation? Both sides avoid this question.\(^{182}\)

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176. No. C-3859, 1999 F.T.C. LEXIS 40 (1999) (consent order). The only other examples are tobacco cases. The *Joe Camel* case, which the Commission dismissed, emphasized that the questioned advertisements encouraged smoking by persons too young legally to purchase tobacco products. See *supra* note 17. The rotating warnings for cigar cases, *supra* notes 18 & 19, extended principles settled for cigarettes as a related product.


178. *See Beck's North America, 1990 F.T.C. LEXIS 40* (complaint ¶ 5) ("Respondent's depiction of this activity in its advertisements is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.").


180. *Id.* at *15.


182. Previous challenges to advertisements in which unsafe behavior is depicted claimed that children would be influenced. *See AMF Inc.*, 95 F.T.C. 310
B. The Changed FTC Unfairness Jurisprudence: Forum for Adjudication

Classic FTC unfairness jurisdiction was handled administratively.183 The Commission developed its doctrine and authority through Commission decisions and federal appellate court review.184 Indeed, part of the early justification of the FTC’s broad unfairness authority was that it was non-punitive, and could lead to penalties only after business leaders had been given ample opportunities to mend their ways.185

This model had started to be weakened by the time Congress added FTC Section 5(n). Although most of the unfairness cases the Commission reported to Congress were administrative (including five litigated cases), the Commission had filed four in federal court.186 (All ten of the unfairness consent orders the Commission overlooked were administrative.)187

The classic model has been further undermined since 1993. No adjudicated opinion by a Commissioner discusses Section 5(n).188 The few adjudicated opinions to address Section 5(n) are by district
court judges. Even with respect to consent orders, there may be as many stipulated court judgments as administrative consent orders.

The change is understandable, because the Commission has slowly developed its authority to bring cases in federal court. In many ways, federal court offers the best of all possible worlds: quick, sometimes draconian relief; potentially massive penalties; and the glamour and elegance of litigating in federal court. Now that the Commission's authority to bring these cases is well established, the temptation to bring them is nearly irresistible. Discomfort is caused only because (1) Congress never would have created a five-member prosecuting authority, (2) there is obvious possible tension between the breadth of the Commission's unfairness authority and the imposition of quick, drastic penalties for violations thereof; and (3) law cannot develop securely without binding precedents.


190. See supra part III.A. One important and unfortunate difference between the two is that the Commission does not file an official Analysis to Aid Public Comment with stipulated court judgments. Commission explanations are available only if individual Commissioners choose to post comments on the web (and only for so long as the comment remain posted).


192. See FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989). See also FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997); FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991).

IV. OBSERVATIONS AND RECOMMENDATIONS

The above review of unfairness cases is singularly unsatisfying. The fact patterns are intriguing and the legal issues challenging, but in few of the cases are important issues definitively resolved. This is in part the nature of law-development without much participation by the courts, but other reasons also contribute.

Ironically, part of the problem is FTC Act Section 5(n). Section 5(n) says that the Commission may not declare unlawful a practice that does not satisfy the listed standards; it does not say, as the Commission might wish, that "[a]n act or practice is unfair if it 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable ...' and so forth." Satisfying the requirements of FTC Act Section 5(n) is necessary to finding illegality but is not and should not be sufficient.

Section 5(n) plays out differently in different contexts. The Commission's standard "unfairness" complaint recites that the 5(n) criteria are met and a challenged practice is "therefore" unfair and illegal under Section 5(a) and (n). This is proper notice pleading. Courts should not be similarly casual. More fundamentally, the Commission, in its private and public deliberations, should not treat the three-part test as the end of the analysis. It is only the beginning.

Much of the difficulty stems from the order of the three factors: injury, unavoidability, and balancing. Analyses tend to follow that order and invest most heavily in measuring injury. Thus, the debates in ReverseAuction and Touch Tone/Rapp recounted above featured an unsatisfying debate on the extent of consumer injury.

The Commission's heavy emphasis on unfairness cases involving theft and variation thereof suggests that the hard questions would be answered more authoritatively were the

196. See supra part III.A.1.
analysis to begin more frequently by balancing costs and benefits.\textsuperscript{197} The Commission easily condemns theft, extortion, and the like not because these practices necessarily inflict great harm or because the harm is unavoidable, but rather because there is no benefit whatsoever. Any harm outweighs zero benefit, and the cost of excessive deterrence of actions without benefit is very low (essentially identification error costs).

Cases involving theft stand in marked contrast to cases involving advertisements promoting unsafe products and cases charging insufficient care, categories that have declined substantially.\textsuperscript{198} Almost by definition, evaluating such cases requires making complex tradeoffs between costs and benefits.\textsuperscript{199} Only rarely will the net effect be sufficiently clear to justify intervention.

That attention to injury is unlikely to resolve hard questions also is made clear by considering some of the challenging cases the Commission has confronted or could confront. It is especially useful to contrast the \textit{Rapp/Touch Tone} pretexting cases,\textsuperscript{200}

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\textsuperscript{197} Although analyses tend to start with and overly emphasize injury, that is not for want of recommendations to highlight balancing, see Gellhorn, \textit{supra} note 27; see also Craswell, \textit{supra} note 27. Neil Averitt has vigorously advocated a "consumer sovereignty" approach, see Averitt, \textit{supra} note 30; Averitt & Lande, \textit{supra} note 27, which has considerable appeal but fits imperfectly with precedent and may not resolve the new kinds of controversies the Commission is confronting.

\textsuperscript{198} See \textit{supra} parts III.A.3 \& III.A.5.

\textsuperscript{199} With the possible exception of \textit{International Harvester}, in which the Commission complained about failing to warn of a dangerous product, the Commission included no cases charging insufficient care in its 1993 list of unfairness cases—thereby conspicuously failing to mention the three 1990 examples, see \textit{supra}, Part III.A.3. of this article. Steps by respondents that would avoid the harms at issue in those cases—hiring better mechanics, inspecting and repairing cars more promptly, having more telephone operators, doing a better job of merging computer systems—invariably impose costs. The Commission’s 1993 list also included no cases in which the Commission challenged advertisements, and there were no such cases, see \textit{supra} notes 92-97. Advertising cases raise intractable questions of benefits (First Amendment values) and proof of harm (causation).

\textsuperscript{200} See \textit{supra} text accompanying note 134.
Reverse Auction, the “pagejacking”/“mouse trapping” case (FTC v. Pereira), and all the mainstream web sites that have started using pop-up windows to highlight advertisements. In each case, the Commission could dismiss the harm as unimpressive (and, for the first two, dissents did so): some personal financial information is sold, people receive some unrequested e-mail offers, and web surfers are directed to undesired web sites or are annoyed and waste time and effort. In none of these situations has a consumer necessarily lost money or been physically harmed. Unless one is prepared to resolve all these cases for defendants, brooding about injury is unlikely to help one draw lines.

Approaching the fact patterns by focusing on costs and benefits is more promising. (Some attention to harms is obviously necessary before costs can be contrasted with benefits; the suggestion is merely to appraise both, and the balance, early in the process, rather than lingering too long on precise measuring of injury.) Pop-up windows, for instance, offer potential benefits to web sites and advertisers, and thus indirectly to viewers. They may directly benefit viewers who choose to participate in the promotion. Market forces minimize harms: established sites will not unduly offend viewers; displeased viewers can vote with their mice by exiting, and promotions that offend will not work. There is no need for Government to intervene even if technological advances will not block pop-up windows. In contrast, mouse trapping offers few benefits. The web sites benefit, to be sure, but when they capture viewers for extended periods there is no reassurance that viewers benefit or that the impositions are modest and controllable. Mouse trapping is less like conventional

201. See supra text accompanying note 133.
202. See supra text accompanying note 21.
203. See supra text accompanying notes 13 & 14.
204. In its “pagejacking” complaint, the Commission alleged that employees were directed to adult sites that violated employer policies and that children were misdirected to inappropriate adult sites. See Complaint ¶ 26.
205. The discussions that follow are based only on hypothesized costs and benefits, since even where there are decisions, analysis is very limited. The point is to suggest thinking, not to draw conclusions.
advertising than the heavy-handed automobile sales representative who will not return a customer's keys. One can see, based on intuition and analysis, that it can be stopped without jeopardizing proconsumer activity.

Pretexting (Rapp/Touch Tone) and ReverseAuction also can be usefully compared. Unless the caller is in law enforcement or quasi-law enforcement, it is hard to see the benefit from letting callers impersonate consumers and trick banks into providing account information. The potential harms are many: to the consumer whose information is subsequently sold, but also to the bank that bears consumers' wrath and has to invest resources in preventing such deceptions, and to consumers who, frustrated by such enhanced security, are unable to learn information that is legitimately theirs. Those harms necessarily outweigh the non-existent benefits of wide-scale pretexting. (Justifications limited to special situations would apply only to those situations.)

ReverseAuction is trickier. With pretexting, it is wrong simply for the respondent to obtain the information, and harm can flow therefrom. In ReverseAuction, the information in question (e-mail addresses and rating information of participants) was freely available. The wrong, if any, was only in using it in ways inconsistent with eBays' contract; yet there is no special reason why a private contract represents public good. Many breaches of private contracts that would benefit the public. Indeed, one can imagine that learning about a potentially better auction service could be a benefit. At best, there is an uncertain balance between costs and benefits, which suggests that was the weakest of the cases.

206. Cf. Dissenting Statement of Commissioner Orson Swindle in Touch Tone Information, File No. 982-3619 (June 27, 2000), available at (visited Mar. 31, 2001) <http://www.ftc.gov/os/2000/06/touchtoneswindle.htm> (dissenting from pretexting settlement and noting that Congress had acted to bar pretexting in some but not all circumstances (pretexting is permitted to aid in the collection of child support payments)).

207. See supra text accompanying notes 134 & 142-144.

208. See id.

Emphasizing costs and benefits makes clearer the proper resolution of other cases, as well. The Commission properly brought C&D, the consent order attacking the sale of cable system decoders, because the only benefit was in permitting consumers to intercept signals and free ride on the payments of others. Hold Billing Services, the cramming case in which an apparent sweepstakes entry in fact caused services to be charged to telephone bills, was an easy case because there was no benefit to the practice. The Verity International cramming case is a much trickier unfairness case (it may be an easy deception case) because there are court-recognized benefits to letting people purchase audiotext services without using a credit card. Those benefits may be outweighed by the harms, but the Commission can achieve clarity most quickly by beginning the analysis by focusing on those benefits and the balancing thereof—and by refraining from relying on a too-simple invocation of the three-part test.

A. An Example

An example of how to identify a good unfairness case, by doing more than merely reciting the three-part test, might be helpful. Consider FTC v. MTK Marketing, Inc. Defendants allegedly make telephone calls pretending to be a customer's usual supplier of photocopier toner and offer to rush some toner to the customer before a price increase. Thereafter, defendants would send additional (unordered) shipments pretending as though the customer had ordered them, and submitting bills for these

210. See supra text accompanying notes 115-17.
211. See supra text accompanying note 126.
212. See Verity International, 124 F. Supp. 2d at 203 n.58 ("There probably also are consumers who benefit from defendants' service by concealing the nature of their on-line activities from others by means of the deceptive bills.").
213. See supra text accompanying notes 130-132.
214. See supra note 119.
215. See id.
shipments. The Commission alleged this to be unfair, and with good reason.

- The practice confers few if any cognizable benefits. Except that defendants profited, a benefit which the Commission and courts should not recognize, the practice has no social utility.

216. See id.
217. See id. (Complaint Count V).
218. The Commission has not been entirely consistent in its calculating of a practice's benefits. Some particular costs (to respondents) appear to be excluded altogether; the gain from defrauding consumers cannot be balanced, dollar for dollar, against consumer losses. See Orkin Exterminating Co., 108 F.T.C. at 364-65 (consumer cost of an increased charge not offset by seller's gain). In C&D Electronics, Chairman Oliver, supporting the decision, said that the gain to consumers free-riding on the payments of others should be disregarded. See C&D Electronics, Inc., 109 F.T.C. at 80 (Separate Statement of Chairman Daniel Oliver). In Griffin Systems, the ALJ found no countervailing benefits when Respondent made it difficult to get through on a telephone line to obtain authorization for repairs, see supra notes 157-159 and accompanying text, thereby presumably ignoring any savings in expense to Respondent.

Other cases suggest more willingness to consider expenses born by affected private parties. International Harvester explicitly recognized that the "principal tradeoff" is "compliance costs," which "are ultimately born as higher prices." International Harvester, 104 F.T.C. at 1065. The Commission's analysis of the Credit Practice Rule squarely examined the costs being imposed on creditors: "To the extent that the remedies that the rule prohibits reduce the cost of business for creditors, borrowers as a group benefit from those remedies through greater availability of credit and lower interest rates. However, the Commission believes the overall costs to consumers are greater than these benefits." Credit Practices Rule, supra text accompanying note 33. In the Statement of Basis and Purpose for the Funeral Rule, the Commission justified requiring itemized pricing not by saying that the greater expense was irrelevant, but rather by concluding that "the increased costs caused by switching to itemization ... are modest and outweighed by the far greater benefits expected by increased price competition and greater consumer choice." Funeral Rule Statement of Basis and Purpose and Regulatory Analysis, 47 Fed. Reg. 42260 (1982); see also supra note 79. The Commission similarly justified the Used Car Rule. See Trade Regulation Rule Concerning the Sale of Used Motor Vehicles, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 45692 (1984). ("The only arguable countervailing benefit to consumers or competition produced by a dealer's failure to disclose warranty terms in a timely manner would be that dealers can avoid the exceedingly small cost of disclosure."); see also amendment to Trade
Defendants must expend resources to participate in the scheme, so this is not a case where defendants are minimizing costs.

- *There is substantial injury* (which, of course, is an essential consideration). Even if defendants do not trick customers into accepting the product, customers incur expenses to return (or reassure themselves they need not).\(^{219}\)


Other Commission decisions are ambiguous. The Commission’s explanation of the Mail Order Rule finessed the issue as follows:

> Finally, the harm to consumers is not outweighed by any corresponding benefits to consumers or merchants. There is no reason to believe that there are legitimate benefits to merchants from unilaterally changing contract terms or breaching contracts or that consumers benefit through lower prices or better quality from such practices. Indeed, unsatisfactory experiences can deter consumers from ordering by telephone from other merchants who would ship on time or properly notify them of delays. . . . Prompt shipment and timely, proper notifications of delay are low cost, good business practices that encourage repeat sales

Trade Regulation concerning mail or telephone order Merchandise statement of basis and purpose Regulatory analysis, 58 Fed. Reg. 19096 (1993).

The District Court in *Crescent Publishing Co.*, 129 F. Supp. at 322, referred to the number of satisfied customers as though that might be a defense (that was not large enough in that particular case). This is too vague; the mere fact that some consumers are content cannot justify a practice unless the practice is necessary to the contentment. But expenses borne by businesses are real expenses, and the thinking of *International Harvester* the Credit Practices Rule ought to be made definitive.

\(^{219}\) For all the attention given it, ambiguity exists with respect to proving consumer injury. One question is whether all injuries count, or whether some count more than others. The 1980 Statement spoke as follows: “The Commission is not concerned with trivial or merely speculative harms. In most cases a substantial injury involves monetary harm . . . . Unwarranted health and safety risks may also support a finding of unfairness. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair.” 1980 Unfairness Statement, *supra* note 6, 104 F.T.C. at 1073 (footnotes omitted). Some Commissioners seem to equate “substantial injury” with economic harm or risk to health or safety. Statement of Commissioner
The scheme has elements of deception. No bright line separates unfairness and deception; both concepts originally traveled in the same vessel. Although there are exceptions, most unfairness cases have involved elements of deception, and the need for government intervention is most apparent when companies deceive consumers.

- The practice harms legitimate competitors by diverting orders to the unscrupulous. Congress's original concept of unfairness turned in significant part on protecting legitimate competition, and the

Orson Swindle in the Matter of Touch Tone Information, File No. 982-3619 (Apr. 22, 1999) ("[T]he Commission has not been presented with any evidence that would create reason to believe that consumers are likely to suffer substantial injury—i.e., economic harm or a threat to health or safety—from defendants' actions."). Other Commission statements elevate monetary harm especially high. See 1982 Letter, supra note 6. ("[T]he Commission believes its concerns should be with substantial injuries; its resources should not be used for trivial or speculative harm. As a general Proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress or offenses to taste or social belief."). Nothing in the statute, however, limits consumer harm to money or health/safety, and even Commissioners eager to concentrate on money or health and safety may not absolutely exclude other injuries. See Statement of Commissioners Orson Swindle and Thomas B. Leary, Concurring in Part and Dissenting in Part in ReverseAuction.com, Inc., File No. 0023046, available at <http://www.ftc.gov/os/2000/01/reversesl.htm> ("We do not say that privacy concerns can never support an unfairness claim."). What is unclear is which injuries count most, how much more than others some injuries count, how directly consumers must be harmed, and what it means (for these purposes) to harm competition.

Also uncertain is the critical question: How precisely must the Commission prove its case? Without being permitted to draw reasonable inferences, the Commission could not function, cf. Novartis Corp. v. FTC, 223 F.2d 783, 788 (D.C. Cir. 2000) (upholding Commission inference that was not "irrational"); but courts will not let the Commission decide cases by making up inferences as it goes along. See California Dental Ass'n, 526 U.S. 756 (1999). This was the dispute that divided the Commissioners in Rapp/ToucbTone, supra notes 133-141 and accompanying text.

220. See supra notes 58-61 and accompanying text.

221. See Am. Financial, 767 F.2d at 979 n. 27 (quoting this distinction); see also Craswell, supra note 27).
Wheeler-Lea Amendment did not change this. Although the modern Commission has treated consumer unfairness separately as a matter of practice, there is no bar to the Commission’s acknowledging the historic roots of the ban on “unfair or deceptive acts or practices.”

- The practice is clearly wrong. The FTC should not condemn any business practice as “unfair” unless it is clearly wrong. Today, no one would suggest that immorality is a sufficient reason for the FTC to intervene, even if Congress permitted this. Surely,

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222. For most of the Commission’s existence, neither the Commission nor the courts had any trouble condemning a host of practices currently labeled “unfair or deceptive acts or practices” as “unfair methods of competition.” See supra part II. The Wheeler-Lea Amendments did little to end this practice. The distinction became important after Magnuson-Moss Rulemaking was authorized, since that was limited to “acts or practices,” and, indeed, the Commission was accused of miscategorizing some traditional “methods of competition” in order to invoke that authority. See, e.g., Michael L. Denger, The Unfairness Standard and FTC Rulemaking: The Controversy over the Scope of the Commission’s Authority, 49 ANTIMUST L.J. 53 (1980). Nonetheless, a casual review of FTC Reports reveals even routine advertising cases being brought as both “methods” and “acts/practices” until about 1986. Even in proceedings pending much later than that, however, and even in the rule-making context, the Commission has noted that what it is calling an unfair act or practice may also “harm competition.” See Mail Order Rule, supra note 96 (noting that “unsatisfactory experiences can deter consumers from ordering by telephone from other merchants who would ship on time or properly notify them of delays”).

223. Supra text accompanying notes 47-55. More questionable would be the Commission’s resort to its ability to outlaw “unfair methods of competition” to attack practices clearly on the consumer protection side of the divide, and thus seek to avoid the § 5(n) limitations. Congress’s restriction only on the Commission’s ability to find an unfair “act or practice” but not an unfair “method of competition” raises the intriguing but probably mischievous question of whether the Commission would have more flexibility were it to challenge some activity as an unfair “method of competition.” The text of the legislation clearly applies only to “acts and practices,” not to “methods of competition.” If one is allowed to peek beyond language even a little, however, one is confronted with reasonably clear evidence that Congress thought “unfair methods of competition” would be identified largely through use of antitrust precedents and posed little threat of swallowing all FTC “unfairness.” See supra text accompanying note 77.
however, it is a necessary condition to Commission action that the practice fits within the ordinary meaning of "unfair": "contrary to laws or conventions, esp. in commerce; unethical"; or "dishonest, dishonorable, or unethical in business dealings." Normal meanings of statutory words are, after all, the usual starting point for interpretation. Before a practice is condemned as unfair, one ought to be able to explain crisply why it is wrong, and over time Commission precedent should help to delineate such practices.

- The practice is designed to exploit human weakness. The defendants in MTK knew that people have poor memories, keep imperfect records, avoid unnecessary work, and are imperfectly informed about legal rights and remedies. They designed their scheme to exploit these weaknesses. Unfairness cases going back as far as R.F. Keppel have been concerned with exactly that.

- There is persuasive precedent for condemning the challenged practice. One of the grand original missions of the FTC was to shed light on business practices and develop a jurisprudence that distinguished fair from unfair. The Commission can accomplish this only if attention is paid to precedent. The Commission has

224. AMERICAN HERITAGE COLLEGE DICTIONARY 1474 (3d ed. 1993) (second definition; first is "not just or evenhanded; biased").
225. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1550 (2d ed. 1982) (second definition; first is "not just or impartial; biased; inequitable").
226. Cf. Keppel, 291 U.S. at 313 ("It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the [break and take] method is not 'unfair.'") (citations omitted); see supra part III.A (Congressional desire to address wrongful practices).
227. This is another reason why mere "unreasonableness" will rarely be "unfair." Few practices are clearly wrong if they are wrong only as qualified. Congress's focus was on specific methods of competition and on specific acts and practices. Deliberately mislabeling wool was an unfair method of competition, see FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922); using too little care in knitting almost certainly was not.
228. Cf. supra text accompanying notes 29 & 54-55 (traditional case law setting out the Commission's calling as a developer of standards).
229. See supra notes 48-55 and accompanying text.
230. See supra part II.
been concerned with unordered merchandise since early days, and this concern is evidenced in legislation and rule-making.

The above list of considerations is intended only as an illustration. Not every listed consideration is essential: a good unfairness case might lack elements of deception, or not harm legitimate competitors. The considerations are offered as examples of the kind of thinking in which the Commission ought to engage as it wrestles with its historic mandate to identify unfair acts and practices, whether through traditional administrative adjudication or through other means.

B. The Need for Administrative Adjudication

From the beginning, defenders of "unfairness" jurisdiction sought to mollify critics by pointing to the special, non-punitive nature of the FTC. Senator Hollis pointed out that businesses would have three chances to show that they were doing nothing wrong: first in informal negotiations with the Commission, then in a Commission hearing, and finally on appeal. Only then would penalties follow from continued misbehaving. Similarly, in the Companion Statement to its 1980 Unfairness Statement, the Commission reassured observers by suggesting that a firm engaging in a "newly identified unfair act or practice" normally could expect little more than a prospective order to cease and desist.

231. See Bunte Bros., Inc., 312 U.S. at 354 n. 4 (1941) (Commission-provided examples of unfair competition included "[s]hipping products at market prices to its customers or prospective customers . . . without an order and then inducing the consignees to accept and purchase consignments.").


233. See Mail Order Rule, supra note 96. One should be wary, however, of excessive reliance on the precedential value of consent orders. A consent order may signify nothing more than that a respondent lacked the resources or inclination to resist. Principles erected on consent orders are grounded in sand and cannot (and should not) bear much weight.

234. See supra part III.B.

235. See supra note 185.

236. See Companion Statement on the Commission’s Consumer Unfairness
In a story told elsewhere, the FTC has moved away from administrative adjudication. The Commission now files the vast majority of its cases in federal court. There are legitimate reasons for preferring a court proceeding, especially where the wrong is obvious and the need for relief is pressing. There are also illegitimate reasons, such as the perceived glamor of litigating “real” courts and the development of marketable court litigating skills. One unfortunate factor driving Commission staff to federal court has been the belief that Commission adjudication does not work.

The Commission needs to make adjudication work and be perceived by agency personnel and others as working. The agency has taken steps to make this happen but the task is almost Sisyphean and requires continuing attention. All the incentives are


Under the Federal Trade Commission Act, businesses cannot be subjected to sanctions for engaging in an unfair practice until the practice has been defined with specificity in a full-dress adjudication or rulemaking. If, in an adjudication, a firm is found to have engaged in a newly identified unfair act or practice, civil penalties are not assessed; rather, the remedies are limited to preventing the firm from engaging in the same or related practices in the future, and, in appropriate cases, to providing relief for injured parties. Only if the order is violated may penalties then be assessed. There are also some special provisions for immediate consumer redress, but these apply only to conduct that “a reasonable man would have known under the circumstances was dishonest or fraudulent,” and that determination must be made in federal court.

237. See Calkins, supra note 191; Report of the American Bar Ass’n Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 161-62 (1989) (data showing dramatic shift in work years from administrative litigation to court proceedings).


239. See Calkins, supra note 191.
the wrong way. With a mandate as imprecise as "unfairness," however, administrative adjudication must be a viable option for complaint counsel and prospective defendants alike.240

Effective adjudication is needed in part to permit the law to develop though precedent and court review; indeed, the Commission was created in part to build up a body of precedent.241 Compare, for instance, the Commission's thoughtful wrestling with "unfairness" quandaries in Orkin242 and International Harvester243 with the inevitably cursory treatment the questions received in FTC v. J.K. Publications.244 It is unfortunate that no court of appeals has reviewed a Commission unfairness decision since 1988. It is unfortunate that understandings of Commission "unfairness" standards must be drawn principally from consent orders entered without benefit of the crucible of adjudication. Law cannot develop, as law, without litigated disagreements, appellate review, and the discipline of applying principles to facts while creating binding precedent. Indeed, it has long been understood that the meaning of "unfairness" "must be arrived at by . . . 'the gradual process of judicial inclusion and exclusion.'"245

V. CONCLUSION

The Federal Trade Commission understandably shies away from filing consumer unfairness cases. The agency's bold exploration of this authority had devastating consequences. With the passage of time and changing circumstances, however, the Commission is again exercising this power. As the Commission does so, it should emphasize the weighing of costs and benefits as

240. See ABA Special Report, supra note 237, at 121 ("Particularly for these rather vague legal standards, there can be virtue in the consistency that can be generated by administrative adjudication.").
241. See supra text accompanying note 29.
242. 108 F.T.C. 263.
243. 104 F.T.C. 949.
244. 99 F. Supp. 2d 1176.
much as or more than merely the measurement of injury. This balancing process helps explain recent agency decisions, most of which have involved allegations of theft and the facilitation thereof, and separate the hard from the easy cases. Analysis must go beyond the simple recitation of the three-part test in FTC Act Section 5(n), and would benefit greatly from the careful attention possible through administrative adjudication.