ANTITRUST UNFAIRNESS VS. EQUITABLE UNFAIRNESS IN FARMER/MEAT PACKER RELATIONSHIPS

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I. INTRODUCTION

The Packers and Stockyards Act[1] ("P&S Act") was passed in 1921 to regulate the sale of livestock by farmers to the more economically powerful livestock buyers.[2] A primary purpose was "[t]o assure fair trade practices in livestock marketing."[3] To do so, the Act provides the Secretary of Agriculture with regulatory jurisdiction over firms that purchase or deal in livestock and poultry,

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1. 7 U.S.C. §§ 181-231 (2000).
2. *See* Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978).
3. *Van Wyk*, 570 F.2d at 704.

including packers and live poultry dealers.[4] The Act prohibits a wide range of practices from unfair and deceptive practices that harm an individual farmer to price manipulation and the creation of a monopoly that harm many farmers system wide.[5] Viewed another way, this statute addresses public policy notions of fairness from two perspectives: (1) in equitable (micro) terms concerning unjustifiable harm to individual farmers or ranchers; and (2) in antitrust (macro) terms concerning harms to the overall competitive environment. However, the distinction between these two notions of fairness has not been developed in the agricultural case law. Rather, the analysis has been muddled in that the primary focus has been on the "macro" view, that is viewing the Act as another antitrust law, supplementing the Sherman[6] and Clayton Acts.[7]

This article explores the "micro" view in defining "unfair practices" arising from business relationships between large agribusinesses and farmers. Because case law and regulations are sparse under the Act, we look primarily to consumer protection standards that are similar in purpose and are better developed in meaning. We conclude that the equitable wing of unfairness should reject antitrust concepts such as the "rule of reason" and concern with harm to the competitive environment. Rather, courts should focus on an analysis that looks to whether agribusiness conduct causes unjustified injury to livestock producers without regard to the competitive harm. The latter analysis is based less on economic factors than on basic notions of fairness imposed by public policy and societal values.

II. THE PACKERS & STOCKYARDS ACT

A. *Legislative History*

A brief review of the history of the P&S Act is important to the interpretation and application of its rules. The structure of the livestock industry is characterized by an inherent disparity in bargaining power and sophistication. The reasons for this disparity in bargaining power include the great number of farmers relative to buyers, the perishability of the farm product, and the difficulty or

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4. 7 U.S.C. § 183 (granting regulatory jurisdiction to Secretary of Agriculture); *see also id.* §§ 182, 191 (defining "live poultry dealer" and "packer" respectively).

5. *Id.* § 192.

6. Sherman Act, 15 U.S.C. §§ 1-7 (original version at ch. 647, 26 Stat. 209 (1890)).

7. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of the U.S.C.).

reluctance of farmers to organize to bargain collectively.[8] In the late 1800s, farmers' demands for legislation to address the market abuses of the meatpacking "trusts" served as an important part of the rationale for passage of the Sherman Act, the world's first antitrust law.[9] Congress soon determined that the Sherman Act did not adequately address the problems inherent in the packing industry.[10]

> [P]ersistent worries about the concentration problem and farmer bargaining power led to passage of the Clayton Act and the Federal Trade Commission Act in 1914. Agrarian concerns inhere in both statutes. The Clayton Act specifically limits the concentration that alarmed farmers, and it confers an antitrust exemption upon farmer efforts to organize themselves economically. The Federal Trade Commission Act created the Federal Trade Commission (FTC) with high expectations that some action would be taken against the "Big Five" meatpackers. The resulting FTC report on the meatpacking industry became the rationale for Congressional efforts to scrutinize closely the packing industry.[11]

That FTC investigation led to a suit filed by the Government in 1920 against the five biggest packers, known as the Big Five.[12] The same day that the suit was filed, the packers agreed to a consent decree that restricted packers from owning or controlling the livestock marketing channels[13] and generally prohibited packers from engaging in other sectors of the food industry.[14] Even the broad scope of the packer consent decree failed to satisfy Congress' concern with the packers' power. In 1921, it passed the P&S Act to deal exclusively with meat-

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8. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 485-87 (1999).

9. *Id.* at 451-52. *See also* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 1.3 (2000) (noting the impetus that the American notion of the Jeffersonian democracy gave to the passage of antitrust laws).

10. *Current Legislation*, 22 COLUM. L. REV. 68, 69 (1922) [hereinafter *Current Legislation*].

11. Lauck, *supra* note 8, at 488-89. *See also Current Legislation, supra* note 10, at 69 (discussing how the FTC Act proved ineffectual against the big meat packers because at the time it reached only competition between members of the same industry; the packers, however, "did not compete unfairly among themselves; they did not compete at all"); Douglas J. O'Brien, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. CORP. L. 651, 658 (1995) (providing summary of legislation leading up to the Packers & Stockyards Act).

12. *See* United States v. Swift & Co., 189 F. Supp. 885, 888 (N.D. Ill. 1960) (discussing the 1920 litigation).

13. *Id.* at 890 (holding packers agreed to divest all interests in the stockyards, railroads, and market journals).

14. *Id.* at 890-91 (holding packers could not maintain an interest in other food companies, wholesale markets, or retail meat establishments).

packers, intending this Act to be more aggressive than all previous antitrust or trade regulation.[15]

Constant dissatisfaction with packer behavior and the FTC investigation substantiating suspicions of packers' anticompetitive practices motivated Congress to pass the P&S Act. The Act applies to meatpackers, livestock dealers, market agencies, and live poultry dealers by outlawing unfair and deceptive practices, price manipulation, undue preferences, and the creation of a monopoly.[16] The House report stated that the Act is "a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act."[17] The Conference report on the Act states: "Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits. . . ."[18]

B. *Case Law*

The courts echo this view of broad regulation, making clear that any practice that would violate previous trade practice legislation would also violate the P&S Act. As *Wilson & Co. v. Benson*[19] states:

> The legislative history shows Congress understood the sections of the Packers and Stockyards Act under consideration were broader in scope then the antecedent legislation (61 Cong. Rec. 1805 (1921)). To illustrate, Representative (later Speaker) Rayburn, emphasized that although Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under the language in section 202(a) and (b) of the Packers and Stockyards Act. (61 Cong. Rec. 1806 (1921)).

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15. Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* AGRICULTURAL LAW 186-87 (John H. Davison ed., 1981) (stating that because antecedent legislation was "not adequate to deal with the problems of the livestock and meat industries, Congress enacted the Packers and Stockyards Act in 1921. The legislative history of the Act shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes").

16. 7 U.S.C. § 192(a)-(c) (2000).

17. H.R. REP. NO. 67-77, at 2 (1921).

18. H.R. REP. NO. 67-324, at 3 (1921). *See also* Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices, 62 Fed. Reg. 1845, 1853 (proposed Jan. 14, 1997) (to be codified at 9 C.F.R. pt. 200) (petition for rulemaking by the Western Organization of Resource Councils to regulate the use of captive supplies in the cattle market).

19. 286 F.2d 891 (7th Cir. 1961).

> From the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Anti-Trust Act were not broad enough to meet the public needs as to business practices of packers. Section 202(a) and (b) was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest.[20]

The Seventh Circuit echoed this sentiment and stated that "[s]ection 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission (15 U.S.C. § 45) and to also reach any of the special mischiefs and injuries inherent in livestock and poultry traffic."[21] Facts giving rise to a violation of the Robinson-Patman Price Discrimination Act[22] would also violate the P&S Act.[23]

For example, in *Swift & Co. v. United States*,[24] the court found a violation of the P&S Act, although the practice at issue might not have violated other antitrust legislation.[25] Swift, a meatpacker, had a history of competing with a particular dealer in the lamb market.[26] The packer and dealer entered into an agreement to compete no longer whereby the packer would buy lambs from that dealer instead of bidding against the dealer.[27] The Secretary found that this practice violated section 202(a) (unfair practice) and section 202(f) (conspiracy to control prices).[28] On appeal, the packer's principle argument was that it had no statutory obligation to purchase lambs.[29] The court denied this argument, stating that although under the Sherman Act a simple refusal to deal is permissible, the P&S Act reaches activities that previous antitrust laws did not address.[30]

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20. *Id.* at 895; *see also* Cent. Coast Meats, Inc. v. USDA, 541 F.2d 1325, 1328 (9th Cir. 1976) (Goodwin, J., dissenting) (noting that the prohibitions under the P&S Act were intended to be "as rigorous, if not more rigorous" than the FTC Act).

21. Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968). This case also stated that the Secretary may not ignore the general outline of anti-trust policy. *Id.*

22. Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (2000) (original version at ch. 592, 49 Stat. 1526 (1936)).

23. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961) (stating that "[t]he language in section 202(a) includes practices which might be a violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act").

24. 393 F.2d 247 (7th Cir. 1968).

25. *Swift & Co.*, 393 F.2d at 253.

26. *Id.* at 250-51.

27. *Id.*

28. *Id.* at 251.

29. *Id.* at 253.

30. *Id.* *But cf.* Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1458 (8th Cir. 1995) (acknowledging that the "Act may have been broader than antecedent legislation," but stating "it none-

Furthermore, a party may sue under the P&S Act, even if the practice might violate another law. The court in *Wilson & Co.* held that a type of price discrimination violated the P&S Act.[31] The packer discriminated on the price of hams it was selling to grocery stores in a particular area. Citing Robinson-Patman Act precedent, the court found that the practice violated section 202(a) of the P&S Act.[32] The packer attempted to use this rationale to its advantage and argue that the USDA could not enjoin the practice because the Department did not have the authority to enjoin violations of the Robinson-Patman Act. The court soundly rejected this argument: "We do not think the fact that Wilson's price-cutting program might have been a violation under some other Congressional enactment in any way destroys the authority of the Secretary of Agriculture in entering the order under the Packers and Stockyards Act."[33] This statement that plaintiffs may seek remedies under the P&S Act independent of other statutes was confirmed by Congress when it amended the Act to state that a person's private right of action under the Act "shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies."[34]

The statutory language and the case law thus set out the following propositions: (1) if a practice is a violation under the FTC, Clayton, Sherman or Robinson Patman Acts, it would be a violation of the P&S Act if the practice was performed by a packer or live poultry dealer; (2) even when conduct would not violate any of those Acts, it may still violate the P&S Act; and (3) when the practice is found to violate the P&S Act, possible remedies under other statutes do not affect the viability of a remedy under the P&S Act.

III. THE FTC ACT

The Federal Trade Commission Act ("FTC Act")[35] deals with fairness issues in both the equitable and the antitrust sense.[36] The similarities between the

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theless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation . . .") (quoting De Jong Packing Co. v. USDA, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980)).

31. Wilson & Co. v. Benson, 286 F.2d 891, 895-96 (7th Cir. 1961).
32. *Id.* at 895 (citing FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 553 (1960)).
33. *Id.* at 896.
34. 7 U.S.C. § 209(b) (2000).
35. 15 U.S.C. §§ 41-77 (2000) (original version at ch. 311, 38 Stat. 717 (1914)).
36. Section 45(a) states the substantive language concerning violations of the Act:

P&S Act and the FTC Act are evident from the statutory language. Section five of the FTC Act states that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[37] Section 202(a) of the P&S Act states, "It shall be unlawful for any packer with respect to livestock [or] meats . . . to (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device. . . ."[38] Because the fairness doctrine is more developed under the FTC Act than under the P&S Act, and because the P&S Act includes violations of the FTC Act within its scope, a deeper analysis is warranted.

Congress passed the FTC Act to supplement previous antitrust legislation, namely the Sherman and the Clayton Acts.[39] The movement for passage of the FTC Act arose from of a feeling that the Sherman Act, passed in 1890, had failed to fulfill its promise of protecting consumers and small competitors from anticompetitive conduct of larger firms.[40] In the 1912 presidential campaign, all three parties included planks dealing with antitrust.[41]

In 1911, the Senate Commerce Committee held extensive hearings on the competitive environment throughout the country.[42] The Committee was especial-

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> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions . . . Federal Credit Unions . . . common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id. § 45(a). *See also* Safeway Stores, Inc. v. Freeman, 369 F.2d 952, 957-58 (holding that although certain operations of a supermarket chain, such as the processing of meat, is subject to the jurisdiction of the P&S Act, Congress intended 7 U.S.C. § 227 to retain jurisdiction as to other activities in the FTC).

37. 15 U.S.C. § 45(a)(1).

38. 7 U.S.C. § 192(a).

39. FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394 (1953).

40. *See id.*

41. PETER C. WARD, FTC: LAW, PRACTICE, AND PROCEDURE §1.02[2] (1986, updated 2000); *cf.* GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 20 (1924) (stating that both the Republican and Progressive Platform of 1912 supported the creation of a new commission to streamline enforcement of antitrust laws).

42. WARD, *supra* note 41, §1.02[1].

ly concerned with a contemporary Supreme Court case, which stated that only "undue" restraints of trade were unlawful, thus narrowing the Sherman Act's scope.[43] This interpretation provided more discretion for a court to decide which activities had pro-competitive effects and those that had anticompetitive effects, and therefore, which cases violated the Sherman Act.[44] Critics saw this as a harbinger of watering down the Sherman Act, fearing that courts were less inclined to protect the interests of small businesses than Congress wished. To counter the Court's interpretation of the Act, the Senate Committee recommended the creation of a permanent commission that would "specifically prescribe certain conditions upon which persons and corporations shall be permitted to engage in commerce."[45] This committee report gave rise to legislation that would eventually become the FTC Act.

In Senate debate on the legislation, proponents stated that this new "commission's advantage would be in its ability to attack those practices that had not ripened into violations of the Sherman Act, but which represented 'the beginning of the attempt to monopolize, the beginning of the insidious efforts toward the restraint of trade and commerce.'"[46] The conference committee finally agreed on a bill that would include provisions of the House version that gave the commission broad powers to investigate and publicize business activities, as well as the Senate provisions that gave the commission the authority to define and enforce what the bill termed as "unfair methods of competition."[47]

The FTC Act addresses unfairness in a bifurcated manner. First, it prohibits "unfair methods of competition" in the antitrust sense.[48] The Supreme Court has repeatedly stated that certain conduct that violates the Sherman Act and other antitrust laws also violates the FTC Act.[49] This analysis has become squarely dependant upon economics.[50] Courts have infused antitrust policy with

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43. The committee was concerned with Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911). *Id.*

44. *Id.* § 1.01.

45. S. REP. NO. 62-1326, at 11 (1913).

46. WARD, *supra* note 41, § 1.02[4] (quoting 51 CONG. REC. 11,455 (1914) (remarks of Sen. Cummins)).

47. *See* H.R. CONF. REP. NO. 63-1142, at 18 (1913).

48. 15 U.S.C. § 45(a)(1) (2000).

49. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 466 (1986); FTC v. Cement Inst., 333 U.S. 683, 691-92 (1948).

50. Although early antitrust jurisprudence looked beyond pure economics to such things as fairness and equality in business dealings, courts now focus almost exclusively on antitrust concerns such as efficiency to maximize consumer welfare. David J. Gerber, *Competition Law*, 50 AM. J. COMP. L. 263, 272-73 (2002).

economic considerations such as a requirement that the defendant possess market power and that certain activities that may seem suspect may be justified by efficiency considerations.[51]

Second, the FTC Act prohibits "unfair or deceptive acts or practices" in the equitable sense.[52] In other words, the Commission was authorized to sit as a court of equity to determine notions of fairness according to public values.[53] For something to be an "unfair act," the actor need not have market power or have a negative effect on competition; rather, the FTC Act covers "a multitude of deceptive practices which might bear no relation whatever to the problem of monopoly and restraint of trade."[54]

IV. EQUITABLE UNFAIRNESS VS. ANTITRUST UNFAIRNESS

The analysis of "unfairness" has often been confused in the case law. Indeed, the FTC Act prohibits both "unfair methods of competition . . . and unfair and deceptive acts or practices."[55] In order to differentiate the doctrines, we need to bring focus to the two analyses.

A. *Antitrust Unfairness*

The Sherman and Clayton Acts set forth the basic doctrines of antitrust unfairness, or unfair competition, which have informed the courts in analogous violations of the FTC and P&S Acts. In general, to prove a violation of the Sherman Act, one must focus on a contract between firms that restrain trade,[56] or that one firm acted unilaterally to form or maintain a monopoly.[57] To determine whether certain challenged conduct violates the Sherman Act, courts attempt to ascertain whether the conduct enhances or reduces competition.[58] This search for

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51. *See, e.g.,* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780-81 (1999) (considering horizontal restrictions on advertising and applying a rigorous rule of reason review).

52. 15 U.S.C. § 45(a)(1).

53. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (stating that "legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").

54. HENDERSON, *supra* note 41, at 37.

55. 15 U.S.C. § 45(a)(1).

56. *Id.* § 1.

57. *Id.* § 2.

58. *Cal. Dental Ass'n*, 526 U.S. at 780-81 (applying Sherman Act analysis in an FTC

competitive consequences has led courts to apply the "rule of reason," which generally requires rigorous economic proof that the firm has the market power to accomplish a restraint of trade or a monopoly.[59]

The rule of reason under the Sherman Act usually requires proof that the defendant has market power and has abused that power. "[M]arket power is the seller's ability to raise and sustain a price increase without losing so many sales that it must rescind the increase."[60] Market power provides a firm the ability to inefficiently allocate resources, unduly transfer wealth to itself, and thwart innovation.[61] For a plaintiff in a Sherman Act case to prove market power, he or she must determine a firm's market share.[62] To do this the plaintiff must go through a rigorous economic exercise of defining both the geographic and product market.[63] After market share is determined, a court will look at the concentration of the industry in that market to determine the likelihood of the ability of the individual firm to engage in anticompetitive conduct.[64]

A full rule of reason analysis is unwieldy, expensive to prove, and uncertain in its application.[65] The process is fact intensive because it requires reams of data about particular markets.[66] The exercise also requires a great amount of high-cost expertise to put the data through econometric models.[67] Defendants have the ability to win on motions to dismiss or for summary judgment by simply showing that the defendant's market share is too small, that competitors can easily enter the market, that excess capacity exists in the market, or that conditions could easily change to cut against the defendant's current market power.[68] De-

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case).

59. *See generally* SULLIVAN & GRIMES, *supra* note 9, § 3.4b.

60. *Id.* § 2.2 (citing William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1981)).

61. *Id.* § 2.1.

62. *Id.* § 2.6b (stating that to determine the existence of market power one needs to define the market, determine market share and evaluate other structural data).

63. *Id.* §§ 2.6b1-2.

64. *See generally id.* § 2.6b4 (stating that "[t]he likelihood of interdependent behavior will likely vary not only with a single firm's market share, but with the shares of its competitors as well").

65. *Id.* § 2.6c.

66. *See id.*

67. *See id.*

68. Stephen Calkins, *California Dental Association: Not a Quick Look but the Full Monty*, 67 ANTITRUST L.J. 495, 521 (2000). As a practical matter, making market power an issue means that defendants can and do hire talented economists who help them win motions to dismiss or summary judgment on grounds of market shares of perhaps 20-30 percent or less (citations omit-

fendants have also become increasingly successful in showing that the procompetitive effects of the challenged conduct outweigh the anti-competitive effects.

The principal of "unfair methods of competition" under the FTC Act also implicates antitrust unfairness but encompasses activities beyond those that violate the Sherman or Clayton Acts.[69] In *FTC v. Sperry & Hutchinson Co.*,[70] the Supreme Court made one of its strongest statements concerning the FTC Act's breadth beyond previous antitrust legislation.[71] In that case, the Commission found that a trading stamp firm violated the FTC Act when it attempted to suppress the operation of stamp exchanges.[72] The Court stated that Congress intended the FTC Act to have flexibility in its broad sweep.[73] The Court rejected a line of cases that attempted to limit the scope of the Act[74] and held that the Act provided the Commission with the power to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[75]

This more expansive interpretation was well-grounded in preceding FTC Act cases. For instance, in *FTC v. Motion Picture Advertising Service*,[76] the Court reasoned that "unfair methods of competition" are not restricted to violations of the Sherman and Clayton Acts.[77] "Congress advisedly left the concept

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ted), or ease of entry, or elastic supply or demand, or powerful buyers, or excess capacity, or changing conditions. Any plaintiff filing a "full blown" rule of reason case faces the prospect of long, expensive discovery, extensive motions practice, and then a merger-like battle over market power without the benefit of the prophylactic language of Clayton Act Section 7. Making a decision turn on a full, formal proof of market power, the antitrust equivalent of the Full Monty, is a defendant's paradise (citations omitted).

69. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986).

70. 405 U.S. 233 (1972).

71. *See Sperry & Hutchinson Co.*, 405 U.S. at 239-40.

72. *Id.* at 236-38. Sperry & Hutchinson had about 40% of the business of the trading stamp industry. Trading stamps were used by retailers as sales incentives. Retailers would offer trading stamps to consumers to accompany certain purchases; the consumers, in turn, would redeem the stamps at Sperry for merchandise. This case concerned the trading or exchange of stamps outside either of these relationships. For various reasons, Sperry believed that these exchanges injured its business and, therefore, attempted to stem the exchanges. *See id.*

73. *Id.* at 239-40 (quoting S. REP. NO. 63-597, at 13 (1914) and H.R. CONF. REP. NO. 63-1142, at 19 (1914)).

74. *Id.* at 241-42 (refusing to follow line of cases that narrowed scope of FTC Act, including FTC v. Gratz, 253 U.S. 421 (1920) and FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923)).

75. *Sperry & Hutchinson Co*., 405 U.S. at 239.

76. 344 U.S. 392 (1953).

77. *Motion Picture Adver. Serv. Co.*, 344 U.S. at 394.

flexible to be defined with particularity by the myriad of cases from the field of business."[78] Referring to the remedy of enjoining the firm from entering into exclusive contracts with a duration of greater than a year, the Court granted leeway to the Commission: "The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question."[79]

However, courts sometimes revert to a Sherman Act analysis when interpreting the FTC Act. This occurs when the Commission is considering a fact scenario addressed by the Sherman Act policy, such as a horizontal agreement in restraint of trade.[80] Where the facts fit squarely within the boundaries of the Sherman Act, the court will engage in an examination of the competitive effects of the challenged conduct.[81] The degree of detailed analysis that a court will demand depends on the nature of the conduct, that is whether it baldly restrains trade or, on the other side of the spectrum, whether it appears to have a number of pro-competitive effects.[82]

B. *Equitable Unfairness Under the FTC Act*

The antitrust analysis, however, is not appropriate in cases where the FTC focuses on its consumer protection authority. For instance, when the FTC prohibits car dealers from engaging in bait and switch schemes,[83] the Commission's authority does not rest on the notion that the scheme harms the competitive environment for autos. Rather, the Commission is protecting a more vulnerable party, the consumer, in a commercial situation.[84]

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78. *Id.* (citing FTC v. R.F. Keppel & Brother, Inc., 291 U.S. 304, 310-12 (1934)).

79. *Id.* at 396.

80. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 762 n.3 (1999) (noting that the Commission relied upon Sherman Act law in adjudicating the case and applying the Sherman Act rule of reason).

81. *Id.* at 763 (citing NCAA v. Bd. of Regents, 468 U.S. 85, 110 (1984)).

82. *See id.* at 763-64.

83. FTC Guides Against Bait Advertising, 16 C.F.R. § 238 (2001) (defining bait advertising).

84. *See* Application of Guides and Trade Practice Rules in Preventing Unlawful Competitive Restraints, 32 Fed. Reg. 15,540, 15,540 (Nov. 7, 1967). When promulgating the bait and switch regulation, the FTC made no mention of antitrust concerns such as market power or efficiencies. Rather, the notice of the final rule simply states that the guides against this type of advertising "were released to the public in the interest of consumer education and to obtain voluntary, simultaneous, and prompt cooperation by those whose practices are subject to the jurisdiction of the FTC." *Id.*

In general terms, the equitable unfairness doctrine focuses upon "unjustified consumer injury."[85] After some attempts to narrow the scope of the FTC Act,[86] both the Supreme Court and Congress made it clear that the FTC Act prohibited unfair or deceptive acts that injure consumers. In *FTC v. R.F. Keppel & Brother, Inc.*,[87] the Court upheld the Commission's finding that a marketing practice that encouraged children to gamble violated the Act.[88] The court found that the goal of protecting children from such marketing practices fell within the scope of the FTC Act, even though the practice did not implicate antitrust policies.[89] Congress reinforced this broad view of the Act when it passed the Wheeler-Lea Amendment of 1938.[90] The new language amended section five to read: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and *unfair or deceptive acts or practices in or affecting commerce*."[91] This language made it clear that section five was directed to prevent harm to consumers as well as a firm's competitors.[92]

In 1988, the Eleventh Circuit found a violation of the FTC Act by focusing on consumer harm without any serious examination of antitrust elements. In *Orkin Exterminating Co. v. FTC*,[93] the Commission condemned the exterminator's breach of its promise to maintain its annual fees with consumers who signed certain contracts.[94] The court upheld the Commission's finding of a violation of section five of the FTC Act, even though the Commission did not find that the practice resulted from an abuse of monopoly power or deception, noting that "the Supreme Court, for example, has 'put its stamp of approval on the Commission's evolving use of a consumer unfairness doctrine not moored to the traditional rationales of anticompetitiveness or *deception*.'"[95]

85. *See* Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1363-64 (11th Cir. 1988) (noting that the FTC promulgated a policy statement concerning the notion of unfairness "which focuses upon unjustified customer injury").

86. *See, e.g.*, FTC v. Raladam Co., 283 U.S. 643 (1931).

87. 291 U.S. 304 (1934).

88. *See R.F. Keppel & Brother, Inc.*, 291 U.S. at 307-08, 314.

89. *See id.* at 307-308, 312, 314.

90. Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a) (2000)).

91. 15 U.S.C. § 45(a)(2) (2000) (emphasis indicating amended language).

92. Am. Fin. Serv. Ass'n v. FTC, 767 F.2d 957, 966-67 (D.C. Cir. 1985) (citing H.R. REP. NO. 75-1613, at 3 (1937)).

93. 849 F.2d 1354 (11th Cir. 1988).

94. *See generally Orkin Exterminating Co.*, 849 F.2d at 1354.

95. *Id.* at 1363 (quoting *Am. Fin. Serv. Ass'n*, 767 F.2d at 971).

The modern standard of equitable or consumer unfairness used by the FTC originally emanated from an FTC policy statement from 1980.[96] Under this standard:

> To justify a finding of unfairness the injury must satisfy three tests. 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.[97]

Congress codified this standard in 1994.[98]

Courts that have applied the consumer fairness standard, however, recognize that while the standard will look at the net effects of the conduct, it focuses on injury to the more vulnerable party in a commercial relationship, the consumer. For instance, in *American Financial Services Association v. FTC*,[99] the D.C. Circuit applied the consumer unfairness standard to FTC rules that prohibited certain creditor practices such as demanding a wage assignment and a security interest in household goods.[100] The court was satisfied that the Commission weighed the costs and benefits of the new regulations, such as the increased costs of collection for credit agencies versus the benefit of the avoidance of harm caused by wage assignments and the use of security interests in household goods.[101] Although the Commission engaged in the usual cost-benefit analysis utilized in most federal rulemaking,[102] the Commission did not utilize any antitrust rule of reason analysis in search of market power or efficiencies.[103] In the same way, when Congress codified the FTC unfairness standard, it did not intend

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96. *Id.* at 1363-64; Trade Regulation Rule, Credit Practices, 49 Fed. Reg. 7740, 7743 (Mar. 1, 1984) (stating that "Consumer injury is the central focus of any inquiry regarding unfairness.").

97. *Orkin Exterminating Co.*, 849 F.2d at 1364 (citing FTC letter directed to Congress when Congress was considering an amendment to section 5 that would have defined unfairness); *accord* FTC v. JK Publ'ns, Inc., 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000). "Commonly referred to as the FTC's 'Policy Statement' on the meaning of unfair acts and practices, the text of this letter is reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess., [at] 33-40 (1983)." *Orkin Exterminating Co*., 849 F.2d at 1364 n.10.

98. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 1994 U.S.C.C.A.N. (108 Stat.) 1691, 1695 (codified as amended at 15 U.S.C. § 45(n)).

99. 767 F.2d 957 (D.C. Cir. 1985).

100. *See Am. Fin. Serv. Ass'n,* 767 F.2d at 970-78, 991.

101. *Id.* at 976.

102. *See* Trade Regulation Rule, Credit Practices, 49 Fed. Reg. 7740, 7779-82 (Mar. 1, 1984).

103. *See id.* at 7744-45 (weighing the costs and benefits of the Credit Rule).

that the FTC engage in an antitrust version of the rule of reason.[104] Congress stated that the FTC was not even required to "quantify the detrimental and beneficial effects" of the challenged conduct.[105] Rather, it simply stated that the FTC should consider "reasonably available evidence."[106]

In *Orkin*, the Eleventh Circuit looked at the unilateral decision of a large insect exterminating firm to breach its contract with customers to whom it promised a lifetime warranty for a set annual fee.[107] Instead of abiding by the agreed upon fee, Orkin attempted to raise the fee years after it had entered into the contracts.[108] Before the Commission, Orkin argued that without the ability to raise the fee, consumers or competition would somehow be harmed.[109] The Commission dispensed with these arguments by focusing on the costs and benefits to consumers,[110] but refused to engage in a rule of reason analysis.[111] The Court of Appeals noted that the Commission recognized that the conduct may yield both beneficial and adverse consequences, but that "the increase in the fee was not accompanied by an increase in the level of service provided or an enhancement of its quality."[112]

Thus, it is clear that the consumer, or equitable, unfairness standard focuses on individual harm. The modern FTC rule, contained in 15 U.S.C. §45(n) prohibits any practice that is "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[113]

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104. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 1994 U.S.C.C.A.N. (108 Stat.) 1691, 1695 (codified as amended at 15 U.S.C. § 45(n)).

105. *Id.*

106. *Id*.

107. Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1355-56 (11th Cir. 1998).

108. *Id.* at 1358.

109. Orkin Exterminating Co., 108 F.T.C. 341, 365 (1986). Orkin argued that by restricting it from raising fees, competition would be harmed because: (1) Orkin's current customers would not move to lower-cost competition; and (2) Orkin's customer who did not have a set-fee agreement would bear a disproportionate share of Orkin's increased costs. The Commission replied simply that (1) the fact that Orkin's unfair conduct would help other competitors is immaterial to a FTC section 5 inquiry; and (2) Orkin assumed the risk of increased costs when it set a flat renewal fee, so the consequences of that decision must be borne by Orkin, which may mean that Orkin will be forced to pass increased costs to consumers.

110. *See* Int'l Harvestor Co., 104 F.T.C. 1050, 1064-65 (1984) (weighing the costs and benefits of requiring a tractor company to warn its customers of a certain danger of fire).

111. *Orkin*, 108 F.T.C. at 365-66.

112. *Orkin Exterminating Co.*, 849 F.2d at 1365 (quoting *Orkin*, 108 F.T.C. at 364).

113. 15 U.S.C. § 45(n) (2000).

C. *Equitable Unfairness Under Other Laws*

One only need look to federal and state regulation of insurance, advertising, car sales, or home improvement to find examples of policies centered on protecting the weaker or less-informed party from onerous practices.[114] State consumer protection statutes provide more examples of equitable unfairness analyses.

Consumer protection statutes sometimes include "deceptive acts" in the definition of what is unfair.[115] The P&S Act itself expressly prohibits deceptive practices.[116] These provisions, both in state consumer statutes and the P&S Act that prohibit deceptive practices often address the inherent informational disparities between large firms and the individual consumer. The Supreme Court of Pennsylvania commented as follows:

> The Legislature sought by the Consumer Protection Law to benefit the public at large by eradicating, among other things, "unfair or deceptive" business practices. Just as earlier legislation was designed to equalize the position of employer and employee and the position of insurer and insured, this Law attempts to place on more equal terms seller and consumer. These remedial statutes are all predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace.[117]

Some state consumer protection statutes condemn a business practice "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[118] Other considerations include whether a party inequitably asserts its power or position[119] or when a party utilizes coercive tactics.[120] These laws some-

114. *See generally* 21 C.J.S. *Credit Reporting Agencies; Consumer Protection* §§ 1-122 (1990) (annotating statutes, regulations, and cases designed to protect consumers); Donald M. Zupanec, Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979).

115. *See, e.g.*, Manley v. Wichita Bus. Coll., 701 P.2d 893, 902 (Kan. 1985) (stating that college violated state consumer protection act when it misrepresented the cost and financial aid policy); Mayhall v. A.H. Pond Co., 341 N.W.2d 268, 272 (Mich. Ct. App. 1983) (stating that sale of diamond ring "guaranteed perfect," when in fact it was not, frustrated buyer's expectations and violated the Michigan Consumer Protection Act).

116. 7 U.S.C. § 192(a) (2000).

117. Commonwealth v. Monumental Props., 329 A.2d 812, 815-16 (Pa. 1974).

118. Atl. Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 715 (4th Cir. 1983) (quoting Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981)) (discussing North Carolina's Unfair Trade Practices Act, N.C. GEN. STAT. § 75-1.1 (1969)).

119. Libby Hill Seafood Rests., Inc. v. Owens, 303 S.E.2d 565, 569 (N.C. Ct. App.

times outlaw unconscionable terms in contracts,[121] require that merchants disclose material information to the consumer,[122] or even prohibit the use of ultra-technical language in a contract.[123]

For instance, in *Wilder v. Squires*,[124] a prospective buyer of a home provided a binder fee or earnest money that was to be returned if the prospective buyer made a good faith effort to obtain a mortgage but failed.[125] The prospective buyer could not obtain reasonable financing, but the seller demanded that the buyer agree to oppressive credit terms or else forfeit the binder fee.[126] The buyer sued the seller claiming that the practice was coercive in violation of North Carolina's State Fair Practices Act.[127] The appeals court agreed, upholding the jury's finding that the conduct violated the law because the seller had no right to threaten the buyer.[128] In this case that deals with oppressive and threatening conduct, the court did not even consider the competitive consequences. Rather, it is focused entirely on the conduct and the effect on the injured party.

The concept of "unfairness" in these protective measures is divorced from the antitrust notion that the only condemnable practices are those that harm the defendant's direct line competitors. Instead these measures protect the more vulnerable party in a vertical business relationship, the consumer.[129] The language and history of the P&S Act requires a similar interpretation. Because of the broad nature of the P&S Act, advocates and courts are able to focus on the possible harm to an individual farmer or rancher stemming from his relationship with a large packer or poultry processor.

1983).

120. Wilder v. Squires, 315 S.E.2d 63, 66 (N.C. Ct. App. 1984).

121. *See* DeBerry v. First Gov't Mortgage, 743 A.2d 699, 700 (D.C. 1999) (noting that the Consumer Protection Procure Act, D.C. Code § 28-3904(r), makes it an unlawful trade practice for someone to make or enforce an unconscionable term).

122. *See* Totz v. Cont'l Du Page Acura, 602 N.E.2d 1374, 1381 (Ill. App. Ct. 1992) (finding that automobile dealer's failure to disclose that vehicle had been severely damaged in accident was actionable under state consumer fraud act).

123. Commonwealth v. Monumental Props., Inc., 329 A.2d 812, 828 (Pa. 1974).

124. 315 S.E.2d 63 (N.C. Ct. App. 1984).

125. *Wilder*, 315 at 65.

126. *Id.*

127. *See id.*

128. *Id.* at 69.

129. *See, e.g.*, Lester v. Resort Complands Int'l, Inc., 605 A.2d 550, 556 (Conn. App. Ct. 1992) (finding that unilaterally altering campground contracts by increasing fees to receive services already agreed to violated the Connecticut Fair Practices Act, CONN. GEN. STAT. § 42-110b (2003)).

D. *Franchisee Protection Laws*

Another area where state and federal legislatures have stepped in to address inequality in bargaining power is in franchising.[130] In many ways these relationships resemble contract relationships between packers or poultry integrators and farmers. Both arrangements involve an extremely large firm, such as McDonalds (franchising) or Tyson (poultry contracting), that enters into a business relationship with a much smaller entity. The agreement is written by the larger entity. In both instances, the agreement requires the smaller entity to invest a substantial amount of money. Some integrators, such as Tyson, even post their own sign at the lane of the poultry grower. Franchise agreements leave the smaller entity at the economic mercy of the large firm. Recognizing the great disparity in marketing power in the franchise situation,[131] both state and federal lawmakers have designed numerous laws to protect the more vulnerable franchisee.[132]

On the federal level, the Automobile Dealers' Day in Court Act[133] ("ADDCA") requires automobile manufacturers to act in good faith in performing or terminating their franchise agreements with automobile dealers.[134] This

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130. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 295 (1990) (annotating state laws affecting franchise relationships) [hereinafter *Private Franchise Contracts*].

131. Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769, 775 (E.D.N.Y. 1983) (stating that the "New Jersey Supreme Court views the Franchise Practices Act as a reflection of 'legislative concern over long-standing abuses in the franchise relationship,' such as instances of economic dominance by a franchisor over its franchisee.") (quoting Shell Oil Co. v. Marinello, 307 A.2d 598, 602 (N.J. 1973)). *See also* Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 677 (2d Cir. 1985) (noting that the Connecticut Franchisee Act was "passed for the purpose of correcting abuses in relationships between franchisees and franchisors"); Westfield Centre Serv., Inc., v. Cities Serv. Oil Co., 432 A.2d 48, 53 (N.J. 1981) (stating that the New Jersey legislature passed the Franchisee Protection Act to address the inherent bargaining inequities in franchise agreements and to "rule out economic coercion as a business tactic" in franchising).

132. *See generally Private Franchise Contracts, supra* note 130, § 292 (setting out the basic purpose of franchisee protection statutes as "protection of the franchisee and preventing a franchisor from taking unfair advantage of the economic disparity between the parties").

133. 15 U.S.C. §§ 1221-1225 (2000).

134. 15 U.S.C. § 1222 states:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or

law protects automobile dealers from coercion of the much stronger automobile manufacturer, whether or not the manufacturer terminates the franchise.[135] Congress intended to "redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships."[136] Much like the FTC and P&S Acts, the ADDCA supplements the antitrust laws and is designed to counter-balance the advantage that manufacturers have over independent dealers.[137] For example, an auto manufacturer violates the ADDCA when it refuses to deliver cars ordered by a dealer when done so as a coercive measure.[138]

The FTC itself recognizes that smaller franchisees are at risk in bargaining with franchisors. To address one of the disparities caused by the nature of a franchise relationship, the FTC set out detailed rules on what a franchisor must disclose as it bargains with a franchisee.[139] The Franchise Disclosure rule provides that "it is an unfair or deceptive act or practice within the meaning of section five of the [FTC] Act for any franchisor" to violate a provision of the rule.[140] This rule requires, among other things, that the franchisor provide prospective franchisees with a detailed prospective of rights and obligations under the franchise agreement[141] and that if the franchisor makes any type of financial represen-

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> not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

135. This is because the term "good faith" applies during the entire term of the contract and is defined "so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation." *Id.* § 1221(e). *See also* Hanley v. Chrysler Motors Corp., 433 F.2d 708, 710 (10th Cir. 1970) (noting that the ADDCA "creates two separate and distinct causes of action: (1) the failure of the automobile manufacturer to act in good faith in performing and complying with the provisions of an automobile franchise; and (2) the lack of good faith in terminating, canceling or not renewing the franchise with the dealer").

136. Maschio v. Prestige Motors, 37 F.3d 908, 910 (3d Cir. 1994); *accord Hanley*, 433 F.2d at 710-11.

137. *Maschio*, 37 F.3d at 910 (citing H.R. Rep. No. 2850, at 1, 3, *reprinted in* 1956 U.S.C.C.A.N. 4596, 4596, 4598).

138. Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir. 1978). For a collection of ADDCA cases, see Kurtis A. Kemper, Annotation, *Liability of Manufacturer Under Automobile Dealers Day in Court Act for Failure to Perform or Comply with Terms or Provisions of Franchise Agreement*, 54 A.L.R. FED. 314 (1981).

139. Disclosure Requirements & Prohibitions Concerning Franchising & Business Opportunity Ventures, 16 C.F.R. pt. 436 (2002).

140. *Id.* § 436.1; FTC v. Minuteman Press, 53 F. Supp. 2d 248, 258-59 (E.D.N.Y. 1998) (citing the Franchise Disclosure Rule).

141. 16 C.F.R. § 436.1(a). The rule requires the franchisor to provide such information as the business experience of the franchisor, the franchisor's criminal record, a statement of the

tations of the business, whether in the past or future, that the franchisor has a reasonable basis for making such representation.[142]

State legislatures have also passed legislation specific to the franchise relationship with the belief that the traditional remedies such as actions for breach of contract and fraud were inadequate to deal with the inherent inequities present in the franchise relationship.[143] A new law in Iowa dealing with franchise agreements provides a good example of what franchise protection laws cover.[144] This law covers everything from jurisdiction and venue of disputes[145] to providing a cause of action for damages caused by the franchisor's encroachment, such as opening a new store in the geographic area of a present franchisee.[146] The law also requires the franchisor to act in good faith throughout the franchise term,[147] with special restrictions on whether and how a franchisor can terminate or refuse to renew a franchise.[148] Other provisions include a prohibition on requirements

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total funds which must be paid by the franchisee, equipment requirements, statement of material terms of financing arrangements between the franchisor and franchisee, and a statement on whether the franchise agreement requires the franchisee to purchase certain goods or services from particular vendors.

142. 16 C.F.R. § 436.1(b)-(c). *See also Minuteman Press*, 53 F. Supp. 2d at 259 (concluding that a franchisor violated the FTC Act and the Franchise Disclosure Rule when it made earnings claims to prospective franchisees without substantiating documentation).

143. Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 677 (2d Cir. 1985) (stating "The [Connecticut] Franchise Act was passed for the purpose of correcting abuses in relationships between franchisees and franchisors (citation omitted). One Commentator noted that an inherent aspect of the franchise relationships was the economic disparity of the parties: 'Were it not for this disparity, why would the franchisee have sought out the assistance of such a franchisor? The recognition of this fact and the economic realities of the franchise relationship have given fairly recent rise to legislative attempts to remedy historic abuses within the franchise field.'") (quoting Richard W. Farrell, *Franchising in Connecticut –"Can Anybody Here Play This Game?,"* 54 CONN. B.J. 446, 447 (1980)); *see also* Carlos v. Philips Bus. Sys., 556 F. Supp. 769, 775-76 (E.D.N.Y. 1983) (noting that both the New Jersey and Connecticut franchise statutes were designed to address the disparity in bargaining power between the franchisee and franchisor).

144. *See* IOWA CODE § 537A (2001).

145. *E.g.*, *id.* § 537A.10(3)(a) (voiding provisions in franchise agreements that require that the claimant institute claims outside of the state).

146. *Id.* §§ 537A.10(6)(a)(1-4).

147. *Id.* § 537A.10(11).

148. *Id.* § 537A.10(7) - (8) (requiring that the franchisor provide written notice of the intent to terminate and the reason for termination and giving the franchisee thirty days to cure, and when a franchisor chooses not to renew a franchise, it must provide six months notice and have good cause to refuse to renew).

that the franchisee purchase certain goods[149] and an express right granted to franchisees to associate with other franchisees.[150]

Some of the franchisee protection laws, such as the Iowa law, cover franchises generally.[151] Others, however, focus on specific types of businesses, such as beer and liquor,[152] petroleum dealers and distributors,[153] automobile dealers,[154] pyramid schemes[155] and farm implement dealers.[156] The pervasive nature of these laws reflect the recognition that in situations when two entities possess such a disparity in bargaining power, the stronger party has numerous opportunities to take advantage of the weaker party.

V. PROPOSED STANDARD OF UNFAIRNESS FOR THE P&S ACT

Neither the Secretary of Agriculture nor the courts have set forth a standard for equitable unfairness under the P&S Act. An equitable unfairness analysis under 7 U.S.C. § 192(a) would prohibit practices that cause unjustifiable harm to growers, farmers, and ranchers. It would be different than the antitrust unfairness contemplated by much of the P&S case law. We propose utilizing the FTC standard set forth by the Commission in 1964 which has been adopted by many states.[157] The standard, called the "Cigarette Rule," calls for the following analysis of a business practice:

> (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

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149. *Id.* § 537A.10(9) ("*Sources of Goods or Services*. A franchisor shall not require that a franchisee purchase goods, supplies, inventories, or services exclusively from the franchisor or from a source or sources of supply specifically designated by the franchisor where such goods, supplies, inventories, or services of comparable quality are available from sources other than those designated by the franchisor.") (Emphasis added).

150. *Id.* § 537A.10(10).

151. *Id.*

152. *E.g.,* ARIZ. REV. STAT. ANN. § 44-1565 (West 1994).

153. *E.g.,* CAL. BUS. & PROF. CODE § 21,148 (West 1994 & Supp. 2003).

154. *E.g.,* COLO. REV. STAT. §§ 12-6-101 – 12-6-303 (2002).

155. *E.g.,* DEL. CODE ANN. tit. 6, §§ 2561–2564 (1999).

156. *E.g.,* WASH. REV. CODE ANN. §§ 19.98.010 – 19.98.912 (West 1999).

157. *See, e.g.,* Lester v. Resort Camplands Int'l, Inc., 605 A.2d 550 (Conn. App. Ct. 1992).

> immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[158]

This language could be adopted by the Secretary of Agriculture in regulation form, by Congress in legislation form, or by the courts. Any debate on adopting such an equitable unfairness rule is likely to include discussion of the 1994 amendment to the FTC Act.[159] That amendment limited the ability of the Commission to find wrongdoing in equitable unfairness cases unless a practice "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[160]

To state the proposed rule more succinctly in the context of the livestock markets, it could be stated as follows: Any practice by packers, dealers or marketing agencies is unfair if it: (a) violates notions of common law, statutory or other established concept of unfairness; (b) it is immoral, unethical, oppressive, or unscrupulous, and (c) it causes substantial injury to growers, farmers or ranchers which injury is not reasonably avoidable by growers, farmers, or ranchers.

VI. CONCLUSION

The U.S. Department of Agriculture has failed to define the meaning of "unfair" practices through regulations or guidelines during the entire eighty year history of the P&S Act. Yet there is no dispute that the P&S Act incorporates conduct prohibited by other trade regulation statutes, such as the FTC Act. Much of the discussion of unfairness in the livestock industry in the context of the P&S Act has confused antitrust fairness with equitable fairness. Yet they are far different in purpose and in analysis.

The proposed rule for equitable unfairness under the P&S Act could be used immediately in litigation or rulemaking for two major reasons. First, it arises under FTC case law and rulemaking and courts have made clear that practices

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158. Am. Fin. Serv. Ass'n v. FTC, 767 F.2d 957, 971 (D.C. Cir. 1985) (citing Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8355 (July 1, 1964)); *see also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972) (approving this standard). This standard became known as the "Cigarette Rule" and has been adapted as the unfairness standard by some state courts when they apply to state "little FTC Acts," or state statutes that mirror the FTC Act. *See, e.g.*, *Lester*, 605 A.2d at 556.

159. FTC Act Amendments of 1994, Pub. L. No. 103-312, 1994 U.S.C.C.A.N. (108 Stat.) 1691.

160. 15 U.S.C. § 45(n) (2000).

that violate the FTC Act likely violate the P&S Act as well. Second, there is little or no conflicting case law under the P&S Act and certainly no conflicting regulations to preclude the establishment of such a standard.

It is important to define rules of business conduct to ensure certainty as well as fairness and competition. Public policy values are the source of the P&S Act, the antitrust laws, and the FTC Act. The economics profession has come to dominate the antitrust unfairness analysis. However, the equitable unfairness analysis should remain squarely within the province of societal norms in the tradition of courts of equity and the civil jury system.