South Carolina Law Review

Volume 33 | Issue 3 Article 7

3-1982

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THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT: SLEEPING GIANT OR ILLUSIVE PANACEA?

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> The need for local consumer legislation is urgent . . . . The "South Carolina Unfair Trade Practices Act," implemented by the Attorney General, could effectively control and eventually eliminate the large scale use of unfair and deceptive trade practices in South Carolina.[1]

The South Carolina Unfair Trade Practices Act (UTPA),[2] a product of the consumer movement that began in the 1960s,[3] was enacted by the South Carolina General Assembly in 1971.[4] The enactment adopted Alternative Form Number 1 of the Unfair Trade Practices and Consumer Protection Act, which was developed by the Federal Trade Commission (FTC) in collaboration with various state officials and was adopted by the Council of State Governments' Committee of State Officials on Suggested State Legislation.[5] Because the UTPA is identical to section 5 of the FTC Act,[6] it is often called the "Little FTC

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1. Note, *Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act,"* 22 S.C.L. REV. 767, 787 (1970).

2. S.C. CODE ANN. § 39-5-10 to -160 (1976 & Supp. 1980).

3. COMMITTEE ON THE OFFICE OF THE ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL, 395 (1971) [hereinafter cited as 1971 REPORT]; Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence,* 48 GEO. WASH. L. REV. 521 (1981); Lovett, *State Deceptive Trade Practice Legislation,* 46 TUL. L. REV. 724 (1972).

Every state but Alabama has enacted some form of consumer protection legislation. Leaffer & Lipson, *supra,* at 521 n.1.

4. 1971 S.C. Acts 369, No. 287.

5. 1971 REPORT, *supra* note 3, at 398; Leaffer & Lipson, *supra* note 3, at 522; Lovett, *supra* note 3, at 730.

6. The Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976). The Wheeler-Lea Act, 52 Stat. 111 (1938), expanded the language of section 5 to prohibit unfair or deceptive acts or practices without the necessity of showing anticompetitive effect, which the United States Supreme Court had held necessary in FTC v. Raladam Co., 283 U.S.

Act." It prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices . . . ."[7]

The UTPA provides for enforcement by the attorney general and by private plaintiffs.[8] In addition, with the attorney general's approval, the solicitors of each judicial circuit and county and city attorneys may bring state actions.[9] The Act permits the state to seek injunctions,[10] restitution for injured persons,[11] civil penalties,[12] and the dissolution, suspension, or forfei-

643 (1931).

7. S.C. CODE ANN. § 39-5-20(a) (1976 & Supp. 1980). In addition to these general prohibitions, the Act expressly declares "pyramid" clubs and similar operations to be unfair trade practices. *Id.* § 39-5-30 (1976).

Comments to the model legislation explain that this alternative "enables the enforcement official to reach not only deceptive practices that prey upon consumers, but also unfair methods that injure competition. This form will reach price fixing arrangements, boycotts by suppliers, coercion of retailers, and other trade restraints which tend to create monopolies and enhance prices." COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED STATE LEGISLATION 141, *quoted in* 1971 REPORT, *supra* note 3, at 399. The other two alternatives in the model act are limited to consumer protection. Alternative Form Number 2 prohibits "false, misleading, or deceptive acts or practices." 1971 REPORT, *supra* note 3, at 399. Alternative Form Number 3 prohibits the twelve specific deceptive practices contained in the Uniform Deceptive Trade Practices Act, 7A UNIFORM L. ANN., *Business & Finance Laws* § 2 (1978); Lovett, *supra* note 3, at 732 n.4, and contains a thirteenth "catch-all" prohibition against "engaging in any other act or practice which is unfair or deceptive to the consumer." 1971 REPORT, *supra* note 3, at 399; Lovett, *supra* note 3, at 733.

In promoting state adoption of Little FTC Acts, the FTC stressed its inability to provide protection against unfair trade practices at the local level. Lovett, *supra* note 3, at 729 n.10, 736. First, the FTC Act does not cover those local practices that do not affect interstate commerce. Second, despite strong policy arguments to the contrary, the FTC Act does not provide for a private cause of action. *See* Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274 (1975). Federal courts have generally refused to imply a private tort action for violation of the FTC Act. *See* Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). *But cf.* Guernsey v. Rich Plan, 408 F. Supp. 582, 587 (N.D. Ind. 1976) (private action permitted to enforce terms of FTC order). Amendments to the FTC Act to create a private cause of action have been offered in Congress but have not passed. *See* H.R. 3816, 95th Cong., 1st Sess. (1970); H.R. REP. No. 95-339, 95th Cong., 1st Sess. 15-17 (1976); S. 1288, 94th Cong., 2d Sess. (1976); S. 642, 94th Cong., 1st Sess. (1975). Simply put, the FTC does not have the resources or power to police all the unfair or deceptive trade practices; it must look to state agencies and private plaintiffs for assistance. The UTPA was designed to fulfill this need.

8. S.C. CODE ANN. § 39-5-140 (1976).

9. *Id.* § 39-5-130.

10. *Id.* § 39-5-50(a).

11. *Id.* § 39-5-50(b).

12. *Id.* § 39-5-110.

ture of a corporate charter or franchise.[13] Furthermore, it authorizes the attorney general to issue investigative demands[14] and subpoenas.[15] Private plaintiffs may recover damages and, in the case of willful violations, treble damages.[16] Successful plaintiffs are also entitled to reasonable attorney's fees and such other relief as the court may deem "necessary and proper."[17] A permanent injunction, judgment, or order issued in a state action is prima facie evidence of a violation in a private action on the same facts.[18]

The UTPA includes a legislative mandate that state courts "will be guided by"[19] FTC and federal court interpretations of section 5 of the FTC Act "as from time to time amended."[20] Federal precedent provides an extensive list of violations, and excellent reporting services and treatises on trade regulation law[21] supplement the usual research sources in this area. In addition, the FTC has collected key decisions and prepared synop-

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13. *Id.* § 39-5-120.
14. *Id.* § 39-5-70, -100.
15. *Id.* § 39-5-80.
16. *Id.* § 39-5-140(a).
17. *Id.*
18. *Id.* § 39-5-140(c).
19. *Id.* § 39-5-20(b).
20. *Id.* The Commission's interpretations take many forms. The FTC holds public hearings and promulgates trade regulation rules that have the same substantive effect as final adjudicatory decisions and orders. These rules should have full precedential status under the UTPA. More questionable are other forms of FTC interpretations, including unresolved complaints, consent orders, stipulations, advisory opinions, trade practice rules, and industry guides, which are not enforceable as substantive law and have no general precedential value. *Compare* Whittinsville Plaza, Inc. v. Kotseas, _ Mass. _, 390 N.E.2d 243, 252 (1979) (FTC consent orders not authoritative interpretations of federal law) *with* State v. O'Neill Investigations, Inc., 609 P.2d 520, 529 (Alaska 1980) (FTC consent orders viewed as FTC interpretations with full precedential value). *See also* Leaffer & Lipson, *supra* note 3, at 534 n.85. Nevertheless, they represent the Commission's considered interpretations of section 5 and are usually based on decisional precedent. In effect, the legislative direction to the state courts is inherently ambiguous.
21. Bibliographical references and research sources are listed in S. Oppenheim, G. Weston & J. McCarthy, Federal Antitrust Laws 1-3 (4th ed. 1981)[hereinafter Oppenheim, Weston, & McCarthy]. In addition, the FTC has indicated its intent "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." Proposed Trade Regulation Rules Embodying Case Law Principles, 16 C.F.R. 1; 41 Fed. Reg. 3322 (Jan. 22, 1976). This massive project, if completed, should provide a veritable hornbook for the consumer protection bar.

ses of decisions in many areas of section 5 enforcement,[22] which may be used to establish not only UTPA violations but also willful violations that give rise to treble damages.

In addition to providing a body of useful precedent, the UTPA incorporates federal principles of general applicability that can provide guidance for courts confronting novel claims of deception or unfairness. For example, courts in many states have endorsed the FTC's broad "capacity-to-deceive" standard,[23] which renders irrelevant to a UTPA action the common-law elements of fraud and deceit.[24] Under this standard, the inquiry focuses on the effect of a seller's conduct on the consumer rather than on the seller's intent,[25] and the consumer need not prove the right to rely on the deception.[26] Several state courts have adopted the FTC's expanded theory of unfairness,[27] and one court has held that the statutory mandate to follow federal interpretations of the FTC Act indicates that state courts "are now free to find methods, acts or practices not heretofore specifically declared unlawful by the FTC or the federal courts prohibited by the [UTPA]. . . ."[28]

This article examines the FTC Act's standards and the problems that may arise in their application, the limitations on

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22. FTC synopses of decisions in thirty-one areas of enforcement are reprinted in Peterson, *The Use of FTC Programs as a Basis for Suit Under State-FTC Acts*, in 2 PRACTICING LAW INSTITUTE, FTC CONSUMER PROTECTION LAW INSTITUTE 919, 957-65 (1980).

23. Guggenheimer v. Ginzberg, 43 N.Y.2d 268, 272, 37 N.E.2d 17, 19, 401 N.Y.S.2d 182, 184 (1977). *See also* People v. Volkswagen of America, Inc., 47 A.D.2d 868, 868, 366 N.Y.S.2d 157, 158 (1975); notes 54-76 and accompanying text *infra*.

24. *See, e.g.*, Heller v. Silverbranch Constr. Corp., _ Mass. _, 282 N.E.2d 1065, 1069 (1978); Slaney v. Westwood Auto, Inc., 366 Mass. 688, 703, 322 N.E.2d 768, 779 (1975); Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

25. *See* Grimes v. Aldesperger, 67 Ill. App. 3d 582, 585, 384 N.E.2d 537, 539 (1978); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 51, 554 P.2d 349, 358 (1976).

26. Perry v. Hansen, 120 Ariz. 266, 269-70, 585 P.2d 574, 577 (1978).

27. *See, e.g.*, Murphy v. McNamara, 36 Conn. Supp. 183, 189, 416 A.2d 170, 175 (1979); Covenant Radio Corp. v. Ten Eighty Corp., 35 Conn. Supp. 1, 9, 390 A.2d 949, 955 (1977), Dan Lorenz, Inc. v. Northampton Nat'l Bank, _ Mass. App. Ct. _, _, 381 N.E.2d 1108, 1109 (1978); Frank J. Linhares Co. v. Reliance Ins. Co., 4 Mass. App. Ct. 617, 623, 357 N.E.2d 313, 318 (1976); State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 315, 233 S.E.2d 895, 898 (1977); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 464, 329 A.2d 812, 818 (1974); Christie v. Dalmig, Inc., 136 Vt. 597, 601, 396 A.2d 1385, 1388 (1979).

28. Murphy v. McNamara, 36 Conn. Supp. 183, 187 n.4, 416 A.2d 170, 174 n.4 (1979).

the UTPA's scope, the remedies it offers, and the manner in which the Act is now being enforced. Finally, the article offers a series of proposals to improve enforcement of the UTPA in a manner consistent with the practices of the United States Justice Department and federal court intepretations of section 5 of the FTC Act.

I. FTC ACT STANDARDS

Like section 5 of the FTC Act, the UTPA prohibits both unfair or deceptive acts or practices (consumer protection) and anticompetitive conduct (antitrust proscription).[29] The UTPA, by incorporating FTC and federal court interpretations of section 5 of the FTC Act,[30] gives state courts wide latitude to define acceptable business practices in the state. Because FTC standards have been developed by and for an administrative agency with remedial powers akin to a court of equity,[31] however, problems arise when their application in UTPA actions may result in civil penalties and treble damages.[32]

A. *Consumer Protection Standards*

1. *Capacity to Deceive.*

a. Literal truthfulness.—The FTC has continually pressed to expand its theories of deceptive practices far beyond the narrow common-law concept. In *Charles of the Ritz Distributing Corp. v. FTC,*[33] the Commission found that respondent's advertising falsely represented that its cosmetic cream would rejuvenate and restore the skin "regardless of the condition of the skin or the age of the user."[34] Upholding a cease and desist order against this advertisement, the Second Circuit Court of Appeals was unconcerned that the FTC had not produced consumers to testify to their deception and observed that "actual deception of the public need not be shown" in section 5 proceedings.[35] According

29. See note 7 *supra.*
30. S.C. CODE ANN. § 39-5-140(a) (1976).
31. See note 79 and accompanying text *infra.*
32. See notes 160-187 and accompanying text *infra.*
33. 143 F.2d 676 (2d Cir. 1944).
34. *Id.* at 678.
35. *Id.* at 680.

to the court, the proper standard is not deception but merely a "capacity to deceive."[36] Under this standard, the primary test is the "net impression which the advertisement is likely to make on the general populace,"[37] and the FTC may require "literal truthfulness"[38] in advertisements and insist "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.'"[39] Clearly, the common-law doctrine of *caveat emptor* has long been dead, at least regarding advertising claims under the FTC Act.

Although the courts have given the FTC broad authority to apply the capacity-to-deceive test, the FTC has recognized the need for some limitation. For example, the Commission declined a strict application of the standard in *Heinz W. Kirchner*,[40] in which the complaint challenged, in part, respondent's representation that its inflatable swimming aid was "INVISIBLE under bathing suit or swim trunks."[41] Although the Commission acknowledged its responsibility to protect "the gullible and credulous, as well as the cautious and knowledgeable," it nevertheless found that the complainant had failed to prove capacity to deceive.[42] According to the Commission, "[t]his principle loses its validity . . . if it is applied uncritically or pushed to an absurd extreme,"[43] and "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."[44]

A corollary to the rule that capacity to deceive must be determined from the net impression a representation creates is that literal truth may nevertheless be deceptive if incomplete. In *P. Lorillard Co. v. FTC*,[45] respondent "truthfully" advertised that an impartial test by Reader's Digest found that among six

36. *Id.*
37. *Id.*
38. Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942).
39. 143 F.2d at 680 (quoting General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941)).
40. 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).
41. *Id.* at 1283.
42. *Id.* at 1290.
43. *Id.*
44. *Id.*
45. 186 F.2d 52, 57 (4th Cir. 1950).

other leading brands, its Old Gold cigarettes were "lowest in nicotine . . . [and] lowest in throat-irritating tars and resins."[46] The advertisement did not, however, disclose the article's conclusion that the differences in tar and nicotine were "practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful."[47] Upholding an FTC order enjoining respondent from representing directly or indirectly that its cigarettes were lower in nicotine or tars and resins or were less irritating than others, the Fourth Circuit Court of Appeals observed that "[t]o tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished."[48]

b. Undisclosed use of demonstration props.—Ironically, although literal truthfulness cannot save a representation that has the capacity to deceive, a representation lacking the capacity to deceive nevertheless violates section 5 if its accurate net impression is accomplished by deceptive means. In *FTC v. Colgate-Palmolive Co.,*[49] the United States Supreme Court held that a demonstration in a television commercial of the effectiveness of shaving cream when shaving sandpaper was deceptive because the commercial used not sandpaper but plexiglass to which sand had been applied.[50] The Court found it irrelevant that sandpaper could be shaved using the shaving cream and that real sandpaper would have appeared to television viewers as plain colored paper[51] and ruled that the commercial deceived viewers by leading them to believe that they were seeing an experiment that used real sandpaper.[52]

In his dissent to *Colgate,* Justice Harlan advanced as a proper test "whether what is shown on the television screen is an accurate representation of the advertised product and the claims made for it."[53] Perhaps a more relevant criticism of *Col-*

46. *Id.*
47. *Id.*
48. *Id.* at 58.
49. 380 U.S. 374 (1965).
50. *Id.* at 377.
51. *Id.* at 376.
52. *Id.* at 390.
53. *Id.* at 398 (Harlan, J., dissenting in part). Justice Harlan suggested that under

gate is that the public interest is not served by prohibiting a practice that can have no injurious consequences.[54] If no one is misled by an accurate representation of the nature or quality of the product, it should make no practical difference to consumers whether real or simulated props are used in an advertisement, so long as the net impression is accurate.[55]

The true rationale for the *Colgate* result may be that advanced by the Court in *FTC v. Algoma Lumber Co.*,[56] which prohibited respondents from selling yellow pine as "California white pine." The Court ruled that one product may not be sold under the name of another even if the products are equivalent and the substitution results in savings to the consumer.[57] It further observed that "the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."[58] Thus, wrongfulness may inhere not only in the damaging effect of a misrepresentation but in the intrinsic impropriety of a dishonest but innocuous misrepresentation. A misrepresentation is actionable as a per se unfair or deceptive practice even though it creates an accurate net impression, as in *Colgate*, or a net impression that is inaccurate but beneficial, as in *Algoma*.

The effect of the broad federal interpretations of deception, if read into the UTPA, is potentially enormous. If the South Carolina courts choose to follow these interpretations, the Act would require the strictest honesty in commercial dealings. A

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the majority opinion, "an advertiser must achieve accuracy in the studio even though it results in an inaccurate image being projected on the home screen." *Id.* at 397-98. Thus, the advertiser's product might look either better or worse, and the accuracy in the studio might create a deceptive net impression. *See id.* at 398.

54. *Id.* at 396-98.

55. *Cf.* Gold Seal Co. v. Weeks, 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom.* S.C. Johnson & Son, Inc. v. Gold Seal Co., 230 F.2d 832 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 829 (1956). The Court dismissed a counterclaim under Lanham Act § 43(a), 15 U.S.C. § 1125a (1976), alleging that the trademark "Glass Wax" on glass cleaner containing no wax was a misleading, false description that injured the plaintiff, a wax products manufacturer. According to the court, "[counter-claimant] has not shown damage or likelihood of damage due to the fact that any substantial number of reasonable customers were misled or likely to be misled as to the nature of the product . . . or that if they had known the true facts, they most likely would have purchased a different product . . . ." 129 F. Supp. 940.

56. 291 U.S. 67 (1934).

57. *Id.* at 78.

58. *Id.*

consumer potentially has a cause of action under the UTPA whenever he or she is injured as a result of a merchant's misrepresentation, regardless of the merchant's intention to deceive or the reasonableness of the consumer's reliance on the misrepresentation.[59] Conservative state courts might resist such a potentially revolutionary cause of action that could largely supplant the traditional fraud actions and remove the barriers to recovery they present. Nevertheless, the UTPA is state law, and the legislature has expressly indicated its intention that the courts interpret its substantive provisions with the guidance of federal interpretations of similar language in the FTC Act. Strong authority exists to support a broad reading of the UTPA's prohibition of deception by the South Carolina courts.

2. *The Unfairness Doctrine.*—The federal courts and the FTC have interpreted the FTC Act's prohibition against unfairness even more broadly than they have construed the Act's prohibition against deception. In *FTC v. Sperry & Hutchinson Co. (S&H),*[60] the United States Supreme Court held that in making determinations of unfairness, the FTC, "like a court of equity, [can consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[61] In a footnote, the Court quoted with apparent approval the elements announced by the FTC in its proposed "Cigarette Rule" for determining whether a practice is unfair:

> (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).[62]

Unfortunately, the Court's opinion offered no additional gui-

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59. See notes 24-27 and accompanying text *supra.*

60. 405 U.S. 233 (1972).

61. *Id.* at 244. For a more extensive catalog of acts and practices commonly held to be unfair under § 5, see Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission,* 1981 WIS. L. REV. 107 (1981).

62. *Id.* at 244-45 n.5, quoting from 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. 8324, 8355 (1964).

dance for determining standards of unfairness.

Four months after *S&H*, the FTC elaborated on its criteria for unfairness in *Pfizer, Inc.*,[63] in which it dismissed a complaint against a sunburn ointment manufacturer for violating section 5 by failing to substantiate efficacy claims for its product before advertising.[64] Instead of delineating precise standards for determining unfairness, the Commission seized on the Court's *S&H* comparison of the FTC to a court of equity and took an even more flexible approach to unfairness than that contained in its proposed Cigarette Rule:

> An unfairness analysis will take into account many basic economic facts and considerations, and will permit a broad focus in the examination of marketing practices. Unfairness is potentially a dynamic tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy. Thus as consumers, products, and marketing practices change in number, complexity, variety, and function, standards of fairness to the consumer may also change.[65]

The Commission concluded that "the making of an affirmative product claim in advertising is unfair to consumers unless there is a reasonable basis for making that claim"[66] because of "the imbalance of knowledge and resources between a business enterprise and each of its customers."[67]

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63. 81 F.T.C. 23 (1972). The FTC alleged two violations in its complaint—one for deception and the other for unfairness. On the deception charge, complaint counsel argued that the company impliedly represented that scientific studies or tests which preceded the representations substantiated the claimed pain-relieving properties of the sunburn ointment, and that this implied representation had the capacity to deceive consumers. *Id.* at 54. Complaint counsel also alleged an unfair trade practice in advertising a product without adequate scientific testing. *Id.* The Commission reiterated its net impression standard for deception cases, pointing out that deceptive acts or practices usually take one of three forms: "(1) advertising containing direct representations, (2) advertising containing representations which reasonably may be said to be implied by the advertising, or (3) advertising which fails to disclose material facts." *Id.* at 58. On the facts adduced, it was found that such prior substantiation could not reasonably be implied from the advertisements and therefore that no showing of a deceptive act or practice had been made.

64. *Id.* at 73.

65. *Id.* at 61.

66. *Id.* at 62.

67. *Id.* The "reasonable basis" standard was said to be not solely a "reasonable man" test. *Id.* at 64. Although the precise formulation of the reasonable basis standard was left to case by case determination, the Commission listed five criteria relevant to the factual issue of what constitutes a reasonable basis for advertising claims:

As in the case of the advertising props in *Colgate*, section 5 violations do not require that the consumer be injured by deception if the advertiser's claims are without reasonable basis. Even though a product performs as advertised, lack of a reasonable basis for the performance claim justifies finding an unfair act or practice in violation of section 5 because the consumer bears the "unavoidable risk that the product may not perform as advertised."[68]

The first trade regulation rule based solely on the unfairness doctrine after *S&H* and *Pfizer* prohibits the assertion of certain claims and defenses, including the holder-in-due-course doctrine, in consumer credit transactions.[69] Pursuing its power recognized in *S&H* to act as a court of equity, the FTC announced that it had "weighed compelling equities in the market in reaching [the] conclusion that the mechanical abrogation of consumer claims and defenses is unfair to consumers."[70] The Commission followed its broad *Pfizer* standard of unfairness based on marketplace economics and the unequal bargaining power between consumers and merchants. It decided that the cost of merchant misconduct could be minimized if creditors were forced to police the marketplace by avoiding promissory notes from merchants whose shoddy goods or unethical business conduct would give consumers valid defenses in actions for debt incurred with them. Creditors would then be forced to absorb losses due to merchant misconduct with the result that consumer credit transactions would more accurately reflect their true cost to society. According to the Commission, "only when prices approach or approximate real social costs do consumer choices in the market tend

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> (1) the type and specificity of the claim made—*e.g.*, safety, efficacy, dietary, health, medical; (2) the type of product—*e.g.*, food, drug, potentially hazardous consumer product, other consumer product; (3) the possible consequences of a false claim—*e.g.*, personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims.

Id. at 64.

68. *Id.* at 67.

69. Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (1980). *See In re* All-State Indus., Inc., 75 F.T.C. 465 (1967), *aff'd,* 423 F.2d 423 (4th Cir. 1970), *cert. denied,* 400 U.S. 828 (1980).

70. Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53,506 (1975).

towards optimal allocation of society's resources."[71]

In its trade regulation rule on ophthalmic advertising, which was designed to defeat anticompetitive state regulation of the eyeglass industry, the FTC made its unfairness standard even more flexible and general.[72] According to the Commission, the determination of unfairness requires two inquiries: "(1) Whether the acts or practices result in substantial harm to consumers. In making this determination both the economic and social benefits and losses flowing from the challenged conduct must be as-

71. *Id.* It has been pointed out that this rationale is similar to that underlying the common-law doctrine of strict products liability. Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1, 11 (1977). Commentators have debated whether the FTC Act has goals other than economic efficiency. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 7-33 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-22 (1977); Schwartz, *"Justice" and Other Noneconomic Goals of Antitrust*, 127 U. PA. L. REV. 918 (1979); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

72. Trade Regulation Rule Concerning Advertising of Opthalmic Goods and Services, 43 Fed. Reg. 23,992, 25,995 (1978), *remanded in part for reconsideration*, American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980) [hereinafter Ophthalmic Rule]. The Ophthalmic Rule is the first trade regulation rule derived from a proceeding conducted completely under the Magnuson-Moss FTC Improvement Act. Pub. L. No. 93-637 (1975), amending § 18 of the FTC Act, 15 U.S.C. § 2301-2310 (1976). The Rule is noteworthy for the FTC's position that it has the power to preempt state statutes restricting advertising of eyewear and eye examinations. Enforcement of the rule would be accomplished by making it an unfair practice for an individual seller to fail to advertise in order to comply with "nonfederal" (i.e., state) laws or private codes of conduct. Ophthalmic Rule, *supra*, § 456.4, 43 Fed. Reg. at 24,007. The declared intent is not to compel informative advertising, but to make this prohibition self-enforcing by providing a defense to any proceeding against a seller or refractionist who advertises "in a nondeceptive and fair manner" contrary to nonfederal law. *Id.* § 456.9(c), (d), 43 Fed. Reg. at 24,008. In other words, the rule voids state laws restricting such advertising. As noted by the court,

> the Commission's proposed preemption of state law is almost as thorough as human ingenuity could make it. Consequently, the Commission has at least approached the outer boundaries of its authority and may have infringed on that deference to the states' exercise of their police powers dictated by the principles of federalism.

626 F.2d at 910.

If valid, a preemptive rule such as this could create an anomalous situation in a state having both a UTPA and prohibitions that have been preempted by an FTC rule: (1) the state law prohibits specified conduct; (2) the FTC rule makes it a § 5 violation to abide by state law; (3) the state's UTPA adopts FTC "interpretations" of § 5 as state law guides; therefore, (4) does abiding by state law prohibiting the specified conduct violate state UTPA? Presumably, this type of problem would be avoided in South Carolina by the express exemption for "actions or transactions permitted by any other South Carolina State law." S.C. CODE ANN. § 39-5-40 (1976).

sessed, and (2) Whether the challenged conduct offends public policy."[73] The Commission found a public policy against restrictions on commercial advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[74] and *Bates v. State Bar of Arizona*,[75] in which the United States Supreme Court held that the first amendment protects the consumers' right to receive price information. As an alternative, the Commission advanced the public policy of fostering free markets[76] and noted that functioning free markets require competition, "availability of information, a lack of excessive transaction costs incurred by or benefits accruing to persons external to the decision process, and mobility of resources."[77] On the substantial harm issue, the Commission found that lack of price information injured consumers by depriving them of "the opportunity to satisfy their needs at the lowest available price."[78] Therefore, the Commission concluded, "[a]cts or practices which cause consumer injury by creating, exploiting, or failing to alleviate market imperfections other than a lack of or threat to competition can be unfair within the meaning of Section 5."[79]

The FTC's expansion of its jurisdictional reach has evoked stiff business opposition. When the Commission proposed its trade regulation rule on cigarette labeling, Congress responded to intense political pressure by passing its own cigarette labeling law—a watered-down version of the proposed FTC rule.[80] More recently, Congress' enactment of the 1980 Federal Trade Commission Improvement Act[81] expressly restricted the Commission's consideration of a proposed trade regulation rule to limit or prohibit television advertising addressed to children, nicknamed the "kid-vid rule,"[82] by prohibiting promulgation of any rule based on the theory that advertising of this type consti-

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73. Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose, 43 Fed. Reg. 23,992, 24,000-01 (1978).

74. 425 U.S. 748 (1976).

75. 433 U.S. 350 (1977).

76. 43 Fed. Reg. at 24,001.

77. *Id.*

78. *Id.*

79. *Id.*

80. Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-1340 (1976).

81. Pub. L. No. 96-252 § 11(c), 94 Stat. 374 (1980).

82. *Id.*

tutes an "unfair act or practice."[83] Thus, the Commission may now predicate any kid-vid rule only on a finding of deception.[84] Congress further prohibited any new rule-making proceedings to regulate "any commercial advertising"[85] on the basis of unfairness during the fiscal years 1980, 1981, and 1982.[86]

Given recent changes in the nation's political climate, some question exists whether the FTC will continue its aggressive use of the unfairness doctrine to prohibit perceived abuses in commerce. The Commission lost much of the flexibility it once had in applying the doctrine when Congress legislated itself a veto power over all newly issued FTC trade regulation rules.[87] The unfairness doctrine is, however, sufficiently established to be a potent weapon in state unfair trade practice arsenals. Courts so inclined could measure any practice allegedly injurious to free markets or consumer protection against the unfairness standard under the UTPA.

B. *Antitrust Standards*

Enactment of the Sherman Antitrust Act of 1890[88] established a national policy of maintaining competition in unregulated sectors of the economy by prohibiting concerted actions in restraint of trade,[89] conspiracy to monopolize, monpolization, and attempts to monopolize.[90] In its 1911 decision in *Standard Oil Co. v. United States*,[91] the United States Supreme Court interpreted the Sherman Act's broad proscription of concerted restraints of trade as prohibiting only "unreasonable" restraints.[92]

83. *Id.*

84. The FTC subsequently terminated its rulemaking proceeding concerning children's television advertising. [1981] ANTITRUST & TRADE REG. REP. (BNA) No. 1033, at A-27.

85. Pub. L. No. 96-252, *supra* note 81, § 11(c).

86. *Id.*

87. *Id.* § 21(a). Congress also demonstrated its displeasure by placing other restrictions on FTC activities, including its proposed rule for the funeral industry, *id.* § 19, and the elimination of FTC authority to cancel a federally registered trademark "on the ground that such mark has become the common descriptive [generic] name of an article or substance." *Id.* § 18.

88. 15 U.S.C. §§ 1-7 (1976).

89. *Id.* § 1.

90. *Id.* § 2.

91. 221 U.S. 1 (1911).

92. *Id.* at 60.

Congress' unfavorable reaction to *Standard Oil* resulted in the FTC[93] and Clayton Acts.[94] The Clayton Act supplements the Sherman Act's narrow "Rule of Reason" standard by prohibiting specified conduct whose effect *may be* a substantial lessening of competition.[95] The purpose of the Clayton Act is to prevent such potential or incipient restraints from ripening into full-blown unreasonable restraints of trade. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,[96] prohibits various forms of anticompetitive price discrimination;[97] section 3 prohibits similar exclusive dealing and tying arrangements;[98] section 7 prohibits corporate mergers and acquisitions that may restrain competition;[99] and section 8 prohibits interlocking directorates, that is, boards of directors of competing corporations having the same members, when this practice might have an anticompetitive effect.[100] In each of these areas, the Clayton Act substitutes an incipiency standard for the Sherman Act's Rule of Reason standard and relaxes the standard of proof necessary to establish a violation.

Although the FTC Act is not by definition, an antitrust law,[101] conduct that violates the Sherman or Clayton Antitrust Acts is by definition unfair and therefore violates section 5 of the FTC Act. Because the federal antitrust acts provide states and their citizens private antitrust causes of action for treble damages and injunctions, the FTC Act would add little if its antitrust coverage were limited to conduct already prohibited by the other acts. In their interpretations of the FTC Act, however, the courts have developed doctrines prohibiting anticompetitive conduct that has not matured into a full antitrust violation or that falls within a technical gap in the antitrust acts. Consequently, the UTPA permits state and private causes of action for conduct not directly prohibited by the Sherman and Clayton Acts.

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93. 15 U.S.C. §§ 41-58 (1976).
94. *Id.* §§ 12-27, 44.
95. *Id.* §§ 13(a), 14, 18.
96. *Id.* § 13.
97. *Id.*
98. *Id.* § 14.
99. *Id.* § 18.
100. *Id.* § 19.
101. *Id.* § 12.

1. The Incipiency Doctrine.—Under the incipiency doctrine, the United States Supreme Court in *FTC v. Motion Picture Advertising Service Co.*[102] stated that conduct which has not yet blossomed into a full-blown violation of the Sherman Act may nevertheless violate section 5 of the FTC Act:[103]

> It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full-blown, would violate those Acts, as well as to condemn as "unfair methods of competition" existing violations of them.[104]

Despite this dictum in *Motion Picture Advertising*, questions persisted whether the incipiency doctrine should apply equally to Clayton Act cases.[105] Both the Clayton Act and the FTC Act are supplementary to the Sherman Act, and the use of one supplementary act to supplement another is subject to question. Moreover, the Clayton Act imposes its own incipiency standard, which expressly prohibits conduct whose effect "*may* be substantially to lessen competition, or *tend* to create a monopoly."[106] It may thus be argued that the application of the section 5 incipiency test to Clayton Act violations would amount to applying a double incipiency test, or "incipient incipiency."[107]

Despite these arguments, the Supreme Court appears to have settled the issue in *FTC v. Brown Shoe Co.*,[108] in which the FTC challenged a franchised dealer program that offered dealers a package of special services and facilities in return for the deal-

102. 344 U.S. 392 (1953).

103. *Id.* at 394-95. *See* Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941) ("[I]t was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable.").

104. 344 U.S. at 394-95.

105. 15 U.S.C. § 12-27, 44.

106. *Id.* §§ 14, 18.

107. *See, e.g.*, Howrey, *Interplay of Unfair Competition and Antitrust Doctrine Under Section 5 of the Federal Trade Commission Act*, 12 IDEA 119 (1968); Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Act*, 59 MICH. L. REV. 821 (1961); Comment, *An Expanded Use of Section 5 of the Federal Trade Commission Act*, 57 GEO. L.J. 1082 (1969). *See also* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 250 n.108 (1980).

108. 384 U.S. 316 (1966).

ers' agreement not to handle competing shoe lines.[109] The FTC did not attack these arrangements as exclusive dealing contracts under section 3 of the Clayton Act, which would require a showing that their effect "may be to substantially lessen competition,"[110] but instead proceeded under section 5 of the FTC Act[111] and did not make such a showing.[112] The Court upheld the Commission's position and stated:

> We reject the argument that proof of this § 3 element [present likelihood of substantial harm to competition] must be made for . . . our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.[113]

The extent of the showing, if any, of incipient injury to competition that must be made to sustain a violation of section 5 remains a question. Per se violations of the antitrust laws clearly would also be per se violations of section 5. Similarly, inasmuch as the Clayton Act's incipiency standard requires no more than a reasonable probability of the proscribed anticompetitive effect, section 5 of the FTC Act must require something less for incipient Clayton Act violations.[114] Finally, the proper

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109. *Id.* at 317-18.

110. 15 U.S.C. § 14 (1976).

111. *Id.* § 45(a)(6).

112. 384 U.S. at 318-19.

113. *Id.* at 322. The FTC's cease and desist order was based on a quasi-tying theory: "Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive." *Brown Shoe Co.*, 62 F.T.C. 679, 715 (1963). *See* Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 OHIO ST. L.J. 539 (1968).

114. The "reasonable probability" test for Clayton Act cases was explained in Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), as follows:

> It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discrimination "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect. But . . . the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

Id. at 738. *Cf.* FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948) (violation of § 2(a) results when "[t]here is a 'reasonable possibility' that competition may be adversely affected" by price discriminations in sales to competing customers). It has been suggested that the

standard for application of section 5 to conduct falling within the Sherman Act's Rule of Reason test can be inferred from the Court's interpretation of the Clayton Act's incipiency standard: the proper test under section 5 for Rule of Reason conduct would appear to be a reasonable probability that, if the conduct were to continue unabated, an unreasonable restraint of trade would result.

2. The "Spirit" Doctrine.—In addition to reaching actual or incipient violations of the antitrust laws, section 5 of the FTC Act has been used to reach conduct that violates the policy or spirit of those laws, even when the conduct may not be technically within their terms. As stated in *Brown Shoe,* the FTC has "broad power"[115] to declare trade practices unfair, especially those that "conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate those laws."[116]

One widely discussed illustration of the "spirit" doctrine is the Commission's application of section 5 to the receipt of discriminatory promotional allowances in violation of the policy, but not the letter, of the Robinson-Patman Act.[117] The Clayton Act, as amended by the Robinson-Patman Act, established a policy for special treatment of specified types of conduct, such as price discrimination.[118] Although section 2(d) prohibits a seller from granting discriminatory promotional allowances[119] and section 2(f) prohibits a buyer from inducing or receiving discriminations in price,[120] the Act does not address the issue of a buyer's inducing or receiving discriminatory promotional allowances. In *Grand Union Co. v. FTC,*[121] the Second Circuit

relevant legal standard under § 5's incipiency test is somewhere between a "reasonable probability" and a "reasonable possibility" that the proscribed effect on competition would occur. Averitt, *supra* note 107, at 249; MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness,* 41 GEO. WASH. L. REV. 407, 422 (1973).

115. 384 U.S. at 321.

116. *Id.* According to the Court, "This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market." *Id.*

117. Robinson-Patman Price Discrimination Act of 1936, 15 U.S.C. §§ 13-13b, 21a (1976).

118. *Id.* § 13.

119. *Id.* § 13(d).

120. *Id.* § 13(f).

121. 300 F.2d 92 (2d Cir. 1962).

Court of Appeals upheld a section 5 cease and desist order against the latter conduct on the ground that it violated the policy of the Robinson-Patman Act. As explained by the court, "[j]urisdiction, perhaps, has been expanded from the technical confines of § 2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of *buying* power."[122]

Because gaps in the scope of the Clayton Act are covered by the general proscriptions of the Sherman Act,[123] use of section 5 may be unnecessary. The only difference in the treatment of conduct under the two antitrust acts is the Clayton Act's incipiency standard;[124] but standards for application of the two acts have tended to coalesce over the years.[125] Because section 5 has its own incipiency standard, conduct contrary to the policy of the Clayton Act, but technically beyond its reach, is subject to section 5 coverage as an incipient violation of the Sherman Act.

A more difficult question is how section 5 might apply to conduct that is neither an actual nor an incipient violation of the broad terms of the Sherman Act. Two gaps in the Sherman Act coverage have evoked FTC interest. The Act proscribes both (1) concerted restraints (a contract, combination, or conspiracy in restraint of trade or conspiracy to monopolize) and (2) unilateral monopolization or attempt to monopolize.[126] Treating unilateral but consciously parallel restraints as contrary to the spirit of the Sherman Act would avoid the requirement of concerted action. Similarly, characterization of an oligopoly as a "shared monopoly" contrary to the spirit of the Sherman Act avoids the requirement of proving monopolization or attempt to monopolize. The complexities of the antitrust concepts of conscious parallelism, implied conspiracy, oligopolistic interdependence, and shared monopoly are beyond the scope of this arti-

122. *Id.* at 98.

123. *See* OPPENHEIM, WESTON, & MCCARTHY, *supra* note 21, at 19.

124. See notes 101-113 and accompanying text *supra*.

125. *See, e.g.*, L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 595 (1977); Day, *supra* note 113, at 545.

126. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce . . . ." 15 U.S.C. § 1 (1976). Section 2 of the Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ." 15 U.S.C. § 2 (1976).

cle.[127] Suffice it to say that extension of section 5 to expand the Sherman Act beyond concerted restraints of trade, monopolization, and attempts to monopolize has not gained widespread support, and in the current political climate prospects for extension seem dim.[128] A similar prognosis may be made for any attempt in the near future to accomplish the same ends under an expanded theory of unfairness, by which the FTC might consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[129]

C. Conclusion

The courts and the Federal Trade Commission have interpreted section 5 of the FTC Act as prohibiting almost any kind of anticompetitive conduct,[130] as outlawing commercial representations that do not convey an accurate impression accurately achieved,[131] and as prohibiting any commercial conduct that can be considered unfair in the broad tradition of equity jurisprudence.[132] The South Carolina UTPA, by permitting state courts to follow federal guidance in interpreting the Act's prohibition of unfairness and deception, provides the potential for incorporating these principles into South Carolina law.

The South Carolina Supreme Court has yet to indicate the extent to which it might adopt federal precedent or how broadly it might construe its powers under the Act. This much, however, is clear: the Act gives the courts of South Carolina the power to declare illegal any "unfair" practice that has the reasonable like-

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127. *See generally* OPPENHEIM, WESTON & MCCARTHY, *supra* note 21, at 205-213.

128. In a 1972 "shared-monopoly" complaint in *In re* Kellogg Co., [1972] TRADE REG. REP. (CCH) ¶ 19,898 (complaints and orders), the FTC charged the big three ready-to-eat cereal producers with maintaining a noncompetitive oligopoly through interdependent conduct that demonstrated shared monopoly power. The complaint was dismissed in September 1981 by an administrative law judge for failure to substantiate either a conspiracy to monopolize or shared monopoly theory. *Id.* The judge noted that his decision did not consider the issue of whether a "shared monopoly" violated section 5. *Id.* The following week, the FTC dismissed an eight-year proceeding to restructure the oil industry, *In re* Exxon Corp., [1974] TRADE REG. REP. (CCH) ¶ 120,388 (complaint and orders), further dimming the likelihood of an extension of the spirit doctrine to "shared monopolies."

129. FTC v. Sperry & Hutchinson Co., 425 U.S. 233, 244 (1972). *See generally* 1 P. AREEDA & D. TURNER, *supra* note 71, ¶ 307; Averitt, *supra* note 107, at 227.

130. *See* notes 88-129 and accompanying text *supra.*

131. *See* notes 33-59 and accompanying text *supra.*

132. *See* notes 60-87 and accompanying text *supra.*

lihood of injuring consumers or competitors or improperly reducing competition in the marketplace. Depending on the courts' response, consumers and businesses may be able to assert an independent cause of action, unfettered by the restrictions on traditional remedies, to seek damages (trebled for willful violations), costs, and attorney's fees,[133] when they are injured by deceptive, unfair, or anticompetitive conduct. Under similar state statutes, courts in other states have granted UTPA remedies to tenants complaining of landlord misconduct,[134] to automobile owners upon a manufacturers' refusal to fulfill warranty obligations,[135] to boat owners complaining that repairmen exceeded cost estimates,[136] to home purchasers when builders failed to make promised repairs,[137] and to persons denied an orally promised right to terminate a written sales contract.[138] Although the remedy is relatively untried in South Carolina, an attorney representing a consumer injured in any commercial transaction should consider bringing a cause of action under the UTPA.

II. Conduct Exempted from UTPA Regulation

A. *Statutory Exemptions*

The UTPA does not prohibit all conduct that is unfair, deceptive, or anticompetitive. It creates four separate exemptions for conduct otherwise falling within its scope: (1) conduct permitted by state law or under federal or state laws administered by a regulatory officer or agency; (2) innocent publication by the media of misleading advertising; (3) trade practices regulated by state insurance law; and (4) practices that comply with statutes administered by the FTC.[139]

Of the foregoing, the permitted conduct exemption is the most ambiguous and difficult to apply, and several alternative interpretations are possible. "Permitted" may mean "not prohibited," but this interpretation renders the remaining three ex-

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133. S.C. Code Ann. § 39-5-140 (1976).

134. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *cert. denied*, 241 S.E.2d 843. *See generally* Annot., 89 A.L.R.3D 449 (1979).

135. Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. 1978).

136. Hyland v. Zuback, 146 N.J. Super. 407, 370 A.2d 70 (1976).

137. Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977).

138. Our Fair Lady Health Resort v. Miller, 564 S.W.2d 410 (Tex. Civ. App. 1978).

139. S.C. Code Ann. § 39-5-40 (1976).

emptions superfluous, strictly limits the UTPA's scope, and frustrates the legislative purpose of providing general protection against unfair and deceptive acts or practices.[140] The legislature, by declaring that "[t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law,"[141] has clearly expressed its intention that the UTPA is to have general application and is to provide additional remedies. Interpretations of the Act's limited exemptions should not frustrate this intent.

"Permitted" may also be read as "regulated" or "controlled" by another federal or state agency or by state law. This interpretation renders the third and fourth exemptions superfluous, severely limits the coverage of an act intended to have general application, and raises the difficult problem of determining when another agency or state statute sufficiently regulates or controls challenged conduct to establish the exemption.

A proper interpretation of "permitted" should have common meaning and acceptance, should be consistent with general principles of judicially implied repeal, preemption, and exemption, should permit meaningful distinctions between the four statutory exemption clauses, and should promote the legislative purpose of making the act an effective enforcement tool and a remedy of general application against unfair or deceptive acts and practices. All of these desiderata are satisfied by reading "permitted" in the generally accepted sense of "expressly permitted." This interpretation limits the scope of the statutory exemptions to conduct expressly removed from the reach of the UTPA by the remaining three examples and conduct whose regulation under the UTPA would create a conflict with other laws or regulations that expressly permit the challenged conduct.

Unfortunately, the South Carolina Supreme Court has not accepted this interpretation. In *State ex rel. McLeod v. Rhoades*,[142] the only reported South Carolina decision on the permitted conduct exemption, the court interpreted "permitted" as meaning "regulated" and held that stock transactions regulated by the Securities and Exchange Commission and by the

140. *See id.* § 39-5-20(a).
141. *Id.* § 39-5-160.
142. 275 S.C. 104, 267 S.E.2d 539 (1980). For further discussion of *Rhoades*, see *Business Law*, 33 S.C.L. Rev. 1 (1981).

state's Uniform Securities Act were exempt from the UTPA.[143] This holding frustrates the purpose of the UTPA as an act of general application and creates inconsistencies, superfluities, and confusion with the remaining UTPA exemptions.

Rhoades may best be explained as an attempt to apply the implied repeal doctrine under the guise of a claimed statutory exemption. Several federal securities cases, for example, demonstrate that when Congress places a field under a pervasive regulatory scheme, courts may imply an exemption from antitrust laws for conduct expressly governed by the regulatory statute even though no regulatory action has been taken.[144] *State ex rel. McLeod v. Fritz Waidner Sports Cars, Inc.*,[145] illustrates the proper approach to considering whether an exemption to the UTPA should be implied.[146] Use of the doctrine of implied exemption is preferable to a distortion of the statutory exemption that may, at best, result in confusion or, much worse, frustrate the legislative purpose of the UTPA.[147]

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143. *Id.* at 107, 267 S.E.2d at 541.

144. *See* United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975); Gordon v. New York Stock Exch., 422 U.S. 659 (1975); Silver v. New York Stock Exch., 373 U.S. 341 (1963).

145. 274 S.C. 332, 263 S.E.2d 384 (1980).

146. *See* notes 141-144 and accompanying text *supra*.

147. A literal application of the *Rhoades* test could totally destroy the UTPA: (1) conduct "regulated" by a federal agency is exempt from the UTPA; (2) The FTC regulates all unfair methods of competition and unfair or deceptive acts or practices in or affecting interstate commerce under § 5 of the FTC Act; therefore, (3) all such conduct is exempt from the UTPA. Considering the broad jurisdictional reach of the FTC under the commerce clause, most business practices of any significance would be exempt from the UTPA under this syllogism, even without considering the exemption for conduct regulated by a state agency or officer or permitted by any other South Carolina state law. *See* S.C. CODE ANN. § 39-5-40(a) (1976).

Further confusion is created by the procedural rule adopted in *Rhoades:* "Initially the burden is on the party seeking the exemption to demonstrate its applicability. Once the exemption is demonstrated, the complainant must then show that the specific act in question does not come within the exemption." 275 S.C. at 107, 267 S.E.2d at 541. Several practical problems arise in complying with the *Rhoades* procedure. Proof of an exemption is clearly an affirmative defense. *Rhoades* shifts the burden of going forward to the opposing party once a prima facie exemption has been shown. *Rhoades* also establishes that defendants can prove exemptions on demurrer. How then is the complainant to rebut? He presumably cannot deny the affirmative exemption defense in his complaint because any attempt to do so would be anticipatory replication and should make the complaint demurrable. *See* Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908). Complainant can only convert the demurrer into a summary judgment motion and file affidavits showing that the specific challenged conduct is not exempt. The South Carolina rules neither provide for this conversion nor prohibit it. *See* S.C. CIR. CT. R. 44. *Cf.*

B. Preemption or Implied Repeal

Under the supremacy clause of the United States Constitution, states may not enforce laws that conflict with federal law.[148] This prohibition is flexible, however, and state statutes may operate concurrently with federal laws absent inconsistent provisions or a clear Congressional intent to occupy the regulated area exclusively.[149] Congress has expressed no such intent in the antitrust and unfair trade practices area, and courts have inferred none.[150] The UTPA is not only consistent with section 5(a) of the FTC Act, but is identical in formulation. Inconsistencies should not arise through judicial interpretation of the South Carolina Act because interpretations of the FTC Act are to guide state courts. Clearly, the federal antitrust laws and the FTC Act have not preempted the UTPA.

South Carolina's only reported decision on preemption of the UTPA is consistent with this reasoning. In *Fritz Waidner,*[151] the South Carolina Supreme Court found "no conflict between remedies"[152] provided by the UTPA and by a federal odometer disclosure act,[153] nor any intent that the federal act was to "supersede and otherwise limit consistent state law remedies for false odometer disclosures."[154]

Closely related to preemption under the supremacy clause is the limitation on state power under the commerce clause.[155] The commerce clause creates an inherent limitation on state power to regulate interstate commerce even in the absence of federal legislation,[156] but the limitation is far from absolute. The United

FED. R. CIV. P. 12(b)(6) (dismissal for failure to state a cause of action). Unfortunately, summary judgment is little better than a demurrer as a vehicle to decide such "important questions of novel impression" having such "far reaching effects." *See* 274 S.C. at 333, 263 S.E.2d at 385.

148. U.S. CONST. art. VI.

149. Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

150. *See* P. AREEDA & D. TURNER, *supra* note 71, ¶ 208; Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement,* 21 ABA ANTITRUST SEC. REP. 358, 367 (1962); Rubin, *Rethinking State Antitrust Enforcement,* 26 U. FLA. L. REV. 653 (1974).

151. 274 S.C. at 333, 263 S.E.2d at 385. See *Business Law, supra* note 142, at 2 n.5.

152. 274 S.C. at 333, 263 S.E.2d at 385.

153. Federal Motor Vehicle Information and Cost Savings Act, Pub. L. No. 95-513, 86 Stat. 951 (1972) (codified at 15 U.S.C. § 1981 (1976)).

154. *Id.*

155. U.S. CONST. art. I, § 8, cl. 3.

156. *See* P. AREEDA & D. TURNER, *supra* note 71, ¶ 220a.

States Supreme Court explained in *Pike v. Bruce Church, Inc.*[157] that courts must balance legitimate state interests against burdens on interstate commerce to determine if a state act violates the constitutional provision.[158] The UTPA is in obvious harmony with the FTC Act and the federal interest in fair business practices generally. It places no anticompetitive or disfunctional burden on interstate trade. Under *Pike,* the UTPA does not unconstitutionally impede the interstate flow of goods and services.[159]

III. REMEDIES UNDER THE UTPA

The UTPA's stiff economic sanctions make the Act a potentially forceful weapon in the consumer protection arsenal. Private plaintiffs who have suffered "an ascertainable loss of money or property, real or personal,"[160] are entitled to recover their actual damages, which, in the case of a willful violation, a court may treble and supplement with any other relief it deems necessary and proper.[161] Successful private plaintiffs may also recover reasonable attorney's fees and costs.[162] In actions brought by the attorney general, the state may recover civil penalties of up to $5,000 for each willful violation[163] and up to $15,000 for violations of injunctions issued under the Act.[164]

Although methods for determining private plaintiffs' damages are reasonably clear, the provision for civil penalties contains a latent ambiguity. When confronted with a continuing failure to obey an injunction or with multiple solicitations or

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157. 397 U.S. 137 (1970).

158. *Id.* at 142.

159. *Cf.* State v. Virginia-Carolina Chem. Co., 71 S.C. 544, 561, 51 S.E. 455, 461 (1905) (state antitrust law cannot regulate imported goods). Although the decision in *Virginia-Carolina Chemical* was made by a circuit court on a demurrer and the commerce clause issue was not appealed and although the UTPA, unlike the state antitrust law, is fully consistent with federal law and contains on its face no undue burdens on interstate commerce, several federal courts have misread the holding. *See In re* Wiring Device Antitrust Litigation, 1980-1981 Trade Cases ¶ 63,581 (E.D.N.Y. 1980); *In re* Corrugated Container Antitrust Litigation, 1980-1981 Trade Cases ¶ 63,163 (D. Tex. 1979); Three J. Farms v. Alton Box Board Co., 1979-1980 Trade Cases ¶ 62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979).

160. S.C. CODE ANN. § 39-5-140 (1976).

161. *Id.*

162. *Id.*

163. *Id.* § 39-5-110.

164. *Id.*

sales in violation of the Act, a court assessing penalties must first determine what constitutes a discrete violation that triggers a separate assessment of the statutory penalty. Concerning continuing failures to obey an injunction, federal precedent is clear. Section 5(1) of the FTC Act provides that "each day of continuance of such failure or neglect shall be deemed a separate offense."[165] Under the UTPA's provision that courts may be guided by federal authority, a strong argument exists that a new UTPA violation occurs every day a party fails to obey an injunction. In cases of multiple solicitations or sales, the federal courts have interpreted language in the FTC Act similar to that in the UTPA as providing separate penalties for every act that would amount to a separate violation of an order standing alone. In *United States v. Reader's Digest Association,*[166] the Third Circuit Court of Appeals affirmed a civil penalty in the amount of $1,750,000 against Reader's Digest for violations of an FTC consent order and held that each individual mailing of promotional materials constituted a separate violation. This determination resulted in a total of 17,940,521 violations. Recognizing that its holding would expose a violator to "the possibility of enormous potential liability,"[167] the court pointed out that any actual award is subject to the limitation of judicial discretion."[168]

In its discretionary determination of the penalty's size, the United States District Court for the District of Delaware considered five factors: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC."[169] On the second point, the district court emphasized that "proof of actual confusion or deception is not required."[170] The Third Circuit endorsed the district court's view that, "[t]he principal purpose of a cease and desist order is to prevent material having a capacity to confuse or deceive from reaching the public . . . [t]hus, whenever such promotional items reach the public, that

165. 15 U.S.C. § 45 (1976).
166. 1981-1982 Trade Cases ¶ 64,247 (3d Cir. 1981).
167. *Id.* at 74,028.
168. *Id.*
169. United States v. Reader's Digest Ass'n, 494 F. Supp. 770, 772 (D. Del. 1980).
170. *Id.* at 778.

in and of itself causes harm and injury."[171] The fact that the Digest obtained more than $5,000,000 in gross subscription revenues from its promotions established that the magazine derived substantial benefit from the violation.

One of the most perplexing questions in UTPA enforcement is whether a civil penalty or treble damages can be assessed in the absence of a prior UTPA injunction against the challenged conduct. The question is how may a willful violation be established? How should a person know that a practice violates the UTPA unless it has been declared to violate the Act by a prior injunction issued under the Act? A comparison with the enforcement procedure under the FTC Act illustrates the difficulty.

Case by case refinement has made workable the intentionally flexible and therefore vague FTC Act proscriptions against "unfair methods of competition and unfair or deceptive acts or practices."[172] When South Carolina enacted the UTPA, the FTC Act provided no cause of action for civil penalties unless the defendant had violated a cease and desist order previously entered against him.[173] This remains the rule for orders against unfair methods of competition—that is, antitrust-type violations—but the Magnuson-Moss FTC Improvement Act of 1975[174] altered penalty provisions for violations of cease and desist orders against "unfair or deceptive acts or practices"—that is, consumer protection violations.[175] Under the Magnuson-Moss Act, any violator of a final cease and desist order may be liable for civil penalties "whether or not such person . . . was subject to such cease and desist order,"[176] if he had "actual knowledge that such act or practice is unfair or deceptive and is unlawful under [section 5 of the FTC Act]."[177] In addition, civil penalties may now be assessed against violators of trade regulation rules proscribing an unfair or deceptive practice who have "actual knowl-

171. 1981-1982 Trade Cases, at 74,030 (quoting 494 F. Supp. at 777-78).

172. 15 U.S.C. § 45 (1976).

173. The attorney general may bring an action for a civil penalty under § 5(1) of the FTC Act. 15 U.S.C. § 45(1)(1970). Under § 16(a)(1), the FTC may sue to recover a civil penalty if the attorney general fails to do so within forty-five days after written notification by the FTC. 15 U.S.C. § 56 (1976).

174. Pub. L. No. 93-637, 88 Stat. 2193, 2198 (1975) (codified in scattered sections of 15 U.S.C.).

175. *Id.*

176. 15 U.S.C. § 45(n)(1)(B)(1) (1976).

177. *Id.* § 45(m)(1)(B)(2).

edge or knowledge fairly implied . . . that such act is unfair or deceptive and is prohibited by such rule."[178] Although these amendments broaden the enforcement remedy to permit a civil penalty action against one not directly subject to a consumer protection cease and desist order, the FTC still may not bring a civil penalty action unless the party has violated a preexisting trade regulation rule or cease and desist order *and* had actual or implied knowledge that the act or practice was unfair or deceptive *and* was prohibited by a trade regulation rule or by section 5 of the FTC Act.

By analogy to the federal interpretations, defendants may argue that complainants can seek a civil penalty or treble damages under the UTPA only for conduct violating a previously issued injunction under that Act. They may also argue that the 1975 FTC Improvement Act provisions are inapplicable to UTPA interpretations because these provisions did not amend section 5(a) of the FTC Act.[179] This argument concludes that the federal interpretive guides require violation of a previously issued injunction by one subject to that injunction for the violation to be willful or knowing. The flaw in this otherwise logical argument is that it renders meaningless the UTPA's specific provisions of a more substantial civil penalty for the violation of an injunction.[180] The structure of the Act, therefore, indicates that something less than a violation of an injunction is needed to establish a willful or knowing violation.

The element of willfulness in FTC proceedings for civil penalties is relatively easy to establish. In order to secure industry-wide enforcement, the Commission sends a copy of relevant orders or synopses of relevant decisions[181] to all members in an affected industry and keeps records of the companies it has so informed.[182] In addition, the Commission may seek civil penalties for a trade regulation rule violation when, on the basis of objective circumstances, the defendant had imputed knowledge

178. *Id.* § 45(m)(1)(A).

179. See note 121 *supra.*

180. S.C. CODE ANN. § 39-5-110 (1976). Under subsection (a), a civil penalty not exceeding $5,000 per violation is provided for willful violations of the UTPA, *id.* § 39-5-20(a), and a civil penalty not exceeding $15,000 per violation is provided for violating an injunction issued pursuant to § 39-5-50.

181. See note 22 and accompanying text *supra.*

182. FTC CONSUMER PROTECTION LAW INSTITUTE, *supra* note 22, at 934.

that his conduct violated the rule.[183] Implied knowledge of this sort arguably should supply the requisite evidence of willfulness under the UTPA, but the analogy is not that simple.

Although the UTPA directs state courts to follow FTC and federal court interpretations of the FTC Act in enforcing the UTPA, courts may not fully comply with this legislative mandate. Thus, a clear FTC Act violation may not be a violation of the UTPA. Even in areas of great certainty under the FTC Act, state policy may vary from federal policy. For example, although resale price maintenance is a per se violation of the FTC Act,[184] South Carolina has retained its Fair Trade Act[185] despite the repeal of the federal fair trade exemption,[186] and the state act permits resale price maintenance otherwise violative of the federal antitrust laws. The Ophthalmic Rule, an FTC rule designed to defeat anticompetitive state regulation of the eyeglass industry, is a further example of an FTC policy expressed in a trade regulation rule that was contrary to a state law.[187] Presumably, even an obvious FTC Act violation would not be considered a violation of a state's UTPA if a contrary local policy exists.

The willfulness standard under the UTPA thus is not clear because state courts have not defined the scope of prohibited activity. Confusion is likely to continue until the state, through its courts, establishes its own decisional guides to test a defendant's willfulness. Under these circumstances, proof of willfulness in many actions under the UTPA may, in fairness, require a showing of knowledge of a prior state court ruling by way of an injunction against the challenged act or practice.

IV. UTPA ENFORCEMENT

A. *Private Damage Actions*

As the UTPA enters its second decade, it is impossible to measure with any precision the impact of its private damages provisions[188] on business practices in South Carolina. The ab-

183. 15 U.S.C. § 57b(a)(2) (1976).

184. L. SULLIVAN, *supra* note 125, § 243(*b*).

185. S.C. CODE ANN. § 39-7-10 (1976).

186. 15 U.S.C. § 1, as amended by Act of Dec. 12, 1975, Pub. L. No. 94-145, [1976] TRADE REG. REP. (CCH) ¶ 25,125.

187. See notes 72-79 and accompanying text *supra*.

188. Inexplicably, the UTPA provides for no private action for an injunction., per-

sence of any reporting system for cases that do not reach the South Carolina Supreme Court creates a substantial barrier to discovering the Act's effect on private litigation. The state's clerks of court could alleviate this problem by complying with the statutory directive that they mail to the attorney general a copy of the complaint, judgment, or decree in any UTPA damage action filed in their office.[189] Unfortunately, the Act provides no method for enforcing this mandate, and it is apparent that officials have followed it irregularly.

The lack of data on lower court activities is particularly disturbing because most private UTPA actions do not proceed beyond trial. Indeed, the Act's impact is probably greatest in the area of precomplaint settlements, about which public information is seldom available. Nevertheless, with no reported case on the merits in over ten years, it would appear that the UTPA has not thus far fulfilled the expectations of its ardent supporters.

One might have thought that the legislative mandate that the courts follow FTC and federal court interpretations of section 5 of the FTC Act would throw the courts open to a flood of new consumer and competitor cases.[190] In light of the great potential for the UTPA to generate liberal consumer protection theories, why has it not been enforced to a greater extent by private actions in South Carolina? The answer may lie in the difference between private and public consumer protection actions. The FTC's activities in expanding the tests for unfair and deceptive practices have concentrated on obtaining cease and desist orders to prevent conduct that may injure competition or consumers in the future.[191] For recovery under the UTPA, private plaintiffs must show an "ascertainable loss of money or property, real or personal, as a result of [conduct violating the act]."[192] Therefore, proof of an incipient antitrust violation[193] or

haps because the Act's main concern is consumer protection. Although injunctions may be of little use to deceived consumers, businesses often find that prospective relief is the only effective remedy against a competitor's continued unfair methods of competition.

189. S.C. CODE ANN. § 39-5-140 (1976).

190. The propriety of using legal standards developed by the FTC as a governmental enforcement agency in private actions has been the subject of debate. *See* Leaffer & Lipson, *supra* note 3, at 533 n.81.

191. *See id.* at 526 n.31 ("Given the conceptual difficulties retrospective relief under § 5 was thought to raise . . ., the absence of useful rules of trade regulation law relating to compensation for consumers is not surprising").

192. S.C. CODE ANN. § 39-5-140(a) (1976).

conduct merely having the capacity to deceive[194] is insufficient to maintain a private damage action under the UTPA.

B. *State Actions*

The Consumer Fraud and Antitrust Section of the South Carolina Attorney General's Office consists of five attorneys—three for consumer fraud cases and two for antitrust enforcement.[195] This minimal contingent is made possible by a federal seed-money grant under the Crime Control Act of 1976.[196] The federal grant program ended in 1980, and as the federal money runs out, the state's enforcement of the UTPA appears to be in serious jeopardy.[197]

To the extent that the goal of the UTPA was to supplement FTC-style enforcement on behalf of consumers at the local level, the state's efforts have been a dismal failure. Like the FTC, the attorney general's office has too few resources for the task. Nevertheless, the attorney general's office has used the UTPA extensively in prosecuting the same types of consumer fraud cases that were prosecuted before its enactment[198] because the Act does not require proof of the common-law elements of fraud or deceit.[199] Limited resources, however, have forced the consumer fraud division to concentrate on only the most egregious violators. Consequently, the state has not yet had the opportunity to test the outer boundaries of such FTC theories as capacity to deceive and unfairness.

The only state antitrust complaint to date under the UTPA

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193. See notes 102-114 and accompanying text *supra*. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 101 S. Ct. 1923, 1927 (1981)(citing Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969)("To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.")).

194. See notes 33-59 and accompanying text *supra*. *See* Hinchcliffe v. American Motors Corp., [1981] ANTITRUST & TRADE REG. REP. (BNA) F-1, -3 ("To satisfy the 'ascertainable loss' requirement, a plaintiff need only prove that he has purchased an item partially as a result of an unfair or deceptive practice or act and that the item is different from that for which he bargained.").

195. Interviews with John Cox and Joseph Isaacs, Assistant Attorneys General for the State of South Carolina.

196. Crime Control Act of 1976, ch. 46, § 3739, 90 Stat. 2415, codified at 42 U.S.C. § 3739 (Supp. 1979).

197. See note 151 *supra*.

198. See notes 151-153 *supra*.

199. See notes 33-59 and accompanying text *supra*.

was filed in October 1981.[200] Until then, state antitrust enforcement took the form of negotiated settlements, and the largest monetary settlements resulted from price-fixing violations of the Sherman Act by members of the highway construction industry.[201] As of this writing, these settlements have resulted in payments totaling approximately $1,000,000 to the state highway department,[202] the victim of price-fixing conspiracies. Meanwhile, the attorney general's office has negotiated confidentially with seven alleged violators of the UTPA, and resulting settlements have brought approximately $100,000 into the state's general fund.[203] One of these settled cases was based on an attempt-to-monopolize theory; four concerned allegedly unlawful "tying" arrangements—the theory underlying the October 1981 antitrust complaint, and two involved alleged price-fixing.[204]

South Carolina's antitrust enforcement efforts are questionable on several counts. While South Carolina has concentrated on vertical restraints of trade, most other states have focused on horizontal price-fixing cases, which occur when businesses agree to restrict competition between themselves.[205] The rationale for the latter focus has been similar to that in the consumer fraud activities in South Carolina—such violations take priority because of the public interest in prosecuting restraints that are per se illegal. Moreover, federal antitrust experience has demonstrated the complexity and proof problems inherent in monopolization and vertical arrangements short of resale price maintenance. Just as the FTC has retreated from its major

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200. State *ex rel.* McLeod v. B.M.D. Dev. Corp., No. 81-CP40-3485 (D.S.C., filed Oct. 1981).

201. Highway construction bid-rigging cases have accounted for the largest share of the Justice Department's antitrust caseload during 1980-81. *See* [1981] ANTITRUST & TRADE REG. REP. (BNA) No. 999, at A-3 (Jan. 1, 1981). Indictments in South Carolina include United States v. A.T. Sistare Constr. Co., [1981] TRADE REG. REP. (CCH) ¶ 45,081 (Case 2871)(D.S.C. May 28, 1976); United States v. R.B. Pond Constr. Co., [1981] TRADE REG. REP. (CCH) ¶ 45,081 (Case 2896)(D.S.C. July 16, 1981); United States v. Smith Grading & Paving, Inc., [1981] TRADE REG. REP. (CCH) ¶ 45,081 (Case 2901)(D.S.C. Aug. 27, 1981); United States v. C.G. Tate Constr. Co., [1981] TRADE REG. REP. (CCH) ¶ 45,080 (Case 2846) (D.S.C. Dec. 18, 1980); United States v. The Dickerson Group, Inc., [1981] TRADE REG. REP. (CCH) ¶ 45,080 (Case 2826a) (W.D.N.C., Nov. 25, 1980).

202. See note 194 *supra.*

203. See *id.*

204. *Id.*

205. OPPENHEIM, WESTON, & MCCARTHY, *supra* note 21, at 160.

monopolization cases,[206] the Antitrust Division of the Department of Justice has indicated an intention to concentrate on horizontal conspiracies in restraint of trade.[207] The legality of such vertical arrangements as exclusive dealing, tying, exclusive distributorships, and geographical and customer allocations has long been the subject of heated debate among economists and antitrust scholars.[208] Even the Supreme Court has had difficulty formulating a consistent approach to treatment of vertical restraints and, within a fifteen-year period, has alternated its view of vertical territorial allocations from a Rule of Reason approach[209] to a per se test[210] and back again to the Rule of Reason.[211] Congress has also stepped in by legislatively reversing the FTC position regarding vertical arrangements in the soft drink bottling industry.[212] Under the circumstances, it is not clear why the attorney general's office should choose to embark on the stormy and uncharted waters of vertical restraints of trade at a time when other antitrust enforcers at both the federal and state levels have chosen to concentrate on simpler and more economically significant horizontal conspiracies among competitors. The wisdom of the current state approach is particularly questionable in light of the state's limited resources.

Despite its complexities, however, this approach has proved to be the line of least resistance to obtaining quick capitulation and voluntary settlements. The advantage of the settlement approach lies in its utter simplicity. Assume the following situation: A business is accused of selling one product or service only on the condition that the purchaser also buys another product or service; that is, it ties the sale of one to the purchase of the other. Normally, this simple allegation raises a number of complex antitrust questions: (1) are there really two products that

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206. See note 128 *supra*.

207. According to Richard J. Favretto, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, the Division does not consider resale price maintenance illegal per se, despite judicial decisions to the contrary. Under the Division's new view, resale price maintenance, like other vertical arrangements, "should not be discouraged when its purpose and effect is to promote rather than restrict competition in the broader interbrand marketplace." [1981] TRADE REG. REP. (CCH) No. 509, at 3.

208. *See generally* OPPENHEIM, WESTON, & MCCARTHY, *supra* note 21, at 578, 642.

209. White Motor Co. v. United States, 372 U.S. 253 (1963).

210. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

211. Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

212. Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-3503 (1976).

can be tied, or is there only one; (2) is the purpose of the tie anticompetitive or promotional; (3) is there sufficient economic power in the tying product to have the proscribed foreclosure effect in the tied product; (4) do economic justifications make the tie reasonable or necessary in the circumstances? The respondent claims that the conduct is not a tie and that, if it were, the tie is procompetitive, justified, and legal. Once the attorney general's office becomes involved, respondent is faced with a Hobson's choice: If he is willing to enter into an informal settlement, stop the challenged practice, and make a "voluntary" payment to the state, the file is closed and the whole matter is kept confidential. Otherwise, respondent faces a public trial. Given the uncertainty and costs of trial, the chance of civil penalties and treble damages, and the certainty of adverse publicity, a settlement is preferable.

This confidential settlement procedure is subject to criticism on several grounds. From the standpoint of the respondent, it is similar to blackmail or hush money; a refusal to settle would result in public disclosure. From the standpoint of the potential private treble-damage plaintiff, the confidential settlement procedure results in the deprivation of the benefit of using a judgment in a state suit as prima facie evidence of a violation of the UTPA.[213] Indeed, because of the confidential status of the settlement, the potential private plaintiff may be left unaware that a cause of action exists. Finally, the procedure ignores the public's right to know what actions have been taken in its name in an area of substantial public interest.[214]

A more basic problem with the informal confidential settlement procedure is its failure to follow the procedure specified in

213. S.C. CODE ANN. § 39-5-140(c) (1976).

214. The South Carolina Freedom of Information Act, S.C. CODE ANN. §§ 30-40-10 to -110 (Supp. 1980), does not guarantee that the public will learn of such actions taken in its name. First, if a settlement is truly confidential, the public remains unaware that any information exists. Second, it is not clear that the Freedom of Information Act subjects relevant information to public inspection. In a voluntary settlement, the respondent does not admit any wrongdoing, and the file is closed without finding a violation. The attorney general has ruled that the Administrator of Consumer Affairs is not required to release information connected with a determination that a consumer complaint is groundless. 1976-77 Op. S.C. Att'y Gen. 11, No. 77-132. Similarly, police criminal investigatory files are not subject to inspection under the Freedom of Information Act on the ground that they are not "public records" within the meaning of S.C. CODE ANN. §§ 30-3-20 & -30 (1976). 1976-77 Op. S.C. Att'y Gen. 146, No. 77-193.

the UTPA for accepting an "assurance of voluntary compliance."[215] According to the Act, "[a]ny such assurance shall be in writing and be filed with and subject to the approval of the court of common pleas having jurisdiction."[216] Compliance with this directive would go far in satisfying the interests of the public and of potential private plaintiffs, but it would also present the likelihood of fewer negotiated settlements, because the major leverage in the confidential settlement is its confidentiality. Nevertheless, the legislature presumably considered the advantages of confidential settlements when it formulated the UTPA provision for voluntary settlements, and the attorney general's practice contradicts the policy the legislature impliedly adopted.

The confidential settlement procedure raises other questions of propriety. The only payments authorized by the UTPA in accepting an assurance of voluntary compliance are a "voluntary payment . . . of the costs of investigation,"[217] or "an amount to be held in escrow pending the outcome of [a private damages] action or as restitution to aggrieved buyers."[218] Of the approximately $100,000 collected thus far as voluntary payments in confidentially negotiated settlements, no money was held in escrow or used for restitution for injured consumers, and none was retained by the attorney general's office for the costs of investigation.[219] The money instead was deposited in the state's general fund, as if it had resulted from civil penalties.

The collection of settlement money for purposes other than the benefit of victims of alleged violations or for reimbursement of investigation costs is subject to question. The only other UTPA provision for the collection of money for the state is the civil penalty provision.[220] The Act expressly requires that civil penalties be levied only by a court when *the court* finds a willful violation of the Act or the violation of a previously granted injunction.[221] It would therefore appear that the collection of money in confidential settlement proceedings violates the civil penalty policy of the Act.

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215. S.C. CODE ANN. § 39-5-60 (1976).
216. *Id.*
217. *Id.*
218. *Id.*
219. See note 195 *supra*.
220. S.C. CODE ANN. § 39-5-110 (1976).
221. *Id.*

The public has other interests that may be prejudiced by negotiated settlements of antitrust charges. First, the threat of prosecution should not be used as a lever to coerce unfair terms. The 1955 United States Attorney General's Antitrust Committee Report made the following recommendation regarding antitrust consent negotiation by the Department of Justice:

> In consent negotiation, the Department should not seek relief (1) deemed by the Supreme Court to transgress constitutional boundaries; or (2) which in the particular case, could not be reasonably expected after litigation. It has been urged that, since the Division, no mere private litigant, enforces a federal statute, it should demand whatever relief, in the public interest, its bargaining position may coerce. We believe that view ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. It threatens our goal of equitable law enforcement and, accordingly, should be rejected.[222]

For these reasons, it should be incumbent upon the South Carolina Attorney General's Office not to coerce a settlement "which, in the particular case, could not reasonably be expected after litigation."[223] This policy should include coerced voluntary payments amounting to civil penalties for disputed conduct not found by a court to be willful violations of the UTPA. Because a common feature of all negotiated settlements, confidential and statutory, is that the settlement "shall not be considered an admission of violation for any purpose,"[224] any payment in the nature of a fine or penalty is contrary to the terms of a voluntary assurance agreement and to the UTPA.

Second, settlements should not be too lenient. When settlement terms are kept confidential, a potential for abuse exists. Federal consent decrees once presented a problem when interested parties sought to intervene and challenge their leniency.[225] The Clayton Act now requires the government to publish the terms of all proposed consent settlements at least sixty days

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222. Report of the Attorney General's National Committee to Study the Antitrust Laws 361 (1955), *reprinted in* 11 J. OF REPRINTS FOR ANTITRUST L. & ECON. 1, 373 (1980).
223. *Id.*
224. S.C. CODE ANN. § 39-5-60 (1976).
225. *See* Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1976), (amending 15 U.S.C. § 16). *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 330(f), (g) (1978); L. SULLIVAN, *supra* note 125, § 243(*b*) (1977).

before entry and to file a "competitive impact statement"[226] setting forth the facts of the case with an "evaluation of alternatives to such proposal actually considered."[227] Furthermore, before approving a consent decree, a federal court must decide that the decree is "in the public interest"[228] and, to this end, may take testimony, consider the views of third parties, and permit participation before the court by "interested persons or agencies."[229] These requirements, however, have been criticized as converting a settlement into a mini-trial and eliminating benefits that might be gained by the parties and the public from a negotiated settlement.[230]

Although South Carolina's current approach to settlements errs in the other extreme, the state need not follow federal precedent too closely. A resolution may lie in a procedure that provides a reasonable balance between the public interest in being informed, with some opportunity for input in appropriate cases, and the desirability of encouraging voluntary settlements, in the interest of saving taxpayers' money while achieving a fair result. The UTPA's minimal requirements for accepting an assurance of voluntary compliance are not oppressive and, as the only legislatively prescribed procedure, should be implemented.

V. Conclusions and Recommendations

Although the effect of the UTPA has thus far been minimal, the Act clearly has the potential, with the aid of some legislative refinement, to provide a strong remedy for unfair and deceptive acts or practices. The Act's supposed strength—its provision of state and private causes of actions for all conduct coming within the omnibus FTC jurisdiction—may be its chief weakness or even undoing. Proving both willfulness and damages based on conduct that an administrative agency has determined should be *enjoined* in a particular instance may be impossible, as well as inappropriate. One possible solution to the willfulness dilemma

226. 15 U.S.C. § 16(c)(ii) (1976).
227. *Id.* § 16(b)(6).
228. *Id.* § 16(e).
229. *Id.* § 16(f).
230. See Oppenheim, Weston, & McCarthy, *supra* note 21, at 1037; Note, *The I.T.T. Dividend: Reform of the Department of Justice Consent Decree Procedures*, 73 Colum. L. Rev. 594 (1973).

might be the adoption of a procedure similar to that in the FTC Improvement Act of 1975, by which civil penalties and, in appropriate cases, treble damages could be recovered for willful violations of a previously issued injunction, "whether or not such person . . . was subject to such [injunction]," if he had "actual knowledge that such act or practice is unfair or deceptive and is unlawful under [the UTPA]."[231] This proposal would provide the certainty and the due process notice that present broad proscriptions arguably lack. Flexibility in enforcement would be preserved in the power to issue the injunction under court approved standards guided by FTC and federal court interpretations of the FTC Act. Private enforcement might also be encouraged by amending the UTPA to provide a cause of action for an injunction and a minimum statutory recovery[232] as an alternative to actual or treble damages when incipient consumer injury can be established by proof of, for example, capacity to deceive.

Successful eradication of unfair and deceptive conduct can probably only be accomplished by an effective consumer protection agency. A decade of experience has made it clear that the attorney general's office is ineffective at controlling any conduct short of fraud and deceit, a clear area in which the consumer has standing based on demonstrable injury. Because the present shortage of resources for consumer protection is likely to become more serious, the legislature should empower the state's Office of Consumer Protection,[233] which is already authorized to enforce the South Carolina Consumer Protection Code,[234] to administer the consumer—as opposed to the antitrust—portion of the UTPA. Most consumer matters, other than those involving fraud or deceit, can be resolved informally outside the courtroom by a mediator with the power of the state behind him. Combining enforcement of two related consumer protection statutes under one agency would increase effectiveness and save the state money.

Another possible solution to the problems of vagueness and

231. 15 U.S.C. § 45(m)(1)(B)(1) (1976).

232. *Id.* § 45(m)(1)(B)(2). Sixteen states provide for minimum statutory damages (ordinarily $100 to $300). *See* Leaffer & Lipson, *supra* note 3, at 532.

233. *See* S.C. CODE ANN. § 37-6-501 (1976).

234. *Id.* §§ 37-6-103, -506.

reasonable notice would be a provision for state trade regulation rules similar to those issued under the FTC Act. Before the adoption of section 57a of the FTC Act,[235] the FTC's substantive rulemaking power came from section 6(g) of the FTC Act, which stated that the Commission had the power "to make rules and regulations for the purpose of carrying out the provisions of this [Act]."[236] In *National Petroleum Refiners Association v. FTC*,[237] the District of Columbia Circuit Court of Appeals, facing the assertion that section 6(g) allowed only procedural rules, found instead that the section authorized the FTC "to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent."[238] The court also stated that the rule-making power provides "an invaluable resource-saving flexibility"[239] and is "fairer to regulated parties than total reliance on case-by-case adjudication."[240] According to the court, "evolution of bright-line rules is often a slow process" and case-by-case adjudication lacks "the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type rule-making procedures."[241] In advocating the increased use of rulemaking procedures, the court emphasized that it "minimizes the unfairness of using a purely case-by-case approach requiring 'compliance by one manufacturer while his competitors [engaging in similar practices] remain free to violate the act.' "[242]

235. 15 U.S.C. § 57a (1976 & Supp. 1979).

236. *Id.* § 46(g).

237. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974).

238. *Id.* at 698.

239. *Id.* at 681.

240. *Id.*

241. *Id.* at 684.

242. *Id.* (quoting Weinburger v. Bentax Pharmaceuticals, Inc., 412 U.S. 645, 653 (1973)). A judicial preference for rulemaking over adjudication was carried to the extreme in Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981), in which the court vacated an FTC order against Ford, its credit company, and a dealer that prohibited certain credit practices in repossessing and reselling automobiles. According to the court, "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." *Id.* at 601. Because the FTC ruling "changes existing law, and has widespread application," the court felt that the matter should have been determined by rulemaking and that the FTC abused its discretion by proceeding through adjudication. *Id.* Although the decision is contrary to § 5(m)(1)(B) of the FTC Act, 15 U.S.C. § 45 (1976), which establishes a civil penalty of not more than $10,000 for a knowing violation of

Arguably, rule-making powers already exist under the UTPA, which authorizes the attorney general to conduct hearings and to "promulgate such rules and regulations as may be necessary."[243] In addition, the UTPA is much more explicit than section 6(g) of the FTC Act, because it declares that such "rules and regulations shall have the force and effect of law."[244] The contention, rejected in *National Petroleum,* that the rule-making power was meant to be only procedural is even less applicable to the UTPA.

Incorporation of rule-making power into the UTPA, however, similar to that accomplished by Congress in the 1975 FTC Improvement Act,[245] is preferable to reliance on the attorney general's rule-making power. Such legislation should provide for rule-making hearings similar to those required by the FTC, which give " 'notice to an entire segment of society of those controls or regimentation that is forthcoming . . . [and] an opportunity for persons affected to be heard.' "[246] Finally, the rule-making power should reside in a single agency with general administrative powers, namely the Consumer Protection Agency. Because more effective control of willful violations can in some instances be achieved by the attorney general's office, a provision for joint enforcement similar to one in the 1975 FTC Improvement Act[247] might be included. Although unfair trade legislation in some states provides for consumer class actions, the effectiveness of class actions in general is now in doubt because of recent restrictive requirements for establishing a class and providing the requisite notice.[248] In any event, an effective con-

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either a trade regulation rule or a final cease and desist order, it illustrates the strong policy reasons favoring rule-making to create new and broadly applicable legal principles.

243. S.C. Code Ann. § 39-5-80 (1976).

244. *Id.*

245. 15 U.S.C. § 57b-3 (Supp. 1979). Unfair Trade Practice Acts in four states now authorize administrative rule-making by the attorney general. Lovett, *supra* note 3, at 737.

246. 482 F.2d at 682 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777 (1969) (Douglas, J., dissenting)).

247. *See* 15 U.S.C. § 45(m) (Supp. 1979).

248. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Justice Rehnquist, concurring in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), expressed considerable doubt about whether large class actions of consumers are "ultimately of primary benefit to consumers themselves; who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services." 442

sumer protection agency armed with the necessary administrative rule-making powers should be more effective and less cumbersome than consumer class actions.

Finally, the need for a state private damages remedy for antitrust violations is not as apparent as the need for consumer protection. As noted above, the Clayton Act provides a private cause of action for an injunction[249] and mandatory treble damages[250] for injuries to business or property resulting from an antitrust violation. These antitrust provisions cover all conduct in or affecting interstate commerce, and very little local activity would not be included.[251] The only real loss if antitrust conduct were not covered by the UTPA would be caused by the unavailability of the FTC Act's incipiency standard. As discussed earlier, the appopriateness of this refinement in a state antitrust action is highly questionable.[252] For these and other reasons, the clause "unfair methods of competition" should be deleted from the UTPA, and the remaining prohibition should be expressly limited to cover only those acts or practices that are "unfair or deceptive" to the *consumer*.[253] Consideration should then be given to enactment of a standard state antitrust law, such as the Uniform State Antitrust Law[254] proposed by the National Conference of Commissioners on Uniform State Laws, which is patterned on the Sherman Act.

These proposals, if adopted, would result in more effective consumer protection and improved antitrust law coverage that is consistent with well established principles of antitrust law as enforced by the Department of Justice and as interpreted by federal courts.

U.S. at 346. *See also* L. SULLIVAN, *supra* note 125, § 249.

249. 15 U.S.C. § 26 (1976).

250. *Id.* § 15 (1976).

251. *See* OPPENHEIM, WESTON, & MCCARTHY, *supra* note 21, at 23; L. SULLIVAN, *supra* note 125, § 233.

252. See notes 88-129 and accompanying text *supra.*

253. *Compare* Alternative Forms Number 2 & 3 of the UTPA, *supra* note 7. The *remedy* would continue to be available to anyone damaged by the prohibited conduct, whether a consumer or a competitor. Whether and how other forms of nonantitrust unfair competition should be regulated (such as commercial disparagement) is beyond the scope of this article. Congress has given lengthy consideration to providing a federal private cause of action for competitors injured by various forms of unfair competition and misappropriation. *See* S. 1416, 95th Cong., 1st Sess. (1977).

254. 7A UNIFORM L. ANN., *Business & Finance Laws* 733 (1978).