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Present Enforcement of FTC Clayton Act Orders Issued Prior to the Adoption of the Finality Act

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complaints here are not justiciable but rather matters of policy to be met and resolved in legislative forum. Appellants appearance in the trial court after lawful arrest was for violation of a valid statute in this jurisdiction and his guilt of the charge was properly established after trial. That his chronic alcoholic condition needs further treatment and attention does not affect that conviction.²⁸

Appellant contended further that criminal prosecution of a chronic alcoholic resulted in cruel and unusual punishment in light of the *Robinson* decision. The court refused to sustain this contention however, stating that a separate opinion by Chief Judge Bazelon in *Hutcherson v. United States*,²⁹ explaining the holding in the *Robinson* decision, made it inapplicable to the present case. The court then remarked:

In the instant case appellant was not punished because of his addiction to alcohol. He was convicted for being intoxicated in public. *Any person, whether an alcoholic or not, who is drunk in a public place in the District of Columbia, is subject to the same penalties.*³⁰ (emphasis added).

The result in the *Easter* case is not conclusive. If an appeal of the decision is perfected, the outcome of that appeal will bear watching, especially in light of the more recent result reached in the *Driver* case. How much effect *Driver* case will have is uncertain at this moment. This much is certain however: the *Driver* case will not go unnoticed and, in light of the United States Supreme Court's position in the *Robinson* case, there is every reason to suppose that both of these decisions will control any ruling the Court might be called upon to make in regard to prosecutions of chronic alcoholics.

John Keefer

PRESENT ENFORCEMENT OF FTC CLAYTON ACT ORDERS ISSUED PRIOR TO THE ADOPTION OF THE FINALITY ACT.

In *FTC v. Jantzen, Inc.*,¹ the Federal Trade Commission sought judicial enforcement of a cease and desist order issued in 1959, against Jantzen, based on an alleged violation of section 2(d) of the Clayton Act.² Prior to the filing of the petition in this case in early 1965, no proceedings had been begun by either party in any court. Judicial enforcement was sought

²⁸ *Easter v. District of Columbia*, *supra* note 25, at 628.

²⁹ 345 F.2d 964 (D.C. Cir. 1965).

³⁰ *Easter v. District of Columbia*, *supra* note 25, at 628.

¹ 356 F.2d 253 (9th Cir. 1966).

² (ROBINSON-PATMAN ACT) 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964), amending 38 Stat. 730 (1914).

under the Clayton Finality Act,³ which was passed in 1959, subsequent to the issuance of the order against Jantzen. Jantzen admitted certain violations of the cease and desist order, but took the position that the order was invalid, and even if it were valid, there was no method provided by law for its enforcement. The Federal Trade Commission, however, maintained that the court could enforce the Commission's orders issued prior to the enactment of the Clayton Finality Act under section 2 of that act.⁴ It was contended that while this section provided that the new enforcement procedures should not apply to any proceeding initiated before the enactment of the amending act, the old procedures were retained to enforce these prior orders.⁵ Any other holding would be contrary to the congressional purpose. The commission concluded by urging that unless its views were ". . . accepted, 'forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist would be wiped from the books'."⁶

The United States Court of Appeals for the Ninth Circuit held that, except for one very limited exception, the courts had no jurisdiction to enforce Clayton Act orders issued prior to the July 23, 1959 Act,⁷ amending the Clayton Act's order enforcement provisions. Congress, in amending the Clayton Act to make orders thereunder final and enforceable in the same manner as the cease and desist orders under the Federal Trade Commission Act,⁸ repealed the provision authorizing the court of appeals to enforce such orders. The one exception to this construction applied to Clayton orders issued prior to enactment where proceedings had already been initiated by the Commission in the court of appeals.

With this holding, the court left the Commission without a means of enforcing "almost 400" prior orders, similar to the order in *Jantzen*. In effect, the Commission must now start anew by issuing a new cease and desist order when it finds a violation of an old order. At first glance, this would seem to be inconsistent with the purpose of the bill as stated in the legislative history:

The purpose of the bill . . . is to facilitate enforcement of the prohibitions in the Clayton Act. . . . The bill as amended would make final cease-and-desist orders issued by the [Commission] . . . with jurisdiction under section 11 of the Clayton Act . . . in the same manner as cease-and-desist orders now become final when issued by the Federal Trade Commission pursuant pro-

³ 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

⁴ Earlier in *Sperry Rand Co. v. FTC*, 288 F.2d 403 (D.C. 1961), the court refused to apply the enforcement procedures of the Clayton Finality Act to cease and desist orders issued prior to the act.

⁵ *FTC v. Jantzen, Inc.*, *supra* note 1, at 257; see also, 2 U.S. CODE CONG. & NEWS 1804, 1807 (86th Cong. 1st Sess. 1959).

⁶ *FTC v. Jantzen, Inc.*, *supra* note 1, at 259.

⁷ Clayton Finality Act, 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

⁸ 38 Stat. 717 (1914), as amended by the Wheeler-Lea Act, 52 Stat. 111 (1938).

cedures that are set forth in section 5 of the Federal Trade Commission Act.⁹

However, as the Supreme Court has pointed out on numerous occasions,¹⁰ the "purpose" is not exclusively controlling; meaning is determined by examining the legislative words in light of their purpose. Justice Frankfurter, quoting Justice Holmes, pointed out: ". . . [S]ince 'a page of history is worth a volume of logic,' courts have looked into the background of statutes, the mischief to be checked and the good that was designed. . . ."¹¹ The court will consider the legislative history to clarify the purpose, for when one knows and understands the circumstances under which the phrase is uttered, he gains clarity and insight into the meaning of the phrase. The use of "purpose" and "history" by the Supreme Court to clarify statutory words is:

Illuminously shown in an opinion written by Mr. Justice Goldberg in *FTC v. Sun Oil Co.*, In this opinion, involving the construction of § 2 (b) of the Robinson-Patman Act, Justice Goldberg first considers the language of the statute, giving the words their normal and usual meaning. . . . Next he seeks to determine if the interpretation of the language is consonant with the overall rationality and broader statutory consistency and legislative purpose. A review of legislative history . . . and legislative purpose . . . are separated in the opinion, and comparing the two, Justice Goldberg says that from the fundamental 'purposes' of the Act, we obtain guidance more impressive than that found in the recited legislative history. . . . Actually, a review of the legislative history expounded by the Justice shows that it further clarifies the 'purpose' and could well have been placed in the same section for discussion. Finally Justice Goldberg clearly rejects application of the legislative purpose; he says that we are bound by the congressional words. . . .¹²

Both the Federal Trade Commission Act and the Clayton Act, when first enacted in 1914, contained substantially identical provisions relating to the enforcement of cease and desist orders. Under these laws as originally enacted, a full scale administrative proceeding followed by the issuance of a cease and desist order was but a preliminary step in the prevention of violations. The cease and desist order had no practical efficacy at this point, nor did the order become final within a specified number of days. Before any consequence attached to a violation of the

⁹ 2 U.S. CODE CONG. & AD. NEWS 1804 (86th Cong. 1st Sess. 1959).

¹⁰ E.g., *Brooks v. Missouri Pac. R.R.*, 376 U.S. 182 (1964); *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); *United States v. Staph*, 375 U.S. 118 (1963).

¹¹ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) (Footnote omitted).

¹² Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 204-05 n.58 (1966) (Citations omitted).

order it must have been reinforced by a judicial decree of enforcement. To obtain the enforcement decree in the court of appeals, a second violation had to be shown. This was done by the Commissions again ordering an investigation, appointing a hearing officer, and, usually, holding a hearing. If a violation was found, the Commission then sought enforcement in the court of appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. The order was thus still lacking practical efficacy, but thereafter, contempt of court penalties could be imposed by a showing of another violation. This would, however, require still a third hearing before the agency as to any disputed factual question, and a review there of by the court of appeals. Succinctly stated, there must have been a first violation of the acts before the cease and desist order was issued. There must then have been a second violation before the court order could be made legally binding, and even then it was binding only as to a third and subsequent violation.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized. In 1938 Congress responded; the Federal Trade Commission Act was amended by the Wheeler-Lea Act.¹³ The Wheeler-Lea Act provided that cease and desist orders issued pursuant to section 5 of the Federal Trade Commission Act became final upon the expiration of 60 days unless challenged by the defendant within that period of time by application to the United States Court of Appeals having jurisdiction. In the event the order is challenged and judicial review is sought, the FTC cease and desist order becomes final upon the court affirmation of the order. Once final, either through lapse of time or by court affirmance, it's violation is punishable by fine. Needless to say, the Wheeler-Lea Act gave the Commission a quicker, much more effective means of enforcing it's cease and desist orders under the Federal Trade Commission Act. However, the Clayton Act remained unchanged leaving the Commission with the same ineffectual, cumbersome procedure it had always had.

For more than twenty years the Federal Trade Commission sought relief from the procedural handicaps in the enforcement provisions of the Clayton Act. Following the United States Supreme Court's 1952 decision in *FTC v. Ruberoid Co.*,¹⁴ recognition of the need for amendatory legislation increased. Prior to the *Ruberoid* decision, the Federal Trade Commission had obtained judicial enforcement of it's Clayton orders by cross petitioning, in those cases where defendants petitioned for judicial review. In *Ruberoid* the Supreme Court held that the appellate court had no jurisdiction to issue a judicial enforcement order until the FTC had established that its order had been violated or that violation was imminent. This decision was to further handicap the Commission's attempts to enforce cease and desist orders under the Clayton Act.

On July 23, 1959, Congress passed the Clayton Finality Act, which in

¹³ 52 Stat. 111 (1938).

¹⁴ 343 U.S. 470 (1952).

substance, does for the Clayton Act orders what the Wheeler-Lea Act did for FTC orders. As observed by the court in the *Jantzen* case the finality act is:

[A]lmost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (1), and providing the same method of review at the instance of the respondent only, the same power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.¹⁵

With the passage of the Clayton Finality Act, the enforcement procedures for Clayton orders and FTC orders, issued by the Federal Trade Commission since 1959, have been the same.

One major difference between the two amending Acts, and one of particular importance in the study of *Jantzen*, is the provision in which cease and desist orders, issued prior to the effective dates of the Act, were enforced. Section 5 (a) of the Wheeler-Lea Act provides:

Sec. 5 (a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period . . . shall begin on the date of the enactment of this Act.¹⁶

The corresponding section in the Clayton Finality Act did not do this; it provides:

Sec. 2. The amendments made by section 1 shall have no application to any proceedings initiated before the date of enactment of the Act under the third or fourth paragraph of section 11 of the . . . [Clayton Act] Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.¹⁷

Thus, we must look to the wording of Section 2, and in particular, the word "proceeding" to determine whether it includes all orders issued prior to enactment or is it limited to those proceedings which have been initiated in the court of appeals before the date of enactment. In doing this, we see that the word "proceedings" is limited by the words ". . . initiated . . . under the third or fourth paragraph of section 11. . . ."¹⁸ Therefore we must look to paragraphs three and four to determine the meaning Congress intended.

Paragraph 3 of section 11 of the Clayton Act as it appeared prior to enactment of the Clayton Finality Act provided that upon failure or

¹⁵ FTC v. *Jantzen, Inc. supra* note 1, at 256.

¹⁶ 52 Stat. 111, 117 (1938).

¹⁷ 73 Stat. 243, 245-46 (1959).

¹⁸ *Ibid.*

neglect to obey an order, the Commission could apply to the United States Court of Appeals for enforcement. It further provided for the jurisdiction of the court of appeals, the taking additional evidence, and the finality of the order. It seems clear that the only "proceedings" initiated under paragraph 3 is that in the United States Court of Appeals.

The fourth paragraph provides a review, for the party charged, of any cease and desist order issued by the Commission. The proceedings discussed in this paragraph are likewise initiated in the court of appeals. The cease and desist orders mentioned in the third and fourth paragraphs arise from proceedings covered by the second paragraph. Thus, if the second paragraph had been included along with the third and fourth paragraphs in section 2 of the amending act, it would be easy to conclude that Congress intended this section to apply to all orders issued prior to enactment. However, considering the statutory words as they are, it appears the court was right in holding that the former enforcement procedures were expressly continued in effect for a very limited purpose—the completion of proceedings for enforcement initiated by the Commission in a court of appeals.

In reaching the conclusion stated above the court of appeals relied primarily on the language of the statute. "It should again be emphasized that in applying statutory provisions, courts must limit themselves to the words. Legislative aims, purpose, and policy can be used only to add clarity to the words."¹⁹ The purpose of the Clayton Finality Act was to provide for a more expeditious enforcement of the cease and desist orders issued thereunder. Under the old enforcement procedures, if after the Clayton cease and desist order had been issued, the Commission suspected or found a further violation it would, as a practical matter, begin again with a full scale proceeding. Even then the order was not enforceable until another violation was shown, which required another processing. The second and third steps of this procedure, following the original issuance of the order, were definitely "ineffectual", "awkward" and "time consuming."²⁰ Under section 2 of the finality act as it is interpreted by the court in *Jantzen*, instead of the extended second and third step to get enforcement and finality of an old cease and desist order, the Commission will issue a new order. The new cease and desist order will then become final within 60 days or, if appealed, when adjudicated by the court. Although the Commission experienced much difficulty in attempting to gain enforcement of this particular cease and desist order, it will not be as difficult, nor time consuming to enforce the remaining "400" prior orders under this court's interpretation of section 2. Apparently Congress felt that the new method of enforcement, even after one step of the old, would be quicker.

William S. Doenges

¹⁹ Thomas, *supra* note 12, at 202.

²⁰ FTC v. *Jantzen, Inc.*, *supra* note 1, at 260 n.11.