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Dead End Road: National Petroleum Refiners Association and FTC 'Unfair Methods of Competition' Rulemaking
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[On Monday, June 27, Concurrences *hosted a conference on the Rulemaking Authority of the Federal Trade Commission. This conference featured the work of contributors to a new book on the subject edited by Professor Dan Crane. Several of these authors have previously contributed to the Truth on the Market FTC UMC Symposium. We are pleased to be able to share with you excerpts or condensed versions of chapters from this book prepared by authors of of those chapters. Our thanks and compliments to Dan and* Concurrences *for bringing together an outstanding event and set of contributors and for supporting our sharing them with you here.]*

[The post below was authored by former Federal Trade Commission Acting Chair Maureen K. Ohlhausen and former FTC Senior Attorney Ben Rossen.]

Introduction

The Federal Trade Commission (FTC) has long steered the direction of competition law by engaging in case-by-case enforcement of the FTC Act's prohibition on unfair methods of competition (UMC). Recently, some have argued that the FTC's exclusive reliance on case-by-case adjudication is too long and arduous a route and have urged the commission to take a shortcut by invoking its purported authority to promulgate UMC rules under Section 6(g) of the Federal Trade Commission Act.

Proponents of UMC rulemaking rely on *National Petroleum Refiners Association v. FTC*, a 1973 decision by the U.S. Court of Appeals for the D.C. Circuit that upheld the commission's authority to issue broad legislative rules under the FTC Act. They argue that the case provides a clear path to UMC rules and that Congress effectively ratified the D.C. Circuit's decision when it enacted detailed rulemaking procedures governing unfair or deceptive acts or practices (UDAP) in the Magnuson Moss Warranty-Federal Trade Commission Improvement Act of 1975 (Magnuson-Moss).

The premise of this argument is fundamentally incorrect, because modern courts reject the type of permissive statutory analysis applied in *National Petroleum Refiners*. Moreover, contemporaneous congressional reaction to *National Petroleum Refiners* was not to embrace broad FTC rulemaking, but rather to put in strong guardrails on FTC UDAP rulemaking. Further, the congressional history of the particular FTC rule at issue—the Octane Ratings Rule—also points in the direction of a lack of broad UMC rulemaking, as

Congress eventually adopted the rule solely as a UDAP provision, with heightened restrictions on FTC rulemaking.

Thus, the road to UMC rulemaking, which the agency wisely never tried to travel down in the almost 50 years since *National Petroleum Refiners,* is essentially a dead end. If the agency tries to go that route, it will be an unfortunate detour from its clear statutory direction to engage in case-by-case enforcement of Section 5.

Broad UMC-Rulemaking Authority Contradicts the History and Evolution of the FTC's Authority

The FTC Act grants the commission broad authority to investigate unfair methods of competition and unfair and deceptive acts or practices across much of the American economy. The FTC's administrative adjudicative authority under "Part 3" is central to the FTC's mission of preserving fair competition and protecting consumers, as reflected by the comprehensive adjudicative framework established in Section 5 of the FTC Act. Section 6, meanwhile, details the commission's investigative powers to collect confidential business information and conduct industry studies.

The original FTC Act contained only one sentence describing the agency's ability to make rules, buried inconspicuously among various other provisions. Section 6(g) provided that the FTC would have authority "[f]rom time to time [to] classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this [Act]."[1] Unlike the detailed administrative scheme in Section 5, the FTC Act fails to provide for any sanctions for violations of rules promulgated under Section 6 or to otherwise specify that such rules would carry the force of law. This minimal delegation of power arguably conferred the right to issue procedural but not substantive rules.

Consistent with the understanding that Congress did not authorize substantive rulemaking, the FTC made no attempt to promulgate rules with the force of law for nearly 50 years after it was created, and at various times indicated that it lacked the authority to do so.

In 1962, the agency for the first time began to promulgate consumer-protection trade-regulation rules (TRRs), citing its authority under Section 6(g). Although these early TRRs plainly addressed consumer-protection matters, the agency frequently described violations of the rule as both an unfair method of competition *and* an unfair or deceptive trade practice. As the commission itself has observed, "[n]early all of the rules that the Commission actually promulgated under Section 6(g) were consumer protection rules."

In fact, in the more than 100 years of the FTC Act, the agency has only once issued a solely competition rule. In 1967, the commission promulgated the Men and Boys' Tailored Clothing Rule pursuant to authority under the Clayton Act, which prohibited apparel suppliers from granting discriminatory-advertising allowances that limited small retailers' ability to compete. However, the rule was never enforced or subject to challenge and was subsequently repealed.

Soon after, the FTC promulgated the octane-ratings rule at issue in *National Petroleum Refiners*. Proponents of UMC rulemaking, such as former FTC Commissioner Rohit Chopra and current Chair Lina Khan, point to the case as evidence that the commission retains the power to promulgate substantive competition rules, governed only by the Administrative Procedure Act (APA) and, with respect to interpretations of UMC, entitled to *Chevron* deference. They argue that UMC rulemaking would provide significant benefits by providing clear notice to market participants about what the law requires, relieving the steep expert costs and prolonged trials common to antitrust adjudications, and fostering a "transparent and participatory process" that would provide meaningful public participation.

With Khan at the helm of the FTC, the agency has already begun to pave the way for new UMC rulemakings. For example, President Joe Biden's Executive Order on promoting competition called on the commission to promulgate UMC rules to address noncompete clauses and pay-for-delay settlements, among other issues. Further, as one of Khan's first actions as chair, the commission rescinded—without replacing—its bipartisan Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. More recently, the commission's Statement of Regulatory Priorities stated that the FTC "will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices." This foray into UMC rulemaking is likely to take the FTC down a dead-end road.

The Signs Are Clear: *National Petroleum Refiners* Does Not Comport with Modern Principles of Statutory Interpretation

The FTC's authority to conduct rulemaking under Section 6(g) has been tested in court only once, in *National Petroleum Refiners*, where the D.C. Circuit upheld the commission's authority to promulgate a UDAP and UMC rule requiring the disclosure of octane ratings on gasoline pumps. The court found that Section 6(g) "clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of Section 5" and liberally construed the term 'rules and regulations' based on the background and purpose of the FTC Act." The court's opinion rested, in part, on pragmatic concerns about the benefits that rulemaking provides to fulfilling the agency's mission, emphasizing the "invaluable resource-saving flexibility" it provides and extolling the benefits of rulemaking over case-by-case adjudication when developing agency policy.

National Petroleum Refiners reads today like an anachronism. Few modern courts would agree that an ambiguous grant of rulemaking authority should be construed to give agencies the broadest possible powers so that they will have flexibility in determining how to effectuate their statutory mandates. The Supreme Court has never adopted this approach and recent decisions strongly suggest it would decline to do so if presented the opportunity.

The D.C. Circuit's opinion is in clear tension with the "elephants-in-mouseholes" doctrine first described by the U.S. Supreme Court in *Whitman v. Am. Trucking Ass'n*, because it largely ignored the significance of the FTC Act's detailed adjudicative framework. The D.C. Circuit's reasoning—that Congress buried sweeping legislative-rulemaking authority in a

vague, ancillary provision, alongside the ability to "classify corporations"—stands in direct conflict with the Supreme Court's admonition in *Whitman*.

Modern courts would also look to interpret the structure of the FTC Act to produce a coherent enforcement scheme. For instance, in *AMG Capital Management v. FTC*, the Supreme Court struck down the FTC's use of Section 13(b) to obtain equitable monetary relief, in part, because the FTC Act elsewhere imposes specific limitations on the commission's authority to obtain monetary relief. Unlike *National Petroleum Refiners*, which lauded the benefits and efficiencies of rulemaking for the agency's mission, the *AMG* court reasoned: "Our task here is not to decide whether [the FTC's] substitution of § 13(b) for the administrative procedure contained in § 5 and the consumer redress available under § 19 is desirable. Rather, it is to answer a more purely legal question" of whether Congress granted authority or not. The same rationale applies to UMC rulemaking.

The unanimous *AMG* decision was no judicial detour, and the Supreme Court has routinely posted clear road signs that Congress is expected "to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," as UMC rulemaking would do. Since 2000, the Court has increasingly applied the "major questions doctrine" to limit the scope of congressional delegation to the administrative state in areas of major political or economic importance. For example, in *FDA v. Brown & Williamson*, the Supreme Court declined to grant *Chevron* deference to an FDA rule permitting the agency to regulate nicotine and cigarettes. Crucial to the Court's analysis was that the FDA's rule contradicted the agency's own view of its authority dating back to 1914, while asserting jurisdiction over a significant portion of the American economy. In *Utility Air Regulatory Group v. EPA*, the Court invoked the major questions doctrine to strike down the Environmental Protection Agency's greenhouse-gas emissions standards as an impermissible interpretation of the Clean Air Act, finding that "EPA's interpretation is [] unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization."

Most recently, in *West Virginia v. EPA*the Court relied on the major questions doctrine to strike down EPA emissions rules that would have imposed billions of dollars in compliance costs on power plants, concluding that Congress had not provided "clear congressional authorization" for the rules despite explicitly authorizing the agency to set emissions levels for existing plants. Because broad UMC-rulemaking authority under Section 6(g) is similarly a question of potentially "vast economic and political significance," and would also represent a significant departure from past agency precedent, the FTC's efforts to promulgate such rules would likely be met by a flashing red light.

Finally, while *National Petroleum Refiners* lauded the benefits of rulemaking authority and emphasized its usefulness for carrying out the FTC's mission, the Supreme Court has since clarified that "[h]owever sensible (or not)" an interpretation may be, "a reviewing court's task is to apply the text of the statute, not to improve upon it." Whatever benefits rulemaking authority may confer on the FTC, they cannot justify departure from the text of the FTC Act.

The Road Not Taken: Congress Did Not Ratify UMC-Rulemaking Authority and the FTC Did Not Assert It

Two years after *National Petroleum Refiners*, Congress enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 (Magnuson-Moss). Section 202(a) of Magnuson-Moss amended the FTC Act to add a new Section 18 that, for the first time, gave the FTC express authority to issue UDAP rules, while imposing heightened procedural requirements for such rulemaking. Magnuson-Moss does not expressly address UMC rulemaking. Instead, it says only that Section 18 "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce." Section 6(g) currently authorizes the FTC "(except as provided in [section 18] of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter."

UMC-rulemaking proponents argue Magnuson-Moss effectively ratified *National Petroleum Refiners* and affirmed the commission's authority with respect to substantive UMC rules. This revisionist interpretation is incorrect. The savings provision in Section 18(a)(2) that preserves "any authority" (as opposed to "the" authority) of the commission to prescribe UMC rules reflects, at most, an agnostic view on whether the FTC, in fact, possesses such authority. Rather, it suggests that whatever authority may exist for UMC rulemaking was unchanged by Section 18 and that Congress left the question open for the courts to resolve. The FTC itself appears to have recognized this uncertainty, as evidenced by the fact that it has never even attempted to promulgate a UMC rule in the nearly 50 years following the enactment of Magnuson-Moss.

Congressional silence on UMC hardly endorses the commission's authority and is not likely to persuade an appellate court today. To rely on congressional acquiescence to a judicial interpretation, there must be "overwhelming evidence" that Congress considered and rejected the "precise issue" before the court. Although Congress considered adopting *National Petroleum Refiners*, it ultimately took no action on the FTC's UMC-rulemaking authority. Hardly the "overwhelming evidence" required to read *National Petroleum Refiners* into the law.

The Forgotten Journey: The History of the Octane-Ratings Rule Reinforces the FTC's Lack of UMC Rulemaking Authority

Those who argue that *National Petroleum Refiners* is still good law and that Congress silently endorsed UMC rulemaking have shown no interest in how the journey of the octane-ratings rule eventually ended. The FTC's 1971 octane-ratings rule declared the failure to post octane disclosures on gasoline pumps both an unfair method of competition *and* an unfair or deceptive practice. But what has remained unexplored in the debate over FTC UMC rulemaking is what happened to the rule after the D.C. Circuit's decision upheld rulemaking under Section 6(g), and what that tells us about congressional and agency views on UMC authority.

The octane-ratings rule upheld by the D.C. Circuit never took effect and was ultimately replaced when Congress enacted the Petroleum Marketing Practices Act (PMPA), Title II of which addressed octane-disclosure requirements and directed the FTC to issue new rules under the PMPA. But despite previous claims by the FTC that the rule drew on both UDAP and UMC authority, Congress declined to provide any authority beyond UDAP. While it is impossible to say whether Congress concluded that UMC rulemaking was unwise, illegal, or simply unnecessary, the PMPA—passed just two years after Magnuson-Moss—suggests that UMC rulemaking did not survive the enactment of Section 18. A brief summary of the rule's meandering journey follows.

After the D.C. Circuit remanded *National Petroleum Refiners*, the district court ordered the FTC to complete an environmental-impact statement. While that analysis was pending, Congress began consideration of the PMPA. After its enactment, the commission understood Congress to have intended the requirements of Title II of the PMPA to replace those of the original octane-ratings rule. The FTC treated the enactment of the PMPA as effectively repealing the rule.

Section 203(a) of the PMPA gave the FTC rulemaking power to enforce compliance with Title II of the PMPA. Testimony in House subcommittee hearings centered on whether the legislation should direct the FTC to enact a TRR on octane ratings under expedited procedures that would be authorized by the legislation, or whether Congress should enact its own statutory requirements. Ultimately, Congress adopted a statutory definition of octane ratings (identical to the method adopted by the FTC in its 1971 rule) and granted the FTC rulemaking authority under the APA to update definitions and prescribe different procedures for determining fuel-octane ratings. Congress also specified that certain rules—such as those requiring manufacturers to display octane requirements on motor vehicles—would have heightened rulemaking procedures, such as rulemaking on the record after a hearing.

Notably, the PMPA specifically provides that violations of the statute, or any rule promulgated under the statute, "shall be an unfair or deceptive act or practice in or affecting commerce." Although Section 203(d)(3) of the PMPA specifically exempts the FTC from the procedural requirements under Section 18, it does not simply revert to Section 6(g) or otherwise leave open a path for UMC rulemaking.

The record makes clear, however, that Congress was aware of FTC's desire to claim UMC authority in connection with the octane-ratings rule, as FTC officials testified in legislative hearings that UMC authority was necessary to regulate octane ratings. After Magnuson-Moss was enacted, however, neither Congress nor the FTC tried to include UMC rulemaking in the PMPA. In a written statement reflecting the FTC's views on the PMPA incorporated in the House report, the FTC described its original octane-ratings rule as UDAP only.[2] While not dispositive, the FTC's apparent abandonment of its request for UMC authority after Magnuson-Moss, and Congress' decision to limit the PMPA exclusively to UDAP, certainly suggests that UMC did not survive *National Petroleum Refiners* and that Congress did not endorse FTC UMC rulemaking.

Conclusion

The FTC appears poised to embark on a journey of broad, legislative-style competition rulemaking under Section 6(g) of the FTC Act. This would be a dead end. UMC rulemaking, rather than advancing clarity and certainty about what types of conduct constitute unfair methods of competition, would very likely be viewed by the courts as an illegal left turn. It would also be a detour for the agency from its core mission of case-by-case expert adjudication of the FTC Act—which, given limited agency resources, could result in a years-long escapade that significantly detracts from overall enforcement. The FTC should instead seek to build on the considerable success it has seen in recent years with administrative adjudications, both in terms of winning on appeal and in shaping the development of antitrust law overall by creating citable precedent in key areas.

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[1] H. Rep. No. 95-161, at 45, Appendix II, Federal Trade Commission—Agency Views, Statement of Federal Trade Commission by Christian S. White, Asst. Director for Special Statutes (Feb. 23, 1977).

[2] 38 Stat. 722 § 6(g), *codified as amended at* 15 U.S.C. § 46(g).

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