THE SEARCH FOR CONSENSUS ON THE REVIVAL OF SECTION 5

BY THOMAS B. LEARY[*/]

Shortly after I circulated *A Suggestion for the Revival of Section 5,* 1/ Susan Creighton and Thomas Krattenmaker, circulated an interesting paper titled *Some Thoughts About the Scope of Section 5*. 2/ The two papers are in strong agreement on a number of significant issues, and I believe that apparently mild differences on some others can be narrowed. The objective here is to foster discussion of two virtually identical proposals, which may impress some as too modest and others as too bold.

I Points of Agreement

Both papers recognize that Congress contemplated a special role for the Commission, beyond that of the usual prosecutor. Creighton & Krattenmaker say that Congress created an "expert FTC … to define and proscribe forms of

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1*/ Of Counsel, Hogan & Hartson, LLP, Washington, D.C.; Federal Trade Commissioner 1999-2005. Of course, neither this paper nor my previous one necessarily represents the views of Hogan & Hartson or any of its clients.

/ Thomas Leary, *A Suggestion for the Revival of Section 5*, submitted in connection with the FTC, October 17, 2008 Workshop, Section 5 of the FTC Act as a Competition Statute.

2/ Susan Creighton & Thomas Krattenmaker, *Some Thoughts About the Scope of Section 5*, ABA Antitrust Section, Fall Forum 2008.

anticompetitive conduct, even if they are hard to analyze under existing Sherman Act precedents." (p. 7). My own paper recognizes that the FTC was not intended merely to duplicate the powers of the Department of Justice and that Section 5 might usefully be employed in situations where the agency believes there is an antitrust violation but "not yet an established body of precedent …." (pp. 2-4)

Creighton & Krattenmaker state that the Commission should apply the "current bipartisan antitrust consensus" and should not consider broader "public values" simply because cases like *Sperry & Hutchinson* 3/ permit it to do so. They warn that "reviewing judges are likely to … [require] that competition cases be competition cases." (pp. 1-2) This is exactly what I intended to convey, with the comment that a vision based on cases like *Sperry & Hutchinson* is "too broad to survive without further qualification." I also proposed that "[t]he elements of the Section 5 offense would be the same as those applied in familiar Sherman and Clayton Act precedents, but adapted to fit more novel situations." (pp. 2-3)

Both papers refer to the need to distinguish between the precedent required in cases where private plaintiffs seek treble damages and in cases where the Commission seeks what Creighton & Krattenmaker refer to as a "simple cease and desist order" (p. 5) and what I refer to as "prospective relief only." (p. 3).

II Shades of Difference

Some apparent differences may arise from slightly varied views of the case law or merely from the arrangement of the papers. For example, I suggested that the first patent settlement and standard-setting cases might, in retrospect, have

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3/ FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

been likely candidates for a Section 5 complaint, because they were primarily intended to provide future guidance, I speculated that particular cases might have fared better on appeal, if the limited objectives had been underscored by pure Section 5 complaints (pp. 7-8)

Creighton & Krattenmaker, on the other hand, speculate that the Commission has thus far been unsuccessful in this area because "they have failed (yet) to persuade most federal judges that the challenged conduct is in fact anticompetitive." (p. 3). I am not sure that I agree with that assessment. Courts seem to be fully aware of the competitive consequences of the conduct in issue, but believe that these consequences flowed from rights conferred under the patent laws rather than the challenged conduct.

But, these shades of difference may be more semantic than substantive. There probably is general agreement that the principal substantive challenge in these cases arises from the fact that they occupy the sometimes hazy boundary between patent law and antitrust law -- in the area that Creighton & Krattenmaker identify as "Yes, but" cases, (pp. 4-6) The categorization is not an issue between us.

In addition, I agree with their observation that Section 5 should not be employed simply as "an easier path that might lead to more short-term victories." (p. 3) The path could actually be steeper, however, when the agency undertakes to demonstrate competitive effects from scratch, without compelling precedents. And,

of course, the objective is not just to improve the Commission's batting average; the objective is to halt what the Commission believes is anticompetitive conduct that may appear in an unfamiliar guise.

There is another apparent difference that also should be clarified. Creighton & Krattenmaker expresses concern that the Commission might come to rely on Section 5 routinely, as a way to "short-circuit … the hard analytical questions imposed by the rigorous standards of the Sherman Act." (p. 3) This is a legitimate concern and I share it.

In my view, however, there is less risk of this occurrence in so-called "frontier" cases than in the "Gap Filling Cases" -- which are first among their targets of opportunity and which they describe as "conduct that fits comfortably within the ambit of antitrust principles" (p. 2). My own suggestion is that "[a] Section 5 complaint would not be justified by perceived gaps in the coverage of the antitrust laws but rather would send a signal that the Commission recognizes it is entering largely uncharted territory." (p. 3)

I am also not persuaded that a separate "Gap Filling" category is necessary. Creighton & Krattenmaker's "paradigmatic" example is the consent order in *Valassis* 4/, a case that involved "an alleged invitation to collude in a market that

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4/ *In the Matter of Valassis Communications, Inc.*, No. 51-000 (Mar. 14, 2006) *available at* http://www.ftc.gov/os/caselist/0510008/060314cmp0510008.pdf.

constituted a durable duopoly with high barriers to entry." (p. 2) Instead of describing this as a case within the "ambit" of antitrust, it might be more rigorous to describe it as a realistic attempt to obtain something close to monopoly power 5/ in a somewhat unusual way. And, I am not sure that an unsuccessful attempt to collude in a more fragmented market, would qualify under Creighton & Krattenmaker's own standard that would condemn under Section 5 only "behavior that is shown …to have serious, measurable anticompetitive consequences." (p. 7).

In any event, however cases of this kind seem to be rare, so our differences are probably trivial. It is far more important that we agree it would be a mistake to bring the agency's artillery to bear on people who have simply behaved in ways that invite moral disapproval.

5/ The concept of "monopoly power" occupies a spectrum; it is not something that you either have or you don't.