Federal Trade Commission

Welcoming Remarks
Commissioner J. Thomas Rosch
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First, I'd like to welcome all of the participants on the next two panels. The Commission understands your participation has involved a lot of time and thought, and we want you to know that we are deeply appreciative. I look forward to hearing some very practical advice on the appropriate use by the Commission of Section 5's unfair methods of competition. Second, I'll acknowledge that I've expressed some opinions in prior remarks and in the *N-Data*[1] matter about the application of Section 5.

I've said I think that, as a matter of law, Section 5 is broader in scope and deeper in reach than Section 2 of the Sherman Act. The Supreme Court's decision in *FTC v. Sperry & Hutchinson Co.*[2] endorses an expansive reading of Section 5 unfair methods of competition. In that case, the Supreme Court held that Section 5 empowered the FTC to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws" and to "proscribe practices as unfair or deceptive in their effect on competition."[3] This expansive reading of Section 5 was not surprising. About two decades

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[1] In re *Negotiated Data Solutions*, LLC, Dkt. No. 051-0094 (2007), *available at:* <http://www.ftc.gov/os/caselist/0510094/index.shtm>.

[2] 405 U.S. 233 (1972).

[3] *Id.* at 239.

earlier the Court declared that "[t]he 'unfair methods of competition' which are condemned by Section 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act."[4]

S&H is arguably alive and well, notwithstanding the trilogy of appellate cases decided in the early 1980s that rejected Commission decisions challenging conduct as unfair methods of competition under Section 5 – *Boise Cascade*, *Official Airline Guides*, and the *Ethyl* case.[5] None of those decisions directly challenges the holding in *S&H* that conduct not governed by the Sherman Act may be treated as an unfair method of competition. Indeed, after these decisions issued, the Supreme Court (albeit in dictum) repeated the teaching of *S&H* that "[t]he standard of 'fairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons. . ."[6]

I've also said I think Section 5 should apply to conduct which is not covered by Section 2. I explained my votes in *Valassis*, a consent decree covering an attempt to collude and in *N-Data*, a consent decree covering an effort to renege on what was akin to a RAND commitment in a standard-setting process, on that basis. In neither case did I consider the conduct at issue to be a Section 2 violation. Indeed, I've opined that, for both legal and policy reasons, Section 5 should not apply when Section 2 does apply. That is arguably the teaching of *Boise Cascade*.

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[4] *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953).

[5] *See Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides ("OAG") v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. ("Ethyl") v. FTC*, 729 F.2d 128 (2d Cir. 1984).

[6] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

There the Ninth Circuit rejected a *standalone* unfair methods of competition claim when there was "well forged" Sherman Act case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior."[7]

I've also said there must be some other limiting principles on the application of Section 5, whether the challenge is made under the "unfair act or practice" prong of the statute (as it was in *N-Data*) or the "unfair method of competition" prong (as it was in *N-Data* and *Valassis*). First, the Second Circuit cases appear to require proof that the conduct at issue is oppressive. In *Ethyl*, the court described an unfair method of competition as requiring "at least some indicia of oppressiveness, such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."[8] And, in *OAG*, the court held that a monopolist could refuse to deal with whomever he pleases, stating "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right."[9]

Second, the Ninth Circuit's decision in *Boise Cascade* appears to teach that in the absence of *per se* illegal conduct, proof of actual or incipient anticompetitive effect is also required when the theory is that there is an unfair method of competition.[10] Indeed, former Chairman Tim Muris has written that sound antitrust analysis must always be grounded in

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[7] *Boise Cascade*, 637 F.2d at 581-82.

[8] *Ethyl,* 729 F.2d at 139.

[9] *OAG*, 630 F.2d at 927-28.

[10] *See Boise Cascade*, 630 F.2d at 582.

anticompetitive effects.[11] His focus was on single firm conduct cases under Section 2, but his views would seem to apply with equal force to an unfair method of competition claim under Section 5. It may be that the effect element of the claim can be inferred from clear evidence of anticompetitive intent (and lack of legitimate business purpose). The Analysis to Aid Public Comment in *Valassis*, for example, stated that an invitation to collude could be treated as an unfair method of competition where there was clear evidence of anticompetitive intent and of a dangerous probability of an anticompetitive effect.[12] However, I think there must be *some* evidence, direct or circumstantial, of actual or incipient anticompetitive effect; otherwise, the claim would arguably be too unbounded.

I've also said we should be mindful of the impact that application of Section 5 instead of Section 2 will have on follow-on treble damage actions. Important here is that violations of the FTC Act that are not also antitrust violations will not support subsequent federal private actions for treble damages.[13] And although damages actions are theoretically available under various mini-FTC Acts of several states, from my knowledge, there have not been any follow-on state court cases based on a Commission Section 5 unfair method of competition case – rather, whatever follow-on litigation there has been to Commission Section 5 unfair method of

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[11] *See* Timothy J. Muris, "FTC and The Law of Monopolization," 67 Antitrust L.J. 693 (2000).

[12] *In the Matter of Valassis*, File No. 051-0008 (Consent Order, March 14, 2006, Analysis to Aid Public Comment at p. 5), *available at:* <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

[13] Herbert Hovenkamp, Federal Antitrust Policy at 596-97 (3d ed. 2005).

competition cases has been based on the Sherman Act.[14] Consequently, I think a Commission conclusion that an act or practice is an unfair method of competition under Section 5 is less likely than a finding that an act or practice is a Sherman Act violation to do collateral damage.

All of this said, however, there exists a myriad of open questions in my mind. Most fundamentally, are my premises right? Put differently, should enforcement of Section 5 be confined to conduct that the Commission also finds does not violate the Sherman Act (or the Clayton Act)? If so, what kind of business conduct besides the conduct challenged in *Valasis* and *N-Data* should be covered by Section 5, and what kind of conduct should not be, either on legal or policy grounds? Should conduct that cannot be shown to injure the competitive process ever be considered an unfair method of competition, and, if so, when? How can the Commission avoid creating a rudderless, unbounded standard acceptable to whoever happens to be the majority of the FTC Commissioners at the time? What should be the practical, workable boundaries susceptible to coherent application? How can unfair methods of competition under Section 5 be defined to avoid capturing benign or procompetitive conduct while allowing for sufficient guidance and predictability for business? Are there some universal limiting principles? If not, what limiting principles may be applicable? Can we conclusively say that bringing the statute back to life outweighs any risks? Should we care whether our Section 5 decrees bar some or all follow-on treble damage actions? If so, what sort of decrees should be employed to insure that there is such a bar?

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[14] The Commission's *Stone Container* invitation to collude case, 125 F.T.C. 853 (1998), led to a class action lawsuit in which the plaintiffs alleged the existence of a Section 1 conspiracy. *See Linerboard Antitrust Litigation*, 203 F.R.D. 197 (E.D. Pa. 2001). *Boise Cascade* led to a federal class action lawsuit based on Section 1 of the Sherman Act. *See In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981).

These are just some of the questions I have, and I'm sure that other Commissioners who don't necessarily share the views I've expressed have many more. For that reason, I want to stress that we all want to learn from what is said here today. That is the purpose of these panels. And I can assure you that that will be the effect.