Federal Trade Commission

The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?
Remarks of J. Thomas Rosch[1]
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Good morning. I'm pleased to be here as the lone advocate for a reinvigoration of the use of Section 5 of the FTC Act's unfair method of competition. To begin with, let me describe what I consider to be four unassailable propositions about Section 5. The first is that its reach is not confined to conduct reached by the Sherman and Clayton Acts. Otherwise, Congress would just have provided that the Commission could enforce those statutes. It did not do so. Instead it provided that the Commission could challenge, inter alia, any "unfair method of competition." That is why the Supreme Court held in the *Sperry & Hutchinson* case that Section 5 was not simply coextensive with these other antitrust statutes.[2]

The second unassailable proposition is that Section 5 does not apply to conduct that is clearly covered by the Sherman or Clayton Acts but is not actionable under those statutes just because there is a failure of proof of one of the elements of those statutory offenses. Under those circumstances, Section 5 is just used as a "safety net," which is not supported by Section 5 or its

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[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Holly Vedova, for her invaluable assistance in the preparation of this paper.

[2] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

legislative history, and which is arguably not a fair way to use it.[3] That seems to me to be the true teaching of the Ninth Circuit in *Boise Cascade*.[4]

The third unassailable proposition is that if conduct is challenged under Section 2 there is a threat that follow-on federal private treble damage actions will be filed whereas that threat doesn't exist if the Commission challenges the practice or transaction under Section 5. Moreover, although my colleague, Bill Kovacic, correctly stated in his dissenting statement in the *N-Data* case that follow-on private actions might still be filed under the state Baby FTC Acts, the fact of the matter was that there was no deluge of such suits in the wake of the *N-Data* consent decree.

The fourth unassailable proposition is that Section 5 does not apply to conduct that cannot, in context, be considered to be oppressive and injurious to consumers at least in the long run. Otherwise, the statute would extend to conduct that may be unfair to competitors but is not unfair to "competition." That would not only be inconsistent with the statutory language but also with the case law that defines injury to competition in terms of injury to consumers.[5] I suggest that that explains the holdings of the Second Circuit in *Official Airlines Guides* and *duPont* that the Commission overreached in applying Section 5 in those cases.[6]

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[3] *See* J. Thomas Rosch, Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint, and the Weyerhauser Amicus Brief, before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Sante Fe, New Mexico, July 6, 2006, *available at:* <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>.

[4] *Boise Cascade v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

[5] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

[6] *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

So where does that leave me respecting my predictions? To begin with, let me remind everyone that the Commission held a very rich workshop on the scope of Section 5 last year, and the report on that workshop has not yet issued. I want to review that report before making any firm predictions, but here are some tentative views. First, Section 5 has been used in the past to fill gaps in the Sherman and Clayton Acts. *See*, for example, its use in challenging invitations to collude, which are not clearly covered – indeed, with deference to Professor Baxter and the Fifth Circuit in the *American Airlines* case,[7] that practice is not covered at all – by the Sherman Act. Moreover, in the past, when the Commission was actively enforcing the Robinson-Patman Act, the Commission used Section 5 to cover gaps in the Robinson-Patman Act, which is still viewed by some as an antitrust statute designed to protect buyers who are victims of discriminatory practices.[8] I can see Section 5 being used as such a "gap-filler" in other areas the future.

Second, I can see Section 5 being used to challenge practices that facilitate concerted action in a duopoly or tight oligopoly industry in much the same way that an agreement among the participants in those markets might facilitate that action. For example, suppose that leaking information or using a pricing method that facilitates coordinated pricing or the division of customers or markets by the participants in those markets in much the same way that an agreement would facilitate those inherently suspect practices. I don't see *Boise Cascade* or *DuPont* as precluding the use of Section 5 in those circumstances because the pricing method and/or the pre-announcement of information would be both oppressive and injurious to consumers in that context.

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[7] *United States v. American Airlines, Inc.,* 743 F.2d 1114 (5th Cir. 1984).

[8] *In the Matter of Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987); *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

Third, Section 5 might be used to challenge some conduct that is tortious or illegal but which competitors must emulate in order to compete effectively. Competition on that basis may remain but it will exist at the expense of legitimate competition that is much more beneficial to consumers in the long run. For example, bribing building inspectors may result in the construction of unsound buildings. Industrial espionage may result in a low-cost substitute for innovative research and development. To be sure, some may suggest this is just dressing up the old and repudiated *Pick-Barth* line of cases under Sherman Act Section 1.[9] But the problem with those cases is that they did not articulate why the conduct might injure competition in the sense that it would injure consumers.[10] However, the examples above show that type injury can be described in some cases.

Fourth, Section 5 might be used to challenge conduct that interferes with, and reduces, consumer choice. That is increasingly being recognized as a species of consumer harm.[11] The focus for this type of conduct would be on factors, in addition to price, that are important for a

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[9] *See Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932)(a conspiracy to eliminate a competitor by unfair means violates the Sherman Act); *Atlantic Heel Co. v. Allied Heel Co.,* 284 F.2d 879 (1st Cir. 1960)(characterizing the same offense under *Pick-Barth* per se unlawful); *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978)(rejecting the per se rule of *Pick-Barth* and adopting a rule of reason to be applied on a case-by-case basis in situations where competitive forces protected by the Sherman Act suffer some palpable injury); *see also* Comment, A Reexamination of Pick-Barth Per Se Illegality Under Section 1 of the Sherman Antitrust Act, 38 U. Pitt.L. Rev. 87 (1976).

[10] *Northwest Power Products*, 576 F.2d 90 (criticizing *Pick-Barth* doctrine for not allowing defendants to argue that their competitive acts, fair or unfair, have not produced an impermissible degree of market power, and that their use of misappropriated business resources evinces an increase in competition, not a reduction).

[11] Robert H. Lande, Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis, The Antitrust Source, February 2009, *available at*: <www.antitrustsource.com>; Neil W. Averitt & Robert H. Lande, Using The "Consumer Choice" Approach to Antitrust Law, 74 Antitrust L.J. 175 (2007).

market to function competitively – such as variety and quality. Consider, for example, practices or transactions like certain covenants not to compete or mergers that deprive consumers of non-price competition like innovation that would otherwise occur. In *Jefferson Parish*, the Supreme Court virtually wrote off a reduction of choice as consumer harm in the enforcement of the Sherman and Clayton Acts.[12] However, subject to limiting principles such as oppressiveness or deception, conduct that deprives consumers of choices they might otherwise have may be fair game under Section 5.

Despite *Jefferson Parish*, I acknowledge that in applying choice theory with appropriate limiting principles, there may be conduct that violates both the Sherman Act, on the one hand, and Section 5, on the other hand. As I said at the outset, if and to the extent there is a well trodden path to Sherman Act liability or to a safe harbour under the Sherman Act, I think *Boise Cascade* would rule out the use of Section 5. However, former Commissioner Tom Leary has suggested that Section 5 may apply when there is not a well trodden path to liability – or to a safe harbour under the Sherman Act. As I've previously said, *Boise Cascade* does not rule out Section 5 liability in these circumstances, and as Tom Leary has observed, its use in that context would signal that the Commission recognized that it is challenging conduct in largely uncharted territory.[13]

Finally, there may be conduct that, because of its context, is uniquely likely to injure

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[12] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31 (1984).

[13] *See* Thomas B. Leary, A Suggestion for the Revival of Section 5, The Antitrust Source, February, 2009, *available at:* <www.antitrustsource.com>.

consumers. This was how I saw the conduct in *N-Data*.[14] I did not see the Respondent's renege on a prior commitment to license technology incorporated into an important industry standard to violate Section 2 of the Sherman Act because it did not seem to me to constitute an "exclusionary practice" required by Section 2 case law like *Microsoft*.[15] But the prior commitment occurred in a standard-setting context and the licensees affected by the renege were locked into the technology because of the adoption of the standard. Under those unique circumstances (which I considered to be limiting principles) I felt comfortable in applying Section 5. I should emphasize, however, that I would not have been comfortable in doing that in a consent decree if I did not think there was reason to believe that the Commission would prevail if the matter were litigated. Tom Leary has pressed me about whether I think the standard for a consent decree should be lower, and I don't think it should be.

Now for the fun part of the discussion – piling on by the distinguished members of our panel. Please don't hold back!

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[14] *In the Matter of Negotiated Data Solutions, LLC*, Docket No. C-4234, (Consent Order accepted September 23, 2008), *available at:* <http://www.ftc.gov/opa/2008/09/nds.shtm>.

[15] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).