Remarks of Michael A. Salinger[1]

Without pretending to be an expert in statutory interpretation, it seems reasonable to start with the premise that Section 5 is not completely redundant. That is, it is possible to have a Section 5 violation that does not offend other Federal antitrust statutes. As the only economist on a panel today, I thought I could be most helpful if I could articulate an economically valid basis for a distinct role for Section 5.

Let me begin with four observations.

1. In broad terms, the three classes of activity that can conceivably offend competition law are: collusion (the province of Sherman Section 1); acts that create, preserve, or extend market power, (the province of Sherman Section 2); and the exercise of market power, (the province of Sherman Section 0, by which I mean that the Sherman Act does not cover it).
2. Antitrust enforcement should be economically sound and therefore guided by advances in economic understanding.
3. Economics is an imprecise discipline.
4. Rational antitrust standards rest on an assessment of error costs.

Based on these four principles, I see four possibilities for how to understand the relationship between Section 5 of the FTC Act and Sections 1 and 2 of the Sherman Act. None of these approaches contradicts any of the four observations or the premise that Section 5 is not redundant, but they implicitly differ as to the emphasis placed on each one.

The first possibility is that Section 5 can be used to go after the exercise of market power. I have not heard anyone argue for this interpretation. In my opinion, it would be bad economic policy to punish the mere use of market power derived through superior skill, foresight, or even luck.

The second possibility is that Section 5 adds nothing at all. This would seem to contradict the premise of a possibly distinct role for Section 5, but one might argue that Congress deliberately left the standards vague to allow for enforcement to evolve with advances in economic understanding. One would then need to argue that based on these developments, we have come to realize that the other antitrust statutes are sufficient for economically sound antitrust enforcement.

The third possibility is that

American Airlines episode, but proving all the elements of a Section 2 case might impose too much of a burden. In general, market power means something more substantial in a Section 2 case than it does in, say, a merger case. With actual price fixing, you don't need to show market power at all. If there is to be a common market power standard for all Section 2 cases, then creative use of Section 5 might be a better vehicle for invitation to collude cases than is the creative use of Section 2.

I would classify facilitating practices as falling within a gap as well. If implemented unilaterally or even without explicit agreement, they are not proper Section 1 cases. However, since the harm is to help solve the prisoner's dilemma problem rather than to exclude competitors, then, at least as a matter of economics, they more nearly resemble a Section 1 offense. The Ethyl case was problematic, but not because the broad concept of using Section 5 to go after facilitating practices is inherently flawed. It was that the specific practices in question had legitimate business purposes. Because Section 2 outlaws only monopolization, another possible gap in the Sherman Act is anticompetitive behavior that creates market power short of monopoly.

The fourth possibility is that Section 5 has different error costs associated with it than does the Sherman Act. Commissioner Leibowitz staked out this position in his concurring statement in Rambus; and it is the rationale behind the use of Section 5 but not Section 2 in N-Data. According to this view, the risk of follow-on suits with treble-damage liability increases the cost of a false finding of liability. The argument is that Section 5 is to Sections 1 and 2 what manslaughter is to murder - a lesser offense with a lower burden of proof and a lower penalty.

This argument troubles me for two reasons. First, consider predatory pricing, the practice for which legal standards embody great concern for a false finding of liability. The reluctance to penalize pricing below cost does not stem from the award of treble damages. It comes from a reluctance to characterize competitive behavior as anticompetitive. Weakened penalties do not change that aspect of th

FTC who contribute to the stew of FTC policy is more sound than the analysis of professional economists. Perhaps I am just being professionally provincial, but that worries me.

To summarize, my personal view is that Section 5 should not be the “lesser charge” version of other antitrust statutes. When the FTC uses section 5 alone, it should do so to attack anticompetitive behavior that falls into gaps left by the Sherman and Clayton Acts.