UNIVERSITY *of* BALTIMORE
SCHOOL OF LAW

Robert H. Lande
Venable Professor of Law

Direct#: 410-837-4538
Fax #: 410-837-4560
rlande@ubalt.edu

Statement of Robert H. Lande, Venable Professor of Law,
University of Baltimore School of Law

at the Federal Trade Commission's Workshop
on Section 5 of the FTC Act As A Competition Statute
Oct. 17, 2008; Washington, D.C.

"How To Have A Distinctive And Useful Antitrust Role for Section 5 of the FTC Act"[1]

Thank you very much for inviting me. I am greatly honored and delighted to be here.

I have two points to make. First, Section 5 of the FTC Act, properly construed, is indeed significantly broader and more encompassing than the Sherman Act or Clayton Act. Second, the best - and probably the only - way to interpret Section 5 in an expansive manner is to do so in a way that also is relatively definite, predictable, principled and clearly bounded. This best can be done if Section 5 is articulated using the "consumer choice" framework. Without the discipline

if the Commission articulates Section 5 condemnation in terms that were relatively non-economic, such as condemning conduct that is "unjust", "oppressive", or "immoral". Fortunately, there is a way for the Commission to minimize the risk of reversal on appeal.

Section 5 Can Be Expansive If, But Only If, It Is Constrained by the Choice Framework

The choice framework would impose the threshold requirement that every Section 5 antitrust violation must significantly impair the choices that free competition would bring to the marketplace. [6] It also would impose the requirement that every Section 5 consumer protection violation must significantly impair consumers' ability meaningfully to choose from among the options the market provides. Construed this way, the two haves of Section 5, operating together, ensure that consumers have the two ingredients needed to exercise effective sovereignty— a competitive array of options and the ability to choose meaningfully from among these options. Antitrust law prevents restraints that would restrict the competitive array of options in the marketplace, insuring they are undiminished by artificial restrictions such as price fixing or anticompetitive mergers. Consumer protection law then ensures that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints such as deception or the withholding of material information. In this way, the two halves of Section 5 together protect a free market economy.

Conduct not causing either type of problem should not violate Section 5 of the FTC Act. Conduct not unduly restricting the options available in the marketplace should not be an antitrust

[6] See Neil W. Averitt & Robert H. Lande, "Using The 'Consumer Choice' Approach To Antitrust Law," 74 Antitrust L. J. 175 (2007).

violation, and conduct not unduly restricting consumers' ability to chose from among these options should not constitute a consumer protection violation.

The choice approach to antitrust - instead of a price or efficiency approach - has the advantage of explaining accurately, simply and intuitively, in a way that everyone can understand, why antitrust is good for consumer welfare.[7] Under a consumer choice standard, factors like innovation, perspectives, quality and safety would in effect be moved up from the footnotes, where they are all too-often forgotten, into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust is construed and applied within the consumer choice framework it will change some antitrust analysis as it gives greater emphasis to such short term issues as quality and variety competition, and long term issues including competition in terms of innovation, ideas and perspectives. It would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often would lead to the wrong result.[8] But it would do so in a predictable, principled manner.

---

[7] The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is evolving in this direction. This Sherman Act and Clayton Act evolution might not be moving quickly enough, however, for a variety of reasons. See Averitt & Lande, supra note 6.

[8] The first category involves conduct in markets with little or no price competition, as a result of regulation, joint ventures, or third party payers. In these situations there is no way properly to assess consumer welfare without focusing explicitly on non-price issues. In these cases we care about artificially diminished consumer choice even if prices are competitive, for these markets a price standard would be inadequate.

A second category of cases when a consumer choice approach will work better involves conduct that increase consumers= search costs or otherwise impairs their decisionmaking ability. This conduct tends to cause consumers to obtain products or services less suited to their needs, in addition to producing adverse effects on price. There are a large number of examples, including the advertising restriction cases and similar cases that involve collusion to raise consumer search costs.

Three Examples: Cases Similar to N Data, Invi

clearer and more predictable as to why the conduct at issue had been condemned. Doing this would also make future similar decisions more

reassure the antitrust and business communities that the Commission is not evaluating conduct on an ad hoc basis.

The N Data majority's opinion utilized an interesting-balancing approach that should remain fully apropos and relevant, and it would constitute a second step in the analysis. But the majority's test should apply only to conduct that first has been found to violate the choice framework.

When a case like N-Data is appealed, the reviewing courts would be more likely to give deference to the FTC's interpretation of Section 5 if "unfairness" is limited to practices that significantly interfere with consumer choice, rather than if the Commission's opinion uses only "fuzzier" concepts such as a condemnation of conduct that is "unjust," "inequitable," or "contrary to good morals". The "choice" limitation also would show that the Commission was not seeking open ended powers, so reviewing courts would be more likely to give the Commission considerable deference when it goes beyond traditional Sherman Act violations.

2. Invitations to Collude

Invitations to collude can violate Section 2 of the Sherman Act.[12] However, for the enforcers to prove a Sherman Act violation they must undertake seve

arrangement.[14] Indeed, even though exclusive dealing and tying arrangements are treated under different legal standards, it often is difficult to classify conduct as one or the other practice.[15]

The traditional market share requirements and degree of certainty over whether an effective "tie" or "exclusive dealing arrangement" should be found to exist should be relaxed when the case involves a defendant with a significantly larger market share than that of the

A case where a similar diminution of consumer choice seems to have occurred was J.B.D.L. Corp v. Wyeth-Ayerst Labs. While the case was vastly more complicated than the ice cream hypothetical, the conduct at issue - bundled discounts - was tantamount to an exclusive dealings arrangement. The conduct offered no significant efficiencies and resulted in the serious possibility of diminished consumer choice in the conjugated estrogen market.

The "choice" framework helps explain why incipient tying and exclusive dealing arrangements should violate Section 5. Its focus on actual or potential choice in the marketplace should also increase predictability for the business community and make it more likely that reviewing courts would uphold the Commission's determinations. Moreover, if "incipient exclusive dealing or tying arrangements" were held to violate Section 5, this would help international harmonization in an increasingly globalized economy by beneficially moving U.S. antitrust law in the direction of European Union competition law.[16]

Conclusion

In conclusion, Section 5 should be interpreted to be broader than the other antitrust laws. But it should be utilized only within the choice framework.

[16] See Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics (2007), Chapter 4, especially 496-97, 530-44, 601-03, 618-23.