<u>Some Thoughts About the Scope of Section 5</u>

Workshop on Section 5 of the FTC Act
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This panel has been asked to consider just how broadly or narrowly Section 5 might reach in relation to the other similar antitrust laws, by which we mean the Sherman Act, sections one and two and the Clayton Act, section three. This is not an easy question. So, although both of us have thought about the issue for some time, we want to say at the outset that the views expressed here are still somewhat preliminary. This remains a work in progress.

We see two very different issues embedded in the question of the scope of Section 5. The first is: how broadly *can* the FTC reach under Section 5? The second, very different question is: how broadly *should* the FTC reach in the exercise of its statutory mandate?

We have focused our remarks here on the second (and to our mind, perhaps more interesting) of these questions. As to the first – how broadly *can* the FTC act under Section 5 -- the simplest approach would be to say that, insofar as its proscriptions on unfairness and deception reach conduct that should be condemned because it is anticompetitive, those proscriptions were intended to be the same as (neither broader nor narrower than) the conduct proscriptions of the Sherman and Clayton Acts. As attractive as this might be from a policy perspective, however, as a matter of statutory interpretation, it seems evident that this is not what the 1914 Congress that enacted Section 5 (and the 1938 Congress that amended it) intended. In a recent pronouncement on this issue, the Supreme Court examined all the legislative history underlying Section 5, and its amendment by the Wheeler-Lea Act, and concluded in no uncertain terms that "the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *See FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 244 (1972).

Even if the FTC *can* reach conduct not otherwise proscribed by other antitrust laws, the question remains, *should* it? As an initial limiting principle, we would argue that in its implementation of Section 5, the FTC should leave fully intact the current bipartisan antitrust consensus that antitrust is designed to protect competition, not competitors; that it protects against the use of market power, not efficient conduct; and that it seeks to prevent diminution of consumer welfare, and to do no more than that. This consensus is, we think, embodied in such

otherwise disparate key decisions and documents as the Supreme Court's decision in *Leegin*,[1] the D.C. Circuit's *Microsoft* decision,[2] the agencies' Horizontal Merger Guidelines, and the Commission's opinion, affirmed by the D.C. Circuit, in *Three Tenors*.[3] Section 5 should not, we submit, be allowed to impose antitrust liability for conduct that does not threaten these fundamental principles of antitrust – that is, the latitude that Congress built into Section 5 should not be used to sacrifice efficient behavior for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.

Such a limiting principle is not only right as a matter of competition policy, but we think it is an inescapable requirement of the trilogy of cases, decided in the 1980s, that rejected somewhat extravagant views of Section 5.[4] At a minimum, reviewing judges are likely to hold the Commission's feet to the fire by requiring that competition cases be competition cases – that is, they must rest on proof of probable actual competitive effects, measured by the consumer welfare standard. So, even if the Commission wanted to extend Section 5 to reach conduct not within the ambit of current antitrust policy, we doubt that reviewing courts would permit this, notwithstanding some of the more elastic phrases in cases like *Sperry & Hutchinson*.

As an initial screen, therefore, we would ask: Does the conduct at issue have the same effect, from an economic perspective, as the types of conduct that are subject to liability under the Sherman Act? If the *economic* effect of the conduct is the same, the second step of the inquiry is to ask: Is there nonetheless some *legal* reason to bring the challenge under Section 5 rather than the Sherman Act? We have imagined three different scenarios that might fit these criteria, and believe that they raise different issues and so might usefully be considered separately. We have labeled them "frontier" cases, "gap-filling" cases, and "yes, but" cases.

A "frontier" case is one that meets all of the legal requirements for a Sherman Act claim, but involves new forms of anticompetitive conduct that fall outside traditional categories of antitrust analysis. Former FTC Commissioner Tom Leary has made strong arguments for the application of Section 5 in this context. A "gap-filling" case, by contrast, is one that may satisfy the economic requirements of antitrust, but fails one of the legal elements of Section 1 (usually the "agreement" requirement) or Section 2 (usually the "monopoly power" element). Finally, "yes, but" cases are ones that meet all the economic and legal requirements of a Sherman Act claim, but cannot be brought under the Sherman Act because of legal limitations imposed for reasons unrelated to antitrust.

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[1] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

[2] *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[3] *In re PolyGram Holding, Inc.*, Docket No. 9298 (FTC), 2003 WL 21770765, *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf, a*ff'd, Polygram Holdings, Inc. v. 0 4opin430005 GiTw (Tc*

Depending on the facts, each of these different potential rationales for the invocation of Section 5 may come into play with respect to any particular type of anticompetitive conduct. Consider, for example, an action challenging unilateral conduct in the standard-setting area. Former Commissioner Leary has noted that because *Rambus* involved a type of conduct that has only recently received careful antitrust scrutiny, it might have been better to have brought the case exclusively under Section 5 – a "frontier" rationale. In *Unocal*, another case involving standard-setting, a "yes, but" rationale might have been considered in deciding whether to invoke a stand-alone Section 5, because *Noerr* was an important defense asserted in that case. Finally, *N-Data* appears to have been supported by the majority under a "gap-filling" rationale, inasmuch as the majority Commissioners acknowledged that the facts in that case did not support a claim under the Sherman Act.

In our view, the "frontier" and "yes, but" cases seem to be the safest applications of a separate Section 5, at least so long as these rationales are not used to skip over a rigorous analysis of whether the legal elements of a Sherman Act claim otherwise are met. The "gap-filling" cases may provide the greatest potential for mischief, if the scope of such cases is not narrowly and rigorously circumscribed. One of the matters to which the Commission may want to give considered attention are the legal limits that should be imposed on Section 5 in these "gap-filling" circumstances, if important elements such as an "agreement" or "monopoly power" are not present.

In the balance of this paper, we discuss some additional potential examples of each of the types of cases that we have identified.

A. Cases Addressing New Forms of Anticompetitive Behavior

Perhaps the least controversial application of a stand-alone Section 5 claim should be its use in "frontier" settings, where it is as an avenue for redressing anticompetitive acts or practices that have newly emerged and have not yet been fully absorbed into the fabric of the Sherman or Clayton acts. Whether it be the elaborate information dissemination schemes of the 1920s or the unwarranted Orange Book listings of the 1990s, we know from experience that new forms of anticompetitive behavior will arise from time to time. It would appear to be a clear opportunity to take advantage of the FTC's experience as an expert body to bring its analytic resources to bear on such new forms of anticompetitive behavior.

Because courts may be reluctant to impose liability where behavior is new and unfamiliar, Section 5 may have advantages in these "frontier" cases because of its prospective application and lack of damages (much less treble damages). Commissioner Leary gives *Schering*[5] and *Rambus*[6] as examples of cases that might have been better brought exclusively under Section 5, because the Commission "was primarily interested in the establishment of some ground rules applicable to settlement of patent disputes between pioneer and generic drug

[5] *Schering-Plough v. FTC*, 402 F.3d 1056 (11th Cir. 2005).
[6] *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

manufacturers (*Schering*

for gap filling. Certain kinds of behavior may facilitate oligopolistic price stickiness, without

have a reach in this area that is only precisely coterminous with that of Section 1. For example, what about the state supervision that is in practice -- for want of a better word -- a sham? In truth, this is what the FTC confronted in the *Kentucky Movers* case.[11]

For another patent/antitrust example, but of the "yes but" variety: as presently construed, the *Walker Process* doctrine seems to have a legal gaping hole. Most courts read *Walker Process* to require that the antitrust plaintiff prove not only that the patent was procured by fraud on the patent office, but also that the patent was "enforced." Such a requirement must find its justification in some law other than antitrust. If "enforced" means that a lawsuit alleging infringement must have been filed, then antitrust law leaves unremedied the threat of suit, directed at an alleged infringer or (often with even more serious consequences) the customers of the alleged infringer, even though the simple threat can have, under the wrong circumstances, very serious anticompetitive consequences. The Federal Circuit realized this problem in the *Hydril* case.[12] We wonder why Section 5 would not be an appropriate vehicle to inquire into allegations of anticompetitive misuse of patents by means other than enforcement. Nor need such cases be confined solely to patents procured by fraud. Deceptive threats to sue for infringement can have inefficient, anticompetitive consequences even if there are arguably valid patents underlying the threat.

Although we cannot prove it, we suspect that some of the limitations on antitrust enforcement in the patent area, such as those just mentioned, stem from the fear of unbridled liability for what could, on the surface, appear to be simply the exercise of a statutory right. To the extent that this is so, Section 5, precisely because it does not provide for unbounded liability, becomes an even more attractive (or should we say "less unattractive"?) tool for challenging inefficient anticompetitive cost-raising behavior where it occurs.

3. Cheap Exclusion

As most of you know, we have argued elsewhere that combating what we called cheap exclusion should be high on the list of enforcement priorities for the FTC's Bureau of Competition.[13] Exclusionary practices that are both inexpensive to undertake and incapable of yielding any cost-reducing efficiencies are "cheap" in both senses of that term and are most likely to appeal to any firm bent on acquiring market power by anticompetitive means. From what we have already said, we hope it is apparent that it seems to us that Section 5 could be a significant tool in preventing cheap exclusion, although most forms of cheap exclusion can and should be reached via straightforward application of the Sherman Act.

A common objection to antitrust enforcement against some types of cheap exclusion is that it might "make a federal treble damages case out of a common law tort." As we have noted elsewhere,[14] we do not agree with a legal principle that conduct should be immunized because it is already illegal under another legal principle. Nonetheless, to the extent that concerns about private enforcement under the Sherman Act could threaten to turn many state torts into a federal treble-damages claim, it seems to us that Section 5 might provide the obvious means for proscribing conduct that, while tortious under conventional state law, can at the same time create

[12] *Hydril v. Grant Prideco,* 474 F.3d 1344 (Fed. Cir. 2007).
[13] Creighton, Hoffman, Krattenmaker & Nagata, Cheap Exclusion, 72 Antitrust L.J. 975 (2005).
[14] *Id.* At 993-94

very substantial competitive harm. In such a case, Section 5 would be performing a "yes, but" role, overcoming a legal obstacle placed in the path of Sherman Act enforcement that is unrelated to antitrust law or policy.

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In conclusion, we should stress that although we have suggested a typology for evaluating whether particular might be worthy of scrutiny under Section 5, we are of course only