A SUGGESTON FOR THE REVIVAL OF SECTION 5

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Introduction

the Sherman Act or the Clayton Act, but where there is not yet an established body of precedent to support that view. A Section 5 complaint would not be justified by perceived gaps in the coverage of the antitrust laws but rather would send a signal that the Commission recognizes it is entering largely uncharted territory. The elements of the Section 5 offense would be same as those applied in familiar Sherman and Clayton Act precedents, but adapted to fit more novel situations.

Consistent with this signal, the Commission would seek prospective relief only. In order to make the signal entirely clear, the Commission should explain up front what it is doing and why. This wo

Not all of the Commission's recent initiatives have been in aid of expanded enforcement. In 2003, the Commission unanimously adopted a Policy Statement, 16/ which made clear that it would not routinely seek to impose monetary remedies in competition cases. In addition, the Commission has actively supported collective industry action to address perceived problems like the widely prevalent promotion of worthless or potentially harmful products, even if traditional antitrust doctrine might describe the action as a group boycott. In other words, the Commission is willing to encourage some supply-side restraints in order to reduce demand-side distortions -- or even economic externalities. 17/

Finally, Workshops like this one indirectly support Commission efforts to provide prospective guidance. The Commission here actively seeks information from the private sector and other government authorities, so that it may in turn better inform the future development of the law.

These examples do not, of course, directly involve an imaginative application of the Commission's Section 5 authority, but they do demonstrate that the Commission continues to assume a special responsibility for clarification and update of fundamental antitrust doctrines, in order to meet the challenges of an

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16/ Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

17/ See examples referenced in Thomas Leary, Competition Law and Consumer Protection Law: Two Wings of the Same House, 72 ANTITRUST L.0 Tw 12 0 034 0e5.46 89.1 Tm(.)T

ever-evolving economy. We now turn to specific illustrations of how a Section 5 complaint might contribute to this ongoing effort.

Examples of Cases that Could Have, or Might Be, Brought Under Section 5

Two recent cases that might possibly have fared better had they been brought under Section 5 are *Schering*, and *Rambus*. 18/ In both cases, there was a lengthy trial before an Administrative Law Judge, who dismissed the complaint. The Commission unanimously reversed with lengthy opinions in both cases, only to be reversed itself by two different Federal Circuit Courts. In each case, the Federal Circuit Court gave scant deference to the Commission's factual findings and no deference whatever to any Commission "expertise" on issues of law.

Purely in retrospect, it might have been a good idea to proceed on a Section 5 theory alone in each of these cases. 19/ There was substantial factual and legal support for claims under the antitrust law in each case, and both decisions were initially well received by many experts in the field. But, in each case, there was scant direct judicial precedent. They were not designed to fill a "gap" in antitrust law, but they clearly were on the frontier.

In these cases, the Commission was primarily interested in the establishment of some ground rules applicable to settlement of patent disputes between pioneer and generic drug manufacturers (*Schering*), or to the conduct of companies who

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18/ Schering-Plough v. FTC, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006). Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

19/ It would not help much today because these issues are not now novel.

was an "agreement," the practice was *per se* illegal.) The Supreme Court's close decision in *Leegin* expressly stated that it is the task of future courts to "establish the litigation structure" and "devise rules over time for offering proof or even presumptions where justified." 21/

If one of the two Federal antitrust agencies does not take the lead on this issue, the evolving principles will be shaped by private litigation or by application of state law. This is not an optimal outcome. And, the Federal Trade Commission is the better of the two Federal agencies to break new ground because an action under Section 5 would be less likely to have retroactive effects -- not assuredly so, but significantly so.

Another candidate for Section 5 treatment might be a case like

antitrust consequence. But, traditional antitrust has long drawn a distinction between unilateral conduct and coordinated conduct or acquisitions.)

A Section 5 complaint could signal that the Commission intends in the future to apply the Clayton Act in this new way, which nevertheless would be entirely consistent with the language and intent of the statute. This application would not fill a gap or address behavior that is "contrary to good morals." It would simply be a venture into uncharted territory.

A final hypothetical example is, again, suggested by some facts in *Whole Foods*. Reliance on the "intent" of a large enterprise has fallen out of favapp1ᴷac

market pressures. A Section 5 complaint

The 1970s were characterized not only by civil unrest over an unpopular war but also by the (hopefully) high-water mark of an intellectual movement that was profoundly skeptical about a market system driven by consumer sovereignty. This essentially paternalistic view, prominently associated with celebrities like John Galbraith and Ralph Nader, obviously had a strong influence on the leadership of the Federal Trade Commission at the time.

In addition, the Chairman appeared to claim an unprecedented span of authority. Since non-compliance with any financially burdensome regulation could confer a competitive advantage, he speculated that this non-compliance could potentially be attacked by the Commission as an unfair method of competition. 27/ He may have been just musing aloud but, given the overheated politics of the time, the private sector reacted with alarm.

This alarm was heightened because the Chairman appeared to view the private bar with suspicion. He refused to take a Chairman's traditional seat on the ABA Antitrust Section's Council -- a gesture of no practical importance because there were other ways to share opinion and information, but it was nevertheless keenly resented at the time. I remember. And, there were consequences.

There was a perception that the Commission had been co-opted by the counter-culture, was out of control, and was suspicious of the private sector.

27/ See Thomas Leary, Unfairness and the Internet, 46 Wayne L. Rev. 1711, 1713-14 (2000).

Members of Congress were made aware of these concerns. It is inconceivable that the leadership of the Federal Trade Commission today or in the foreseeable future would make the same mistakes. The fact that the Commission is hosting this Workshop is a good indication that the "lesson of the 1970s" has been taken to heart.

An open dialogue between the Commission and the private sector is particularly important. Because we have become so used to it in recent years, we may not appreciate how remarkable it is. Although the Commission and members of the private bar may have an adversarial relationship in certain specific cases, they are not adversaries across the board.

Most members of the private bar want the antitrust agencies to be pro-active, efficient and successful overall. Of course, some of these sentiments are prompted by pure self-interest. But, both "sides" have a genuine belief that competition law is important, and there is remarkable agreement on fundamental principles. Even lawyers employed on large corporate staffs feel that way, which is not so surprising when you consider that their employers are customers as well as sellers.

Commission transparency is important not only because candor elicits reciprocal candor from people who really are friends of the agency. It is also important because the Commission is a very small agency, with a huge responsibility. It cannot be everywhere at once, and needs a well informed private bar that will also enforce the law.

Conclusion

It is a pleasure to be back here, as