[1] In re *Negotiated Data Solutions*, LLC, Dkt. No. 051-0094 (2007), *available at:* <http://www.ftc.gov/os/caselist/0510094/index.sh

There the Ninth Circuit rejected a *standalone* unfair methods of competition claim when there was "well forged" Sherman Act case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior."[7]

I've also said there must be some other limiting principles on the application of Section 5, whether the challenge is made under the "unfair act or practice" prong of the statute (as it was in *N-Data*) or the "unfair method of competition" prong (as it was in *N-Data* and *Valassis*). First, the Second Circuit cases appear to require proof that the conduct at issue is oppressive. In *Ethyl*, the court described an unfair method of competition as requiring "at least some indicia of oppressiveness, such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."[8] And, in *OAG*, the court held that a monopolist could refuse to deal with whomever he pleases, stating "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right."[9]

Second, the Ninth Circuit's decision in *Boise Cascade* appears to teach that in the absence of *per se* illegal conduct, proof of actual or incipient anticompetitive effect is also required when the theory is that there is an unfair method of competition.[10] Indeed, former Chairman Tim Muris has written that sound antitrust analysis must always be grounded in

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[7] *Boise Cascade*, 637 F.2d at 581-82.

[8] *Ethyl*, 729 F.2d at 139.

[9] *OAG*, 630 F.2d at 927-28.

[10] *See Boise Cascade*, 630 F.2d at 582.

anticompetitive effects. His focus was on single firm conduct cases under S

[11] *See* Timothy J. Muris, "FTC and The Law of Monopolization," 67 Antitrust L.J. 693 (2000).

[12] *In the Matter of Valassis*, File No. 051-0008 (Consent Order, March 14, 2006, Analysis to Aid Public Comment at p. 5), *available at:* <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

[13] Herbert Hovenkamp, Federal Antitrust Policy at 596-97 (3d ed. 2005).

[14] The Commission's *Stone Container* invitation to collude case, 125 F.T.C. 853 (1998), led to a class action lawsuit in which the plaintiffs alleged the existence of a Section 1 conspiracy. *See*

These are just some of the questions I have, and I'm sure that other Commissioners who don't necessarily share the views I've expressed have many more. For that reason, I want to stress that we all want to learn from what is said here today. That is the purpose of these panels. And I can assure you that that will be the effect.