Federal Trade Commission

The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?
Remarks of J. Thomas Rosch[1]
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Good morning. I'm pleased to be here as the lone advocate for a reinvigoration of the use of Section 5 of the FTC Act's unfair method of competition. To begin with, let me describe what I consider to be four unassailable propositions about Section 5. The first is that its reach is not confined to conduct reached by the Sherman and Clayton Acts. Otherwise, Congress would just have provided that the Commission could enforce those statutes. It did not do so. Instead it provided that the Commission could challenge, inter alia, any "unfair method of competition." That is why the Supreme Court held in the *Sperry & Hutchinson* case that Section 5 was not simply coextensive with these other antitrust statutes.[2]

The second unassailable proposition is that Section 5 does not apply to conduct that is clearly covered by the Sherman or Clayton Acts but is not actionable under those statutes just because there is a failure of proof of one of the elements of those statutory offenses. Under those circumstances, Section 5 is just used as a "safety net," which is not supported by Section 5 or its

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Holly Vedova, for her invaluable assistance in the preparation of this paper.

[2] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

legislative history, and which is arguably not a fair way to use it.[3] That seems to me to be the true teaching of the Ninth Circuit in *Boise Cascade*.[4]

The third unassailable proposition is that if conduct is challenged under Section 2 there is a threat that follow-on federal private treble damage actions will be filed whereas that threat doesn't exist if the Commission challenges the practice or transaction under Section 5. Moreover, although my colleague, Bill Kovacic, correctly stated in his dissenting statement in the *N-Data* case that follow-on private actions might still be filed under the state Baby FTC Acts, the fact of the matter was that there was no deluge of such suits in the wake of the *N-Data* consent decree.

The fourth unassailable proposition is that Section 5 does not apply to conduct that cannot, in context, be considered to be oppressive and injurious to consumers at least in the long run. Otherwise, the statute would extend to conduct that may be unfair to competitors but is not unfair to "competition." That would not only be inconsistent with the statutory language but also with the case law that defines injury to competition in terms of injury to consumers.[5] I suggest that that explains the holdings of the Second Circuit in *Official Airlines Guides* and *duPont* that the Commission overreached in applying Section 5 in those cases.[6]

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[3] *See* J. Thomas Rosch, Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint, and the Weyerhauser Amicus Brief, before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Sante Fe, New Mexico, July 6, 2006, *available at:* <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>.

[4] *Boise Cascade v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

[5] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

[6] *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

So where does that leave me respecting my predictions? To begin with, let me remind everyone that the Commission held a very rich workshop on the scope of Section 5 last year, and the report on that workshop has not yet issued. I want to review that report before making any firm predictions, but here are some tentative views. First, Section 5 has been used in the past to fill gaps in the Sherman and Clayton Acts. *See*, for example, its use in challenging invitations to collude, which are not clearly covered – indeed, with deference to Professor Baxter and the Fifth Circuit in the *American Airlines* case,[7] that practice is not covered at all – by the Sherman Act. Moreover, in the past, when the Commission was actively enforcing the Robinson-Patman Act, the Commission used Section 5 to cover gaps in the Robinson-Patman Act, which is still viewed by some as an antitrust statute designed to protect buyers who are victims of discriminatory practices.[8] I can see Section 5 being used as such a "gap-filler" in other areas the future.

Second, I can see Section 5 being used to challenge practices that facilitate concerted action in a duopoly or tight oligopoly industry in much the same way that an agreement among the participants in those markets might facilitate that action. For example, suppose that leaking information or using a pricing method that facilitates coordinated pricing or the division of customers or markets by the participants in those markets in much the same way that an agreement would facilitate those inherently suspect practices. I don't see *Boise Cascade* or *DuPont* as precluding the use of Section 5 in those circumstances because the pricing method and/or the pre-announcement of information would be both oppressive and injurious to consumers in that context.

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[7] *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

[8] *In the Matter of Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987); *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

[9] *See Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932)(a conspiracy to eliminate a competitor by unfair means violates the Sherma

market to function competitively – such as variety and quality. Consider, for example, practices or transactions like certain covenants not to compete or mergers that deprive consumers of non-price competition like innovation that would otherwise occur. In *Jefferson Parish*, the Supreme Court virtually wrote off a reduction of choice as consumer harm in the enforcement of the Sherman and Clayton Acts.[12] However, subject to limiting principles such as oppressiveness or deception, conduct that deprives consumers of choices they might otherwise have may be fair game under Section 5.

Despite *Jefferson Parish*, I acknowledge that in applying choice theory with appropriate limiting principles, there may be conduct that violates both the Sherman Act, on the one hand, and Section 5, on the other he or mer grwotther h

[12] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31 (1984).

[13] *See* Thomas B. Leary, A Suggestion for the Revival of Section 5, The Antitrust Source, February, 2009, *available at:* <www.antitrustsource.com>.

[14] *In the Matter of Negotiated Data Solutions, LLC*, Docket No. C-4234, (Consent Order accepted September 23, 2008),