The Great Doctrinal Debate:
Under What Circumstances is Section 5 Superior to Section 2?

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Over the last several years, I've spoken out about the virtues of Section 5 as a vehicle for challenging single-firm conduct. I've suggested that with Section 5 at its disposal, the Commission should think long and hard before challenging single-firm conduct under a Section 2 theory. Today, with this esteemed panel, I'd li

prohibits “unfair methods of competition.”[1]

There are certain instances where existing Sherman Act precedent might potentially lead a court to find that a firm is not liable for certain conduct under Section 1 or Section 2. This could be the case in an invitation to collude case brought under Section 1, for example, or a course of conduct case brought under Section 2. In these cases, if the Commission believes that the firm's conduct has anticompetitive effects (or is likely to have anticompetitive effects, as in the invitation to collude context) and those anticompetitive effects are not outweighed by a procompetitive business justification, Section 5 provides an appropriate vehicle. Some may say that the Commission should stick to the Sherman and Clayton Acts in these contexts, but from a doctrinal standpoint, I don't think that's right. In these cases, if we shoehorn the facts of the case into a Sherman Act framework, we run the risk of either making bad law (to bring an unusual case within the ambit of existing precedent) or, alternatively, losing the case even though the firm's conduct is causing anticompetitive effects because of precedent[3] that's ill-suited to the conduct at issue. If that's the result and we have a better mousetrap at our disposal, we're not doing our job as prosecutors very well by eschewing the better mousetrap. In my view, the Commission does a greater service in these hard cases by declaring the practice to be a Section 5 violation provided that we clearly explain why the conduct constitutes an unfair method of competition so that future parties are on notice.[4]

[3] I believe that the case law under Section 2 of the Sherman Act may be "binding" (1) when there is a Supreme Court decision squarely on point or (2) when those regional federal appellate courts that have weighed in on an issue agree that Section 2 should be interpreted and applied in a certain way. It should be noted that both instances are the exception rather than the rule.

[4] *See, e.g.*, Amanda Reeves, *[illegible]*, CPI ANTITRUST CHRON., February 2010, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562734.

Indeed, this was exactly what I had in mind when I supported the Commission's decision

Commission and the Bureaus of Competition, Consumer Protection, and Economics to debate whether the application of a course-of-conduct theory to the facts that the staff had uncovered was appropriate. And, had the Commission had the opportunity to render a decision, I had hoped that we would have identified the precise elements of such a claim—just as the Supreme Court did in *Brooke Group*,[7] for example, when it identified the elements of a predatory pricing claim.

Apart from the doctrinal benefits, I also believed that a course-of-conduct claim was proper under Section 5 as opposed to Section 2 because, while such a claim could be far-reaching, Intel (or any other firm with comparable market power) would rarely be subject to the threat of treble damages so long as the course-of-conduct claim was based exclusively on Section 5. So, as I'll discuss in a moment, in many respects, proceeding under Section 5 created less exposure for Intel and had less of a chilling effect than a decision blessing a course-of-conduct claim under Section 2 would have had. For these reasons, in supporting litigation of a course-of-

dealing decisions as *Dlpa* ,[9] on the one hand, and *BavAtLa* ,[10] on the other hand. Similarly, with respect to bundling, there is *LePg* ,[11] which differs from *Oba DgSpIavAtLa* ,[12] which in turn differs from *PeHa* .[13] With respect to loyalty discounts, compare the very different analyses by the Eighth Circuit in *CaBa* [14] and the D.C. Circuit in *MfSa* .[15] With respect to deception, the Third Circuit's decision in *BaCa vQbIa* [16]

C. Circuit's decision in

opinion describing why a particular practice should create liability under Section 2. (This, incidentally, is the most powerful argument to me for why we should litigate these cases under Section 2 in the first place.) The disadvantage, of course, is that if we rule against the respondent, the respondent can forum shop its way to the circuit with the binding precedent that is most favorable to it, therefore immediately nullifying any opinion we issue. To be sure, the Commission can then attempt to relitigate the same issue under Section 5, but at that point, I have to wonder if we are using our resources wisely. This, after all, was precisely the option we had in the wake of the D.C. Circuit's unfavorable Section 2 decision in *Rambus*. Suffice it to say, the Commission thought the case had dragged on long enough and made the decision that it was best to fold up its tent and go home.[18]

Third, the Commission can sue in Part 3 under a Section 5 theory. From a prosecutorial standpoint, Section 5 has far fewer downsides because Section 2 law is so thin. In fact, the only downside I see here is that an appellate court may rule that Section 5 does not cover the conduct at issue, which I frankly don't view as a downside because then the Commission, the defense bar, and firms have clarity once and for all on the scope of Section 5 and whether or not a particularly category of conduct creates liability and under what circumstances.

Some may say that the Commission has a fourth option which is to sue in Part 3 under both Section 2 and Section 5, as the majority elected to do in *Intel*. To be honest, the trial lawyer in me hasn't yet been persuaded that a tag-along Section 2 claim will ever make sense if the Commission's goal is to actually win a Section 5 case. The minute we allege both claims, the respondent has the upper hand because it can go before the ALJ (and ultimately an appellate

[18] Order Returning Matter to Adjudication and Dismissing Complaint, *In re Rambus*, Docket No. 9302 (May 12, 2009), *available at* http://www.ftc.gov/os/adjpro/d9302/090512orderdismisscomplaint.pdf.

court, if necessary) and get a ruling on the Section 2 claim. Once a court finds that conduct is protected under Section 2, I think a federal court is going to be hard pressed to say the same conduct is nevertheless inappropriate under Section 5. The reason for this is that the core of any Section 5 argument must be that the Commission has special expertise to add and that, for whatever reason, the conduct should not be subject to damages. Once the Commission has proffered the Section 2 claim, it has severely undercut these arguments. It was for this reason, in addition to the others that I discussed above, that I dissented from the Commission's decision to challenge Intel's conduct under Section 2.[19]

II.

The second argument I've advanced for why Section 5 is superior in some contexts to Section 2 is that there's no private right of action to sue for Section 5 violations. I understand that not everyone agrees with me on this and some may believe that follow-on class actions are inevitable so let me explain my thinking here as well.

When Congress enacted Section 5, it made two findings that are directly relevant to the class action debate. First, Congress considered and rejected a provision that would allow private plaintiffs to sue for treble damages. In rejecting such a provision, several members of Congress noted that Section 5's breadth and the fact that it allowed the Commission to identify "unfair methods of competition" on a case-by-case basis made it unfair to penalize firms with treble damages for conduct that they didn't know was clearly circumscribed by Section 5.[20] Therefore,

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[19] Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In the Matter of Intel Corp.*, Docket No. 9341 (Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf.

[20] 51 CONG. REC. 11,379-80 (1914) (remarks of Sen. Cummins) (expressing concern that those who violate the act without moral turpitude should not be unfairly punished); *id.* at 13,114 (remarks of Sen. McCumber) (finding treble damages against unsuspecting violator is harsh penalty); *id.* at 13,119 (remarks of Sen. Williams) (expressing concern that businesspeople

settlement.[22] Thus, it makes sense to me that Section 5 should only be a tool for the Commission.

It was my reading of this legislative intent that was at the root of both of my statements in the two Section 5 cases that the Commission brought this year. In June, I joined the majority's statement in the settlement of the *U-Haul* invitation to collude case.[23] In that case, the staff uncovered evidence of an invitation to collude, but absolutely no evidence of an agreement.[24] I felt it was important to make that point clear to reduce the likelihood that the private class action bar would be tempted to sue U-Haul and Budget under Section 1. Similarly, as I already explained, I wrote separately in *Intel* to emphasize that I believed a complaint premised on a course-of-conduct theory should only be cognizable under Section 5.[25] While the knee-jerk reaction to that statement appears to have been that I was taking a more aggressive approach to antitrust enforcement, I believed that insofar as we were trying to limit Intel's exposure and the ultimate reach of any Commission opinion more generally, proffering a course-of-conduct theory under Section 5—rather than Section 2—was actually more conservative.

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[22] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("[I]t is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage, much less lucid instructions to juries, . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.") (internal quotations and citations omitted).

[23] Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, *In re U-Haul Int'l, Inc.*, FTC File No. 081-0157 (June 9, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf.

[24] Analysis to Aid Public Comment, *In re U-Haul Int'l, Inc.*, FTC File No. 081-0157, at 3 (June 9, 2010), *available at* http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf ("If the invitation is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for a criminal investigation. In this case, the complaint does not allege that U-Haul and Budget reached an agreement. . . .").

[25] Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *Intel Corp.*, Docket No. 9341 (Dec. 16, 2010), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf.

Getting to the critiques of my views on class actions, I understand that some may agree that Congress did not intend for follow-on class actions in the Section 5 context, but suggest that, as a practical matter, that is a moot point, given that the private plaintiffs' bar will always find a means to sue if it really wants to. While I believe the jury is still out on this (in part because we have not used Section 5 enough to know for sure), I'm not convinced this critique holds much water.

Let me review the legal options for follow-on class action relief. The first and best option from the class action bar's standpoint is a suit under the Sherman Act. In other words, it can take our allegations under Section 5 and plead that the same conduct violates Section 1 or Section 2. If we are doing our job at the Commission, it should not be worth their time to do this, however. In an invitation to collude case, the Commission has necessarily not found evidence of an agreement – an essential element of a Section 1 case. Thus, provided we make clear the fact that our months—and sometimes year-long—pre-complaint investigation did not yield any evidence of an agreement when we pursue an invitation to collude case (as we did in both the separate statement and analysis to aid public comment in *U-Hub*), a plaintiff should not possibly be able to pursue a follow-on Section 1 case. Section 5 cases based on a unilateral conduct theory are trickier for sure because the Section 2 law is relatively unsettled, so a plaintiff

Du settlement.[26] However, an exhaustive study of state "little FTC Acts" has found that most of these statutes have such significant limitations that there is little likelihood of follow-on litigation.[27] In any event, in the wake of the few Section 5 cases that the Commission has brought thus far—including *N-Du* ,[28] *Vu* ,[29] and *U-Hu* [30]—there have not been any follow-on suits, so until there is more evidence that "little FTC Acts" actually have deleterious

[26] Dissenting Statement of Commissioner William E. Kovacic, *In re N Du Su* , File No. 051-0094 (Jan. 23, 2008), *u* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

[27] *Se* Justin J. Hakala, *Fu O Se Au Bu e FTC's E Su 5* at 7 (Wayne State Univ. Law Sch., Working Paper Grp., Oct. 9, 2008), *u* http://www.ftc.gov/os/comments/section5workshop/537633-00002.pdf ("[T]he follow-on actions that are possible are not numerous enough, nor are they certain enough, to give the Commission or the courts cause for concern."). A review of state "little FTC Acts" on file with the National Association of Attorneys General similarly shows that the possibilities of follow-on state court litigation from FTC Section 5 cases are quite limited. Only nineteen states have a private right of action, and only eleven of those have a multiple damages provision. Of the eleven states, only two have mandatory trebling (Alaska and Hawaii). Two states (North and South Carolina) have mandatory trebling only if the violation was willful or knowing. One state (Wisconsin) has mandatory doubling, and two (New Hampshire and Massachusetts) have mandatory doubling with a possibility for more damages if the violation was willful or knowing. The rest of those eleven (Vermont, Rhode Island, Montana and Washington) have discretionary trebling, and one of those (Washington) has a cap of $25,000. It should be noted that at least one state supreme court (California) has specifically held that the state's version of the FTC Act is designed to be as broad as Section 5 of the FTC Act. *Ce Th Ca Ju v L.A. Cu Th Co* , 973 P.2d 527, 544 (Cal. 1999) (Defining unfair competition as "conduct that threatens an incipient violation Tc0((av)-4.1(0.9(ornia) h)5eneral)Tj13.665 0 6Tech Comm-.008945 .i3(a)u4/cyTT9 1 Tf15.525 0 TD

consequences for our Section 5 enforcement, I have no reason to consider the hypothetical risk of those actions to be a real threat.

III.

Third, I'd like to explain why I believe the Commission's expertise validates its use of Section 5 in certain unusual or anomalous cases that are not good candidates under Section 2. I've periodically heard people say that this argu

at issue "inherently suspect."[34] In both cases, the D.C. Circuit and the Fifth Circuit, respectively, agreed and adopted the FTC's analysis. Had these questions been presented to a federal district court in the first instance, it's unlikely that the court would have been open (let alone equipped) to apply a more novel form of analysis in the first instance. Yet because the FTC supplied the courts with a well-crafted roadmap, the FTC was able to introduce a different form of doctrinal analysis—and one that, I might add, provides more predictability—into antitrust law.

I believe that if and when the Commission has the opportunity to issue an opinion in a Section 5 case, it will at some point have the ability to similarly use the administrative litigation and decision-making process to influence the law in the manner that Congress intended.

IV.

Fourth and finally, I know I am a voice in the wilderness here, but as I said in my *Intel* statement, documents that illuminate a party's intent or demonstrate evidence of multiple anticompetitive practices should be relevant in assessing liability under Section 5. This is because the types of causes of action that arise under Section 5 may involve incipient conduct (in which case, intent is really the bulk of what we should assess) or other more troubling conduct that the Commission does not trust to a civil jury (as, for example, in the course-of-conduct case). My concern is that if we challenge these types of conduct under Section 2, this evidence may not be considered as probative as it should be.

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[34] *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (July 24, 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf; *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715 (Nov. 29, 2005), *available at* http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf.

To be sure, the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* holds that such an intent would be relevant in a Section 2 case.[35] Moreover, in a 1984 decision, the Second Circuit held that a respondent's state of mind is not only relevant, but also must be taken into account to determine whether the respondent's conduct constitutes an "unfair method of competition" under Section 5.[36] Yet some Section 2 decisions have said that an analysis of the defendant's intent is irrelevant in a Section 2 case.[37] And in light of the Supreme Court's decided distrust for civil juries and private plaintiffs in *Trinko* and *Credit Suisse*,[38] I'm not convinced that a federal court would depart from that view.

So if evidence of intent and multiple anticompetitive practices provides the best evidence of conduct that the Commission has reason to believe is having anticompetitive effects, what is the Commission /TT9Y[S,3 TDtain, I believe that the answer is that we should litigate Section 5 cases in a Part 3 administrative trial. Under that approach, both sides avoid ever appearing before a jury, yet all of the probative evidence can come in without fear that a private plaintiff will use it /TTforce an inequitable settlement. This seems to be the only way /TTresponsibly prosecute a case where the Commission believes such evidence is relevant to proving liability.

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[35] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*

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I've now given you my defense of why I believe that in some contexts, Section 5 provides a superior mechanism to Section 2 for challenging unilateral conduct. In closing, I'd like to offer one final thought for your consideration. As it currently stands, the FTC's Section 5 expertise is supposed to be irrelevant to clearance discussions. Is that right? I personally don't think so because, for all of the reasons that I have expressed here, I think there is a lot the Commission can add as a prosecutor as a result of its Section 5 authority. I'd be curious, however, if others agree.

Let the debate begin.