Federal Trade Commission

Wading Into Pandora's Box: Thoughts On Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observations on Section 5

Remarks of J. Thomas Rosch[*]
Commissioner, Federal Trade Commission

before the

LECG Newport Summit on Antitrust Law & Economics

October 3, 2009

Good morning. To get the conversation started, I thought I would offer a few thoughts on topics that continue to be hotly debated when it comes to unilateral conduct. First, I will offer some thoughts on monopoly power and, in particular, Justice Scalia's suggestion in *Trinko* that monopolization may be a good thing. Second, I will address two key doctrinal debates – whether or not we should be as concerned as the DOJ Section 2 Report suggested with false positives and whether there is or should be a one-size-fits-all rule for monopolization. Third, I will discuss some evidentiary considerations related to the circumstances under which one can infer a Section 2 violation. Finally, I will conclude with some thoughts about when it might be appropriate for the Commission to

---

[*] 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, Amanda Reeves, for her invaluable assistance preparing this paper.

use Section 5 instead of Section 2 to challenge the single-firm conduct of a firm with monopoly or near-monopoly power.

I.

I would like to begin with what, as recently as just two decades ago, were largely universally regarded as three unassailable propositions about monopolization. First, monopolization is a single-firm concept. While that has always been the case here in the U.S., one needs only travel to the EU to find a regime that since 1992 has recognized a concept of "joint" or "collective dominance" and which prohibits "one or more undertakings" (such as members of an oligopoly) from abusing a dominant position.[1] As the Canadian Draft Abuse of Dominance Guidelines unveiled earlier this year suggest, prices, for example), does not create liability under Section 2 in the absence of exclusionary conduct.[3] Again, the U.S. differs from the EU in this regard because Article 82 makes "abuse" of dominance alone a violation and does not require exclusionary conduct.

Third (and it boggles my mind that this is now up for debate), simply because the law does not prohibit charging monopoly prices does not mean that monopolies are a good thing. In *Trinko*, of course, Justice Scalia famously opined that

> [m]ere possession of monopoly power, and the concomitant charging of monopoly prices, is . . . an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.[4]

The DOJ Section 2 Report likewise embraced this view by basing much of its analysis on theory that the promise of monopoly profits drives firms to innovate and compete.[5]

In so stating, I would suggest that Justice Scalia and the DOJ Report may have thrown the baby out with the bathwater. In *Alcoa*, Learned Hand identified three evils associated with monopoly power: first, that a dominant firm has excessive power over price; second, that excessive prices reduce efficiencies and create deadweight loss; and

---

[3] *See, e.g.*, *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416, 430 (2d Cir. 1945) (holding that monopoly power was not objectionable when acquired through "superior skill, foresight, and industry"); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (distinguishing unlawful conduct from "growth or development as a consequence of a superior product, business acumen, or historic accident").

[4] *Verizon Commun's v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[5] *See, e.g.*, U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter REPORT] at 7-8, 49, 119.

third, that monopolies "deadens initiative," "depress[] energy" and eliminate[] rivalry.[6] I, for one, agree with these assessments of monopoly power, and I believe that when Congress enacted Section 2, it had these concerns in mind. The problem, however, is that having identified these policy concerns associated with monopolization, *Alcoa* arguably went too far doctrinally thereby prohibiting conduct that was not exclusionary.

Enter the Court's decision in *Trinko*. *Trinko* arguably overreacted to *Alcoa* and subsequent decisions that had a decisive anti-monopolization bent by not merely holding that the defendant's conduct was not exclusionary, but by suggesting that monopolists *qua* monopolists are valuable. That suggestion is flawed in at least three respects.

First, it should go without saying that when Congress adopted Section 2, its purpose was certainly not to protect monopolies.[7] The text of Section 2 explicitly prohibits "monopolization." Given that Justice Scalia views statutory text as the be all

---

[6] *Alcoa*, 148 F.2d 416, 427; *see also Standard Oil Co. v. FTC*, 340 U.S. 231, 252 (citing the danger that a monopoly will "fix the price," impose a "limitation on production," or cause a "deterioration in the quality of the monopolized product"); *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition*, Sept. 26, 2006 Hr'g Tr., Empirical Perspectives at 13 (Scherer), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/transcripts/sept26EmpiricalPerspectivestrans.pdf (observing that reluctance to "cannibalize the rents that they are earning on the products that they already have marketed" may make monopolists "sluggish innovators").

[7] *Standard Oil*, 340 U.S. at 248-49 (with the Sherman Act, “"Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent") (quoting *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 455 (7th Cir. 1943)). As the National Commission for the Review of Antitrust Laws and Procedures later stated: "The chief aim of government litigation under Section 2 of the Sherman Act is the dissipation of persistent monopoly power." National CoetitiFTC

and end all of legislative intent,[8] any suggestion that monopolies are a good thing in light of Section 2 which explicitly prohibits monopolization is a tough pill to swallow.

Second and relatedly, whether or not, in any absolute sense, monopolies are good, that suggestion was unnecessary to resolve the question before the Court in *Trinko*. In *Trinko*, the one and only question was whether that defendant's *conduct* constituted monopolization, given the regulatory "safety net" that existed. There was simply no need for the Court to enter the policy fray and take such an extreme position.

Third, while it is true that anticipated financial rewards certainly drive innovation and competition, the observation that monopolies rival’s access to key inputs or to the post-innovation market and thereby reduced the possibility that an industry *in the aggregate* would successfully engage in innovation.

In sum, insofar as *Trinko* and the DOJ Report suggest that antitrust enforcement against monopolists is somehow anti-innovation, I do not agree with that suggestion. To the contrary, to the extent that such enforcement has the net effect of increasing the

for example, took the position that concerns about under-enforcement are overblown because monopoly power is self-destructive and markets are self-correcting.[17] The problem with that assumption, however, is that it gives no weight to the harm that consumers will suffer while waiting for the correction to occur. Not only may markets take years to correct themselves, but a monopolist's own deliberate conduct may further delay a market correction and prolong the duration of consumer harm.

Finally, I think the emphasis on false positives provides a mechanism for savvy practitioners and judges to use abstract theory instead of focusing on concrete evidence. In short, if there is case law that says a default rule should be applied even at the expense of under-enforcement, the application of that default rule will mean that there may be cases where the parties' documents reveal an intent or plan to cause anticompetitive harm, but where a court will have air cover to push those documents under the rug.

The Search for a Single Test. Next, I would like to offer some thoughts on whether there should be a single test for all exclusionary conduct. The Supreme Court has made various attempts to establish such a test putting forth formulations in, among other decisions, *Standard Oil* and *Grinnell*.[18] These attempts, however, have largely come up short, leaving lower courts and practitioners with little guidance as to what unilateral conduct constitutes an unlawful or exclusionary act. The Court arguably came the closest in *Aspen Skiing* where the court stated that "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunity of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive

[17] *See, e.g.*, REPORT at 25.

[18] *See Standard Oil*, 221 U.S. 1; *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

way."[19] Yet the Court also affirmed a jury verdict in the plaintiff's favor where the evidence showed that the defendant sacrificed revenues and profits to exclude a rival and where the defendant has no business justification for its behavior. In doing so, *Aspen Skiing* provided more questions than answers. Did *Aspen Skiing* set forth a new standard requiring no business justification? Or was *Aspen Skiing*'s holding simply that the conduct proven there was sufficient, but not necessary, to prove a Section 2 violation?[20]

In *Aspen Skiing*'s wake, there have been various attempts to formulate a uniform standard. As Mark Popofsky has accurately observed "advocates of rival Section 2 tests treat *Aspen* as a mirror, reflecting support for their favored doctrine."[21] Although cataloging the pros and cons of those tests would be grist for a separate series of remarks altogether, I will briefly discuss a few of those tests to highlight some of my concerns.

defendant in the short-run regardless of whether they are" likely anticompetitive.[25] Similarly, the "no economic sense test" neglects the fact that there is certain exclusionary conduct – such as deception practiced on a standard setting organization – that a monopolist can engage in which makes perfect economic sense because there is no increased cost to providing false information.[26] (Indeed, providing false information might actually be cheaper.) The "no economic sense test" provides no basis to regulate such conduct.

Apart from these tests, there are also various balancing tests that weigh the harm of the defendant's conduct against its benefits. The DOJ Report advocated one such balancing framework as a default standard – the disproportionality test – under which conduct violates Section 2 when the harm to competition is disproportionate to the benefits accruing to consumers and the defendant.[27] Areeda and Hovenkamp are also advocates of similar tests.[28] As the ABA's Antitrust Section has observed, "the disproportionality standard appears more rigorous than the usual balancing of procompetitive and anticompetitive effects under the traditional rule of reason standard,

---

[25] Herbert Hovenkamp, "The Harvard and Chicago Schools and the Dominant Firm," in *How the Chicago School Overshot the Mark* 115 (2008). Hovenkamp goes on to observe that, "the improper patent infringement suit is likely to be most costly to the dominant firm when the infringement defendant has the resources to defend it and may not be particularly costly when the infringement defendants are nascent firms who are easily excluded from the market." *Id.*

[26] *See id.* at 115-16.

[27] REPORT at 46.

[28] 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651a, at 72 (2d ed. 2002 (conduct is exclusionary of it "produce[s] harms disproportionate to benefits"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148 (2005).

and appears to establish a higher threshold for Section 2 liability."[29] Steve Salop has also proposed an effects-based balancing test which assesses the net effects of the defendant's conduct on consumer welfare.[30]

While I think these balancing tests are improvements on the others because they move away from a default rule that concentrates (to a fault) on rational choice theory, one has to wonder if such tests are, like the *Grinnell* framework, empty shells, leaving courts with no more guidance – for example on what consumer effects to value and by how much – than no test at all.

So where do we go from here? Given recent history, I appreciate the suggestion by many that such a unifying test is simply not feasible. Indeed, it is arguable that, by the time any single test is sufficiently legally and politically palatable so as to command a consensus, it will be so watered down – so as to avoid, among other things, false positives – that it will ultimately fail to punish conduct that, in my view, is plainly anticompetitive. In this regard, I think the DOJ Section 2 Report arguably did a service by largely eschewing resolution of the question of whether a single test works well in all cases and, instead, adopting specific tests for certain types of exclusionary conduct, such as predatory pricing, loyalty discounts, price bundling, tying, refusals to deal with rivals, and exclusive dealing. This is essentially the approach taken in the EC Guidance to

---

[29] American Bar Association Section of Antitrust Law, Unilateral Conduct Committee, Analysis of DOJ's Section 2 Report (December 2008), *available at* http://www.abanet.org/media/youraba/200903/DOJSection2Report.pdf

Article 82,[31] and it is consistent with Justice Souter's suggestion in *California Dental* that courts apply an "enquiry meet for the case."[32]

Nevertheless, having spent virtually my entire career representing and advising large corporate clients, I have to think that we do a disservice to corporate institutions and lower federal courts by failing to reach agreement on any such test. Indeed, one downside to Section 2's evolution from a broad and amorphous prohibition to a statute that regulates defined categories of conduct is that the Supreme Court will always be able to punt on the issue, claiming that it is always deciding Section 2's application to the narrow issue before it. Given the low rate at which Section 2 cases make it to the courts of appeals (to say nothing of the Supreme Court), it will be decades (if ever) before the common law is sufficiently fleshed out as to each discrete category of conduct.

I therefore believe that we should continue the search for one test, even if that test is not perfect and ultimately only applies to, say, 80 percent of all monopolization cases. In my view, under such a test a firm with monopoly or near monopoly power that engages in exclusionary conduct (be it through a single recognized act or a course of conduct) that has anticompetitive effects could be liable under Section 2. I would analyze anticompetitive effects by looking at whether the intent of the firm with monopoly or near-monopoly power (as revealed through the statements and documents of its senior executives) is to cripple or eliminate rivals that could otherwise constrain the

---

[31] European Commission Communication – Guidance on The Commission's Enforcement Priorities In Applying Article 82 EC Treaty to Abusive Exclusionary Conduct By Dominant Undertakings The Guidance ("Guidance"), along with a press release, a list of questions and answers, the Commission staff working paper, and other useful citations, are available at http://ec.europa.eu/comm/competition/antitrust/art82/index.html.

[32] *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

firm’s exercise of monopoly or near-monopol plead and prove a Section 2 claim based on a course of conduct. In my view, a series of actions, which, standing alone, would not be unlawful, may, in combination, result in a Section 2 violation where those actions have an anticompetitive effect.

To be sure, the law is at best muddy on this issue. The *Microsoft* court was asked to directly opine on such a claim and, nevertheless, refused to "pass on" the DOJ's course of conduct argument as a matter of law, finding that "the District Court did not point to any series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form an independent basis for liability."[37] The Section 2 Report, likewise, punted on this issue, failing to identify the analysis that courts should apply when confronted with allegations of multiple forms of exclusionary conduct. This was a significant shortcoming of the Section 2 Report, given that, in my experience, rarely does a Section 2 plaintiff allege just a single form of misconduct.

---

that any one of the scheme's predicate actions was independently violative of antitrust laws"); *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D. Del. 2006) ("Plaintiffs are entitled to claim that individual acts are antitrust violations, as well as claiming that those acts as a group have an anticompetitive effect even if the acts taken separately do not."). *Cf. City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) (observing that "it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect" but that "at the same time, if all we are shown is a number of perfectly legal acts, it becomes much more difficult to find overall wrongdoing . . . . We are dealing with what has been called the 'synergistic effect' of the mixture of the elements").

[36] *See* J. Thomas Rosch, "Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence," Remarks at the Bates White Antitrust Conference, Washington, D.C. (June 25, 2007), *available at* http://www.ftc.gov/speeches/rosch/070625pendulum.pdf (reviewing Court of First Instance decisions divining monopoly power from the defendant's course of conduct).

[37] *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (en banc).

In *linkLine*'s wake, some litigants have argued that the Supreme Court rejected a "monopoly scheme" claim in *linkLine*[38] when it held that a plaintiff cannot manufacture a price squeeze claim by pleading a course of otherwise permissible conduct.[39] I do not read *linkLine* so broadly. In my view, *linkLine* simply rejected a price squeeze claim as a free-standing theory of liability; the Court was not asked and did not address whether, as a matter of law, Section 2 prohibits all course of conduct claims. That is arguably an open question that the Court will need to address at a later date.[40]

senior executives, which showed that "Microsoft's ultimate objective" was to thwart Java's threat to Microsoft's monopoly power in the market for operating systems were probative of Microsoft's liability.[42] It is also the EC's teaching in its recent decision fining Astra Zeneca for its abuse of dominance. There, the EC – going much further than the *Microsoft* court – applied a low threshold for a finding an anticompetitive effect, finding abuse even in jurisdictions where the exclusionary strategy had failed, on the basis that there was an intention to exclude competitors and, stating that, given the exclusionary intent, there was no requirement to show actual exclusionary effects.[43] A decision from the CFI in this case is expected in the next few months.[44]

My third and final evidentiary observation (and this one is intended to be provocative) is that it is arguable that a defendant's change in practices can bespeak an anticompetitive intent. That, it can be argued, was Justice Stevens' fundamental teaching when he wrote for a unanimous Court in *Aspen Skiing* that the defendant "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years" and that such conduct "support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[45] In this regard, the main issue left in my mind is whether and under what circumstances the change of practice evidence is too attenuated to permit such an inference.

---

[42] *Id*. at 76.

[43] Commission Decision 2006/857/EC (June 15, 2005), Case No. COMP/A.37.507/F3 – Astra-Zeneca, OJ L 332.

[44] Case T-321/05 *AstraZeneca v. Comm'n*.

[45] *Aspen Skiing*, 472 U.S. at 603, 610.

* * *

In sum, if there is one thing that we can all perhaps agree on, it is that with every recent attempt to turn a corner on Section 2 law and reach a consensus, we have opened a pandora's box of sorts. It is hard to dispute that predictability in antitrust is a good thing, but is it really possible to define a rule that encompasses the broad range of exclusionary conduct contemplated by Section 2? Should Section 2 strive to protect consumer welfare, efficiencies, or both? Is a pro-competition default rule one that errs on the side of over- or under-enforcement?

I certainly don't have the answers to all (or any) of these questions. But I will offer one possible means to address some of the more vexing conflicts between conduct that may not fit neatly within a Section 2 box, but nevertheless has anticompetitive effects – and that is Section 5 of the Federal Trade Commission Act which prevents any "unfair method of competition." As the Supreme Court made clear in *Sperry & Hutchinson*, Section 5 is not simply coextensive with other federal antitrust statutes, but instead reaches further.[46] How far it should reach, of course, is a much trickier question and one that the Commission continues to grapple with on a case-by-case basis.

As I have previously observed,[47] a trilogy of appellate court decisions from the early 1980s offered some limiting principles, including the Ninth Circuit's teaching in

[46] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). As I have noted elsewhere, I do not believe, however, that Section 5 should apply to conduct that isclearly 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. *See* J. Thomas Rosch, "The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?"(March 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090325abaspring.pdf; J. Thomas Rosch, "Welcoming Remarks at FTC Section 5 Workshop" (October 17, 2008), *available at* http://www.ftc.gov/speeches/rosch/081017section5wksp.pdf.

[47] *Id.*

Boise Cascade that Section 5 cannot reach conduct that Section 1 and 2 reach simply because there is a failure to prove an established essential element of the offense[48] and the Second Circuit's teachings in the *Official Airline Guides* and *Dupont* cases 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.[49]

Beyond those limiting principles, however, there are still many tough questions that remain. As the panel that I participated on at the Antitrust Section's Spring Meeting made clear, there is vigorous debate as to whether that use of Section 5 in *N-Data* was correct.[50] Yet, I have to wonder, if the Commission had focused our efforts in *Rambus* on a Section 5 theory as opposed to a Section 2 theory, perhaps we would have had more luck. In looking ahead, I believe that there are at least six considerations that may guide the Commission in its application of Section 5 to cases involving single-firm conduct.

First, does the case involve a market in which the respondent has monopoly power? This is a factor for two reasons. To begin with, unless one believes that monopoly power is inherently a good thing, it is fair to expect a firm with monopoly power to tread more cautiously than less powerful firms when it engages in conduct that may be considered exclusionary. That is consistent with Section 2 itself, which, as I say, by definition only covers firms with monopoly or near-monopoly power, not less powerful firms. Additionally, examining whether the respondent has monopoly power eliminates from Section 5's purview cases involving markets which are simply highly

---

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

[49] *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).

[50] *In the Matter of Negotiated Data Solutions, LLC*, Docket No. C-4234, (Consent Order accepted Sept. 23, 2008), *available at* http://www.ftc.gov/opa/2008/09/nds.shtm.

concentrated but in which upfront fixed costs are very high;[51]

series of acquisitions, regardless of whether any single transaction violated Clayton Act Section 7.[55]

Third, is the law or economics unsettled as to whether the Respondent's practices have an anticompetitive effect? For example, the Supreme Court's decision in *Tampa Electric*[56] articulated a number of factors that should be considered in determining whether an excl determis83 n1

Systems, Inc. v. Abbott Laboratories,[62] which in turn differs from *PeaceHealth*.[63] With respect to loyalty discounts, compare the very different analyses by the Eighth Circuit in *Concord Boat*[64] and the D.C. Circuit in *Microsoft*.[65] With respect to deception, the Third Circuit's decision in *Broadcom Communications v. Qualcom, Inc.*[66] is hard to reconcile with the D.C. Circuit's decision in *Rambus*.[67]

The fact of the matter is that the courts have not settled on any single test for determining when most practices are exclusionary and when they simply constitute "hard" competition. To be sure, as I've noted, the Supreme Court tried to do so in its most prominent Section 2 decisions.[68] But in those instances the Court failed to draw any bright lines that could be relied upon. The economists have fared no better.[69] Under these circumstances, those complaining about the lack of predictability if a case is tried and decided under Section 5 must acknowledge that there is no more predictability in the Section 2 case law. Moreover, those who co

In short, when the law is unsettled as to whether the practices at issue are illegal or not, the arguments that are usually made against applying Section 5 instead of Section 2 (i.e., that Section 5 is too vague to be useful and simply constitutes a way to circumvent bad Section 2 case law) arguably do not apply, or at least they do not apply with much force. Nor does the *Boise Cascade* rejoinder – that Section 5 does not apply when there is a failure of proof on any established element of a Sherman Act claim – work because the proof required to sustain some unilateral conduct claims is itself unknown. To the contrary, consistent with Congress's intent in enacting Section 5, the ambiguity in certain areas of Section 2 law can make a case a prime candidate for the Commission to analyze the competitive, economic, and consumer effects of a particular practice, whether it stands alone or is part of a broader "course of conduct" having synergistic effects.

Fourth, does the challenged practice not only have an exclusionary effect, but also adversely affect consumer choice? Price has often been described as the "central nervous system," but that aphorism focuses too much on whether the challenged practice directly affects consumer price. As I've said, the law measures all effects – like effects on product quality, or innovation – that may result from a practice. Moreover, a certain practice – like customer or territorial allocation – may only indirectly affect consumer prices. Accordingly, the Supreme Court and other courts have declared that the competitive process may be impaired if a challenged practice "limits consumer choice."[70] Thus, it is more accurate to describe consumer choice as the "central nervous system."

---

[70] *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-60 (1986); *see also United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991).

Fifth, is there evidence from the respondent about the purpose or effects of the alleged practice? The case law now seems to be reasonably well-settled that evidence of intent is relevant to determine what the effect of the conduct is likely to be.[71] That said, there is a difference between a low level manager's intent, on the one hand, and a senior executive's intent, on the other. When the latter expresses himself or herself in documents or other statements, there is considerably more certainty about what the effects of the conduct is likely to be – regardless of whether the practice is challenged under Section 5 or under Section 2 of the Sherman Act.

Sixth, to what extent will a Section 5 challenge likely have fewer collateral consequences than a challenge under Section 2? This is an especially important consideration when federal court private treble damage litigation involving the same conduct is pending or threatened. But is it important whenever there is a reasonable prospect that such a private claim will be filed. A plaintiff cannot rely on favorable Section 5 case law in a federal treble damage action. Neither can a federal district court rely on such a decision because the FTC alone can avail itself of Section 5 at the federal level. Conversely, the spillover effects on federal law enforcement of Supreme Court substantive law jurisprudence that is the product of concern about such treble damage actions can be reduced if the Commission uses Section 5, instead of traditional antitrust law that is equally applicable to private and public plaintiffs.

Finally, it bears emphasis that applying a multi-factor analysis in determining whether and when Section 5 should or can be applied is not unique.[72] As previously

---

[71] *See, e.g.*, *Aspen Skiing*, 472 U.S. at 602; *Microsoft*, 253 F.3d at 29.

[72] I view these factors as considerations and do not consider the presence or absence of any one factor to be dispositive.

stated, the Supreme Court used such an analysis in *Tampa Electric* in determining whether exclusive dealing was illegal in that case. The various rule of reason analyses that courts employ in Sherman Act Section 1 cases all focus on intent, anticompetitive effects, and efficiencies in determining whether Section 1 has been violated. And the Section 2 analysis that the D.C. Circuit employed in *Microsoft* is similar to the rule of reason analyses in that it considers multiple factors.