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Unfair Competition Law

Antitrust Violations as Unfair Competition

Section 5 of the FTC Act and the End of Antitrust Modesty

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Since he became Federal Trade Commission Chairman in March 2009, Jon Leibowitz has made several bold moves to reassert the relevance of his agency and to provide ballast against a federal judiciary that he has labeled "hostile to vigorous enforcement of the antitrust laws." Most prominent among them has been his sustained effort to revisit the Commission's enforcement powers under section 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."[1]

That effort attracted attention beyond the antitrust community in December 2009, when the Commission brought a complaint under section 5 against Intel Corp., asserting that Intel had engaged in an overall "course of conduct," including exclusive dealing, price bundling, and supply guarantees, to exclude competitors in two computer processor markets.[2] Opinion has been divided as to whether the *Intel* complaint and other recent section 5 actions constitute wise use of the Commission's authority. The Washington Post, for example, called the FTC's actions "aggressive and potentially worrisome" and said that the Commission's proposed remedies were "disconcertingly intrusive."

The FTC's renewed use of section 5 undoubtedly presents a compliance challenge for businesses and their counsel. The text of section 5 was designed to be flexible – to set forth principles rather than to delimit prohibited conduct – and the Commission has been reluctant to commit to more specific line-drawing. Its boundaries therefore remain somewhat uncertain.

At the same time, however, the harshest criticisms of the Commission's expanded use of section 5 are probably overstated. The Commission cannot be expected to provide a catalog of every possible competitive act that could implicate section 5.[3] What the Commission can and must do instead is to articulate clear enforcement principles, use discretion in exercising its enforcement authority, and seek only those remedies necessary to curb abusive conduct.

In this article, we examine the leading section 5 precedents, look at some of the recent cases brought by the FTC, and offer a few predictions as to the future direction of enforcement in this area.

Section 5 Basics

Strictly speaking, section 5 of the FTC Act is not part of the corpus of antitrust law, but rather a catch-all designed to protect consumers from practices that are not reached by the Sherman and Clayton Acts but that nonetheless have the potential to harm the competitive process. Passed in 1914, the FTC Act was to some extent a product of Congressional dissatisfaction with the brief history of the Sherman Act, which had been narrowly read by the federal courts and was feared to be too inflexible to reach the full scope of practices that a competition policy ought to address.[4] Section 5 was thus deliberately drafted to be an elastic statute; Congress did not intend for the FTC to enumerate all of the practices that potentially violate section 5, but rather to establish a principles-based approach that could be applied to new markets and new forms of conduct.

The text of section 5 contemplates two distinct types of violations. The bar on "unfair acts or deceptive acts or practices" has traditionally been considered a consumer protection statute and has been applied principally against misleading advertising, abusive debt collection practices, and other forms of conduct that directly affect vulnerable consumers. By contrast, the "unfair methods of competition" clause in section 5 has typically been used in cases having a close logical nexus to the kinds of competitive harm addressed by the Sherman Act. Perhaps the archetypal "unfair method of competition" is the invitation to collude, which touches one of the core evils of competition policy – price-fixing – but does not meet the technical requirements of section 1 of the Sherman Act, because no actual "agreement in restraint of trade" is reached. While some of the Commission's recent uses of section 5 have been controversial, there is broad consensus in the antitrust community that the statute is appropriately used in invitation-to-collude cases.

Recently, however, the Commission has blurred the distinction between these two types of harm by invoking the "acts or practices" clause outside the consumer protection area. The commissioners themselves have divided over this use of "acts or practices," with dissenters arguing that the traditional division should be maintained. This is more than an academic debate; in connection with the financial reform legislation currently being considered in Washington, the

FTC has asked Congress to expand its remedial powers in consumer protection and competition matters, which would make section 5 potentially a much more powerful enforcement tool.[5] Commissioner Kovacic has registered his disagreement with the Commission's attempt to expand its section 5 remedial power.[6]

As it stands now, there are several important limitations on the Commission's authority. Recognizing that its elastic approach to drafting created the risk of overdeterence, Congress limited the FTC mainly to prospective remedies in section 5 cases. Later, as part of the Federal Trade Commission Act Amendments of 1994, section 5(n) was added, which specifically limits the Commission's authority to declare unlawful only those acts or practices "likely to cause substantial injury to consumers." This language tends to affirm the nexus between section 5 and the Sherman Act and suggests that section 5 is best applied when that nexus is most clear. Significantly, federal law also provides that a section 5 order shall have no collateral estoppel effect in subsequent private actions under the antitrust laws.

The treatment of section 5 in the federal courts has been somewhat discordant. On one hand, the courts routinely recognize that section 5 grants the FTC *some* authority to challenge practices that do not violate the Sherman and Clayton Acts. In *FTC v. Sperry & Hutchinson*[7], the Supreme Court appeared to give section 5 a rather broad reading, stating that "legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[8] This language, which is perhaps best understood as a product of Warren Court-era antitrust thinking, appears to contemplate almost no principled limitations on the Commission's power. Subsequent courts, however, while dutifully reciting the language of *Sperry & Hutchinson*, have nonetheless found reasons to overturn the Commission's section 5 orders, citing the Commission's failure to articulate limiting principles for its authority. Strikingly, no federal court has affirmed liability premised solely on section 5 since 1968.

The Commission Must Overcome Existing Section 5 Precedent

The FTC's prior experience with expanded section 5 enforcement was an unsuccessful one. The setbacks it suffered in three early 1980s decisions, *Official Airlines Guides v. FTC*[9] ("Official Airline Guides"), *Boise Cascade Corp. v. FTC*[10] ("Boise Cascade"), and *Ethyl Corp. v. FTC*[11] ("Ethyl Corp."), chilled the Commission's section 5 ambitions for almost a quarter-century. All three courts recited the *Sperry & Hutchinson* language investing the FTC with broad powers under section 5, but all three also hastened to add that judicial review constituted an essential check on those powers, lest they be used to promote undue agency interference in the marketplace. These cases constitute a continuing challenge to the Commission's section 5 enforcement agenda.

In *Official Airline Guides*, the Second Circuit rejected the Commission's section 5 challenge to the defendant monopolist's unilateral refusal to deal with a non-competitor, holding that "enforcement of the FTC's order would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[12] Though the defendant's refusal to publish the schedules of commuter airlines undoubtedly placed those airlines at a competitive disadvantage against certified airlines, and while the defendant's conduct lacked strong procompetitive justification, the court nonetheless held that defendant did not have a section 5 duty to non-competitors who might be affected by its decisions.[13] This decision is consistent with the general principle that unilateral refusals to deal will not violate the antitrust laws without some evidence of likelihood of foreclosure.

In *Boise Cascade*, the Ninth Circuit rejected the Commission's attack on consciously parallel behavior in an oligopolistic industry. Manufacturers of plywood had long used a system of "delivered pricing," which tended to make pricing between different types of plywood more transparent and, according to the complaint, reduced price competition for what was essentially a commodity product.[14] Again, while the court acknowledged that "any delivered pricing system can become a potent tool for assuring that competitors are able to match prices and avoid the rigors of price competition"[15], it criticized the Commission for failing to articulate a limiting principle, holding that the FTC's approach would "blur the distinction between guilty and innocent commercial behavior."[16]

In *Ethyl Corp.*, the Second Circuit likewise rejected a potentially sweeping interpretation of the Commission's power under section 5 in a case in which the complaint alleged "price signaling," that is, behavior short of the kind of price-fixing agreement that would invoke the Sherman Act that nonetheless has the power to harm consumers in oligopoly markets. The defendants allegedly employed a mix of practices, including delivered pricing, advance notice of price increases, and widespread use of most-favored nation clauses, to artificially maintain prices in a market with steadily declining demand.[17] Again, while the court acknowledged that such practices had the potential to harm competition, it expressed concern that the Commission had begun to drift away from employing section 5 to deter practices having a strong logical nexus to the Sherman and Clayton Acts.[18]

Boise Cascade and *Ethyl Corp.* set forth an important limitation on the reach of section 5; while they do not state that so-called "conscious parallelism" can never give rise to a section 5 violation, they do require that the FTC show that the practice in question has actually resulted in fixing or stabilizing prices – not merely that it threatens to do so. Without this limitation, section 5 would tend

to condemn a variety of potentially procompetitive practices and pose an extraordinary threat to businesses operating in oligopoly markets.

Past is Prologue, or A New Era?

The Commission has brought a number of actions under section 5 in the "new era" that began in 2008, but the four cases below have attracted the most commentary and represent the Commission's boldest attempts to test the outer limits of its authority. Three of these cases involve consent decrees, and the *Intel* matter is ongoing. How the federal courts will respond to the Commission's assertive new approach therefore remains to be seen.

- *N-Data* The FTC fired the first shot in the new section 5 wars when it announced an agreement with Negotiated Data Solutions LLC (N-Data) to settle charges that N-Data had violated both the "unfair method of competition" and the "unfair act or practice" clauses of section 5 by failing to live up to commitments made by its predecessor-in-interest to a standard-setting organization (SSO).[19],[20] Chairman Majoras and Commissioner Kovacic filed dissents from the Commission's decision[21], with Chairman Majoras objecting in particular to the Commission's application of the "unfair act or practice" clause, normally invoked in consumer protection cases, to conduct involving an alleged breach of a commitment made to other members of an SSO. Indeed, while consumer harm could indirectly be implicated by the failure of the SSO process, it is not clear that section 5 needs to be invoked to protect businesses who possess an apparent remedy in contract or tort. The ABA's Section of Science & Technology Law submitted a public comment regarding the *N-Data* consent decree expressing the concern that the lack of clarity in the Commission's order could chill, rather than promote, participation in SSOs.[22]
- *NAMM* On March 4, 2009, the Commission announced that it had reached a settlement with the National Association of Music Merchants (NAMM), a trade group whose members are manufacturers, distributors, and retailers of musical instruments, involving allegations that NAMM violated section 5 by organizing meetings to facilitate the exchange of price and business strategy information among members.[23] The FTC charged that this conduct enhanced the members' ability to coordinate price increases for musical instruments, to the clear detriment of consumers. While *NAMM* does involve a somewhat unusual application of section 5, the conduct involved here – the sharing of sensitive price information among horizontal competitors – has long been understood to pose a risk to competition. The question remains, however, just how aggressively the Commission might employ section 5 to deter so-called "facilitating practices." Broad use of the statute in this area could create significant additional enforcement risk, especially in oligopoly markets where coordinated activity is inherently more likely.
- *Intel* As discussed above, the section 5 case to receive the most attention thus far is the Commission's complaint against Intel, filed on December 16, 2009. The Commission has sought sweeping remedies against Intel, going to basic elements of the way Intel prices its chips and deals with customers. Intel General Counsel Douglas Melamed told the Washington Post that Intel had been prepared to settle the FTC's case on reasonable

terms and that it was the FTC's remedies demands, which "would make it impossible for Intel to conduct business," that prevented such a settlement.[24] While the Commission is entitled to relief sufficient to cure the potential harm, overreaching by the Commission on remedies could tend to suppress procompetitive conduct. Widely-respected scholar Herbert Hovenkamp has expressed skepticism regarding the Commission's ability to separate pro- from anti-competitive practices in this complex marketplace.[25]

- *Transitions Optical* On March 3, 2010, the Commission announced that it had settled with Transitions Optical, a manufacturer of darkening treatments for eyeglass lenses, over charges that Transitions had maintained its monopoly in the market for such lenses by engaging in a variety of exclusionary practices at various levels of the distribution chain.[26] As in *Intel*, the Commission brought a section 5 action on facts that would typically be analyzed under section 2. In addition, the Commission sought and received a wide range of conduct remedies from Transitions, including limitations on Transitions' ability to offer volume discounts. Finally, a follow-on class action asserting section 2 claims has been filed against Transitions.[27] This runs counter to the argument that section 5 enforcement presents less error risk than Sherman Act enforcement because of the unlikelihood of follow-on actions. Along with *Intel*, *Transitions Optical* constitutes a warning to firms possessing market power to carefully review their distribution practices for section 5 risk.

As the Commission itself acknowledges, something of a doctrinal vacuum has existed around section 5 since *Ethyl Corp.* was decided in 1984. Chairman Leibowitz and Commissioner Rosch acknowledge that the 1980s precedents are unhelpful, but they believe that the cases are properly read to turn less on judiciary hostility to section 5 per se than on the failure of the Commission in those instances to articulate limiting principles for its exercise of authority. By clearly articulating such principles this time around, they believe they can reverse the FTC's section 5 fortunes. The cases above demonstrate that the Commission regards section 5 as essential to its mission and is prepared to invest significantly in its revitalization.

The Antitrust Wars

Several significant factors, both institutional and doctrinal, stand in the way of the Commission realizing its section 5 ambitions. Despite the FTC's status as an "expert" agency, the federal judiciary is likely to guard jealously its right to say "what the law is" in this area, just as it always has in interpreting the Sherman Act. Appellate review thus remains a significant practical constraint on overreaching by the Commission.[28],[29]

Another institutional tension is that a broad reading of the Commission's section 5 authority could result in a significant amount of conduct being simultaneously lawful at the DOJ and unlawful at the FTC. Former FTC Chairman Bob Pitofsky has called such a state of affairs "untenable."[30] The FTC Act does, however, appear to contemplate somewhat different mandates for the two

agencies, so what Chairman Pitofsky views as untenable may nonetheless be consistent with Congressional intent.[31]

Indeed, if the federal courts were again to take a narrow view of the Commission's section 5 powers, as they did in deciding the 1980s cases discussed above, a sort of existential crisis could arise at the FTC. The idea that the FTC was an expert agency that could be entrusted to deal with novel or close questions of law was the crucial rationale for the agency's creation. As Commissioner Kovacic himself has asked, if the FTC has, practically speaking, virtually no enforcement authority beyond that granted to the Antitrust Division, why does the agency need to exist at all?[32]

Finally, as has been observed elsewhere[33], the last several decades in antitrust have been a period of institutional modesty, in which antitrust has moved away from its protectionist origins to embrace the view that allocative efficiency is the primary goal of competition policy. The result has been a focus in antitrust enforcement on core theories of consumer harm like price-fixing and monopolization and away from the earlier concern with concentration as a social evil. Chairman Leibowitz, who was a longtime Congressional staffer and whose background is principally in consumer protection, seems keen to return antitrust enforcement to its Progressive Era roots. His approach, while finding some support in the legislative history, is nonetheless likely to bring the Commission into direct conflict with the antitrust mainstream.

One of the clear risks presented by expanded section 5 enforcement is a blurring of lines carefully-drawn over decades of Sherman Act cases between permissible and impermissible competitive conduct. It almost goes without saying that failure to provide clear guidance for businesses creates the risk of overdeterrence or "Type I" error. The spoils of several decades of labor by the federal judiciary to create clear and administrable Sherman Act rules could be lost if the FTC is allowed to bring section 5 cases involving types of conduct that have already undergone extensive Sherman Act analysis.

This has led some observers to propose that one of the principles of section 5 enforcement should be that the Commission will not invoke section 5 in paradigmatic Sherman Act cases.[34] As evidenced by the *Intel* complaint, the Commission does not accept this argument, and some commentators have criticized the Commission for attempting to "end-run" section 2 precedent of which it does not approve. Chairman Leibowitz and Commissioner Rosch have characterized the recent court-imposed limitations on Sherman Act enforcement as motivated by concern with the potential chilling effects associated with high discovery costs and the potential for tremble damages, which together can lead to strike suits and abusive settlements.[35] They argue that

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section 5, with its prospective remedies and limited risk of follow-on suits , strikes the perfect balance, permitting vigorous competition while giving the Commission the means to curb dominant firm abuses. In any event, the Commission will have a fine line to walk in invoking section 5 to reach conduct not reached under current Sherman Act precedent while not seeming to suggest that the Commission is "correcting" errant case law, which might invite backlash from the judiciary.

Looking Ahead

Consistent with Sherman Act enforcement, section 5 enforcement efforts likely will continue to be trained principally on dominant firms. Commissioner Rosch confirmed this in a March 2010 speech, noting that section 5 would have its broadest application "in cases involving ostensibly exclusionary practices by firms with monopoly power where those practices have an anticompetitive effect, which may include preventing a rival from constraining the use of monopoly power."[37] Firms with strong market positions should be made aware of section 5 risk and advised to adjust their distribution practices accordingly, understanding that the scope of the FTC's authority remains substantially undefined. The courts may yet decide that the Commission overreaches when it brings section 5 cases involving classic section 2 facts in an effort to avoid unfavorable section 2 precedent, but only strong and determined litigants are likely to carry the fight to the appellate stage. As in *N-Data*, many firms will be motivated to reach a quick settlement in the face of a Commission complaint.[38]

Of particular concern for dominant firms is the possibility that section 5 could be used to bring so-called "monopoly broth" or "course of conduct" claims. Such claims are founded on the argument that while no single practice of the dominant firm would give rise to a violation, the firm's practices, when examined together, may tend to exclude competitors. This argument is troubling because of its tendency to turn lawful practices like above-cost price discounting and package pricing into evidence of attempted monopolization, which creates a significant risk of deterring procompetitive conduct. As in *Intel*, the Commission might prefer to plead course of conduct claims under section 5 because the "unfair methods of competition" language of that statute is arguably less stringent than the "monopolization" language of section 2. It has been suggested, in fact, that the section 5 standard is closer to the "abuse of dominance" standard of the EU's Article 82 than it is to that of section 2.[39] One of the problems with the "course of conduct" theory is the practical difficulty of designing an antitrust compliance program that would account for it, since a practice that is procompetitive or anodyne in most circumstances may, under the course of conduct theory of harm, be anticompetitive when analyzed in conjunction with other practices. The Commission should make clear that it will not attempt to include in course-of-conduct cases allegations regarding practices that have previously been held to be procompetitive under Sherman Act precedent.[40]

Commissioner Rosch has suggested that the FTC might next turn its attention to dynamic effects

cases, that is, cases in which dominant firm conduct could negatively affect long-term innovation incentives.[41] Dynamic effects are rapidly becoming a focus of antitrust interest, but it is not clear that the best-established econometric tools, which tend to focus on static price effects, are well-suited to mapping the shifting incentives in innovation markets. For this reason, it may be that dynamic effects cases are better treated under section 5 than under section 2, since the error rate in these cases may be higher. Again, however, the Commission seems to want to quarrel with existing section 2 precedent. Commissioner Rosch has specifically criticized Justice Scalia's opinion in *Verizon v. Trinko*[42], which he calls "arguably the most direct attempt to account for dynamic concerns," for allegedly suggesting that antitrust enforcers "ought to be deferential to firms with monopoly power." Counseling in this area will be challenging until the Commission articulates its views more clearly, but it seems clear that dominant firms will once again be the primary enforcement target.

Conclusion

Critics have complained that the FTC's failure to provide clear and administrable section 5 standards could have a chilling effect on businesses and result unwittingly in the suppression of procompetitive conduct. This concern is not without foundation when one considers that the Commission appears to be moving to increase its institutional authority in several areas and that agency leaders have made no secret of their unhappiness with recent decisions of the federal courts narrowing the effective reach of the Sherman Act. Indeed, observers may one day look back at the appointment of Chairman Leibowitz as marking the end of a long period of modesty in antitrust enforcement.

There are, however, a number of factors that will tend to limit the Commission's section 5 ambitions, including a body of somewhat unfavorable precedent. "Trust us, we're the FTC" has not been a successful rhetorical position for the agency in the past. Further, Chairman Leibowitz and Commissioner Rosch appear to recognize that it is incumbent upon the FTC to "fill the doctrinal vacuum" regarding the scope of section 5 by giving the business community clear notice of the kinds of conduct that the Commission is likely to regard with suspicion. As discussed above, while the Commission has, perhaps, overreached on remedies, it should be credited with making a transparent and intellectually honest effort to set forth its views and put businesses on notice regarding the types of cases it is likely to bring under section 5.[43] Given the practical limitations on the Commission's use of section 5 and its own recognition of its obligation to provide as much clarity and predictability as possible, the fear that the agency will become a "national nanny" seems largely unfounded.

It could be some time before the federal courts get an opportunity to speak once again to the parameters of section 5.[44] In the interim, counseling clients regarding section 5 will necessarily be an uncertain process, since so much of the current "law" in this area is in the form of consent

decrees and public pronouncements by the Commissioners. This is not say, however, that a preliminary assessment cannot be made of the kinds of conduct that are likely to attract Commission attention. Dominant firms will be in the crosshairs, as will firms that abuse the SSO process. The Commission will focus on cases where the consumer harm is evident. And invitations to collude and other practices that raise the specter of horizontal price fixing will be punished. Despite the facts that the Commission's remedies under section 5 are principally prospective and that a section 5 consent decree has no collateral estoppel effect in follow-on private actions, clients should be advised that they nonetheless face exposure to follow-on actions under state consumer protection laws in the unhappy event that they are found to have violated section 5.

Addendum: On June 21, 2010, the FTC and Intel announced that they had jointly agreed to suspend the FTC's administrative trial proceedings until July 22, 2010, to give the parties a window in which to negotiate a possible consent decree. The terms of any such decree will be scrutinized for the light they might shed on the strength of the FTC's case and the ongoing debate over the Commission's willingness to seek extraordinary remedies in cases involving dominant firm conduct.

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1 In its entirety, the statute reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1).

2 The Commission's complaint also asserts claims under section 2 of the Sherman Act. *See* Federal Trade Commission complaint against Intel Corp., FTC Docket No. 9341, December 16, 2009.

3 The court in *Ethyl Corp. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984), observed that "Congress, in the process of drafting section 5, gave up efforts to define specifically what methods of competition and practices are competitively harmful and abandoned a proposed laundry list of prohibited practices for the reason that there were too many practices to define and many more unforeseeable ones were yet to be created by ingenious business minds."

4 *See* Neil W. Averitt, *The Meaning of 'Unfair Methods of Competition' In Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 231-35 (1979) (analyzing the legislative history of the FTC Act with particular reference to section 5).

5 *See* Maureen K. Ohlhausen, *The FTC Complaint against Intel Corporation: Implications for Consumer Protection*, CPI Antitrust Journal, April 2010 ("the FTC is busy trying to remove limits on its remedial powers through legislation in Congress…That legislation, the Consumer Financial Protection Agency Act of 2009, would greatly expand the FTC's ability to undertake

enforcement action and impose civil penalties in competition and consumer protection matters…").

6 Statement of William E. Kovacic before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance (March 17, 2010) ("In my view, the existing consequences attendant to finding that an act or practice is unfair or deceptive under the FTC Act are generally appropriate and are consistent with the goal of developing FTC law to establish new doctrine and to reach new and emerging problems.")

7 405 U.S. 233 (1972).

8 *Id.* at 238.

9 630 F.2d 920 (2d Cir. 1980).

10 637 F.2d 573 (9th Cir. 1980).

11 729 F.2d 128 (2d Cir. 1984).

12 630 F.2d at 927.

13 *Id.* at 925.

14 637 F.2d at 574.

15 *Id.* at 575.

16 *Id.* at 577.

17 729 F.2d at 128.

18 *Id.* at 137 ("As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.")

19 Statement of the Federal Trade Commission, In the Matter of Negotiated Data Solutions LLC, File No. 051-0094.

20 In an earlier case involving alleged abuse of a standards-setting process, the Commission had brought claims under both section 2 and section 5, but specifically disclaimed any argument that section 5 reached practices beyond the scope of section 2. *Rambus v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008) ("In this case under section 5 of the FTC Act, the Commission expressly limited its theory of liability to Rambus's unlawful monopolization of four markets in violation of

section 2. Therefore, we apply principles of antitrust law developed under the Sherman Act.")

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Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, FTC File No. 051-0094; Dissenting Statement of Commissioner William E. Kovacic, In the Matter of Negotiated Data Solutions LLC, FTC File No. 051-0094.

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April 24, 2008, Letter of Gilbert F. Whittemore, Chair, ABA Section of Science & Technology Law, re: Negotiated Data Solutions LLC, FTC File No. 051-0094.

23

Federal Trade Commission Press Release, March 4, 2009, *National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition*.

24

Cecilia Kang and Steven Mufson, *U.S. files antitrust suit against Intel, alleges unfair tactics used against rivals*, Washington Post, December 17, 2009 (quoting Mr. Melamed).

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See Herbert Hovenkamp, *The FTC's Anticompetitive Pricing Case Against Intel*, CPI Antitrust Journal, February 2010 ("The FTC's proposed remedies concerning Intel's pricing practices are problematic … Only if the FTC's remedy is limited to truly anticompetitive acts and does not seek to impose irrational pricing constraints can the FTC be confident that its pricing order will make the market in question more competitive.")

26

Federal Trade Commission Press Release, March 3, 2010, *FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses*.

27

April 8, 2010, Press Release, *Nouveau Vision Files Class Action Antitrust Lawsuit Against Transitions Optical, Essilor, and ELOA*.

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See Daniel Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, CPI Antitrust Journal, February 2010 ("Commissioner Rosch's principles for Section 5 independence come across more as quarrels with the interpretation that some judges have given the Sherman Act than justifications founded in the institutional structure of the FTC and its comparative advantages over Article III courts. If the FTC is to succeed in revitalizing an independent Section 5, it will need to take a more cautious, robust, and ultimately strategically-minded approach. Instead of confronting the courts with their supposed errors under the Sherman Act, the FTC will need to convince the courts why the FTC should sometimes — although not always — be allowed to walk a different path.")

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Under 15 U.S.C. § 21(c), defendants seeking reversal of Commission orders "may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business." Section 21(c) effectively allows defendants to forum shop their appeals; in a case testing the scope of the FTC's section 5 authority, a defendant could choose to file its appeal in the Second Circuit or the Ninth Circuit, both of which have section 5 precedent favorable to defendants, assuming that the appealing defendant "carried on business" in those circuits.

While the Commission's interpretation of section 5 is theoretically entitled to a degree of deference on review, in practice this deference is not always dispositive. *See, e.g.*, *Ethyl Corp.*,

729 F.2d at 136 ("Although [the Commission's] interpretation of section 5 is entitled to great weight, it is the function of the court ultimately to determine the scope of the statute on which the Commission's jurisdiction depends.")

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Federal Trade Commission Workshop on Section 5 of the FTC as a Competition Statute, October 17, 2008, Remarks of Robert Pitofsky, Official Transcript at 64. Mr. Pitofsky was Chairman of the FTC from 1995-2001.

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See presentation, *The Application of Section 5 of the Federal Trade Commission Act*, Commissioner William E. Kovacic, Federal Trade Commission, at the ABA Fall Forum, Washington, D.C., November 12, 2009.

32

Federal Trade Commission Workshop on Section 5 of the FTC as a Competition Statute, October 17, 2008, Remarks of William Kovacic, Official Transcript at 4-5 ("If you ask the basic question, why have two competition agencies in the United States, a critical consideration was to have an institutional design that was predicated upon maintaining different forms of adjudication, a different mix of policy-making tools and, quite importantly, a different mandate. If you pull Section 5 out of the mix of what the Commission does, I think you begin to ask profound questions about whether the institution ought to exist at all.")

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Daniel A. Crane, *Antitrust Modesty*, Review of *The Antitrust Enterprise: Principle and Execution*, by H. Hovenkamp, 105 Mich. L. Rev. 1193 (2007).

34

See, e.g., Daniel A. Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, CPI Antitrust Journal, February 2010 ("Courts are most likely to defer to administrative agency judgments in cases involving commercial practices about which the courts have not developed a deeply rooted body of precedent … Conversely, courts are least likely to defer when they have already spoken to the exact practice on many occasions and developed a time-tested body of liability rules to govern it. Refusal by the agency to honor the judicially created precedents may look — to judges at least — like intransigence.")

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See, e.g., Statement of Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corporation, FTC Docket No. 9341 ("[C]oncern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a "free pass" under antirust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement.") This claim has been criticized as a disingenuous reading of the Court's section 2 precedents. *See* Josh Wright, *Section 5, Collateral Consequences, and Counting Unicorns*, Truth On The Market Blog, April 29, 2010 ("the Rosch/Leibowitz claim that antitrust law has been narrowed *exclusively* because of concerns about private plaintiffs is dramatically overstated at best, and at worst, blatantly inconsistent with the Supreme Court's jurisprudence which has been remarkably consistent in focusing on the inherent difficulties associated with identifying anticompetitive conduct when discussing error costs and the role they play in setting antitrust rules.") Wright is Assistant Professor of Law at George Mason University.

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It should be noted, however, that many states have consumer protection acts (CPAs), sometimes known as "Little FTC Acts," that may closely track the language of section 5. These

CPAs often offer much broader remedies to plaintiffs than those available under section 5, including treble damages and punitive damages. There is therefore some risk that a section 5 judgment or consent decree could invite follow-on actions, though again, a section 5 judgment would have no collateral estoppel effect in a CPA action.

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Promoting Innovation: Just How 'Dynamic' Should Antitrust Law Be?, Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the USC Gould School of Law 2010 Intellectual Property Institute, March 23, 2010.

38

In his dissenting statement, Commissioner Kovacic noted that N-Data had indicated during negotiations that it would accept a settlement, and observed that "[t]he prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely." Dissenting Statement of Commissioner William E. Kovacic, In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051-0094.

39

Herbert Hovenkamp, The FTC's Anticompetitive Pricing Case Against Intel, CPI Antitrust Journal, February 2010, at 4.

40

For an extended consideration of this problem, *see* Daniel A. Crane, Monopoly Broth Makes Bad Soup, University of Michigan John M. Olin Center for Law & Economics, Working Paper 09-020 ("[T]he 'monopoly broth' maxim is subject to misuse … There exists — or should exist — a class of competitive acts that are per se lawful and cannot become unlawful by their combination with other acts.")

41

Remarks of J. Thomas Rosch, supra note 28.

42

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

43

See, e.g., Amanda Reeves, Conduct-Specific Tests? How the Federal Trade Commission Can Reframe the Section 5 Debate, CPI Antitrust Journal, February 2010. Ms. Reeves is attorney-advisor to Commissioner Rosch.

44

The FTC has said that it aims to complete its recently-overhauled administrative process and issue a decision in *Intel* within 20 months. Statement of Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corporation, FTC Docket No. 9341. Even if the Commission meets this timeframe, a court of appeals opinion could not reasonably be expected before late 2012 at the earliest.

Legal Topics:

Antitrust Violations as Unfair Competition

Unfair Competition Law