

## Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China

***Editor's Note:** China's new Anti-Monopoly Law (AML) came into effect in August 2008. Three government agencies have enforcement authority under parts of the AML. The Ministry of Commerce (MOFCOM) has responsibility for merger notification and merger control. Indeed, in the last six months, MOFCOM already has intervened in a cross-border deal involving brewers InBev N.V./S.A. and Anheuser-Busch Companies, Inc., and is reviewing Coca-Cola Companies' proposed acquisition of China Huiyuan Juice Group Limited.*

*Mr. Shang Ming is the Director General of MOFCOM's Anti-Monopoly Bureau. In this interview with The Antitrust Source, DG Shang discusses the structure, focus, and future of MOFCOM's merger mission. He also graciously provides helpful history and perspective on the AML.*

*From 2003 to August 2008, when the Anti-Monopoly Bureau was established, DG Shang chaired the Anti-Monopoly Office while serving as the Director General of the Department of Treaty & Law. DG Shang has written extensively on competition law and foreign trade. Among other works, his recent books include Merger Control in EU and Several Member States: Legislation & Enforcement Practice; Anti-Monopoly Law of the People's Republic of China: Interpretations and Applications; Regulating Abuse of Dominance by Anti-Trust Law; and Anti-Monopoly Laws and Practices of Major Countries and International Organizations.*

*During his service in the government that began in 1982, DG Shang long has engaged in foreign trade and economic affairs, as well as work on commercial laws, including the negotiation of bilateral and multilateral trade and investment agreements, intellectual property protection agreements, and anti-dumping agreements; legislation on market circulation, foreign trade, foreign investment, and foreign economic cooperation; government consultations on important trade disputes and intellectual property protection; WTO law and dispute settlement; and guidance for investigation and responding in anti-dumping, countervailing, and safeguard measure cases. Since August 2008, DG Shang has focused on antimonopoly review of mergers.*

*In addition to his government work, DG Shang serves as vice president of the China International Law Association, the China International Economic Law Research Institute, and the China International Economic Law Association. He is the vice chairman and an arbitrator of the China International Economic and Trade Arbitration Commission, a research fellow of the International Law Research Center under the Chinese Academy of Social Sciences, and an adjunct professor of the University of International Business and Economics and the China University of Political Science and Law.*

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**THE ANTITRUST SOURCE:** China's new Anti-Monopoly Law (AML) was drafted carefully after many years of thoughtful debate that involved leading competition officials, scholars, economists, and practitioners from throughout the world. Could you describe your involvement in the drafting of the law and its legislative enactment?



*Shang Ming*

**DIRECTOR GENERAL SHANG MING:** The Ministry of Commerce (MOFCOM) always has attached great importance to its antimonopoly work, and in 2003 took over the assignment of drafting the AML. During the legislative process, MOFCOM finished a draft of the AML, based on extensive research and debate, and submitted it to the State Council in February 2004. Thereafter, MOFCOM cooperated closely with the Legislative Affairs Office of the State Council and the National People's Congress throughout the process of legislative deliberation, actively participating in legislative discussions and promoting the adoption of the Anti-Monopoly Law as early as possible.

**ANTITRUST SOURCE:** We understand that that MOFCOM's Anti-Monopoly Bureau officially was organized in early September and comprises six divisions with distinct responsibilities. Could you please explain the functions of the divisions?

**DG SHANG MING:** At present, the Bureau consists of six divisions, namely the General Affairs Division, Competition Policy Division, Investigation Division I, Investigation Division II, Supervision and Law Enforcement Division, and Economic Analysis Division. The General Affairs Division is responsible for administrative affairs of the Bureau and external liaison. The Competition Policy Division is responsible for drafting relevant regulations on the concentrations of undertakings and formulating relevant rules and regulatory documents. Investigation Division I and Investigation Division II are responsible for antimonopoly review of filings of concentrations of undertakings. The Supervision and Law Enforcement Division mainly is responsible for handling and investigating reported concentrations of undertakings, and punishing non-compliance with the law. The Economic Analysis Division is responsible for conducting economic analysis on concentrations of undertakings in the process of antimonopoly review. In addition, the Bureau also takes the lead in organizing consultation and negotiation of competition-related articles in multilateral agreements, and is responsible for international exchange and cooperation on multilateral competition policy.

**ANTITRUST SOURCE:** In addition to enforcement of the merger and acquisition provisions of the AML, we understand that MOFCOM will undertake day-to-day working functions for the Anti-Monopoly Commission (AMC) that was established recently pursuant to the new law. Could you please explain who will serve as the members of the AMC, and the specific functions and mission of the AMC. In addition, what kinds of activities will MOFCOM undertake on behalf of the AMC, in the contexts of both domestic enforcement and international cooperation?

**DG SHANG MING:** In order to implement the AML, the State Council has formed the Anti-Monopoly Commission, which is chaired by Vice Premier Wang Qishan and includes member departments, such as the National Development and Reform Commission, MOFCOM, and the State Administration for Industry and Commerce, etc. The AMC under the State Council is responsible for the organization, coordination, and supervision of antimonopoly-related work, specifically performing the following duties: the study and formulation of competition policies; the organization of research, assessment of, and the preparation of reports regarding the overall competitive condi-

tions of markets; the drafting and promulgation of antimonopoly guidelines; coordination of anti-monopoly law enforcement; and other duties as stipulated by the State Council. The AMC has no specific law enforcement functions.

Currently, the Anti-Monopoly Bureau of MOFCOM has the following functions: conducting anti-monopoly review of concentrations of undertakings according to law; providing guidance for domestic enterprises taking part in overseas antimonopoly litigation; participating in international exchanges; and cooperation on multilateral competition policy. In addition, the Bureau also assumes day-to-day work of the AMC under the State Council.

**ANTITRUST SOURCE:** Before the enactment of the AML, MOFCOM had conducted reviews of certain mergers involving foreign investors under the old provisional rules and then the revised foreign M&A rules. In what ways is that experience useful to the Bureau's merger reviews under the AML? Is it clear that the AML and the Notification Thresholds Regulation superseded the relevant rules under the M&A Regulation? Will this be confirmed formally in some way? How will MOFCOM's procedures under the AML differ from those it used under the foreign M&A rules?

**DG SHANG MING:** In 2003, six ministries and commissions jointly promulgated the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (which was amended and replaced by the *Regulations on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors*, promulgated in 2006), whereby MOFCOM began antimonopoly review of mergers and acquisitions. From 2003 to the end of July 2008, MOFCOM accepted more than 600 notifications of mergers and acquisitions by foreign investors, and conducted substantive reviews of several important notifications. During these substantive reviews, MOFCOM conducted many hearings and meetings, and sent out questionnaires to competitors of the parties to the transactions, as well as to consumers and industrial associations. Through more than four years of such enforcement practice, MOFCOM has made positive progress in terms of antimonopoly legislation and law enforcement, gained certain experience, and cultivated professionals, which provide a solid foundation for better fulfilling its antimonopoly functions. After the AML and the *Regulations of the State Council on Notification Thresholds for Concentrations of Undertakings* came into effect, they replaced the relevant provisions in the *Regulations on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors*, which will be amended by the relevant departments according to statutory procedures so that those antimonopoly provisions will be repealed. MOFCOM has conducted antimonopoly reviews of concentrations of undertakings pursuant to the newly enacted laws and regulations.

**ANTITRUST SOURCE:** Mr. Shang, as you know, concern was expressed during the drafting of the law regarding whether the AML would be applied to foreign companies in the same manner as it is applied to Chinese companies. Now that the law is in force, and some foreign mergers have been submitted for review, could you please comment on whether decisions on mergers involving foreign parties will differ in any way from decisions on purely domestic ones?

**DG SHANG MING:** The enactment of China's AML is expected to permit enterprises of all types to develop and expand through fair competition, and at the same time to prevent the elimination of competition by monopolistic actions, so as to facilitate the winning of the superior and the weeding out of the inferior, and transform the mode for economic growth. It should be noted that the AML will be uniformly and equally applicable to both domestic and foreign enterprises of all

types without any discriminatory treatment. In order to ensure the consistency of antimonopoly legislation and the uniform implementation of antimonopoly laws, existing antimonopoly provisions should conform to the AML, and no antimonopoly legislation or enforcement will target certain types of enterprises.

**ANTITRUST SOURCE:** Turning to questions about specific procedural and substantive issues faced by parties filing merger notifications, is there a uniform standard of “completeness” that MOFCOM applies to determine whether to accept a filing? Is there any limitation on the number of requests for additional information that MOFCOM may make, or the amount of time that MOFCOM may take, before its acceptance of the filing? If parties have questions about the procedure or the specific information that should be included in a filing, does the Bureau provide informal consultation by telephone or email to assist the filing parties in ensuring their filings are complete and their understanding of the thresholds is correct?

**DG SHANG MING:** Article 23 of the AML provides that undertakings filing notifications of concentration shall submit the following documents and information: (1) the notification letter; (2) the explanation regarding the impact that the concentration may have on the competition in the relevant market; (3) the concentration agreement; (4) the financial accounting reports of the undertakings involved in the concentration in the preceding accounting year audited by a certified public accountant; (5) other documents and information required by the Anti-Monopoly Enforcement Authority under the State Council. This provision, however, only stipulates in principle the documents and information to be submitted for a notification without giving a detailed list of documents and information. As a basic law that guides antimonopoly enforcement, the AML cannot provide greater detail, so it is impossible to narrow down to a very detailed and specific degree the information that may be required in connection with any given transaction. Unlike some other types of cases, every merger filing case is different—for example, the nature of the parties, the transaction, or the industries involved vary considerably between cases. Therefore, it is difficult to adopt a “one size fits all” approach to setting a uniform requirement on notification materials for all cases. When dealing with a specific case, the Anti-Monopoly Bureau will issue specific requirements for notification materials according to the feature of each case and its effect upon competition in the market. Actually, this is exactly the meaning of Article 23 (5) of the AML: “other information required by the Anti-Monopoly Enforcement Authority under the State Council.”

As for concentration notification cases, MOFCOM implements a pre-notification consultation system. When the notifying party has any questions about the notification, it may request a meeting for negotiation or consultation with the Anti-Monopoly Bureau by sending its questions in writing to the Bureau. After receipt of such a request, the Anti-Monopoly Bureau will study the issues raised, and reply to the notifying party face to face. After the notification of a concentration of undertakings is officially accepted, if a notifying party has any doubts or questions, it may communicate with the Anti-Monopoly Bureau via various means, such as email or telephone, depending on the circumstances.

**ANTITRUST SOURCE:** The concentration provisions of the AML use fairly general language regarding both the review procedures and the substantive standards to be applied. As you know, many other jurisdictions have enacted regulations or established procedural rules to implement their statutes, and issued guidelines and informal interpretations to provide detailed explanations of the agencies’ processes and analytical approaches to merger reviews. Do you foresee the enact-

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ment of more implementing regulations or the publication of other sources of guidance for parties and practitioners seeking to understand the process? For example, will MOFCOM provide explanations on such matters as how turnover should be calculated, or the Bureau's approach to defining relevant markets, beyond the general definition in Article 12 of the law?

**DG SHANG MING:** Although the AML contains only fifty-seven Articles, it is operational to a relatively high degree as a law. In practice, we need gradually to develop experience and further improve and fine-tune our legislative and enforcement work. The *Regulation of the State Council on Notification Thresholds for Concentrations of Undertakings*, coming into force upon promulgation by the State Council on August 3, 2008, contains provisions regarding the notification thresholds as well as investigation of concentrations of undertakings below the notification thresholds. Of course, in order to implement properly the AML, having only one such implementing regulation will not be enough. We are doing research and studies in connection with our practical experience, and implementing guidelines, rules, regulatory documents, and working rules under the AML are in the process of being drafted and will be promulgated in due time.

**ANTITRUST SOURCE:** In addition to reviewing the documents submitted by the parties to a transaction, what kinds of investigative methods are currently employed by MOFCOM? How much weight will MOFCOM give to opinions from competitors and customers?

**DG SHANG MING:** In antimonopoly reviews of concentrations of undertakings, MOFCOM will, depending on the circumstances presented by a given case, investigate and gather facts and evidence from relevant parties, including relevant governmental authorities, functional departments, trade associations, experts, parties to the transaction, competitors, upstream and downstream enterprises, and consumers. Various means are employed, including primarily meetings, hearings, telephone inquiries, written solicitations of opinions, on-site investigations, studies, and questionnaires. During the review process, MOFCOM duly will ensure the rights of competitors, consumers, and other interested parties to state their opinions, and also will ensure that decisions will be grounded on sufficient facts.

**ANTITRUST SOURCE:** What standards will the Bureau apply to determine whether a proposed concentration presents sufficiently substantial issues to subject it to further examination beyond the initial thirty-day period? Do you anticipate that MOFCOM's approach will be comparable to the approach taken by any other jurisdictions, such as the European Union or the United States? Will MOFCOM consider factors other than the merger's effect on price and, if so, what are the other factors and how much weight will they be given? Once a matter is in the ninety-day second phase, what circumstances would cause the Bureau to extend that time limit, as is permitted under Article 26, up to an additional sixty days?

**DG SHANG MING:** Article 27 of the AML provides that the following factors shall be considered in the review of concentrations: (1) The market shares of the undertakings involved in the relevant market and their ability to control the market; (2) The degree of market concentration in the relevant market; (3) The impact of the concentration on market entry and technical progress; (4) The impact of the concentration on consumers and other undertakings; (5) The impact of the concentration on national economic development; and (6) Other factors affecting market competition as determined by the Anti-Monopoly Enforcement Authority under the State Council.

During the first stage review of the concentrations of undertakings, the Anti-Monopoly Bureau will consider all those factors as a whole, and, if there are likely to be competition concerns which need further investigation, a second stage review will be initiated in accordance with the law. In this regard, our approach is similar to those of other jurisdictions, such as the European Union and the United States.

According to Article 26 of the AML, a second stage review shall be completed within ninety days from the date of the decision for such further review. Under any of the following circumstances, the Anti-Monopoly Enforcement Authority under the State Council may extend the time limit, provided that the extension does not exceed sixty days at the maximum: (1) The undertakings agree to extend the time limit for the review; (2) The documents submitted by the notifying undertakings are inaccurate and need further verification; or (3) The relevant circumstances have significantly changed after notification by the undertakings.

*On November 18, 2008,*

*the Ministry of*

*Commerce decided*

*to grant a conditioned*

*approval of InBev's*

*acquisition of*

*Anheuser-Busch*

*Companies (AB) with*

*certain restrictive*

*conditions attached*

*. . . . This is the first*

*such conditioned*

*approval given by*

*MOFCOM in its review*

*of concentrations*

*since 2003.*

**ANTITRUST SOURCE:** Could you please describe the extent to which MOFCOM intends to rely on hearings in its investigation of mergers and acquisitions? Will hearings be public or confidential? Are there certain issues that you believe are likely to require a hearing when they arise in the course of a merger review? Is it possible that hearings might be conducted during the first stage review in some cases? Do you anticipate that MOFCOM will issue procedural rules or guidelines on the conduct of hearings?

**DG SHANG MING:** Hearings are one of the means for the Ministry of Commerce to obtain facts, conduct investigation and gather evidence, and ensure that the relevant parties are able to state their opinions fully. Depending on the specific circumstances, complexity, and importance of each case, the necessity, form, and timeline of hearings may differ. We currently are drafting detailed procedures and rules for hearings.

**ANTITRUST SOURCE:** In concentrations that raise concerns, will MOFCOM seriously consider remedies to alleviate those concerns and still allow the remainder of the merger to proceed in order to realize procompetitive benefits? If so, must those remedies be structural, such as divestiture, or will MOFCOM consider behavioral undertakings? Does MOFCOM intend to impose penalties on transactions that are consummated during the course of MOFCOM's review, especially foreign-to-foreign mergers that may have been cleared already by other jurisdictions? If so, what kinds of penalties are likely?

**DG SHANG MING:** Article 29 of the AML provides that "where a concentration is not prohibited, the Anti-Monopoly Enforcement Authority may decide to attach restrictive conditions to offset the negative impact of the concentration on competition." On November 18, 2008, the Ministry of Commerce decided to grant a conditioned approval of InBev's acquisition of Anheuser-Busch Companies (AB) with certain restrictive conditions attached, and issued an announcement, [2008] No. 95, to that effect. This is the first such conditioned approval given by MOFCOM in its review of concentrations since 2003. The restrictive conditions include that the 27 percent equity interest currently held by AB in Qingdao Beer shall not be increased; any change to InBev's controlling shareholder or any change to the shareholders of such controlling shareholder shall be promptly notified to the MOFCOM; the 28.56 percent equity interest currently held by InBev in Zhujiang Beer shall not be increased; and no effort or attempt shall be made to acquire any shares in Huarun Snow Beer (China) or Beijing Yanjing Beer. The purpose of those restrictive conditions

is to mitigate any adverse impact that such merger may have on future competition in the Chinese market. MOFCOM will, depending on the specific circumstances of the case, elect to take structural remedies or behavioral remedies or, in certain cases, a combination of both.

According to Article 21 of the AML, a prior notification shall be filed with the Anti-Monopoly Enforcement Authority by the undertakings if the concentration exceeds the thresholds of notification stipulated by the State Council. The concentration transaction shall not be implemented without prior notification. Article 48 of the AML provides that where undertakings implement concentrations in violation of the relevant provisions of this Law, the Anti-Monopoly Enforcement Authority under the State Council shall order the undertakings concerned to stop implementing the concentration, to dispose of its stock, to transfer of its business within a time limit, and adopt other necessary measures to restore to the condition before the concentration. It also may impose a fine of up to RMB 500,000.

Where any undertaking fails to report any transaction that should be notified under the law, MOFCOM will render a decision that takes into account the above stipulations of the AML, the specific circumstances of the case, approaches taken by other jurisdictions, and the enforceability of the decisions. The measures taken in such cases will be more or less similar to that taken by other countries, but may differ in degree.

**ANTITRUST SOURCE:** Director-General Shang, we are most grateful for the opportunity to have the benefit of your views on these important issues. ●

# *In re Hydrogen Peroxide Antitrust Litigation* Bleaches Clean the Class Certification Standard

**Richard A. Ripley and Mark J. Glueck**

With its December 30, 2008, decision in *In re Hydrogen Peroxide Antitrust Litigation*,<sup>1</sup> the Third Circuit joins a growing list of U.S. Courts of Appeals that have clarified the responsibilities that district courts face in determining the suitability of a claim for class treatment. The features that distinguish the *Hydrogen Peroxide* opinion from the decisions by the Seventh Circuit in *Szabo*,<sup>2</sup> the Second Circuit in *Initial Public Offerings*<sup>3</sup> and the First Circuit in *Canadian Export*<sup>4</sup> are: (1) the unambiguous instructions it gives district courts as to the degree of fact finding necessary under Rule 23 of the Federal Rules of Civil Procedure; (2) its rejection of the “battle of experts” argument which class plaintiffs have invoked with metronomic regularity; and (3) its acknowledgment that the “*Bogosian* short-cut”—which emerged from a thirty-year old Third Circuit antitrust decision<sup>5</sup>—is no longer a standalone basis for satisfying Rule 23(b) on the issue of classwide antitrust impact.

The Third Circuit’s decision will undoubtedly influence the timing, tactics, and evidentiary record of future class certification disputes in that circuit, as *Szabo*, *IPO*, and *Canadian Export* did in their respective circuits. The *Hydrogen Peroxide* opinion, however, likely will enhance and focus the role of expert testimony in Rule 23 analysis, an area of particular importance in antitrust claims.

## ***Hydrogen Peroxide***

**At the District Court.** *In re Hydrogen Peroxide Antitrust Litigation* encompasses price-fixing claims brought by direct and indirect purchasers of hydrogen peroxide, filed as a follow-up to criminal investigations by U.S. and E.U. regulators of eighteen hydrogen peroxide manufacturers.<sup>6</sup> The direct purchasers moved for certification of a national class. In response, the defendants did not “specifically contest” the plaintiffs’ Rule 23(a) arguments but instead focused their attack on whether maintenance of the suit as a class action would satisfy Rule 23(b)(3)—that is, whether “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>7</sup>

■ **Richard Ripley** is a partner at Howrey LLP. He practices in the area of complex litigation, with particular focus on antitrust/competition law and class action defense. Mark Glueck is Chairman of CapAnalysis, an economic and financial consulting group. His experience spans the spectrum of economic consulting in litigation, including issues related to class certification.

<sup>1</sup> 552 F.3d 305 (3d Cir. 2008) (*Hydrogen Peroxide II*). (The authors represented one of the defendants in an unrelated matter.)

<sup>2</sup> *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

<sup>3</sup> *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

<sup>4</sup> *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

<sup>5</sup> *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977).

<sup>6</sup> See *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 166 (E.D. Pa. 2007) (*Hydrogen Peroxide I*) (citing FED. R. CIV. P. 23(b)(3)).

<sup>7</sup> *Id.* at 169–72.

At the outset of its Rule 23(b) analysis, the district court carefully articulated what it believed were the limits of any inquiry it could conduct into the merits of the plaintiffs' claim in resolving the class certification motion. On this threshold issue, the district court observed that the instructions in the Supreme Court's *Eisen*<sup>8</sup> and *Coopers & Lybrand*<sup>9</sup> decisions "are seemingly difficult to reconcile."<sup>10</sup> Acknowledging that "some inquiry" into the merits was necessary, the district court nevertheless ruled that, under Third Circuit law, the inquiry should be limited "to the minimum necessary."<sup>11</sup> Consequently, the district court held "[i]t will not do here to make judgments about whether the plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants."<sup>12</sup>

The court extended this reasoning to its consideration of the defendants' motion to strike the opinion of the plaintiffs' class expert under *Daubert*.<sup>13</sup> Defendants, based on the findings of their expert, argued that the plaintiff expert's conclusions were unreliable in four areas: that (1) the chemicals at issue were fungible, undifferentiated commodity products; so (2) price was the most significant means of competition; (3) the pricing structure for the chemicals was industry-wide; and (4) as a result, an agreement to control prices would hinder competition across the board.<sup>14</sup> Characterizing the defendants' class expert's conflicting conclusions as "of no moment" to its *Daubert* analysis, the court held that, at the class certification stage, the plaintiff expert's opinion passes muster unless shown to be "junk science."<sup>15</sup> "We are not permitted," the court observed, "in addressing defendants' *Daubert* motion, to weigh the relative credibility of the parties' experts."<sup>16</sup> Under this standard, the court held that plaintiff's expert "identified a generally accepted methodology which is applicable to the class" and had probative value; therefore the court would consider his findings in addressing the Rule 23(b)(3) factors at issue.<sup>17</sup>

With respect to the issue of antitrust impact, the court determined that a presumption of class-wide impact was appropriate under the Third Circuit's 1977 decision in *Bogosian v. Gulf Oil Corp.*,<sup>18</sup> which held that if plaintiffs alleged a nationwide conspiracy successfully increased prices, then it was likely that each member of the class would have made purchases at the artificially raised price.<sup>19</sup> Further, the court held that the plaintiffs' expert demonstrated sufficient common impact, as summarized above. The court rejected the defendants' argument that, even at the

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<sup>8</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

<sup>9</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. . . . The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits," (quoting 15 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976))).

<sup>10</sup> *Hydrogen Peroxide I*, 240 F.R.D. at 169–70.

<sup>11</sup> *Id.* at 170 (citing *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152 (3d Cir. 2002)).

<sup>12</sup> *Id.*

<sup>13</sup> *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

<sup>14</sup> *Hydrogen Peroxide I*, 240 F.R.D. at 170–72.

<sup>15</sup> *Id.* at 170.

<sup>16</sup> *Id.* at 171.

<sup>17</sup> *Id.*

<sup>18</sup> 561 F.2d 434, 455 (3d Cir. 1977).

<sup>19</sup> See 240 F.R.D. at 173 (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 (E.D. Pa. 2001) (applying *Bogosian* presumption of impact); *Lumco Indus. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 173 (E.D. Pa. 1997) (same)).

class certification stage, plaintiffs must establish that each class member has, in fact, been injured.<sup>20</sup>

On the issue of damages, the defendants observed that the plaintiffs' expert's analysis was incomplete but the district court held the incomplete status of the damage analysis was not fatal to the plaintiffs' motion.<sup>21</sup> The plaintiffs' burden was limited to whether they had identified an accepted method of determining damages on a classwide base, a burden the court found the plaintiffs had met.<sup>22</sup>

**The Third Circuit.** The Third Circuit granted the defendants' Rule 23(f) motion for interlocutory appeal in order to consider "the standards a district court applies when deciding whether to certify a class."<sup>23</sup> The court broke this question into three procedural issues: (1) the quantum of evidence necessary to meet Rule 23 requirements; (2) the scope of a merits inquiry the court must conduct to resolve factual and legal disputes regarding those requirements; and (3) the role of expert testimony in the court's analysis.<sup>24</sup>

The court observed that the requirements set out in Rule 23 are "not mere pleading rules"; rather, these requirements frame how the courts are to test the factual sufficiency of a class certification request. The movant bears the burden of meeting those requirements by a preponderance of the evidence, and that burden will not be met by an assurance of how the movant intends or plans to meet these requirements.<sup>25</sup> Thus, the court rejected the notion that a plaintiff can satisfy Rule 23 by making a "threshold showing."<sup>26</sup>

Next, the court instructed that "[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met."<sup>27</sup> The language in *Eisen* that gave the district court pause—"nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."<sup>28</sup>—is "best understood," the Third Circuit explained, "to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement."<sup>29</sup> The Third Circuit stated: "A contested requirement is not forfeited in favor of the party seeking class certification merely because it is similar or even identical to one normally decided by a trier of fact."<sup>30</sup> Consequently, a district court "errs as a matter of law" when it does not resolve, on an evidentiary basis, a factual dispute relevant to the Rule 23 requirements.<sup>31</sup>

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<sup>20</sup> *Id.* at 174 n.14.

<sup>21</sup> *Id.* at 175.

<sup>22</sup> *Id.*

<sup>23</sup> *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

<sup>24</sup> *Id.* at 307.

<sup>25</sup> *Id.* at 316, 318.

<sup>26</sup> *Id.* at 321–22.

<sup>27</sup> *Id.* at 316.

<sup>28</sup> 417 U.S. at 177.

<sup>29</sup> 552 F.3d at 317.

<sup>30</sup> *Id.* at 318.

<sup>31</sup> *Id.* at 320. The court also rejected the concept that, in antitrust claims, doubt as to whether to certify a class should be resolved in favor of allowing class treatment of the claims asserted. *Id.* at 321.

Those disputes include conflicting expert testimony.<sup>32</sup> The court held that “opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason.”<sup>33</sup> Instead, resolving conflicts presented by the experts’ testimony “may be integral to the rigorous analysis Rule 23 demands.”<sup>34</sup> The court acknowledged that weighing expert opinions may not be necessary in every case, but held that a district court must do so where the conflicting evidence is relevant to a Rule 23 requirement. Here, the defense expert’s dispute on characterizations of the relevant market and the alleged pricing structure demanded resolution by the district court, and its refusal to do so because of a perceived bar to resolving a “battle of the experts” at the class certification stage constituted reversible error.<sup>35</sup>

*The court acknowledged that weighing expert opinions may not be necessary in every case, but held that a district court must do so where the conflicting evidence is relevant to a Rule 23 requirement.*

Finally, the Third Circuit considered the district court’s application of the presumption of class-wide impact under *Bogosian*. Without abrogating the presumption, the Third Circuit concluded that presuming impact based solely on an “unadorned” price-fixing allegation “would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery.”<sup>36</sup> The plaintiffs had proffered its expert’s opinions to demonstrate independently the assertion of common impact that the presumption establishes, but the court of appeals observed that, in evaluating that evidence, the district court failed to consider the defense expert’s evidence submitted to undermine this presumption. Thus, it instructed the district court to review all the evidence pursuant to the clarified standards, and then “consider whether the reasoning in *Bogosian* is compatible with the record in this case.”<sup>37</sup>

### **The Post-Hydrogen Peroxide World**

**Timing of the Class Certification Motion.** *Hydrogen Peroxide II*’s unequivocal command that district courts resolve all genuine factual disputes regarding Rule 23 elements by weighing all probative evidence and make the necessary credibility assessments—without regard to that evidence’s role in the merits of the case—should cause discerning antitrust class plaintiffs to re-think the timing of the class certification motion. In the past, class plaintiffs opted for sooner rather than later, a decision that had both tactical and legal support. Plaintiffs found legal support in the pre-2003 version of Rule 23, which instructed courts to determine the suitability of class treatment “as soon as practicable after the commencement of an action”<sup>38</sup> and in case law that tilted in plaintiffs’ favor early class certification requests.<sup>39</sup> The tactical advantage of an early request is to bring

<sup>32</sup> *Id.* at 322–24.

<sup>33</sup> *Id.* at 323.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 325.

<sup>36</sup> *Id.* at 326 (citing FED. R. CIV. P. 23 advisory committee’s note, 2003 Amendments (“[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.”)).

<sup>37</sup> *Id.* The Third Circuit distinguished its *Linerboard* decision, *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), which affirmed class certification where the district court invoked *Bogosian*, because there the plaintiffs submitted evidence of common impact, but the court did not address whether opposing expert opinions would have been properly considered.

<sup>38</sup> The 2003 amendments replaced that language with “at an early practicable time.”

<sup>39</sup> *E.g.*, *Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975) (“If the court does choose to rule on class certification at an early stage of the litigation before the supporting facts are fully developed, then it should err ‘in favor and not against the maintenance of the class action, for [the decision] is always subject to modification . . .’”(citation omitted)).

about what the Third Circuit observed was often the “defining moment” of class actions that could sound the “death knell of the litigation, irrespective of the merits of the claims.”<sup>40</sup> This strategy now must be tempered by an assessment of when the record evidence is sufficiently robust to support the necessary fact finding that *Hydrogen Peroxide II* demands; failure to do so creates a significant risk that plaintiffs will not meet their Rule 23 burden, particularly in antitrust claims, which are likely to rely heavily on empirical data not in the plaintiffs’ possession, custody, or control. From the defendants’ perspective, a strategy of bright-line sequencing of class and merits discovery (which, in the past, courts seldom implemented) arguably lacks even a toehold of support following the Third Circuit’s decision. In addition, arguing against discovery of any merits issue might effectively concede that the issue is irrelevant to the Rule 23 analysis.<sup>41</sup>

**Simply put, Hydrogen Peroxide II will greatly expand the scope of evidentiary presentations.** **Tactical Considerations.** *Hydrogen Peroxide II* also should lay to rest either side’s attempts to oppose an evidentiary hearing on a class certification motion. The district court’s now explicit duty to assess credibility and persuasiveness should make the request for an evidentiary hearing a no-brainer. The Third Circuit’s reversal of class certification came in part due to the evidentiary record that the defendants compiled at the district court. Prudent parties will take the steps necessary to ensure that the record contains all their evidence on disputed Rule 23 elements and should consider proffers of evidence that the district court refuses to admit into evidence in order to preserve the record for appeal.

A related tactical consideration is the form of the evidentiary presentation. Given the persuasiveness/credibility discussion in the Third Circuit’s decision, a party arguably takes an unnecessary risk when its presentation does not provide the district court with an opportunity to make such observations—e.g., presentations limited to documents and written statements (affidavits or printed deposition transcripts). The district court is a fact finder—albeit in a limited context—and one cannot discount the impact of live testimony, particularly from lay witnesses. Further, the factual findings that resolve disputes relevant to Rule 23 assessment are reviewed under the abuse of discretion standard, which includes “a clearly erroneous finding of fact.”<sup>42</sup> Prevailing parties at the district court level will be a better position to defend those findings where they are embedded with in-person credibility assessments, which courts of appeals are more reluctant to supplant.<sup>43</sup> *Hydrogen Peroxide II* reinforces the belief held by some defense counsel that the class certification evidentiary hearing should be approached forensically no differently than a trial on the merits.

**Substance and the Role of Experts.** Simply put, *Hydrogen Peroxide II* will greatly expand the scope of evidentiary presentations. One could ask, with regard to antitrust claims, what factual dispute would *not be* relevant to resolve the class certification issue. For example, class certification defense in such claims has been focused primarily on impact or injury in fact, with quan-

<sup>40</sup> 552 F.3d at 310 (quoting *Newton v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

<sup>41</sup> *See id.* at 320 (“[B]ecause each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements”).

<sup>42</sup> *See id.* at 320 (quoting *In re Gen. Motors Corp., Pick-Up Truck Prod. Liab. Litig.* 55 F.3d 768, 783 (3d Cir. 1995)).

<sup>43</sup> *Cf. Rothermel v. Wronke*, No. 07-3799, 2008 U.S. App. LEXIS 8860 at \*\*3 (7th Cir. Apr. 16, 2008) (due deference given to bankruptcy court’s credibility findings; “as the trier of fact, it is in the best position to observe witnesses to determine whether they are telling the truth”); *El Paso Elec. v. NLRB*, No. 07-60600, 2008 U.S. App. LEXIS 7126 at \*\*5 (5th Cir. Apr. 3, 2008) (same—ALJ’s credibility findings in NLRB hearing); *Ray v. Campbell*, No. 07-14283, 2008 U.S. App. LEXIS 18968 at \*3–\*4 (11th Cir. Aug. 29, 2008) (same—trial court’s credibility findings at suppression hearing); *FED. R. Civ. P. 52(a)(6)* (in bench trials, “the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

tification of damages coming in a distant second. Yet a dispute over common impact could readily encompass one, some or all of the following issues as to which, in the past, courts had accepted plaintiffs' proffers without much analysis: (1) definition of the relevant market (product and geographic); (2) market structure and market power; (3) plausible exercise of market power in terms of price and non-price predation, (4) conditions conducive to coordination among competitors, among other threshold findings related to the likelihood of classwide impact. This means that the "battle of the experts" will actually be fought.

*Hydrogen Peroxide II* changes the character and substance of potential expert opinions and testimony from the prevailing focus—i.e., the extent to which cognizable methods exist that allow for the demonstration of class-wide impact by means of common proof to a new focus—i.e., evidence of [actual and expected] outcomes of such methods, within the context of the specific facts of the case. Experts should expect that courts will apply the well-accepted standards used in evaluating their merits opinions relating to liability, impact, and damages when judging whether conduct is suitable for class treatment. Thus, methods used in assessing class-wide impact would need to be shown to be reliable both in theory and practice as they pertain to the specific facts of the case.

*The Third Circuit's decision assures that empirical evidence will get its day in court.*

Going forward, parties may need to reassess whether expert opinions on class impact are deficient in the *Daubert* context, or whether they can expect that the type of stringent review of expert opinions and methods necessary to meet the preponderance standard will adequately identify and dispose of insupportable methodologies, rendering a separate *Daubert* challenge and hearing superfluous. Another likely change in the scope and rigor of expert testimony will be more thorough vetting of evidence relating to the functioning of the market in the absence of the challenged conduct (the "but-for" market). A case will be suitable for class treatment where common proof can be used to demonstrate that all members of the purported class would have been made better off in the absence of the challenged conduct. Previously, experts may have offered limited evidence and opinions as to potential market outcomes and which was most plausible given the characteristics of the market. Deference to avoiding a "battle of the experts" may have limited the court's ability to assess the most likely outcome in this regard. Because a common impact finding may turn on the decision among alternative versions of the "but-for" market, *Hydrogen Peroxide II* places heightened emphasis on developing the facts by which experts are able to opine about the most plausible outcome.

Finally, the Third Circuit's decision assures that empirical evidence will get its day in court. Positing that a method could be applied to a hypothetical set of information with a predictable outcome will no longer suffice.<sup>44</sup> A proposed method without adequate support, be it lacking recognized statistical significance or theoretically unsupportable based on the available evidence, seem likely to fail to satisfy the standards announced in *Hydrogen Peroxide II*. Similarly, reliability standards, in the form of tests for robustness of proposed methods for demonstrating and measuring impact, have until now skirted the standards that apply when the proposed methods are executed at the merits stage. Such a distinction in assessing the basis for expert opinions has

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<sup>44</sup> Indeed, less than thirty days after its decision, the Third Circuit vacated a class certification order and remanded for further proceedings consistent with *Hydrogen Peroxide II*. *In re Plastic Additives Antitrust Litig.*, Nos. 07-2159, 07-2418 (Jan. 27, 2009). The plaintiff class expert in the case was the same as the plaintiff expert in *Hydrogen Peroxide*, and the contours of his conclusions in the two industries were remarkably similar. See *In re Plastic Additives Antitrust Litig.*, CA 03-2038, 2006 U.S. Dist. LEXIS 69105 (E.D. Pa. Sept. 1, 2006).

arguably lapsed with *Hydrogen Peroxide II*.<sup>45</sup> A challenge to the applicability of a proposed method can no longer be met with a promise that something will be workable at the trial stage.

### Conclusion

The Third Circuit's decision in *Hydrogen Peroxide II* maintains the momentum generated by *Szabo* and *IPO*, and confirms what defense counsel litigating in courts in that Circuit have long advocated: class certification must be grounded in evidence that makes each element of Rule 23 more likely than not. The added value that *Hydrogen Peroxide II* brings to jurisprudence in this area is an expectation that economic theories advanced with respect to those elements will be supported by evidence, and that the trial court must resolve competing theories based on that evidence. ●

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<sup>45</sup> *But see In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, No. 3:03md1542 (SRU), Ruling on Class Certification (D.I. 512), at 41 (D. Conn. Feb. 13, 2009), available at <http://ecf.ctd.uscourts.gov/doc1/04112026207> (granting class certification while declining to assess which conflicting expert opinion was "correct," distinguishing *Hydrogen Peroxide II* factually because the EPDM expert actually completed the proposed analytic models "demonstrat[ing] class-wide impact and injury using proof common to the class.>").

# Towards a Consistent Antitrust Policy for Unilateral Conduct

**Jonathan M. Jacobson**

The recent Department of Justice Report<sup>1</sup> and a Federal Trade Commission Statement<sup>2</sup> articulate sharply divergent approaches to antitrust policy for unilateral conduct. The point of this article is that those approaches can, with modifications, be reconciled. To some, that may seem like suggesting reconciliation between a lit match and a stick of dynamite. But, as we will see, if the outer edges of the two approaches are smoothed, some reasonable reconciliation—or at least a coherent compromise—is possible. And it is entirely clear that some agency consensus is essential to convey a strong and unified message to the public and the courts, emphasizing the importance of unilateral conduct enforcement.

The agencies would enhance enforcement by adopting an approach: (1) that rejects the DOJ's default "disproportionality" test and replaces it with the rule of reason analysis urged by the FTC; and (2) that accepts the DOJ's notion of appropriate "safe harbors" to provide guidance to businesses on what they can do, safely, without risking antitrust liability. By adopting an approach embracing these two propositions, the agencies can commence the process of prodding the courts and other stakeholders into understanding that aggressive unilateral conduct antitrust enforcement is important to our national economy, and that enforcement can be productive without any undue chilling effect on the ability of companies to compete effectively in the marketplace.

## Monopolization Matters

Some of the recent critiques of Section 2 enforcement question whether unilateral conduct ever really harms consumers.<sup>3</sup> The doubts raised by these commentators appear to have had some significant impact, especially in the Supreme Court.<sup>4</sup> But are the criticisms valid? The view here is that they are not.

■  
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 Glazer for helpful  
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<sup>1</sup> U.S. DEP'T OF JUSTICE, COMPETITION & MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf> [DOJ REPORT].

<sup>2</sup> Statement of Commissioners Harbour, Leibowitz & Rosch on the Issuance of the Section 2 Report by the Department of Justice (Fed. Trade Comm'n Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf> (FTC Statement). FTC Chairman William E. Kovacic did not join in the FTC Statement and wrote separately. Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>. The FTC has released four staff working papers that helped inform the analysis. They are available at <http://ftc.gov/os/sectiontwohearings/index.shtm>.

<sup>3</sup> E.g., Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345–48.

<sup>4</sup> E.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth.").

History tells us that unchecked monopoly power can endure for many years—far longer than almost any cartel—and can inflict substantial economic harm. Examples include the Pullman sleeper car monopoly, secured and maintained through exclusive dealing, which lasted from the 1870s through the 1950s; United Shoe's monopoly of shoe-making machinery, also maintained through exclusive dealing, which lasted from the early 1900s through the 1960s; the Motion Picture Patents Company, whose tying arrangements cartelized the motion picture industry for several decades and continue to affect the industry's structure even today; AT&T's refusals to interconnect, which monopolized long distance service and slowed innovation for many years; and Microsoft's control of PC operating systems, enhanced by a number of practices, starting with its per processor (exclusive dealing) license, which has distorted competition in many software markets for almost twenty years.<sup>5</sup> In each of these (and many other) instances, more timely antitrust intervention would have lowered prices to millions of consumers and spurred far greater levels of output and innovation.

*Unilateral conduct*

*antitrust enforcement*

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*highest order.*

Unilateral conduct antitrust enforcement is a priority of the highest order. The calls for judicial repeal (or radical curtailment) of Section 2, however effective they may seem to be now, are unfortunate and short-sighted.

### The Agency Statements

The DOJ Report takes a stance not far from the laissez-faire approach to single-firm conduct set forth in the writings of critics like Judge Frank Easterbrook. Although the Report agrees with the majority of current commentators that there is no general single test for evaluating unilateral conduct, it adopts as its baseline or default analysis a “disproportionality test,” under which conduct violates Section 2 only where “its likely anticompetitive harms substantially outweigh its likely pro-competitive benefits.”<sup>6</sup> The Report's rationale for tipping the scales in a defendant's favor is that the dangers of false positives outweigh the dangers of false negatives and that the alternative approach of applying the traditional rule of reason is too “burdensome” and “open-ended.”<sup>7</sup>

The FTC Statement agrees that there is no appropriate single “test” for evaluating unilateral conduct issues, and it also agrees that a default test is appropriate. But the Statement differs vigorously on what that test should be. The FTC Statement's proposed default standard is the traditional rule of reason as applied in the Section 2 context in such cases as *Microsoft*.<sup>8</sup> As the Statement points out, “The existing rule of reason standard already poses a significant hurdle to liability, unless care is taken to ensure that a Section 2 plaintiff does not bear a prohibitively high burden of proof.”<sup>9</sup>

The agencies also differ on the treatment to be accorded to specific types of conduct. In summary, the DOJ Report urges safe harbors for most all practices, some of which amount to rules of

<sup>5</sup> See, e.g., *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa. 1943); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *United Shoe Mach. Corp. v. United States*, 347 U.S. 521 (1954); *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); see generally Jonathan M. Jacobson, *Challenges to Dominant Firm Exclusionary Conduct*, Speech Before the Conference Board 2007 Antitrust Conference: Tying—Antitrust Law and Policy (Mar. 2007), available at <http://wsgr.com/publications/pdfsearch/jacobson0307.pdf>; Jonathan M. Jacobson & Scott A. Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, 73 ANTITRUST L.J. 779, 779 & n.1 (2006).

<sup>6</sup> DOJ REPORT, *supra* note 1, at 45.

<sup>7</sup> See *id.* at 45-47.

<sup>8</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

<sup>9</sup> FTC Statement, *supra* note 2, at 5.

de facto per se legality. The FTC Statement appears to reject any safe harbors, relying instead on the rule of reason as the decision guide for all practices.

### A Middle Ground

Any articulation of a consistent enforcement policy for unilateral conduct will require a consensus on the treatment of specific practices and agreement on a default test for illegality where specific decision rules do not apply. Both should be possible.

**An Appropriate Default Test.** The key disagreement between the agencies' approaches is with respect to the default test of illegality. The DOJ applies a "disproportionality standard," under which conduct is prohibited only when the anticompetitive effects outweigh any procompetitive benefits by a very substantial margin. The FTC Statement, in contrast, relies on the basic rule of reason, under which the plaintiff need demonstrate only that the net effect of the challenged practice is anticompetitive. But, notwithstanding that divergence, the distance between the two approaches is not quite as vast as it might seem.

First, both approaches reject the various alternative "no economic sense" and "profit sacrifice" tests that some commentators have proposed.<sup>10</sup> Second, both statements embrace a standard that asks the same basic question; that is, whether the conduct at issue produces adverse effects on competition that outweigh any beneficial effects. Indeed, the two standards are effectively the same with one major exception: under the rule of reason standard, the plaintiff need show only that there is, on balance, an adverse effect on competition while, under the disproportionality test, the plaintiff must show that the anticompetitive effects "substantially" outweigh the asserted procompetitive benefits.

The only question, then, is whether to apply a standard that is purposefully tipped in favor of the defendant or one that asks whether the net effect on competition is adverse. And it seems apparent that the standard rule of reason approach is preferable. There are several reasons:

- Monopoly power can cause great harm to the national economy through higher prices, lower output, reduced choice, and stunted innovation. The premise underlying the disproportionality test is that monopoly is not really harmful. That premise is unsupported and, in any event, contrary to the fundamental purposes underlying Section 2.
- The risk of harmful false positives is ephemeral. The DOJ Report cites no example of a harmful false positive over the entire 118-year history of Section 2, and none comes to mind. Reasonable observers can differ over the correctness of the outcomes in particular cases, but there is simply no reason to believe that false positives are any more prevalent than false negatives. The available evidence suggests, on the contrary, that false negatives significantly outnumber false positives.<sup>11</sup>

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<sup>10</sup> See Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006) (profit sacrifice test); cf. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003) (efficiency standard). For a critique, see Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006).

<sup>11</sup> See William F. Adkinson, Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, App. at 5–6 (Fed. Trade Comm'n Working Paper, Nov. 3, 2008), available at <http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf> (reporting on an FTC staff survey of Section 2 opinions from 2000 through 2007; 539 cases were reviewed, with 344 involving a judicial resolution of the claim(s); "[o]f these, 335 cases [97.4%] were decided for defendants and nine [2.6%] were decided for plaintiffs"); see also Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, ANTITRUST, Fall 2007, at 21, 22 (asking whether "false negatives [are] becoming the problem that false positives once were").

- The risk of false positives due to the uncertainty of balancing under the rule of reason is ephemeral as well. Substantially all applications of the rule of reason involve no balancing. Cases typically are resolved either by a failure of the plaintiff to demonstrate harm to competition or by a failure of the defendant to demonstrate a cognizable justification.<sup>12</sup> Instances where there is a genuine need to balance are exceedingly rare and cannot provide a reasoned basis for systematically favoring the monopolist.
- The rule of reason is not too complex. It is the standard of analysis applied in Section 1 cases every day and mirrors closely the analysis of mergers under Section 7 of the Clayton Act. Moreover, the asserted complexity is not a basis for differentiating the rule of reason from the disproportionality test. The two tests are the same—with the only difference being the burden of proof imposed on the challenger.
- In applying the rule of reason, the burden of proof already rests with the plaintiff. Sustaining that burden is difficult enough without the overcompensation the disproportionality test is designed to achieve. For many, the rule of reason has been associated over the years with the idea that “the defendant always wins.” That indeed was the common reaction to the original articulation of the rule of reason in *Standard Oil*,<sup>13</sup> leading to the enactment of the Clayton Act in an effort to restore the balance. Tipping the scales even further is just not necessary.
- Finally, the imposition of a heightened burden on the plaintiff makes no sense as an antitrust enforcement policy. The agencies have ample prosecutorial discretion as to what cases should, or should not, be brought. It makes little sense to add to their burden once they get to court by heightening the showing they are required to make.

The standard rule of reason is a test designed to reach the correct outcome in every case. The disproportionality test, in contrast, is a test that inevitably will be wrong in many close cases and that will prove wrong in some that are, in fact, not that close. On this aspect of the divergence between the agencies, the FTC Statement's view is clearly the better one.<sup>14</sup>

**Safe Harbors Generally.** The agencies' disagreement is not limited to the default standard. The agencies disagree on the treatment of specific practices as well. The core dispute is that the DOJ believes that various safe harbors are appropriate so that businesses can have some certainty as to the practices that will not be subject to legitimate challenge under the antitrust laws. The FTC Statement, in contrast, would apply the rule of reason in all cases, apparently without any safe harbors.<sup>15</sup>

On the broad question of whether safe harbors are appropriate, the DOJ has the better of the argument. While one can legitimately object to several of the specific safe harbors the DOJ advances, there is surely a high value to be placed on relative certainty. Advising businesses on antitrust compliance is difficult, but competition is enhanced when firms are given leeway to engage in conduct that poses little or no threat to competition.

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<sup>12</sup> See, e.g., *Microsoft*, 253 F.3d at 58–59.

<sup>13</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>14</sup> See also Jacobson & Sher, *supra* note 5, at 799–801; Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006).

<sup>15</sup> However, the FTC Statement does acknowledge that the Supreme Court has adopted safe harbors relating to predatory pricing and bidding due to “the unique threat to consumer welfare that otherwise might result from challenges to low prices.” FTC Statement, *supra* note 2, at 4–5 & n.16 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226–27 (1993)).

The classic argument in favor of safe harbors was made by Justice Brandeis, then a practicing lawyer, in the hearings leading to the enactment of the Clayton Act:

I have been asked many times as regard to particular practices or agreements as to whether they were legal or illegal under the Sherman law. One [group of] gentlemen said to me, "we do not know where we can go." To which I replied, "I think your lawyers or anyone else can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip and go over; but anybody can tell you where you can walk perfectly safe within convenient distance of that precipice." The difficulty which men have felt generally in regard to the Sherman law has been that they have wanted to go the limit rather than that they have wanted to go safely.<sup>16</sup>

As Brandeis suggested, it is of great practical importance to know which types of activities are "perfectly safe."

**Specific Practices.** Notwithstanding the desirability of safe harbors in principle, the FTC commissioners have reason to object to some of the safe harbors the DOJ has offered. It is useful to address each of the practices in turn.

**Predatory Pricing.** Price predation is the practice of charging unduly low prices to eliminate or weaken competition so as to enhance the defendant's market power once the competition has been removed. The courts since the mid-1970s have recognized that predatory pricing is one area in which defendants should be given ample leeway because price cutting is the essence of competition and distinguishing predation from intense competition can be extremely difficult.<sup>17</sup> Most courts have therefore limited pricing challenges to instances where the defendant's prices are below a measure of incremental cost, typically average variable cost.<sup>18</sup>

The DOJ Report articulates a standard of permitting prices in excess of "average avoidable cost."<sup>19</sup> The FTC Statement criticizes this standard as too lenient, but does not propose a specific alternative.<sup>20</sup> In this instance, the DOJ's standard appears to be one that is more plaintiff-oriented than the standard applied by the courts, and seems specifically designed to overturn the outcome in *United States v. AMR Corp.*<sup>21</sup> There, the DOJ's challenge to American Airlines' efforts to exclude low-cost carriers from various city-pair routes was rejected because the company's prices were not below average variable cost. The DOJ argued in *AMR* that a traditional application of the average variable cost standard was unsound on the facts presented and that a more accurate assessment of competitive impact would entail considering at least some portion of the profits American lost on other routes when it shifted capacity to the competitive routes in issue. The DOJ Report's "avoidable cost" standard would include at least some portion of the opportunity costs the Tenth Circuit declined to consider in *AMR*. Given that the courts have already installed a safe harbor for price predation that is even broader than that suggested by the DOJ, this is one area where the FTC commissioners might beneficially yield to the narrower safe harbor advocated in the DOJ Report.

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<sup>16</sup> *Hearings on S. Res. No. 98*, Sen. Comm. on Interstate Commerce, 62d Cong., 1st Sess. 1161 (1911) (statement of Louis Brandeis).

<sup>17</sup> See ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 272–88 (6th ed. 2007) [hereinafter *ANTITRUST LAW DEVELOPMENTS*]; see generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>18</sup> See *ANTITRUST LAW DEVELOPMENTS*, *supra* note 17, at 274–81.

<sup>19</sup> DOJ REPORT, *supra* note 1, at 65–67.

<sup>20</sup> See FTC Statement, *supra* note 2, at 6.

<sup>21</sup> 335 F.3d 1109 (10th Cir. 2003).

**Exclusive Dealing.** Exclusive dealing arrangements—pursuant to which a customer or supplier agrees to deal exclusively with the defendant on the product in question—have long been a subject of antitrust interest. The courts routinely analyze exclusive dealing under a general rule of reason analysis.<sup>22</sup> The DOJ would permit exclusive dealing where the foreclosure is 30 percent of the market or less and otherwise apply the disproportionality test. The FTC Statement would apply the rule of reason with no safe harbor. As a practical matter, the DOJ safe harbor is reasonable. No case has been decided in a plaintiff's favor in over twenty years involving foreclosure of less than 30 percent.<sup>23</sup> If cases involving foreclosure levels lower than 30 percent are so likely to fail anyway, some safe harbor again seems desirable. If 30 percent is too high, the agencies can select another number, such as 25 percent, or perhaps as low as 20 percent.

**Loyalty Discounts.** Loyalty (or “market share”) discounts are agreements in which the seller conditions a discount on the buyer's agreement to purchase a stated percentage of its requirements from the seller. Some such discounts, called “first dollar” discounts, may provide especially strong inducements—in some instances, outright coercion—because they apply not only to the contested volume but to all of the customer's purchases, enhancing a loss if the percentage commitment is not fulfilled. The DOJ Report suggests that further research on this subject would be useful but, in the meantime, urges a “standard predatory pricing test,” even to “first dollar” loyalty discounts. The FTC Statement, in contrast, would treat these arrangements as exclusive dealing and apply a standard rule of reason. On these arrangements, the FTC Statement seems correct. The issue with loyalty discounts is not the price level, as is the case with predatory pricing; the issue is the conditioning of the discount on partial or complete exclusivity. Exclusive dealing analysis is therefore appropriate.<sup>24</sup> Applying that analysis, the same 20–30 percent foreclosure safe harbor for exclusive dealing seems equally applicable.

**Bundling.** Bundled discounts are arrangements under which the seller of two (or more) products offers buyers a discount if they take both (or more) of the products offered. A variety of approaches to this practice have been proposed, ranging from the Third Circuit's ruling in *LePage's*, which appeared to base liability solely on the adverse effect on rivals,<sup>25</sup> to a virtual rule of per se legality under which the bundled pricing would be lawful unless it were shown that the price for all the products was below the average variable cost of the full product line.<sup>26</sup>

One alternative approach urged by a number of commentators involves application of an “attributed cost” safe harbor. Under this approach, the sum of the discounts on all the bundled products is deducted from the cost of the single product on which the defendant faces competition from its single-product rival. If the defendant's price on the competitive product remains above cost on that basis, the safe harbor applies and the conduct is lawful without further analysis. Variants of this test have been proposed by the Antitrust Modernization Commission and

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<sup>22</sup> See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327–29, 333–35 (1961); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 193–94 (3d Cir. 2005); see generally Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311 (2002).

<sup>23</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 17, at 217.

<sup>24</sup> See Jacobson, *supra* note 22, at 338–40. In fact, an argument can be made for a harsher standard because traditional exclusive dealing agreements are almost always associated with some efficiencies; loyalty discounts, in contrast, are typically accompanied by no efficiencies.

<sup>25</sup> See *LePage's Inc. v. 3M*, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc).

<sup>26</sup> *E.g.*, Timothy J. Muris, *Exclusionary Behavior & Bundled Discounts*, Submitted on Behalf of the United States Telecom Ass'n (Nov. 29, 2006) (advocating *Brooke Group* test applied to revenues and costs for the total package).

adopted by the Ninth Circuit in the *PeaceHealth* case.<sup>27</sup> The DOJ Report agrees with an application of the attributed cost safe harbor; for bundling outside the safe harbor, the DOJ would apply its disproportionality test. The FTC Statement, again, urges application of the standard rule of reason.

Although there can be complexities in determining the appropriate costs to consider, especially for products with extremely low marginal costs, such as pharmaceuticals or software,<sup>28</sup> the attributed cost standard has gained a broad range of adherents.<sup>29</sup> If costs are calculated properly, this standard stands as an appropriate safe harbor. For conduct falling outside the safe harbor, however, the disproportionality test remains inappropriate as the default standard. If the defendant's prices are below attributed cost (and thus outside the safe harbor), it should still be the plaintiff's burden to demonstrate that the effect of the bundling on competition is adverse. But there is no reason to elevate that burden to the level the disproportionality standard would impose.

*Unilateral Refusals to Deal.* As the Supreme Court has said, “[B]oycotts are not a unitary phenomenon.”<sup>30</sup> The types of practices that can be characterized as “refusals to deal” are indeed far too numerous to mention. One broad set involves refusals to deal, except on condition, with customers or suppliers. In this category, refusals to deal except on condition that the customer award some or all of its business on another product are best viewed as tying; and refusals to deal unless all or a large portion of the customer's business is provided are best viewed as exclusive dealing.<sup>31</sup> Another broad set consists of refusals to deal with rivals. Some of these refusals to deal, like AT&T's refusals to connect with competing long distance carriers, represent the use of monopoly power in one market to attempt to monopolize another. Others, as in *Aspen*, fall into the less common category of refusals to deal with a rival in the same market.<sup>32</sup>

The DOJ Report suggests virtual per se legality for all refusals to deal with rivals. The FTC Statement urges a standard based on the *Colgate* case, allowing refusals to deal except where the defendant's “purpose [is] to create or maintain a monopoly.”<sup>33</sup> A reasoned reconciliation of these views would apply a rule of reason approach to attempts to monopolize an adjacent market. Efforts to extend monopoly from one market to another based on means other than competition on the merits in the adjacent product market warrant no special protection. For the unusual case of a refusal to deal with a rival in the same market, some variant of Professor Einer Elhauge's efficiency test could be applied.<sup>34</sup> If there is no efficiency justification for a refusal to deal such that

<sup>27</sup> See *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906–09 (9th Cir. 2008); ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 99–100 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>28</sup> See *Meijer, Inc. v. Abbott Labs.*, 544 F. Supp. 2d 995, 1000–05 & n.7 (N.D. Cal. 2008). In cases involving such products as pharmaceuticals or software, it is important to choose a measure that encompasses at least some research and development costs. See Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Cost and Market Power*, 112 YALE L.J. 681, 703–26 (2003) (“defin[ing] ‘costs’ as whatever measure of costs would prevent an incumbent pricing at cost from inflicting losses on an equally efficient entrant or rival”); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2250 (2000) (long run incremental costs).

<sup>29</sup> See Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission's Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 23, 25 & n.21 (citing sources).

<sup>30</sup> *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978) (citation omitted).

<sup>31</sup> See Kenneth L. Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1 (2002).

<sup>32</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>33</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

<sup>34</sup> See Elhauge, *supra* note 10.

*Moving the courts in the direction of supporting unilateral conduct enforcement may be difficult under any circumstances. But it will be especially difficult if the agencies remain so distantly at odds on fundamental principles.*

the only effect is the impairment of rivals, and the refusal contributes significantly to the maintenance of monopoly power, condemnation seems appropriate.

*Other Practices.* The DOJ does not specifically address other types of conduct. The FTC Statement is critical of the DOJ in that respect. This is understandable given the FTC's recent focus on varieties of cheap and deceptive conduct—practices that may create or enhance market power at little cost and with few, if any, accompanying efficiencies. The FTC rightly has devoted significant resources to these practices.<sup>35</sup> Application of a standard rule of reason approach to the various types of “cheap exclusion” seems appropriate.

### Convincing the Courts

As the *Trinko* decision suggests, the Supreme Court has moved away from the long-held view that the Sherman Act is “the Magna Carta of free enterprise.”<sup>36</sup> Today, several of the Court's opinions suggest an almost overt hostility to antitrust. In this environment, it is especially critical that both of our federal antitrust agencies act to bring the judicial system back to its historical role as a place where the antitrust laws will be enforced and competition allowed to flourish.

The Supreme Court respects the views of antitrust policy articulated by the Solicitor General, and the circuit courts respect the views of the agencies when they appear as amici curiae. If the agencies can speak with a unified voice, their pro-enforcement positions will carry more weight. Moving the courts in the direction of supporting unilateral conduct enforcement may be difficult under any circumstances. But it will be especially difficult if the agencies remain so distantly at odds on fundamental principles. ●

<sup>35</sup> See FTC Statement, *supra* note 2, at 10 & n.53 (citing Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005)). One example is gaming the standard-setting process.

<sup>36</sup> *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). The *Trinko* Court, in fact, quoted this passage, but only in stressing that the Act “does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.” *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 504 U.S. 398, 415–16 (2004).

## Appropriate Role(s) for Section 5

**Susan A. Creighton and Thomas G. Krattenmaker**

Like any other interesting legal question, the issue of how far Section 5 of the Federal Trade Commission Act enables the FTC to reach has many facets and a long history. Supreme Court dicta seem to afford the Commission the widest possible discretion, but some subsequent circuit court cases do not, at least on the surface, seem so hospitable. The articles and book chapters devoted to this vexing question are too numerous to list.

To try to move the discussion forward, we focus on a somewhat more modest task: identifying the different possible roles for Section 5, assuming the agency stays within the current bipartisan consensus that antitrust seeks only to further consumer welfare without sacrificing productive efficiency. In other words, we seek to identify not what the FTC can do, but what it should do to strengthen antitrust law while remaining committed to the bedrock consumer welfare function of antitrust. We do so by developing a typology that draws on recent FTC cases to delineate three rationales that have been advanced to justify where Section 5 can usefully be deployed.

We call these the “frontier,” “yes, but,” and “gap-filling” rationales. While all three may have an appropriate role, for the reasons described below, we believe that the “frontier” and “yes, but” cases are the ones that should be most squarely at the heart of the agency’s enforcement agenda. The “gap-filling” cases are the ones that appear most open-ended, and risk straying from antitrust’s consumer welfare standards.

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### **The Basic Limiting Principle: Protecting Consumer Welfare by Fostering Competition as the Central Purpose of Section 5**

When asking how much authority the FTC might plausibly claim under Section 5, one very simple approach immediately appears. One could say that where Section 5 is employed to condemn conduct because it is anticompetitive, Section 5’s reach should be the same as (neither broader nor narrower than) the conduct proscriptions of the Sherman and Clayton Acts. As attractive as this might be from a policy perspective, however, as a matter of statutory interpretation, it seems evident that this is not what the 1914 Congress that enacted Section 5 (and the 1938 Congress that amended it) intended. In a comparatively recent pronouncement on this issue, the Supreme Court examined the legislative history underlying Section 5 and its amendment by the Wheeler-Lea Act and concluded in no uncertain terms that:

[T]he 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.<sup>1</sup>

<sup>1</sup> FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

Nothing the Court has written since calls that expansive view into question.

Even if the FTC *can* reach conduct not otherwise proscribed by other antitrust laws, the question remains, *should* it? And, if so, why?

As an initial limiting principle, we would argue that in its implementation of Section 5, the FTC should leave fully intact the current bipartisan antitrust consensus that antitrust is designed to protect competition, not competitors; that it protects against the use of market power, not efficient conduct; and that it seeks to prevent diminution of consumer welfare, and to do no more than that. This consensus is embodied in such otherwise disparate key decisions and documents as the Supreme Court's decision in *Leegin*,<sup>2</sup> the D.C. Circuit's *Microsoft* decision,<sup>3</sup> the agencies' Horizontal Merger Guidelines,<sup>4</sup> and the Commission's opinion, affirmed by the D.C. Circuit, in *Three Tenors*.<sup>5</sup> Section 5 should not, we submit, be allowed to impose antitrust liability for conduct that does not threaten these fundamental principles of antitrust. The latitude that Congress built into Section 5 should not be used to sacrifice efficient behavior for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.

Because this is, so far as we can tell, a consensus position, we know of no current forceful challenge to it. If, in performing its competition-protecting mission, the agency should be sacrificing efficiency or consumer welfare for other goals, we do not know what those goals are or why Section 5 is an appropriate means to pursue them.

Treating the consumer welfare goal as the central limiting principle seems to us not only right as a matter of competition policy, but appears to be an inescapable requirement of the trilogy of cases, decided in the 1980s, that rejected somewhat more extravagant views of Section 5.<sup>6</sup> Reviewing judges are not necessarily disregarding the Supreme Court's dicta concerning Section 5 when they hold the Commission's feet to the fire by requiring that competition cases be competition cases—that is, they must rest on proof of probable actual competitive effects, measured by the consumer welfare standard. So, even if the Commission wanted to extend Section 5 to reach conduct not within the ambit of current antitrust policy, we doubt that reviewing courts would permit this, notwithstanding some of the more elastic phrases in cases like *Sperry & Hutchinson*.<sup>7</sup>

### Role(s) for Section 5: A Legal Tool to Reach Anticompetitive Effects

Where, then, should Section 5 come into play in the antitrust enforcer's approach? As an initial screen we would ask: Does the conduct at issue have the same effect, from an economic competition policy perspective, as the types of conduct that are subject to liability under the Sherman Act? If the *economic* effect of the conduct is the same, the presumption is that the case ought to be brought under the Sherman Act.

Therefore, the second step of the inquiry is to ask: Is there nonetheless some *legal* reason to bring the challenge under Section 5 rather than the Sherman Act? Drawing on cases filed by the

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<sup>2</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>3</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

<sup>4</sup> U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

<sup>5</sup> *PolyGram Holding, Inc.*, FTC Docket No. 9298, 2003 WL 21770765, available at <http://www.ftc.gov/os/2003/07/polygramopinon.pdf>, *aff'd*, *PolyGram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

<sup>6</sup> See *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (*Ethyl*).

<sup>7</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

FTC during the past several years, we have identified three different rationales that might be used to justify bringing a case under Section 5. We call them the “frontier,” “yes, but,” and “gap-filling” rationales.

The “frontier” rationale argues that there are some cases that meet all of the legal requirements for a Sherman Act claim, but involve new forms of anticompetitive conduct that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis. Former FTC Commissioner Tom Leary has made strong arguments for the application of Section 5 in this context.<sup>8</sup> The “yes, but” argument comes into play when a case would meet all the economic and legal requirements of a Sherman Act claim, but cannot be brought under the Sherman Act because of legal limitations imposed for reasons unrelated to the goals of antitrust law. The application of Section 5 in these circumstances is grounded in the notion that the concerns that led to these legal limitations in the Sherman Act (principally the concern regarding private treble-damage actions) cannot justify shielding otherwise anticompetitive conduct from FTC scrutiny.

Finally, the “gap-filling” rationale might be invoked if a case would satisfy the economic requirements of antitrust, but fails one of the legal elements of Section 1 (such as the “agreement” requirement) or Section 2 (such as the “monopoly power” element).

Depending on the facts, each of these different potential rationales for the invocation of Section 5 might have been used to justify an enforcement action brought by the FTC during the past several years. Consider, for example, an action challenging unilateral conduct in the standard-setting area. Former Commissioner Leary has noted that because *Rambus*<sup>9</sup> involved a type of conduct that has only recently received careful antitrust scrutiny, the FTC might better have brought the case exclusively under Section 5—a “frontier” rationale. On the other hand, in *Unocal*,<sup>10</sup> another case involving standard setting, a “yes, but” rationale might have been considered in deciding whether to invoke a stand-alone Section 5 action because Noerr was an important defense asserted in that case. Finally, *N-Data*<sup>11</sup> appears to have been supported by the majority under a “gap-filling” rationale, inasmuch as the Commissioners in the majority acknowledged that the facts in that case did not support a claim under the Sherman Act.

In our view, the “frontier” and “yes, but” cases seem to be the safest and most compelling applications of a separate Section 5, at least so long as these rationales are not used to skip over a rigorous analysis of whether the legal elements of a Sherman Act claim otherwise are met. The “gap-filling” cases may provide the greatest potential for mischief, if the scope of such cases is not narrowly and rigorously circumscribed. One of the matters to which the Commission and its critics may want to give more considered attention are the legal limits that should be imposed on Section 5 in these “gap-filling” circumstances if important elements such as an “agreement” or “monopoly power” are not present.

In the balance of this article, we discuss some additional examples of each type of case that we have identified.

*Depending on the facts, each of these different potential rationales for the invocation of Section 5 might have been used to justify an enforcement action brought by the FTC during the past several years.*

<sup>8</sup> Thomas B. Leary, *A Suggestion for the Revival of Section 5*, ANTITRUST SOURCE, Feb. 2009, <http://www.abanet.org/antitrust/at-source/09/02/Feb09-Leary2-26f.pdf>.

<sup>9</sup> *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

<sup>10</sup> *Union Oil Co. of Cal.*, FTC Docket No. 9305, Opinion of the Commission (July 7, 2004) (rejecting *Noerr* defense and remanding for trial), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

<sup>11</sup> *Negotiated Data Solutions LLC*, FTC File No. 51-0094 (Sept. 23, 2008) (complaint), available at <http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf>.

**1. Frontier Cases.** Perhaps the least controversial application of a stand-alone Section 5 claim should be its use in “frontier” settings, where Section 5 could provide an avenue for redressing anticompetitive acts or practices that have newly emerged and have not yet been fully absorbed into the fabric of the Sherman or Clayton acts. Whether it be the elaborate information dissemination schemes of the 1920s<sup>12</sup> or the unwarranted Orange Book listings of the 1990s,<sup>13</sup> we know from experience that new forms of anticompetitive behavior will arise from time to time. It would appear to be a clear opportunity to take advantage of the FTC’s experience as an expert body to bring its analytic resources to bear on such new forms of anticompetitive behavior.

Because courts may be reluctant to impose liability where behavior is new and unfamiliar, Section 5 may have advantages in these “frontier” cases due to its prospective application and lack of provision for private damages recovery (much less treble damages or class actions). Former Commissioner Leary gives *Schering*<sup>14</sup> and *Rambus* as examples of cases that might have been better brought exclusively under Section 5 because “the Commission was primarily interested in establishing some ground rules applicable to settlement of patent disputes between pioneer and generic drug manufacturers (*Schering*), and to the conduct of companies who participate in standard-setting bodies (*Rambus*).”<sup>15</sup>

Another example of a case that might have been a good candidate for “frontier” status, had it been handled by the FTC, was *United States v. AT&T*,<sup>16</sup> the case that led to the break-up of the U.S. telephone monopoly. *AT&T* was essentially two cases, one challenging monopolization of long distance service and the other claiming monopoly over telecommunications equipment. Both were well grounded in the economic policy underlying the Sherman Act, but each rested on asserted behavior—discriminatory interconnection in the long distance phase of the case, predatory cross-subsidization in the equipment phase—for which clear Sherman Act precedent was lacking.<sup>17</sup> Because the case settled before verdict, we will never know if the courts would have balked at reading the Sherman Act to cover the challenged conduct, but surely judicial reluctance was a risk. An action under Section 5 would have been particularly appropriate given that the government’s goal was to obtain structural relief, not to punish the defendant, deter similar acts, or clear the way for private treble damage actions.

Perhaps the principal risk from a stand-alone Section 5 action in this context is that, precisely because the conduct is new, the “frontier” rationale might too easily become a means for the Commission to short-circuit asking the hard analytical questions imposed by the rigorous standards of the Sherman Act—questions that become all the more important when considering new forms of conduct. There is also the risk that, by bringing the case exclusively under Section 5, the Commission ironically might weaken its influence as an expert voice in the antitrust debate regarding the proper application of the Sherman Act.

To guard against these tendencies, the Commission in “frontier” cases would need to analyze and litigate the case precisely as it would under the Sherman Act, with the only exception being

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<sup>12</sup> See, e.g., *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563 (1925).

<sup>13</sup> See *In re Bupirone Patent Antitrust Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

<sup>14</sup> *Schering-Plough v. FTC*, 402 F.3d 1056 (11th Cir. 2005).

<sup>15</sup> Leary, *supra* note 7, at 3.

<sup>16</sup> See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d*, 460 U.S. 1001 (1983) (ruling on consent decree).

<sup>17</sup> For a comprehensive description of the antitrust theories underlying the government’s case in *United States v. AT&T*, see THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW & POLICY* 376-410 (2d ed. 1998).

that it would explicitly limit the relief sought because of the novelty of the challenged conduct. Otherwise the Commission might find that even if it is more likely to “win” a pure Section 5 claim, it might come at the cost of having failed to develop a broader consensus that the conduct is anti-competitive and precisely why it deserves condemnation.

**2. “Yes, But” Cases.** A different group of cases that might warrant challenge under Section 5 are what might be called the “yes, but” cases. These are cases where, strictly on the *antitrust* merits and the terms of the antitrust statutes, the conduct would be condemned, but legal concerns extrinsic to the antitrust statutes cause courts to pull back from recognizing a Sherman Act claim. Like the “gap filling” cases, they address anticompetitive conduct that escapes Sherman Act condemnation because of a legal shortcoming. The “yes, but” cases, however, involve legal constraints imposed for reasons having nothing to do with antitrust law or policy. Indeed, for some of these cases, Section 5 might sensibly permit the Commission to take advantage of unique aspects of Section 5—particularly its deliberate limitations to prospective relief only, and then only in cases brought by a federal expert agency—to reach conduct that, but for the invocation of non-antitrust policy considerations, would be condemned as anticompetitive and harmful to consumer welfare. Drawing on recent history, here are some potential examples:

***Anticompetitive Conduct Protected by Antitrust Immunities.*** The FTC has devoted considerable resources to seeking to restrict the growing scope of doctrines such as *Noerr*,<sup>18</sup> which is a classic “yes, but” defense: the conduct is anticompetitive, but non-antitrust concerns are invoked to shield it from Sherman Act scrutiny. Given the substantial differences between the Sherman Act and Section 5, however, might it not be the case that some of the anticompetitive conduct protected by *Noerr* against Sherman Act liability might nonetheless be subject to limited prospective relief under Section 5?

The *Noerr* doctrine is neither an antitrust principle<sup>19</sup> nor a rule of constitutional law.<sup>20</sup> *Noerr* is a principle of statutory interpretation, and at least some of the concerns that apparently drove the *Noerr* Court are not applicable to Section 5. For example, to the extent that the *Noerr* doctrine is driven by the fear that antitrust liability will “chill” protected speech, Section 5 cases—limited to prospective cease and desist remedies and in cases filed only by an expert impartial government agency—should prove much less chilling than Sherman Act litigation.

The FTC challenged conduct allegedly protected by *Noerr* in the Orange Book listing cases. Although the Commission prevailed in these cases on straightforward Sherman Act grounds,<sup>21</sup> the FTC might well have brought these cases under Section 5. For another example, several courts have held that threats to litigate can be shielded from antitrust proscription by *Noerr*,<sup>22</sup> and some litigants have even argued that settlements might be *Noerr*-protected.<sup>23</sup> But there can be little question that litigation threats and settlements can, under the wrong circumstances, cause material anti-competitive injury without yielding any efficiency benefit. Such acts are not, in any way, shape, or form constitutionally protected petitioning conduct. Whatever the merits of seeking to protect such

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<sup>18</sup> *Eastern RR. Presidents’ Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>19</sup> One of its most recent applications was to the National Labor Relations Act. *See* *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

<sup>20</sup> We know of no one who has ever suggested that all conduct immunized by *Noerr* was already independently shielded from antitrust scrutiny by the First Amendment.

<sup>21</sup> *See e.g., In re Buspirone Patent Antitrust Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

<sup>22</sup> *See, e.g., Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).

<sup>23</sup> *See, e.g., Andrx Pharms. v. Biovail Corp. Int’l*, 256 F.3d 799 (D.C. Cir. 2001) (rejecting argument that terms of patent litigation settlement were immune from antitrust scrutiny under *Noerr*).

conduct from the chill of private enforcement, would the FTC not be on firm ground in ordering a firm to cease and desist from threats to litigate if those threats produce only anticompetitive consequences or from settlement of litigation that merely creates, and then distributes the rewards from, market power? Particularly where the anticompetitive consequences are clear, the lack of any justification is evident, and the risk of unlimited liability is avoided, it seems to us that challenging anticompetitive conduct protected by *Noerr*—but not the First Amendment—could be a salutary use for Section 5.

Similarly, the state action doctrine<sup>24</sup> reflects the very sound principle that the antitrust laws should not be read to impose on the states the laissez-faire regime of *Lochner v. New York*.<sup>25</sup> If states want to displace competition and actively supervise the resulting regulated markets, then the Sherman Act will not be read to forbid that, just as the demise of *Lochner* means that the due process clause no longer stands as a barrier to states opting for regulation over competition. Again, however, we wonder whether Section 5 must have a reach in this area that is precisely coterminous with that of Section 1. For example, what about the state supervision that is in practice—for want of a better word—a sham? In truth, this is what the FTC confronted in the *Kentucky Movers* case.<sup>26</sup> What if the Commission examined the application, on very specific facts and on a case-by-case basis, of states' certificate of need statutes?<sup>27</sup> Why could the FTC not be permitted to void a specific application of such a statute in order to protect against what turned out to be, upon inspection, nothing more than a raw extension of market power? Particularly where the remedy is a simple cease and desist order, such a case seems to us potentially compelling. Further, providing the FTC—and only the FTC—with authority to examine with greater care the justification for a state's decision to displace competition as a disciplinary force, and the effects on consumer welfare of that displacement, should avoid fears of permitting anyone aggrieved by a regulatory regime anywhere in the economy to challenge that regime as a violation of the Sherman Act.

We are not experts with regard to non-judicially created statutory antitrust immunities. When enforcing the antitrust laws, if one encounters an immunity, one just moves on. Nevertheless, we do think it might be worthwhile to examine a series of statutory immunities or exemptions to see if they were enacted, for example, because of a fear that private, treble damages actions, perhaps including class actions, would be particularly harmful to that industry. If such an exemption is discovered and if the immunity does not expressly extend to the FTC Act, it might constitute a responsible and modest use of Section 5 to put these otherwise shielded practices under the antitrust microscope for the limited purposes of FTC investigation and potential cease and desist remedies.

*Patents/Antitrust Interface.* The edges where patent law and antitrust law interface are not smooth. The Sherman Act has proven not fully capable of responding to certain challenges stemming from behavior with patents that threatens consumer welfare. One obvious example: as presently construed, the *Walker Process*<sup>28</sup> doctrine seems to have a gaping legal hole. Most

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<sup>24</sup> The state action doctrine is extensively reviewed and critiqued in the FTC's *Report of the State Action Task Force* (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

<sup>25</sup> 198 U.S. 45 (1905).

<sup>26</sup> Ky. Household Goods Carriers Ass'n, FTC Docket No. 9309 (June 2005), available at <http://www.ftc.gov/os/adjpro/d9309/050622opinionofthecommission.pdf>.

<sup>27</sup> By "certificate of need statutes" we refer to state laws that restrict entry into certain professions, markets, or industries to those who can first convince the state authorities that there is a need for additional competition.

<sup>28</sup> *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

courts read *Walker Process* to require that the antitrust plaintiff prove not only that the patent was procured by fraud on the patent office, but also that the patent was “enforced,” in addition to the conventional Sherman Act elements.<sup>29</sup>

An “enforcement” requirement must find its justification in some law other than antitrust. If “enforced” means that a lawsuit alleging infringement must have been filed, then antitrust law leaves unremedied the threat of suit, directed at an alleged infringer or (often with even more serious consequences) the customers of the alleged infringer, even though the simple threat can have, under the wrong circumstances, very serious anticompetitive consequences. The Federal Circuit realized this problem in the *Hydril* case.<sup>30</sup> Under a “yes, but” rationale, Section 5 might be an appropriate vehicle to inquire into allegations of anticompetitive misuse of patents by means other than enforcement. Nor need such cases be confined solely to patents procured by fraud. Deceptive threats to sue for infringement can—where other conditions are present—have inefficient, anticompetitive consequences even if there are arguably valid patents underlying the threat.

Although we cannot prove it, we suspect that some of the limitations on antitrust enforcement in the patent area, such as those just mentioned, stem from the fear of unbridled liability for what could, on the surface, appear to be simply the exercise of a statutory right. To the extent that this is so, Section 5, precisely because it does not provide for unbounded liability, becomes a potentially more attractive tool for challenging inefficient anticompetitive cost-raising behavior where it occurs.

**Cheap Exclusion.** We have argued elsewhere that combating what we called cheap exclusion should be high on the list of enforcement priorities for the FTC’s Bureau of Competition.<sup>31</sup> Exclusionary practices that are both inexpensive to undertake and incapable of yielding any cost-reducing efficiencies are “cheap” in both senses of that term and are most likely to appeal to any firm bent on acquiring market power by anticompetitive means. Section 5 could be a significant tool in preventing cheap exclusion, although most forms of cheap exclusion can and should be reached via straightforward application of the Sherman Act.

A common objection to antitrust enforcement against some types of cheap exclusion is that it might “make a federal treble damages case out of a common law tort.” As we have noted elsewhere,<sup>32</sup> we do not agree with a legal principle that conduct should be immunized because it is already illegal under another legal principle. Nonetheless, to the extent that concerns about private enforcement under the Sherman Act could threaten to turn many state torts into a federal treble-damages claim, Section 5 might provide the obvious means for proscribing conduct that, while tortious under conventional state law, can at the same time create very substantial competitive harm. In such a case, Section 5 would be performing a “yes, but” role, overcoming a legal obstacle placed in the path of Sherman Act enforcement that is unrelated to antitrust law or policy.

**3. Gap Filling Cases.** Unlike “frontier” cases, where the conduct is novel but otherwise satisfies traditional Sherman Act requirements, and “yes, but” cases, where the elements of the Sherman Act would be met but for the invocation of some limiting rationale unrelated to antitrust, “gap filling” cases are ones where the conduct at issue does not (or arguably does not) meet one

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<sup>29</sup> The cases dealing with this issue are collected and neatly summarized in Christopher R. Leslie, *New Possibilities for Asserting Walker Process Claims*, ANTITRUST, Summer 2007, at 48.

<sup>30</sup> *Hydril v. Grant Prideco*, 474 F.3d 1344 (Fed. Cir. 2007).

<sup>31</sup> Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

<sup>32</sup> *Id.* at 993–94.

of the elements of the Sherman Act. Most such cases likely raise questions regarding the “agreement” element of Section 1, or the “monopoly power” element of Section 2.

Perhaps the paradigmatic example of a “gap filling” case is an invitation to collude, such as the FTC’s consent order in *Valassis*.<sup>33</sup> As alleged in the complaint, that case—which was settled without trial—involved an alleged invitation to collude in a market that constituted a durable duopoly with high barriers to entry. Invitations to collude do not fit easily within the language of either Section 1 (where is the agreement?) or Section 2 (where is the dangerous probability of success?), yet there is little doubt that attempted collusion is conduct that fits comfortably within the ambit of antitrust economic and policy analysis. The conduct, if consummated, would be illegal per se, and, even unaccepted, it may facilitate coordinated interaction by disclosing the solicitor’s preferences. Meanwhile a simple, naked invitation to collude serves no procompetitive, efficiency-enhancing purpose.

Although the *Valassis* case was not controversial, the risk of an unbounded application of Section 5 is greatest in these “gap-filling” cases, and the Commission should give careful thought to the imposition of stringent requirements where “gap-filling” is the rationale for the stand-alone use of Section 5. We limit ourselves here to two further fact patterns where these issues may arise.

First, certain kinds of behavior may facilitate oligopolistic price stickiness, without generating any potential cost-saving efficiencies, yet still leave unmet the Sherman Act requirement for an agreement or concerted action. For example, consider refusals to quote other than delivered prices in the absence of any reason to explain why delivered pricing reduces transaction costs, or contractually committing with all buyers to announce publicly any price increase before the price increase goes into effect without any explanation as to why, in this industry, this practice might increase price competition. Under certain conditions, these practices—if followed by most firms in the market—can have serious anticompetitive consequences, even if there is no evidence of agreement on these terms among competing sellers. It would appear consistent with the policies underlying the Sherman Act to analyze such conduct under Section 5, although that raises the question of what limits should be imposed if Section 5 were to be used in this way.<sup>34</sup>

Another potential candidate for “gap filling” adjudication under Section 5 would be what is often referred to as “patent fishing.” When firms acquire patents and then demand payments from probable non-infringers, but where the payments are much less than the costs of litigation, this behavior—especially where repeated many times—can significantly raise the costs of the producing firms. These increased costs are inefficiencies and will also likely yield higher prices and a diminution in consumer surplus. Depending on how the cost increases are spread, the fishing may also create entry barriers and give some firms market power. Yet, because the patent fisher does not itself gain from the market power that its fishing can create (or because the practice may reduce consumer welfare but without yielding monopoly profits to any market participant), it is not obvious that conventional antitrust would speak to this behavior. Section 5 might be an appropriate tool for investigating allegations of such conduct, but before filing such a complaint it is important to identify the elements that must be satisfied to bound this application of the statute.

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<sup>33</sup> *Valassis Commc’ns, Inc.*, FTC File No. 51-0008 (Mar. 14, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510008/060314do0510008.pdf>.

<sup>34</sup> The *Ethyl* case, *supra* note 6, might well have been another well-grounded gap filling case, given the panoply of interlocking facilitating practices at issue. However, the trial record apparently was insufficient to convince the reviewing court that actual anticompetitive effects stemmed from the challenged conduct and the Commission was unable to persuade the court that the practices at issue lacked redeeming procompetitive value. Consequently, on the facts as found, *Ethyl* would not appear to be a candidate for a Section 5 “gap filling” case.

### **A Cautionary Conclusion**

Although we have suggested a typology for evaluating whether particular conduct might be worthy of scrutiny under Section 5, we must emphasize that we are, of course, only speaking of proscribing behavior that is shown, after trial, to have serious, measurable anticompetitive consequences without promise of procompetitive benefits. Apart from per se cases, which might include certain kinds of egregious exclusionary acts, any case that does not meet that standard should not be brought under any antitrust regime, in our opinion. An interpretation of Section 5 that crossed this line would cause harm to our economy.

Finally, although we do believe that Section 5, enforced by the expert FTC, is in fact a good vehicle for what Congress intended—to define and proscribe forms of anticompetitive conduct, even if they are hard to analyze under existing Sherman Act precedents—the Commission should be exceedingly cautious in resisting the temptation to use Section 5 simply because, as a matter of statutory authorization, it thinks it can. ●

## Section 5 as a Bridge Toward Convergence

### Albert A. Foer

Creative thinking about Section 5 of the Federal Trade Commission Act should take into account the need for building bridges toward harmonized antitrust enforcement on an international scale. In this article, I point out several opportunities for convergence that are open to the FTC, including commonalities in Europe's abuse of dominance standard and the FTC's unfairness standard (providing examples relating to unilateral withdrawal of capacity and abuse of buying power); and guidance for determining when resale price maintenance and price discrimination are either pro- or anticompetitive.

### The Federal Trade Commission Should Use Section 5 as a Bridge Toward Convergence with Europe.

Our interest in this discussion is in practical applications of Section 5 that go beyond the other antitrust laws. The context for the ideas I will raise is international. One of the primary missions of the antitrust enterprise in the coming years must be to move toward a system of enforcement that has coherence and practical workability on a global playing field. I will focus on some ways in which Section 5, with its particular potential for prospective clarification of the law, can be used to bridge gaps with the European Union and other civil law jurisdictions.

This context is important because there are now more than one hundred nations with their own antitrust laws and there is no overarching institution for formally harmonizing these laws or for resolving disputes involving cross-border transactions and/or behavior. With the relatively recent breakdown of Doha Round efforts toward convergence, it will be up to the leading antitrust jurisdictions, i.e., the United States and the European Union—one a common law jurisdiction, the other civil law, each with its own traditions and needs—to try to bring as much harmony as possible to the antitrust world. This can be achieved to an important extent through the tools of guidance that are familiar to both the FTC and the European Commission.

As we head into a global economic recession, we can predict that pressures will build to limit trade, to promote protectionistic policies, and to reverse the positive momentum that has characterized international competition policy in so many ways since the late 1970s and early 1980s when the principal international issue was the extent of our extraterritorial reach and I was head of an FTC task force looking into allegations that our antitrust laws had become an obstacle to a strong U.S. presence in an increasingly global economy.<sup>1</sup> (We concluded, incidentally, that the charges were mostly wrong but that there were adjustments that the Commission should consider in light of increasing cross-border trade.) I believe that if the United States and the European

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Workshop on Section 5  
as a Competition Statute,  
Oct. 17, 2008.

<sup>1</sup> See Albert A. Foer, *International Implications of Section 7 Enforcement*, 50 ANTITRUST L.J. 819 (1981).

Union can now work together to formulate and present more of their competition policies in a common language, they together will have a better chance of achieving what I take to be their common goal of strengthening the role of antitrust enforcement throughout the world.

At the current time (i.e., at the end of the Bush era), it seems to me that, philosophically, the FTC is considerably closer to Rue Joseph II in Brussels than to its neighbor on 10th and Pennsylvania. Although there are undeniable complexities if the FTC stakes out positions too different from those of the Department of Justice, I believe that the two institutions are intended to be different and that Section 5 and the processes that permit its interpretation to evolve make it and the Commission a better candidate than the Sherman Act and the DOJ for attempting to bridge the gap between European and American competition policies. The DOJ's ideological constraints will likely be loosened in the future. In the meanwhile, I urge the FTC, while consulting with DOJ, to take the initiative in seeking modes of convergence with the European Commission.

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### **Section 5 and Article 82 Have Similarities that Can Be Emphasized Through Various Mechanisms of Guidance that Will Give Common Structure to Their Inherently Vague Meanings.**

Let us begin by recognizing a few important similarities between Section 5 and Article 82 of the Treaty of Rome. One deals with “unfair” methods of competition, the other with “abuse” of a dominant position. Both “unfair” and “abuse” are open-ended words that are normative in nature, certainly not restricted to a narrow efficiency-based meaning. They should be viewed as quite similar. What is not unfair is not abusive; what is not abusive is not unfair. Or so the words could be defined. Both of these tests of commercially incorrect behavior are fundamentally vague as stated and require structure in order to avoid their arbitrary and unpredictable application. It is in the common interest of the European Union and the United States to find the areas in which they can express their interpretations of Section 5 and Article 82 with similar guiding language.

Both concepts deal with monopoly power in the sense that they are understood to apply to firms with very high market shares. But market power can be exercised unfairly or abusively with anti-competitive effects in certain situations without having monopoly levels of market share. Whereas the Sherman Act clearly applies to firms that have the status of economic monopoly, Article 82 clearly applies to lesser levels of market power in which a firm has achieved dominance.<sup>2</sup>

I believe that Section 5 can and should be applied with a realistic and practical assessment of a firm's ability and incentives to exercise market power and its effects, and that a firm which is dominant in actuality and which engages in an unfair method of competition should be reachable under Section 5 even if its market share is less than the “70 percent or so” that often characterizes Sherman Act decisions.<sup>3</sup> The concept held in common is, or could be, that when a firm has

<sup>2</sup> EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 268 (2007); ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE* 676 (2002) (“EC policy and jurisprudence tend to define dominance as occurring at market share thresholds of 40 to 50 percent—considerably lower than the 70 percent or so that American courts usually associate with monopoly power in Section 2 cases.”).

<sup>3</sup> The U.S. Supreme Court has indicated that market shares above 66 percent indicate monopoly power without clearly specifying the lower boundary. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 379 (1956). The EC's recently released guidance document on how it intends to interpret Article 82 indicates that dominance will generally not be found where the market share is less than 40 percent. *See Commission of the European Communities, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings III A. 14* (Dec. 3, 2008, available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>) [hereinafter *Guidance*].

so much power over its market that it is capable of undermining a competitive market by unilateral actions, it can be held liable for abusing that power.<sup>4</sup>

In December 2008, the European Commission issued a detailed guidance document on its interpretation of Article 82 that provides a basis for careful comparisons.<sup>5</sup> Hopefully, the FTC will be able to work jointly with the Commission or at least with the EC's approach in mind, to provide comparable, if not identical guidance, through adjudicated cases, speeches, guidelines, formal rules, and other forms of guidance, which can be directed at specific categories of abuse.

In this way, the FTC can help bridge a gap that has probably been exaggerated in the past, when a small proportion of high profile cases were decided in different ways by the DOJ and the European Commission. In recent years, as the European Commission has moved in the direction of more and better use of economic science and a new emphasis on the importance of effects rather than structure, and as the FTC has developed its own jurisprudence that does not always go in lock step with the DOJ,<sup>6</sup> the potential convergence between the FTC and the EC has become a reachable and desirable objective. I do not mean to imply by this that the FTC can ignore the DOJ or act as if it were a sovereign and I do not mean to suggest that the FTC should take its marching orders from Europe; rather, I am suggesting that as the FTC gives renewed consideration to the meaning of Section 5, it should keep in mind that there are potential benefits in taking European learning and experience into account and in seeking ways to bring the two antitrust jurisdictions closer together through processes of formalized guidance.

### **“Unilateral Withholding” Is an Example of a Section 5 Violation that Does Not Necessarily Violate the Sherman Act, but Which Can Be Viewed as an Abuse of Dominance.**

We have seen circumstances in the electricity industry, most strikingly in California, where an electric generator has been able to produce significant increases in price by strategically reducing its output, for example by closing a plant for maintenance at a time of peak demand when the indus-

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<sup>4</sup> Early case law in the European Union “seems quite parallel to the U.S. formulation of a power to exclude competition or control prices, and raises similar issues.” ELHAUGE & GERADIN, *supra* note 2, at 267. The new Guidance from the European Commission states, “Dominance has been defined under EC law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.” *Guidance, supra* note 3, at III A.10. Although this is more encompassing than the Sherman Act, it could arguably be adopted by the FTC as a reasonable interpretation of Section 5.

<sup>5</sup> The United States has no such document, although the DOJ/FTC Horizontal Merger Guidelines reflects a similar approach to spell out how a major section of the antitrust law is to be interpreted. *See generally* U.S. Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>. Such guidelines are more typical of a civil law than a common law approach, and indicate a potential pathway for convergence. In a recent report, the Antitrust Division did seem to attempt to pre-empt the European Commission, but its narrow interpretation was rejected by the Federal Trade Commission and its future influence is dubious. *See generally* U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.htm>. *But see* Press Release, Fed. Trade Comm’n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

<sup>6</sup> I applaud the Commission for not allowing the DOJ’s recent statement on Section 2 to stand unchallenged as an expression of the Section 5’s approach to unilateral conduct. *See generally* Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>; Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>. However, the DOJ’s publication suggests the desirability of an FTC statement providing guidance on its interpretation of Section 5.

try is operating close to full capacity.<sup>7</sup> A successful withholding strategy appears to require highly inelastic demand on the part of consumers and a temporary situation that can be exploited by a strategically situated, but not necessarily monopolistic, firm.

Strategic unilateral withholding by a non-monopolist would arguably violate Section 5, but perhaps not the Sherman Act, if the following elements are present:

- a. There is highly inelastic demand at a time of peak capacity utilization;
- b. Strategic temporary withholding is not justified by a legitimate business practice;<sup>8</sup>
- c. Such withholding undermines efficiency in the market;<sup>9</sup>
- d. It is unfair in the sense that it is opportunistic or coercive. For example, there may be a legitimate expectation by customers that electricity production will not be slashed in an arbitrary way during peak demand when they have no alternatives or even the knowledge of what their supplier is doing.

The electricity example occurs in the context of a regulated sector. This fact would not deprive the FTC of regulatory authority, which is shared with the Federal Energy Regulatory Commission under the Federal Power Act.<sup>10</sup>

Would there be a remedy the FTC could employ against unilateral withholding?<sup>11</sup> Most likely the Commission would not act in the electricity context in the absence of a pattern of repeated behavior. A possible remedy could be to enjoin the behavior and require a demonstration of legitimacy prior to future withholdings of a defined nature. In the PacifiCorp merger,<sup>12</sup> for example, the remedy was divestiture to avoid the possibility of withholding.

Certainly, there could be a Section 5 unilateral withholding example in an unregulated industry. Consider the possibility of a manufacturer of flu vaccine closing one of its plants during flu season for the purpose of creating an artificial shortage.<sup>13</sup> Assume there are three manufacturers of this vaccine, each with multiple plants, and that no firm has more than 35 percent of the market. Assume further that no new entry is possible during the current flu season.

But wouldn't a firm necessarily have Section 2 monopoly power to enable it successfully to withhold output and raise prices? In the case of electricity, this may be a matter of market definition. If the market is defined very narrowly and in terms of a time period that may be measured in minutes or hours, perhaps one can build a case for the temporary but repeated exercise of monop-

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<sup>7</sup> See Diana L. Moss, *Electricity and Market Power: Current Issues for Restructuring Markets (A Survey)*, 1 ENVIRONS: ENVTL. & ENERGY L. & POL'Y J. 11, 18 (2006) (calling withholding "a relatively novel form of market power in an industry that has traditionally been concerned with exclusionary conduct."). It has been shown that market power can be exercised not only during peak periods but during off-peak and shoulder periods too. A recent merger complaint by the DOJ alleges that the potential of withholding capacity would be among the reasons the merger would have been illegal. Complaint, *United States v. Exelon Corp.*, No. 1:06CV01138 (D.D.C. filed June 22, 2006), available at <http://www.usdoj.gov/atr/cases/f216700/216785.htm>.

<sup>8</sup> A legitimate business practice would be, e.g., to close for scheduled or emergency repairs.

<sup>9</sup> A resulting price increase would be evidence of an anticompetitive effect.

<sup>10</sup> That the Federal Power Act does not remove the electric industry from antitrust oversight was made clear in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>11</sup> For an example of an FTC case involving withholding, see Analysis of Proposed Consent Order to Aid Public Comment, PacifiCorp, FTC File No. 971-0091 (Feb. 18, 1998), available at <http://www.ftc.gov/os/1998/02/9710091.ana.htm>. The analysis shows how withholding for a short period by a vertically integrated energy company can result in a price hike.

<sup>12</sup> *Id.*

<sup>13</sup> See Albert A. Foer et al., *What Do Exit Polls and Flu Vaccine Shortages Have in Common?*, FTC:WATCH No: 647, Feb. 14, 2005, at 12, available at <http://www.antitrustinstitute.org/Archives/379.ashx>.

oly power. But it is not clear that the Sherman Act can or will be stretched in this manner, whereas Section 5 can focus on the effects and use it to imply the pre-event market power.<sup>14</sup>

In the case of the flu vaccine, if all available vaccine is being demanded at the height of flu season and all plants are operating at capacity, even a manufacturer with a relatively low share of the market could unilaterally close one of its plants, perhaps temporarily, be able to raise its own prices in the face of inelastic demand and reduced supply, and benefit (along with its rivals) from the higher price, provided the higher price on a lower output is expected, on balance, to increase profitability for the firm. The remedy here would be a mandatory injunction to resume production of the vaccine.<sup>15</sup>

Thus, unilateral withholding may be an example of a non-monopolist dominant firm, perhaps defined with respect to the price sensitivity of the residual demand it faces, abusing its position of power and engaging in an unfair method of competition. Both the FTC and the European Commission could likely agree on a statement to this effect.

### **Abuse of “Buyer Power” May Violate Section 5 Without Monopsony-Level Market Power**

A second example of a dominant but not monopolistic firm engaging in an unfair method of competition could be found in the area of buyer power. For a variety of reasons, a power buyer can exercise disproportionate, anticompetitive bargaining power over its suppliers when it has a market share far below that required for a monopolistic seller.<sup>16</sup> The American Antitrust Institute (AAI) points to the emergence of large buyers as a prominent feature in many sectors of the economy<sup>17</sup> and defines buyer power as “the ability of a buyer to depress the price it pays a supplier or to induce a supplier to provide more favorable nonprice terms.”<sup>18</sup> This encompasses both classic monopsony and what the AAI refers to as “countervailing power.” Both monopsony and countervailing power can have competitive effects that are beneficial or harmful, which means that outside of the buyer cartel context they need to be assessed under the rule of reason. Monopsony and countervailing power differ in the degree of dominance required to exercise market power:

Since classic monopsony power is the mirror image of monopoly power—a large degree of market power—classic monopsony power is normally associated with a large share of purchases in the relevant market, approximately 70% or more. In contrast, both theory and evidence suggest that a firm can exercise countervailing power in many market settings with a substantial but nondominant share, perhaps as little as 10–20%. Countervailing power, therefore, is likely to be exercised more frequently than

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<sup>14</sup> In this, one might argue that the Section 5 violation is of a nature that the Sherman Act, properly construed, could reach it, but I tend to think it is enough of a stretch that the justification for FTC action should not have to rest on making a prediction of this sort.

<sup>15</sup> Compare this hypothetical with the FTC’s action in the *Stone Container* case. Analysis of Proposed Consent Order to Aid Public Comment, Stone Container Corporation, FTC File No. 951-0006 (Feb. 25, 1998), available at <http://www.ftc.gov/os/1998/02/9510006.ana.htm>. In that case, the respondent, apparently not a monopolist and facing excess capacity in the industry, unilaterally closed several of its plants while acquiring its competitors’ inventory, with the intent of encouraging competitors to raise prices. This was treated as an invitation to collude, in violation of Section 5. In my hypothetical, the problem is not excess capacity and there is no need for competitors to follow suit in order for prices to increase.

<sup>16</sup> See AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 95–137 (2008), available at <http://www.antitrustinstitute.org>.

<sup>17</sup> *Id.* at 95 (citing the packing of meat, the processing of chicken, the harvesting of hardwood timber in the Pacific Northwest, the employment of professional athletes, the provision of health insurance, and the retailing of toys and games, groceries, and books).

<sup>18</sup> *Id.* at 99.

classic monopsony power and its effects, whether beneficial or harmful, are likely to be more widespread.<sup>19</sup>

For example, a retailer that controls 20 percent of a national market can make both price and nonprice demands on an individual supplier via a take-it-or-leave-it or all-or-nothing offer that in practice gives the supplier less real choice than a consumer would have if one seller controls 90 percent of the same product market. In some cases, this should be deemed a sufficient degree of dominance to warrant intervention by both the FTC and the European Commission, in the event that the dominance is abused.

There are undoubtedly difficult questions relating to what would constitute an unfair method of competition or an abuse of dominance by a non-monopsonist buyer,<sup>20</sup> but if the possibility of anti-competitive effects is realistic and will play an increasingly important role in economic life, as we strongly believe, then both the FTC and European Commission should be trying to provide guidance as to the line between proper and improper exercise of buyer power. If the guidance is joint or at least quite similar, this would be a major contribution to convergence and would help clarify an important area of competition policy that is probably still in its infancy.

### **Price Discrimination Policy Could Be Developed Under Section 5**

It is well-recognized that price discrimination by a company with market power can be anticompetitive under certain circumstances but that it can be pro-competitive under other circumstances.<sup>21</sup> The Robinson-Patman Act, which is the United States' principal law for dealing with price discrimination, is generally not enforced by the federal government because of its complexity, the nearly open-ended exemption for meeting competition, and its propensity for being used for anticompetitive outcomes. Section 2 of the Sherman Act also can be used against price discrimination in certain circumstances. It is fair to say that price discrimination is a confusing area of law, in which the competitive process can under some circumstances be harmed and businesses can find it difficult to ascertain whether their price (and sometimes non-price) policies expose them to liability.

But Section 5 could be utilized, again in consultation with the Europeans, to develop a series of parallel guiding statements as to what practices will be deemed by the FTC and the European Commission to constitute unfair methods of competition. We believe that a market power screen is necessary in this regard, but that price discrimination can, under identifiable circumstances, be used anticompetitively by a firm with less market power than a monopolist.<sup>22</sup>

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<sup>19</sup> *Id.* at 104.

<sup>20</sup> *See generally id.* at 103–30.

<sup>21</sup> *See id.* at 130–35.

<sup>22</sup> *Id.* at 133 (“All that would be required [under an AAI proposal for reforming the Robinson-Patman Act] is proof that competition was sufficiently imperfect that a seller had the incentive and the ability to undertake significant, persistent, unjustified favoritism.”). In Europe, Article 82(2)(c) offers parallel protection to the R-P Act, prohibiting dominant firms from “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.” ELHAUGE & GERADIN, *supra* note 2, at 399. Article 82(2)(a) also prohibits a dominant firm from “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.” *Id.* at 400. We are not endorsing, however, an interpretation of Section 5 that would prohibit exploitation of legitimate market power through excessive pricing.

## Developing Structure for RPM Rule of Reason Cases Could Be an Example of Bridging the Gap Between Section 5 and Europe's Article 81

Thus far we have focused on the relationship between Section 5 and Article 82. Here we focus on the example of resale price maintenance (RPM) as an example of bridging the gap between Section 5 and Article 81.

The Supreme Court in *Leegin*<sup>23</sup> called on the legal system to develop a methodology for dealing with resale price maintenance under a rule of reason regime. One potential approach already exists in the form of the European Commission block exemption regulation applicable to vertical restraints, and the guidelines associated with it.<sup>24</sup> According to the EC's guidelines, there is a rebuttable presumption that an agreement which contains RPM is anticompetitive and will not have positive effects or that, where efficiencies are likely to result, these will not be passed on to consumers and/or that RPM is not indispensable for creating these efficiencies. But it is always possible for the firm in question to come forward with substantiated claims that the RPM will bring about efficiencies. When this occurs, the European Commission then is forced to show the likely or actual negative effects. If the efficiencies outweigh the negative effects and the other conditions such as the indispensability test are also fulfilled, the agreement is not prohibited.

The European Commission will be re-evaluating its Vertical Restraints policies in 2010, and the work on this has already begun. The EC case law and practice toward RPM is apparently more flexible than the United States per se approach that was overturned. It is also more forthright and explicit, in that it contains no *Colgate* doctrine to confuse and perhaps obliterate any RPM prohibition. I believe that the FTC could apply its jurisdiction under Section 5 and work in conjunction with the European Commission to agree on a rebuttable presumption and burden-shifting approach very similar to, if not identical with, the current EC guidelines to arrive at a structured rule of reason approach which meets the Supreme Court requirements.

With respect to the RPM question and the price discrimination question addressed in the previous section of this article, I am making the recommendation that the Federal Trade Commission use its tools for providing prospective guidance to bring greater clarity and predictability, with or without EC coordination. Taking the long range picture into account, I think it would be worth the additional effort to try to produce compatible if not fully harmonious guidance. ●

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<sup>23</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>24</sup> See generally Luc Peepkorn, *Resale Price Maintenance and Its Alleged Efficiencies*, 4 EUR. COMPETITION J. 201 (June 2008) (going into more detail both on European policy and on the potential applicability in the US). The AAI's position on RPM, calling for the FTC to develop a structured rule of reason approach, is set out in AMERICAN ANTITRUST INSTITUTE, *supra* note 16, at 88–92.

# Revitalizing Section 5 of the FTC Act Using “Consumer Choice” Analysis

**Robert H. Lande**

The ongoing debate over the breadth and nature of Section 5 of the FTC Act has intensified due to the outcome of the recent Presidential election. Some call for or predict a much broader and more aggressive approach to Section 5. Others caution that reviewing courts will not permit an overly expansive interpretation of Section 5 unless it is clearly bounded by a structure that will prevent it from becoming untethered and standardless.

In this article, I propose that the use of the consumer choice framework would be the best and perhaps the only way to revitalize Section 5 in a manner that is definite, predictable, principled, and clearly bounded. This approach would focus attention on the factors that are important for a market to function competitively, including variety and quality, as well as price. It also would provide a relatively clear way for businesses and courts to distinguish anticompetitive conduct from procompetitive or benign conduct. If the Commission were to adopt the consumer choice limitations, the Act would be given the broad interpretation Congress intended, and this reinvigorated interpretation would be likely to be sustained by reviewing courts.

■ **Robert H. Lande** is Venable Professor of Law, University of Baltimore School of Law. This is a revised and expanded version of testimony originally presented as the Statement of Robert H. Lande, Venable Professor of Law, University of Baltimore School of Law, at the Federal Trade Commission’s Workshop on Section 5 of the FTC Act as a Competition Statute, Oct. 17, 2008, Washington, D.C. The author is grateful to Albert A. Foer for extremely useful comments on an earlier draft and to Christine Carey for excellent research assistance.

## Section 5 of the FTC Act Is Significantly Broader than the Other Antitrust Laws

There is no doubt that when Congress enacted Section 5 of the FTC Act, it intended the law to be more aggressive than the Sherman and Clayton Acts.<sup>1</sup> The legislative history and Supreme Court decisions<sup>2</sup> demonstrate that Section 5 was intended to cover incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission.<sup>3</sup> Even though reasonable people may differ as to whether the FTC Act should be more expansive than the other antitrust laws, congressional intent concerning this point is clear.<sup>4</sup>

Some might question the propriety of subjecting conduct to a different, tougher legal standard when it is challenged under Section 5 of the FTC Act. For example, one might ask why an exclusive dealing arrangement should be evaluated under an incipency standard when it is challenged under the FTC Act, but not when challenged under the Sherman Act?<sup>5</sup> One answer is that Sherman Act violations lead to automatic treble damages and award of attorneys’ fees to victorious plaintiffs.<sup>6</sup> By contrast, there is no private right of action under the FTC Act, and FTC Act vio-

<sup>1</sup> 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, 233, 251, 271 (1979–1980).

<sup>2</sup> See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–44 (1972).

<sup>3</sup> See Averitt, *supra* note 1, at 228–29, 242, 251, 271, 275.

<sup>4</sup> See *id.* at 229–38.

<sup>5</sup> For the current legal treatment of exclusive dealing arrangements under the Sherman Act, see the sources cited *infra* note 31.

<sup>6</sup> See 15 U.S.C. §15(a).

lations are not precedents that lead to private litigation unless an FTC decision specifically finds a Sherman Act or Clayton Act violation; a “pure” FTC Act violation would not do this.<sup>7</sup> Moreover, mergers already are judged under two different laws that employ two different standards. Mergers can potentially violate Section 2 of the Sherman Act,<sup>8</sup> but only if they violate a monopolization standard. Mergers also can violate Section 7 of the Clayton Act, where they are scrutinized under a much stricter incipency standard.<sup>9</sup> In other words, despite the existence of the 1890 Sherman Act, Congress wanted mergers challenged more aggressively, so in 1914 it enacted the Clayton Act. Similarly, Congress believed that the Sherman Act was not aggressive, flexible, or broad enough,<sup>10</sup> so in 1914 it enacted the FTC Act.

However, the Supreme Court case law addressing Congress’ intent in enacting Section 5 is relatively old.<sup>11</sup> There is no guarantee today’s more conservative<sup>12</sup> Court would interpret Section 5 expansively today. If the Commission were to attempt to promulgate an approach to the FTC Act that was vague, insufficiently bounded, or that gave it undue discretion, more conservative reviewing courts today might well restrict the scope of Section 5 and make it coterminous with the other antitrust laws, no matter how clear the congressional intent and no matter what the older case law holds. A narrower interpretation of Section 5 would be especially likely if the Commission were to articulate the scope of Section 5 in non-economic terms, such as by forbidding conduct that is “unjust,” “oppressive,” or “immoral.” Fortunately, the Commission does have a way to minimize the risk of reversal on appeal.

*If the Commission were to adopt the consumer choice limitations, the Act would be given the broad interpretation Congress intended, and this reinvigorated interpretation would be likely to be sustained by reviewing courts.*

### **Section 5 Can Be Expansive If, But Only If, It Is Constrained by the Choice Framework**

Section 5 prohibits conduct that constitutes “unfair methods of competition” (which, in this article, I call Section 5 antitrust violations) as well as conduct that constitutes “unfair or deceptive acts or practices” (which, in this article, I call Section 5 consumer protection violations).<sup>13</sup> The choice framework would impose a threshold requirement that every Section 5 antitrust violation significantly impairs the choices that free competition brings to the marketplace.<sup>14</sup> The choice framework also would impose the requirement that every Section 5 consumer protection violation significantly impairs consumers’ ability meaningfully to choose from among the options the market provides. Construed this way, the two halves of Section 5, operating together, ensure that consumers have

<sup>7</sup> See Averitt, *supra* note 1, at 251 n.112; see also *id.* at 253 n.116, 299 n.303.

<sup>8</sup> Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .” 15 U.S.C. § 2. Illegal conduct can include corporate mergers. See LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:41 (4th ed. 2003).

<sup>9</sup> See Robert H. Lande, *Resurrecting Incipency: From Von’s Grocery to Consumer Choice*, 68 ANTITRUST L. J. 875, 876 (2001).

<sup>10</sup> See Averitt, *supra* note 1, at 228–29, 233, 242, 251, 271, 275.

<sup>11</sup> The Supreme Court’s most recent expansive interpretation of Section 5 occurred more than twenty years ago in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), where the Court characterized Section 5 to include traditional antitrust violations and also “practices that the Commission determines are against public policy for other reasons.”

<sup>12</sup> See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 6, tbl.3 (U. Chi. Law & Economics, Olin Working Paper No. 404, May 23, 2008), available at <http://ssrn.com/abstract=1126403> (documenting that a large proportion of the most conservative Supreme Court justices of recent decades are serving on the Court today).

<sup>13</sup> See 15 U.S.C. § 45.

<sup>14</sup> See Neil W. Averitt & Robert H. Lande, *Using The “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 182 (2007) [hereinafter *Using the “Consumer Choice” Approach*]; see also Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law*, 65 ANTITRUST L.J. 713, 718–20 (1997) [hereinafter *Consumer Sovereignty*].

the two ingredients needed to exercise effective sovereignty—a competitive array of options and the ability to choose meaningfully from among these options.<sup>15</sup> Antitrust law prevents restraints that would restrict the competitive array of options in the marketplace, ensuring these competitive options are undiminished by artificial restrictions, such as price fixing or anticompetitive mergers. Consumer protection law then ensures that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints, such as deception or the withholding of material information. In this way, the two halves of Section 5 together protect a free market economy.

By contrast, conduct not causing either type of problem should not violate Section 5 of the FTC Act. Conduct not unduly restricting the options available in the marketplace should not be an antitrust violation, and conduct not unduly restricting consumers' ability to choose from among these options should not constitute a consumer protection violation.

The choice approach to antitrust, instead of a price or efficiency approach,<sup>16</sup> has the advantage of explaining accurately, simply and intuitively, in a way that is easy to understand, why antitrust is good for consumer welfare.<sup>17</sup> Under a consumer choice standard, factors like innovation, perspectives,<sup>18</sup> quality and safety would in effect be moved up from the footnotes, where they are all too-often forgotten, into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust law is construed and applied within the consumer choice framework, it will change some antitrust analysis because it will give greater emphasis to such short term issues as quality and variety competition, and to such long term issues as competitive innovation, ideas, and perspectives. It would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often would lead to the wrong result.<sup>19</sup> The consumer choice framework could also lead to more aggressive enforcement,<sup>20</sup> but would do so in a predictable, principled manner.

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<sup>15</sup> The converse, however, is not correct. It is not true that everything that reduces consumer choice is an antitrust violation, or that everything that reduces consumers' ability to choose from among the options the market provides is a consumer protection violation. What is true is that every antitrust violation reduces or distorts the choices that are on the market. It also is true that every consumer protection violation reduces or distorts consumers' ability to choose from among the options the market provides. Averitt & Lande, *Consumer Sovereignty*, *supra* note 14, at 715–22.

<sup>16</sup> For specific differences between the consumer choice, price and efficiency approaches, see Averitt & Lande, *Using the "Consumer Choice" Approach*, *supra* note 14, at 185–89.

<sup>17</sup> The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is slowly evolving in this direction. *Id.* at 263–64.

<sup>18</sup> Competition in terms of perspectives arises most meaningfully in the media contest. *See id.* at 206–12.

<sup>19</sup> There are several categories of cases where courts have reached the wrong results, and would be likely to reach the right results if they had used the choice approach. The first category involves conduct in markets with little or no price competition, as may occur with certain types of regulation. In these situations, no avenues exist for properly assessing consumer welfare without focusing explicitly on non-price issues. For these markets a price standard would be inadequate because our main concern is artificially diminished consumer choice. *See id.* at 196–99.

A second category of cases for which the consumer choice approach would work better involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. Such conduct tends to cause consumers to obtain products or services less suited to their needs, as well as to produce adverse effects on price. There are a large number of examples, including the advertising restriction cases and similar cases that involve collusion to raise consumer search costs. *Id.* at 199–201.

Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, rather than through price. These markets may involve high-tech innovation or editorial independence in the news media. *Id.* at 201–22.

<sup>20</sup> *Id.* at 196–222.

### Three Examples: Cases Similar to *N-Data*, Invitations to Collude, and Incipient Exclusive Dealing and Tying Violations

In this section I provide three examples of ways that Section 5 usefully could be construed and applied more expansively than the other antitrust laws. I will also briefly show how the choice framework would beneficially assist in the analysis of each example, and raise the probability of a reviewing court sustaining a decision by the Commission.

**1. Cases Similar to *N-Data*.** The FTC's action in the *Negotiated Data Solutions (N-Data)* case should be applauded,<sup>21</sup> and the Commission commended for condemning the opportunistic behavior at issue and affirming that conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.<sup>22</sup>

The issues in *N-Data* never reached a reviewing court, but the next time the Commission decides a similar case the issues could be appealed. The FTC's approach to such cases would be more likely to be sustained if it were supplemented by "consumer choice" limitations that make it clearer and more predictable why the conduct at issue was challenged.

It is not completely clear that the conduct at issue in *N-Data* would have violated the Sherman Act. It could be argued that the conduct only constituted the exploitation of intellectual property rights, in which case it might not have violated the Sherman Act. It could also be argued that the case does not clearly involve an act of monopolization in violation of Section 2 of the Sherman Act because the original patent holder adhered to its agreement, and the successor holder was just exploiting its newly acquired patent rights, rather than taking improper steps to acquire or maintain monopoly power.<sup>23</sup> In light of this uncertainty, it is fortunate the Commission was able to use Section 5 of the FTC Act to challenge the anticompetitive conduct at issue.

Even though the Commission's *N-Data* decision came to the right result, the majority opinion's overall articulation of its "unfairness" standard risks attack for being unduly indefinite. The Commission correctly noted: "The legislative history from the debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge" including conduct that is "unjust, inequitable or . . . contrary to good morals."<sup>24</sup> Despite the clear legislative intent to give the Commission the power to define, challenge, and condemn such conduct, doing so arguably would give the Commission too much discretion. Any Commission assertion that conduct violates Section 5 because it is "unjust, inequitable or . . . contrary to good morals" also could be criticized as not providing sufficient notice to businesses as to what specific conduct is illegal.

*There is no doubt that when Congress enacted Section 5 of the FTC Act, it intended the law to be more aggressive than the Sherman and Clayton Acts.*

<sup>21</sup> See *Negotiated Data Solutions LLC*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> There was free and fair competition at the time presentations were made in the early 1990s by owners of different technologies to the Institute of Electrical and Electronics Engineers (IEEE), a standard-setting organization, in connection with the selection of a standard to facilitate interoperability between Ethernet technologies. In that connection the IEEE accepted the offer of National Semiconductor in 1994 to license its technology (which accomplished the desired objective) for a one-time fee of \$1000 (a price far below the monopoly level).

After roughly eight years, following transfer of the pertinent patents to a new owner, the new owner increased its royalty demand. Rather than honor the price that had been established through the competitive standard-setting process, due to lock-in effects consumers purchasing from licensees were forced to pay higher prices to cover the increased licensing fees. This was a significant change to the (price) choice that competition had brought to the marketplace roughly eight years earlier. The conduct therefore quite properly was found to violate Section 5 of the FTC Act. See *N-Data*, 2008 WL 4407246.

<sup>24</sup> See Statement of Commission at 1–2, *N-Data*, available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf> (citations omitted).

*The consumer choice limitation would help reassure the antitrust and business communities that the Commission is not evaluating conduct on an ad hoc, unprincipled basis.*

However, *N-Data's* conduct did artificially remove important consumer choices that would have arisen if competition had been set by the free market.<sup>25</sup> For this reason, it would have been condemned if the Commission had utilized the choice approach. Moreover, because the choice framework carefully relies upon an extensive body of earlier Commission "unfairness" policy statements and opinions, as well as court decisions, it would have helped inoculate the Commission's opinion against the charge that it provided inadequate notice that the conduct in question was illegal. Additionally, the consumer choice limitation would help reassure the antitrust and business communities that the Commission is not evaluating conduct on an ad hoc, unprincipled basis.

When a case like *N-Data* is appealed, the reviewing courts would be more likely to give deference to the FTC's interpretation of Section 5 if "unfairness" were limited to practices that significantly interfere with consumer choice, rather than if the Commission uses "fuzzier" concepts such as "unjust," "inequitable," or "contrary to good morals." The consumer choice limitation also would provide bounds that would demonstrate that the Commission was not seeking open ended powers. This should help convince reviewing courts to give the Commission the considerable deference it deserves when it goes beyond traditional Sherman Act violations.

**2. Invitations to Collude.** Invitations to collude can violate Section 2 of the Sherman Act.<sup>26</sup> However, for enforcers to prove a Sherman Act violation they must undertake several formidable tasks.<sup>27</sup> First, they must prove a relevant market, a complex and time-consuming undertaking. Then the enforcers must prove that the challenged conduct was anticompetitive (as that term has been defined) and that it would result in either the respondent's achieving or maintaining monopoly power or the "dangerous probability" of its achieving monopoly power. This analysis would have to show harm to competition, including a careful analysis of barriers to entry. Lastly, claimed efficiencies associated with the practices would have to be litigated.<sup>28</sup> Like every successful Section 2 action, these cases would be complex, lengthy, and costly.

By contrast, naked collusion cases are much less complicated. In these cases the enforcers do not have to define markets, prove difficulty of entry or any form of market power, litigate efficiencies, or establish actual anticompetitive effects.<sup>29</sup>

Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly and lengthy market definition and market power issues in collusion cases also apply to invitations to collude cases. Moreover, invitations to collude can comfortably be characterized as conduct that significantly risks impairing the price or other choices that the marketplace otherwise would provide to consumers, and thus fit comfortably within the consumer choice framework. They should, as the Commission has concluded,<sup>30</sup> violate Section 5 of the FTC Act without requiring the Commission

<sup>25</sup> If the Commission adopted the self-limiting principle that every antitrust violation must significantly impair the choices that free competition would have brought to the marketplace, in the *N-Data* case the choice option of concern would have been the price of the products in question. At the time of the original presentations to the IEEE, the presentations should have been forced to fully compete with each other in terms of price options (as well as quality options). The IEEE should have been free to select as its preferred technological option the one with the lowest long term cost.

<sup>26</sup> *United States v. American Airlines*, 743 F.2d 1114, 1121 (5th Cir. 1984) ("attempted monopolization may be established by proof of a solicitation along with the requisite intent").

<sup>27</sup> See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* ch. 3 (2006).

<sup>28</sup> *Id.* at 73–74.

<sup>29</sup> *Id.* at 228–29. This is not to suggest that collusion cases are simple. Collusion cases are, however, far less complex than Section 2 cases.

<sup>30</sup> *Valassis Commc'ns, Inc.*, FTC File No. 051 0008 (Mar. 14, 2006) (Analysis to Aid Public Comment), available at <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

to undertake the Herculean tasks of proving the traditional Sherman Act requirements. This would save money for the taxpayer and also lead to faster and more reliable results.

**3. Incipient Exclusive Dealing and Tying Violations.** There is substantial uncertainty over the market share required to establish a tying violation, and the amount of foreclosure necessary for an exclusive dealing violation.<sup>31</sup>

Similar uncertainty exists over how much pressure or inducement, in the form of a discount or other conduct, must exist before an arrangement will be termed a “tying” or “exclusive dealing” arrangement.<sup>32</sup>

The traditional market share requirements and degree of certainty over whether an effective tie or exclusive dealing arrangement should be found to exist should be relaxed when the case involves a defendant with a significantly larger market share than that of the plaintiff. In these “incipient” tying or exclusive dealing situations, incumbents often will be able to disadvantage significantly smaller competitors or would-be entrants because their market share is larger, even if it is not large enough for a traditional Sherman Act violation. Suppose, for example, a company introduces a new brand of super-premium ice cream. Suppose also that an existing seller of super-premium ice cream has 30 percent of this market, and also another 30 percent of the premium and non-premium ice cream markets. Then suppose the incumbent firm tells supermarkets that they have to choose between the established firm’s products and the newcomer’s products. No efficiencies would arise if the established firm’s demands were met.

These facts, including defendant’s low market share, would be unlikely to constitute either a tying or exclusive dealing case.<sup>33</sup> Moreover, market definition and market power or foreclosure issues would be extremely difficult, lengthy, and costly to litigate. However, if the incumbent’s exclusionary strategy succeeded, consumer choice in this market, in terms of varieties of ice cream on the market, would be diminished for the short term. Moreover, successful exclusion would risk diminishing incentives to innovate and enter by non-incumbents in the long term. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.<sup>34</sup>

The consumer choice framework helps explain why incipient tying and exclusive dealing arrangements should violate Section 5. Its focus on actual or potential choice in the marketplace should also increase predictability for the business community and make it more likely that reviewing courts would uphold the Commission’s determinations. Moreover, treating incipient exclusive

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<sup>31</sup> See Sullivan & Grimes, *supra* note 27, §§ 7.2, 7.3; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ch. 10 (3d ed. 2005). The market shares and market power required can be similar to those required for Section 2 violations as some commentators suggest: “courts require a significantly lower foreclosure share in Sherman Act § 2 cases than in Sherman Act § 1 cases.” See EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 530 (2007).

<sup>32</sup> See ELHAUGE & GERADIN, *supra* note 31, at 623–33.

<sup>33</sup> For the necessary requirements, see *id.* at 382–87, 404–05, 435–39.

<sup>34</sup> A similar exclusive dealing case where a diminution of consumer choice occurred was in *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 485 F.3d 880 (6th Cir. 2007). Although the *Wyeth* case was vastly more complicated than the ice cream hypothetical, the conduct at issue was bundled discounts, in the form of rebates, that were tantamount to an exclusive dealing arrangement. *Id.* at 884–85. The conduct offered no significant efficiencies and resulted in the serious possibility of diminished consumer choice in the conjugated estrogen market. See *id.* at 886 (One of Wyeth’s clients, Express Scripts, wanted to renegotiate its contract with Wyeth because a small group of Scripts’ customers insisted on having the other product, Cenestin, available but defendant refused and reminded Script that 40 million dollars in rebates per year would be at risk if it made the other product available). The defendant’s exclusionary strategy could have significantly diminished an important aspect of consumer choice in the short term, regardless whether prices were affected by its conduct. Moreover, successful exclusion would risk diminishing incentives to innovate and enter by non-incumbents in the long term. Unfortunately, the court focused on price, rather than consumer choice, and did not condemn the conduct in question. *Id.* at 886–91. Regardless whether the conduct should have been found to constitute a Section 2 violation, it should be a violation of Section 5 of the FTC Act.

dealing or tying arrangements as a violation of Section 5 would advance international harmonization in an increasingly globalized economy by beneficially moving U.S. antitrust law in the direction of European Union competition law.<sup>35</sup>

### **Conclusion**

In conclusion, Section 5 of the FTC Act should be interpreted to be significantly broader than the other antitrust laws. But this expansive mandate only should be used within the consumer choice framework. ●

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<sup>35</sup> See ELHAUGE & GERADIN, *supra* note 31, at 496–97, 531–44, 601–03, 618–23.

## A Suggestion for the Revival of Section 5

**Thomas B. Leary**

The recent opinions issued by a divided Federal Trade Commission in *Negotiated Data Solutions (N-Data)*<sup>1</sup> have brought to the fore a long-simmering debate over the appropriate reach of the “unfair methods of competition” language in Section 5 of the Federal Trade Commission Act. The majority Statement for the Commission states that the Act reaches “not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”<sup>2</sup> Included among the practices that are against public policy is conduct that is “unjust, inequitable or dishonest,” conduct that is “contrary to good morals,” and conduct that involves “deception, bad faith, fraud or oppression.”<sup>3</sup>

A dissenting opinion by former Chairman Deborah Majoras advocated a much more constrained view of Section 5. In her view (implicitly endorsed in the dissenting opinion of present Chairman William Kovacic), there is a “scholarly consensus” that the Sherman and Clayton Acts, as currently interpreted, are broad enough to reach “nearly all matters that properly warrant competition policy enforcement.”<sup>4</sup> Without full knowledge of the facts,<sup>5</sup> it is difficult to voice agreement with either the majority or the dissenters in this particular case. As an abstract legal proposition, however, it seems that the dissent’s vision of Section 5 is too narrow to be of much use, and the majority’s vision is too broad to survive without further qualification. The appropriate solution may not be some compromise between the majority and the dissenting opinions, but rather an approach that is entirely different—a new approach that is actually a revival of something old.

Reliance on Section 5 might be most useful in cases where the Commission does, in fact, have reason to believe that there has been a violation of the Sherman Act or the Clayton Act but where there is not yet an established body of precedent to support that view. A Section 5 complaint would not be justified by perceived gaps in the coverage of the antitrust laws but rather would send a signal that the Commission recognizes it is entering largely uncharted territory. The elements of the Section 5 offense would be same as those applied in familiar Sherman and Clayton Act precedents, but adapted to fit more novel situations. Consistent with this signal, the Commission would seek prospective relief only. To make the signal entirely clear, the Commission

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<sup>1</sup> See Statement of the Commission, *Negotiated Data Solutions LLC*, FTC File No. 051 0094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf> [hereinafter *N-Data Commission Statement*]; Dissenting Statement of Chairman Majoras, *Negotiated Data Solutions LLC* (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf> [hereinafter *Majoras N-Data Dissenting Statement*]; Dissenting Statement of Commissioner Kovacic, *Negotiated Data Solutions LLC* (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf> [hereinafter *Kovacic N-Data Dissenting Statement*].

<sup>2</sup> *N-Data Commission Statement*, *supra* note 1, at 2 (quoting *FTC v. Ind. Fed’n of Dentists*, 467 U.S. 447, 454 (1986)).

<sup>3</sup> *Id.* (citations omitted).

<sup>4</sup> *Majoras N-Data Dissenting Statement*, *supra* note 1, at 3.

<sup>5</sup> It is obvious that various Commissioners had very different views about the facts.

should explain up front what it is doing and why. This would not entirely remove the threat that retroactive relief will be sought by other plaintiffs in other fora,<sup>6</sup> but the Commission cannot shut down private remedies even if it terminates an investigation or dismisses a case. Private plaintiffs can crib from Commission complaints regardless of how the Commission disposes of them. Some concern about these consequences is inevitable and ever-present, but excessive concern will lead to paralysis.

### A Return to the Original Mission

The Federal Trade Commission has a polyglot parentage, and the original Act represents an amalgamation of conflicting sentiments, often expressed by the same individual at different points of time.<sup>7</sup> It is obvious, however, that both the Clayton Act and the Federal Trade Commission Act were responsive to the uncertainties created by the first clear articulation of a rule of reason in *Standard Oil*.<sup>8</sup> It is also obvious that the Commission was not intended merely to duplicate enforcement powers already lodged in the Department of Justice. The Commission was given a particular responsibility to provide prospective guidance—in President Wilson’s words, the Commission would not merely “cry, ‘Stop,’” but also “warn where things were going wrong and assist instead of check.”<sup>9</sup>

A clear indication of the Commission’s traditional responsibility to provide prospective guidance beyond settled antitrust doctrine is the fact that a violation of the Federal Trade Commission Act is not prima facie evidence of an antitrust violation in subsequent private actions<sup>10</sup> and the fact that originally the Commission could not rely on its own order in an action against a non-compliant party before it had applied to a court of appeals for “enforcement.”<sup>11</sup>

In the intervening years, of course, the need for this kind of prospective guidance has diminished; the Commission has been given increased power to apply retroactive sanctions, including orders to divest illegally acquired assets and even to obtain disgorgement and restitution relief in both competition and consumer protection cases.<sup>12</sup> Moreover, increased levels of state and private antitrust enforcement make it much more likely that any FTC complaint will have retroactive consequences. Nevertheless, it is still true that “The Commission is supposed to be an expert agency . . . [It] was not intended to be a gun, a carbon copy of the Department of Justice.”<sup>13</sup>

Actually, the Commission seeks to influence the development of antitrust law today without reliance on the potential flexibility of Section 5. *PolyGram*,<sup>14</sup> for example, would have been a trivial case if the Commission had not taken the opportunity to shed light on the hazy boundary between per se and rule of reason offenses, a boundary that had become even more murky following the Supreme Court’s decision in *California Dental*.<sup>15</sup> The agency has also recently under-

*A Section 5 complaint would not be justified by perceived gaps in the coverage of the antitrust laws but rather would send a signal that the Commission recognizes it is entering largely uncharted territory.*

<sup>6</sup> See Kovacic *N-Data* Dissenting Statement, *supra* note 1.

<sup>7</sup> See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

<sup>8</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>9</sup> See Winerman, *supra* note 7, at 2.

<sup>10</sup> See 15 U.S.C. § 16(a); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 981 n.1087 (6th ed. 2007).

<sup>11</sup> Act to Create a Federal Trade Commission, Pub. L. No. 203 85, 63 Stat. 717 (1914) (provision eliminated in 1938).

<sup>12</sup> *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

<sup>13</sup> *FTC v. Dean Foods Co.*, 384 U.S. 597, 618–19 (1966) (Fortas, J., dissenting).

<sup>14</sup> *PolyGram Holdings, Inc. v. FTC* 416 F.3d 29 (D.C. Cir. 2005).

<sup>15</sup> *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

taken an active amicus program to narrow the scope of the “State Action” and the *Noerr* doctrines that impede antitrust intervention.<sup>16</sup>

Not all of the Commission’s recent initiatives have been in aid of expanded enforcement. In 2003, the Commission unanimously adopted a Policy Statement,<sup>17</sup> which made clear that it would not routinely seek to impose monetary remedies in competition cases. In addition, the Commission has actively supported collective industry action to address perceived problems like the widely prevalent promotion of worthless or potentially harmful products, even if traditional antitrust doctrine might describe the action as a group boycott. In other words, the Commission is willing to encourage some supply-side restraints in order to reduce demand-side distortions—or even economic externalities.<sup>18</sup>

Finally, workshops like the one at which an earlier version of this article was presented<sup>19</sup> indirectly support Commission efforts to provide prospective guidance. The Commission actively seeks information from the private sector and other government authorities, so that it may in turn better inform the future development of the law.

These examples do not, of course, directly involve an imaginative application of the Commission’s Section 5 authority, but they do demonstrate that the Commission continues to assume a special responsibility for clarification and update of fundamental antitrust doctrines in order to meet the challenges of an ever-evolving economy.

### Examples of Cases that Could Have Been, or Might Be, Brought Under Section 5

Two recent cases that might possibly have fared better had they been brought under Section 5 are *Schering*<sup>20</sup> and *Rambus*.<sup>21</sup> In both cases, there was a lengthy trial before an Administrative Law Judge, who dismissed the complaint. The Commission unanimously reversed with lengthy opinions in both cases, only to be reversed itself by two different federal circuit courts. In each case, the circuit court gave scant deference to the Commission’s factual findings and no deference whatever to any Commission “expertise” on issues of law.

Purely in retrospect, it might have been a good idea to proceed on a Section 5 theory alone in each of these cases.<sup>22</sup> There was substantial factual and legal support for claims under the antitrust law in each case, and both decisions were initially well-received by many experts in the field. But, in each case, there was scant direct judicial precedent. They were not designed to fill a “gap” in antitrust law, but clearly were on the frontier.

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<sup>16</sup> Thomas B. Leary, *The Muris Legacy*, ANTITRUST SOURCE, Nov. 2004, <http://www.abanet.org/antitrust/at-source/04/11/Nov04Leary1129.pdf>.

<sup>17</sup> Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

<sup>18</sup> See Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005) (referencing specific examples).

<sup>19</sup> See Thomas Leary, A Suggestion for the Revival of Section 5, Presentation to FTC Workshop on Section 5 as a Competition Statute (Oct. 17, 2008), available at <http://www.ftc.gov/bc/workshops/section5/docs/tleary>; see also Susan Creighton & Thomas Krattenmaker, Some Thoughts About the Scope of Section 5, Presentation to FTC Workshop on Section 5 as a Competition Statute (Oct. 17, 2008) (also stressing the role of the Commission as an expert agency with a special mission to act prospectively in areas where current antitrust precedent is unclear), available at <http://www.ftc.gov/bc/workshops/section5/docs/screighton.pdf>; Thomas Leary, The Search for Consensus on the Revival of Section 5 (additional Leary Workshop paper commenting on Creighton & Krattenmaker), available at <http://www.ftc.gov/bc/workshops/section5/docs/tleary2.pdf>; Susan Creighton & Thomas Krattenmaker, *Appropriate Role(s) for Section 5*, ANTITRUST SOURCE, Feb. 2009, <http://www.abanet.org/antitrust/at-source/09/02/Feb09-Creighton2-26f.pdf>.

<sup>20</sup> *Schering-Plough v. FTC*, 402 F.3d 1056 (11th Cir. 2005), cert. denied, 548 U.S. 919 (2006).

<sup>21</sup> *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

<sup>22</sup> It would not help much today because these issues are not now novel.

In these cases, the Commission was primarily interested in establishing some ground rules applicable to settlement of patent disputes between pioneer and generic drug manufacturers (*Schering*), and to the conduct of companies who participate in standard-setting bodies (*Rambus*). The only relief ordered by the Commission in *Schering* was an injunction dealing with future conduct. The order in *Rambus* did include, in addition to an injunction, a cap on future royalties for some technologies, but the technologies in question were of marginal and shrinking importance, and there were no retroactive financial consequences.

It is, of course, impossible to say whether it would have made a difference in each of these cases if the Commission had relied solely on Section 5. But a Section 5 complaint, coupled with an open acknowledgement that the Commission was operating in largely uncharted territory and therefore would not seek retroactive relief, might have had a salutary effect. Many judges have a visceral sense that it is wrong to penalize companies for things that were not clearly illegal at the time they were done. Commission reliance on Section 5 could, at the very least, have blunted arguments that respondents were blindsided after they had relied on the traditional judicial preference for settlements (*Schering*) or on one possible interpretation of the complicated rules of a standard-setting organization (*Rambus*).

Cases like these do not exhaust the universe of matters that are possible candidates for a Section 5 complaint. Consider the fallout from the Supreme Court's recent decision in *Leegin*.<sup>23</sup> At the moment, there is a lot of learned commentary but no precedent on the dividing line between procompetitive and anticompetitive resale price maintenance. (Before *Leegin*, if a court found there was an "agreement," the practice was per se illegal.) The Supreme Court's close decision in *Leegin* expressly stated that it is the task of future courts to "establish the litigation structure" and "devise rules over time for offering proof or even presumptions where justified."<sup>24</sup>

If one of the two federal antitrust agencies does not take the lead on this issue, the evolving principles will be shaped by private litigation or by application of state law. This is not an optimal outcome. And the Federal Trade Commission is the better of the two federal agencies to break new ground because an action under Section 5 would be less likely to have retroactive effects—not assuredly so, but significantly so.

Another candidate for Section 5 treatment might be a case like *Whole Foods*.<sup>25</sup> This was a matter where a price effect was arguably not the only, or even the most serious, potential competitive harm. Application of the traditional Guidelines "SSNIP" test<sup>26</sup> for market definition, on which so much depends, is not necessarily the most useful approach for all cases. Non-price competition also needs to be considered in a substantial and growing sector of the U.S. economy.<sup>27</sup> A case under Section 5, with overt emphasis on purely prospective relief, might be a good way to start.

Recent events in the financial sector suggest another possible use of Section 5. Traditional merger analysis is fixated on the consequences of horizontal overlaps and, very rarely, on possi-

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<sup>23</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>24</sup> *Id.* at 2720. See generally Thomas B. Leary & Erica S. Mintzer, *The Future of Resale Price Maintenance, Now that Doctor Miles is Dead*, 4 N.Y.U. J.L. & Bus. 303 (2007).

<sup>25</sup> *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008). A potential price effect is just one of the important elements in the *Whole Foods* case. The references to the case here and in the additional example just below are intended as hypothetical illustrations, not as suggestions on how the Commission should decide the actual case.

<sup>26</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.0 (1992, revised 1997) (referring to the ability of a hypothetical monopolist to "impose at least a 'small but significant and nontransitory' increase in price . . .").

<sup>27</sup> Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST L.J. 1007 (2001).

ble foreclosure effects. Yet, this analysis does not exhaust the potential competitive effects of a merger. The financial strength of the combined enterprise may also be significant, pro or con. The Commission sometimes does consider the efficiencies that may result from the injection of new capital, as a plus factor,<sup>28</sup> and it routinely considers financial capability when it evaluates whether a potential purchaser of divested assets will be able to preserve competition that would otherwise be lost post-merger. Yet, for some reason, the agency does not take account of the flip side—namely, the real possibility that an over-leveraged buyout could impair the competitive potency of an aggressive company in the same way that acquisition by a more staid rival could. (Of course, a company can unilaterally borrow heavily or change its competitive strategy without antitrust consequence. But traditional antitrust has long drawn a distinction between unilateral conduct and coordinated conduct or acquisitions.)

A Section 5 complaint could signal that the Commission intends to apply the Clayton Act in this new way, which arguably would be entirely consistent with the language and intent of the statute. This application would not fill a gap or address behavior that is “contrary to good morals.” It would simply be a venture into uncharted territory.

A final hypothetical example is, again, suggested by some facts in *Whole Foods*. Reliance on the “intent” of a large enterprise has fallen out of favor for a number of legitimate reasons. Multiple decision makers in a large company may have varied objectives, and it is difficult to draw the line between the normal bluster of keen competitors and the expression of more sinister motives. For this reason, agencies and courts tend to rely on more objective criteria to evaluate whether the strategy would make sense absent the predatory motive—overtly when addressing possible attempts to monopolize under Sherman Section 2 and implicitly when addressing possible attempts to secure market power by acquisition under Clayton Section 7.

But, on rare occasions, the agency may encounter an expression of intent that is so authoritative and so apparently plausible that it might support a complaint, even if subsequent events were to suggest that the strategy was doomed from the start. The situation is not analogous to an unsuccessful solicitation of a price-fixing agreement but is more like an actual agreement that promptly collapsed under market pressures. A Section 5 complaint could serve a useful purpose although no structural relief is considered necessary or desirable. An injunctive order that requires prior notification and approval of future merger proposals, for example, could tame the predatory instincts of a particular CEO and deter similar forays by others.

These suggestions are intended to stimulate thought and debate, and there may be sound objections in any particular case. The suggestions do, however, reflect a conviction that the Federal Trade Commission has a special role to play and is not just another prosecutor in a nation that already has too many.

### **Objections and Opportunities**

A major objection to more extensive reliance on Section 5 is based on what is sometimes called “the lesson of the 1970s” by those Commission veterans who served at that time. In the 1970s, proposals for an aggressive use of Section 5 by a particularly activist Chairman, Michael Pertschuk, stimulated a particularly harsh Congressional response that almost destroyed the

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<sup>28</sup> This, of course, is a welcome reversal of an earlier quixotic view that increased financial strength would confer an undesirable “competitive advantage.” *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059, 1080–81 (1962), *modified and aff’d*, 67 F.T.C. 282 (1965).

Commission.<sup>29</sup> It is possible, however, to make use of Section 5 in ways that take appropriate account of the “lesson of the 1970s.”

The 1970s were characterized not only by civil unrest over an unpopular war but also by the (hopefully) high-water mark of an intellectual movement that was profoundly skeptical about a market system driven by consumer sovereignty. This essentially paternalistic view, prominently associated with celebrities like John Galbraith and Ralph Nader, obviously had a strong influence on the leadership of the Federal Trade Commission at the time.

In addition, the Chairman appeared to claim an unprecedented span of authority. Since non-compliance with any financially burdensome regulation could confer a competitive advantage, he speculated that this non-compliance could potentially be attacked by the Commission as an unfair method of competition.<sup>30</sup> He may have been just musing aloud but, given the overheated politics of the time, the private sector reacted with alarm.

This alarm was heightened because the Chairman appeared to view the private bar with suspicion. He refused to take a Chairman’s traditional seat on the ABA Antitrust Section’s Council—a gesture of no practical importance because there were other ways to share opinion and information, but it was nevertheless keenly resented at the time. And, there were consequences.

There was a perception that the Commission had been co-opted by the counter-culture, was out of control, and was suspicious of the private sector. Members of Congress were made aware of these concerns. It is inconceivable that the leadership of the Federal Trade Commission today or in the foreseeable future would make the same mistakes. That the Commission hosted a workshop on Section 5 is a good indication that the “lesson of the 1970s” has been taken to heart.

An open dialogue between the Commission and the private sector is particularly important. Because we have become so used to it in recent years, we may not appreciate how remarkable it is. Although the Commission and members of the private bar may have an adversarial relationship in certain specific cases, they are not adversaries across the board.

Most members of the private bar want the antitrust agencies to be pro-active, efficient, and successful overall. Of course, some of these sentiments are prompted by pure self-interest. But, both “sides” have a genuine belief that competition law is important, and there is remarkable agreement on fundamental principles. Even lawyers employed on large corporate staffs feel that way, which is not so surprising when you consider that their employers are customers as well as sellers.

Commission transparency is important not only because candor elicits reciprocal candor from people who really are friends of the agency. It is also important because the Commission is a very small agency, with a huge responsibility. It cannot be everywhere at once, and needs a well informed private bar that will also enforce the law, in myriad conference rooms every day. ●

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<sup>29</sup> For a recent memoir of the 1970s Commission by someone who lived through it, see William MacLeod, Elizabeth Brunins & Anna Kertesz, *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 ANTITRUST L.J. 943 (2005).

<sup>30</sup> See Thomas B. Leary, *Unfairness and the Internet*, 46 WAYNE L. REV. 1711, 1713–14 (2000).

# The FTC's Procedural Advantage in Discovering Concerted Action

**William H. Page**

Scholars have long argued that Section 5 of the Federal Trade Commission Act<sup>1</sup> can or should be interpreted to reach more conduct than Section 1 of Sherman Act<sup>2</sup>—whether, in other words, there are gaps in the coverage of Section 1 that allow certain forms of anticompetitive conduct that Section 5 should condemn.<sup>3</sup> One potential difference in coverage lies in how the two antitrust statutes draw the line between lawful conscious parallelism and unlawful concerted action.

I argue here that there is no substantive gap between the two antitrust statutes on this issue—both statutes prohibit (and permit) the same conduct. There may, however, be a procedural gap. Particularly after the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,<sup>4</sup> the FTC has an advantage over private plaintiffs in the procedures at its disposal for discovering unlawful concerted action.

The dilemma in the treatment of conscious parallelism is often posed by some version of the following hypothetical<sup>5</sup>: There are four independently owned gas stations at the same street corner in a remote town. Without a wholesale price increase, one station owner decides to raise his prices in the hope that the others will follow. When the first mover posts the new prices, his rivals realize they have an opportunity to increase sales at the old price. Nevertheless, each decides to match the price increase, in the belief that doing so is more likely to enhance long-run profit. The stations have achieved a noncompetitive price by a series of consciously parallel decisions.

One might argue that the gas stations in this scenario have formed a “contract, combination . . . or conspiracy” under Section 1. The first station's price increase is arguably an offer and the other stations' matching price increases are arguably acceptances.<sup>6</sup> Moreover, some of the Supreme Court's traditional definitions of concerted action under Section 1—a “conscious com-

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<sup>1</sup> 15 U.S.C. § 45.

<sup>2</sup> 15 U.S.C. § 1.

<sup>3</sup> See, e.g., Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999) (“The FTC and Clayton Acts were intended to refine and extend the Sherman Act and better implement its basic goals by filling in the gaps in its coverage.”).

<sup>4</sup> 127 S. Ct. 1955 (2007).

<sup>5</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 128 (2005); Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423, 428–29 (1997); George A. Hay, *Facilitating Practices: The Ethyl Case*, in *THE ANTITRUST REVOLUTION* 182 (John E. Kwoka Jr. & Lawrence J. White eds., 3d ed. 1999); William H. Page, *Communication and Concerted Action*, 37 LOYOLA U. CHI. L.J. 405, 411–12 (2007).

<sup>6</sup> See, e.g., *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (Posner, J.) (“If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm's behavior can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices.”).

mitment to a common scheme”<sup>7</sup> or a “meeting of minds”<sup>8</sup>—might literally apply, because the station owners come to share a common goal in taking their respective actions.<sup>9</sup> Courts have not, however, interpreted Section 1 in this way. Under *Matsushita*,<sup>10</sup> evidence of consciously parallel conduct, by itself, is not enough to avoid summary judgment. The plaintiff must produce evidence that tends to exclude the possibility that the defendants’ parallel actions were the product of either independent or merely interdependent decisions.<sup>11</sup> In other words, a plaintiff must have some evidence that is consistent only with an agreement or concerted action among the defendants.

In requiring more than conscious parallelism to establish a Section 1 violation, the courts have agreed with Donald Turner that simple conscious parallelism is (a) not culpable, because firms that engage in the practice are only acting rationally by taking account of each other’s likely responses to their respective actions; and (b) not subject to regulation, because the courts could only interdict the practice by direct price regulation.<sup>12</sup> Contrary to Turner, the courts have held that conscious parallelism is lawful even if the actors are able to maintain noncompetitive prices only with the aid of “facilitating practices,” like delivered pricing or most favored customer clauses.<sup>13</sup>

Courts have also refused to extend Section 5 of the FTC Act to consciously parallel conduct, with or without facilitating practices, for similar reasons.<sup>14</sup> Unlike Section 1, Section 5 does not require an agreement; it requires only that the defendants have engaged in an unfair method of competition. But courts have refused to extend Section 1 to consciously parallel conduct because they believe that to do so would represent bad antitrust policy, not because they believe that the literal language of the statute forecloses that result. The same antitrust policy concerns apply in the interpretation of the broad language of Section 5. Courts are unwilling to infer that firms are engaged in concerted action if they are able to maintain noncompetitive prices by facilitating practices that also provide clear consumer benefits.<sup>15</sup> Consequently, both Section 5 and Section 1 are properly interpreted to require proof of concerted action rather than simple conscious parallelism. There is no substantive gap.

After *Twombly*, however, there may be a procedural gap between Section 5 and Section 1, as those statutes are most commonly enforced. *Twombly* extends *Matsushita*’s summary judgment rationale to the pleading stage of a Section 1 claim. Under *Twombly*, to avoid dismissal for failure to state a claim, a private plaintiff must plead more than simple conscious parallelism; it must allege enough factual detail about the defendants’ conduct to make it “plausible” to believe that

**[T]here may be a procedural gap between Section 5 and Section 1, as those statutes are most commonly enforced.**

<sup>7</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

<sup>8</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

<sup>9</sup> See, e.g., William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 24–25 (1993)

<sup>10</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

<sup>11</sup> *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 n.35 (11th Cir. 1998).

<sup>12</sup> Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665, 669 (1962).

<sup>13</sup> William H. Page, *Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act*, in ANTITRUST LAW AND ECONOMICS (Keith Hylton ed., forthcoming 2009). See, e.g., *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1274–75 (N.D. Ga.), *aff’d sub nom. Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003). Of course, an express agreement to adopt a facilitating practice is likely to be held per se illegal. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980).

<sup>14</sup> See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 133–34, 140–42 (2d Cir. 1984).

<sup>15</sup> *Id.* at 136–37 (holding that Section 5 may bar “incipient” violations of the antitrust laws).

they conspired.<sup>16</sup> The Court rested this pleading standard on its fear of discovery: “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.”<sup>17</sup> Justice Stevens, in dissent, condemned this rationale because the evidence necessary to allege agreement is usually in the possession of defendants, and thus only accessible through discovery.<sup>18</sup> Thus, he feared, the Court’s standard might shield some unlawful conduct.

*The decisions of the lower federal courts since Twombly lend some support to Justice Stevens’ concerns because they generally require allegations of fairly specific communications among rivals in order to state a Section 1 claim.*

The decisions of the lower federal courts since *Twombly* lend some support to Justice Stevens’ concerns because they generally require allegations of fairly specific communications among rivals in order to state a Section 1 claim.<sup>19</sup> Those kinds of communications will usually only be available through discovery. Some courts do allow limited pre-answer discovery on the merits.<sup>20</sup> This sort of discovery is appropriate, particularly where the allegations suggest that a focused factual inquiry might confirm whether the plaintiff could make sufficient allegations.<sup>21</sup> But, to the extent that courts do not allow sufficient pre-answer discovery, the FTC might fill the procedural gap in appropriate cases by exercising its administrative powers of investigation.

Private parties who believe that they have been injured by concerted action, but who lack sufficiently detailed information to plead a violation of Section 1 under *Twombly*, can bring their evidence to the FTC either before filing suit or after dismissal of their action in federal court. The FTC, using its expertise in evaluating both economic and noneconomic evidence, can decide whether to conduct further investigation. The FTC “was granted in its enabling statute broader powers of investigation than almost any other department or agency in the federal government.”<sup>22</sup> For example, the FTC can informally request information from firms.<sup>23</sup> More important, under Section 9 of the FTC Act, the Commission may “require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.”<sup>24</sup> This provision allows the FTC to conduct what amounts to civil discovery before it has issued a complaint. Obviously, such a sweeping power raises the risk of imposing undue costs

<sup>16</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

<sup>17</sup> *Id.* at 1966–67.

<sup>18</sup> *Id.* at 1975 (Stevens, J., dissenting) (quoting earlier decisions holding that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators’ . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly”) (citations omitted).

<sup>19</sup> See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (requiring allegations that identify “specific actions by a particular defendant at a particular time”); *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 492 (D. Conn. 2008) (“Although the complaint repeatedly refers to these alleged ‘clandestine meetings’ among certain defendants, it states no specific examples of the defendants’ conduct in the meetings, other than general allegations of conspiracy.”); see generally William H. Page, *Twombly and Communication: the Emerging Definition of Concerted Action Under the New Pleading Standards* (Oct. 19, 2008) (examining post-*Twombly* rulings on motions to dismiss Section 1 claims), available at <http://ssrn.com/abstract=1286872>.

<sup>20</sup> See, e.g., *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (reporting, without criticism, that the district court allowed limited discovery after a dismissal of the complaint with leave to amend).

<sup>21</sup> Page, *supra* note 19, § IV(C).

<sup>22</sup> Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 214 (2005). See generally Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 35 REAL EST. L.J. 33 (2006) (surveying FTC investigative mechanisms).

<sup>23</sup> FTC OPERATING MANUAL § 3.3.6.6.1 (request for access letters), § 3.3.6.6.4 (interviews), available at <http://www.ftc.gov/foia/ch03investigations.pdf>.

<sup>24</sup> 15 U.S.C. § 49. See also FTC OPERATING MANUAL, *supra* note 23, § 3.6.7.5.2 (describing criteria for issuance of subpoenas).

on businesses. The FTC's own internal standards, however, provide procedural safeguards, which should be used to avoid abuses. For example, there are prior and subsequent internal review procedures for any use of compulsory process.<sup>25</sup>

If the FTC finds evidence of concerted action, it can file a complaint<sup>26</sup> or, in the case of naked price fixing or market allocation, refer the case to the Antitrust Division for possible criminal prosecution.<sup>27</sup> Private parties may, in appropriate cases, file suits after the FTC investigation, relying on the additional information the FTC developed in order to satisfy the demands of *Twombly*.<sup>28</sup> One might argue that this division of responsibility between public and private enforcers is efficient. *Twombly* may provide a useful screen against "impositional discovery"<sup>29</sup> by private plaintiffs, who necessarily consider only their private interest in deciding whether to sue.<sup>30</sup> If, however, Justice Stevens is correct that the screen will filter legitimate lawsuits, the FTC provides a forum and a mechanism to decide whether further discovery is justified on public interest grounds. In these kinds of cases, the FTC can use its procedural advantage to discover evidence of concerted action that would otherwise lie hidden. ●

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<sup>25</sup> FTC OPERATING MANUAL, *supra* note 23, § 3.6.7.3 (requiring clearance and approval by a Bureau Director for compulsory process), § 3.6.7.5.7 (providing for petitions to quash or limit subpoenas).

<sup>26</sup> *Id.* § 4.2.2.

<sup>27</sup> *Id.* § 3.6.9; ANTITRUST DIVISION MANUAL VII-8 (2008) ("When a matter is before the FTC and the FTC determines that the facts may warrant criminal action against the parties involved, the FTC will notify the Division and make available to the Division the files of the investigation following an appropriate access request."), available at <http://www.usdoj.gov/atr/public/divisionmanual/chapter7.pdf>.

<sup>28</sup> See Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1166-70 (1986).

<sup>29</sup> Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

<sup>30</sup> William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 23 (1995) (observing that "private plaintiffs, particularly competitors, have every incentive to bring suit whenever the prospect of treble damages exceeds the costs of suit, regardless of the economic consequences").