The FTC'S 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 and its Potential Impact Upon Little FTC Acts

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THIS ARTICLE EXPLORES THE POTENTIAL significance of the apparent expansion of the Federal Trade Commission's view of its enforcement authority under the 2022 "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" [hereinafter "2022 Statement"].[1] The 2022 Statement departs markedly from the FTC's prior recent effort to provide guidance as to the scope of its unfair method of competition authority. Moreover, as addressed in some considerable detail within, it is our view that the 2022 Statement expresses a vision of the FTC's authority that federal courts have rejected on multiple occasions.[2]

Importantly, this article will also examine the 2022 Statement's potential impact upon state analogues to the FTC Act, commonly referred to as "Little FTC Acts." Although Little FTC Acts during the past several decades have generated an enormous number of decisions on a yearly basis,[3] virtually all of these decisions have dealt with either unfair or deceptive acts and practices, rather than unfair methods of competition. We suggest in this article that the 2022 Statement may incentivize both government and private litigants to expand unfair method of competition theories in Little FTC Act litigation.

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The 2015 Statement

Some statutory and historical background is helpful in appreciating the magnitude of the FTC's move under the 2022 Statement. Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), prohibits, inter alia, "unfair methods of competition." The FTC is empowered to pursue cease and desist orders through administrative proceedings or seek injunctive relief in federal district court. Critically, the statute is devoid of any definition of "unfair methods of competition," which has resulted in an ongoing debate regarding the scope and extent of the FTC's authority to prohibit certain specific conduct deemed by the Commission to be anticompetitive.

In 2015, 101 years after the enactment of the FTC Act, the FTC first issued a Statement of Enforcement Principles [hereinafter "2015 Statement"] which provided a framework explaining how the agency would enforce the unfair method of competition component of Section 5.[4] The 2015 Statement looked to historical principles and referenced existing federal law to determine whether an act or practice would constitute an unfair method of competition. Specifically, the Commission's 2015 Statement sought to evaluate potentially anticompetitive conduct utilizing a traditional "rule of reason" framework to ensure that the act or practice at issue would not be enjoined if it posed little to no harm to competition or the competitive process. The 2015 Statement also obligated the FTC to evaluate whether the act/practice was within the four corners of conduct deemed violative of either the Sherman Act or the Clayton Act.

However, by 2021 a majority of the Commission viewed the 2015 Statement as a constraint upon the FTC's authority to investigate and halt anticompetitive conduct under Section 5. The 2015 Statement was thus withdrawn on July 1, 2021.[5] At the time of the withdrawal of the 2015 Statement, FTC Chair Lina Khan commented that the withdrawal of the 2015 Statement would be the first of several actions by the FTC to clarify Section 5, including steps to assist the FTC to better exercise its authority to deliver clear guidance principles consistent with both Congressional directives and case law.[6]

The 2022 Statement

The 2022 Statement is far more ambitious than the 2015 Statement. For example, the 2022 Statement seeks to expand the Commission's current unfair method of competition mission to prohibit conduct that is almost certainly permissible under Section 5 precedent. The 2022 Statement provides two criteria, which are weighed on a sliding scale, for evaluating whether a party's conduct constitutes an unfair method of competition: whether a practice: (1) exhibits indicia of unfairness; and (2) constitutes conduct that tends to negatively affect competitive conditions. The 2022 Statement also identifies certain affirmative defenses, providing

the targeted entity the opportunity to present a potentially cognizable justification to the challenged act or practice. Considering the breadth of the 2022 Statement, there is little doubt that the federal courts will have their hands full while examining the Commission's revised interpretation of its unfair method of competition authority.

Opposition to the 2022 Statement

The 2022 Statement has provoked strong criticism. Commissioner Christine Wilson[7] authored a detailed dissent to the 2022 Statement.[8] Commissioner Wilson criticized the 2022 Statement, labeling it a "dramatic expansion of the agency's purported authority."[9] Commissioner Wilson further condemned the 2022 Statement as lacking clear or meaningful guidance for businesses aiming to comply the law, and instead sought to pinpoint "essentially any business conduct it finds distasteful."[10] Commissioner Wilson was also critical that the 2022 Statement did away with long-standing principles of antitrust such as the "rule of reason" framework, the consumer welfare standard, and the "vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct."[11]

Commissioner Wilson also dissented[12] from the 2022 Statement's first application, the proposed trade regulation rule [hereinafter "Proposed Rule"] that would effectively invalidate most employee non-compete agreements.[13] She noted, inter alia, in her dissent from the Proposed Rule that the Commission, in her view, lacked authority to issue trade regulation rules, i.e., substantive regulations, with regard to unfair methods of competition.[14] Commissioner Wilson's dissents are early signals that both the 2022 Statement and those initiatives by the FTC in furtherance of the 2022 Statement will be the subject of future and continuing competition discourse, and potentially protracted litigation.[15] Indeed, as noted above, there have been successful challenges in the past to the FTC's efforts to expand its authority with respect to unfair methods of competition.

Judicial Limitations on the FTC's Past Efforts to Expand its Unfair Method of Competition Footprint

Efforts by the FTC to reach expand its competition authority under Section 5 beyond other antitrust laws are not new. Several attempts to do so have, however, generally proven unavailing.

For example, in *Boise Cascade*, the FTC had issued a complaint against plywood manufacturers, alleging that the companies had pursued what amounted to a consciously parallel course of business behavior in the use of a zone pricing system.[16] The allegations did not include evidence, however, of concerted action, i.e., a conspiracy among the plywood manufacturers.[17] Thus, the Ninth Circuit overturned the FTC's finding that the price system was an unfair method of competition. In doing so, the Ninth Circuit stated that, without establishing concerted action, a requirement under Section 1 of the Sherman Act, the FTC could not successfully prove the existence of an unfair methods of competition claim under Section 5 because there existed "well forged" Sherman Act case law governing this specific conduct.[18]

Shortly after *Boise Cascade*, the FTC's use of Section 5 was again reined in when the Second Circuit in *Official Airline Guides* overturned a Commission decision holding that it was an unfair method of competition for a monopolist, the sole provider of airline flight schedules, to refuse to publish listings of connecting flights of commuter airlines, notwithstanding the court's recognition that the refusal was arbitrary and adversely affected competition between certificated and commuter air carriers.[19] The Second Circuit stated, "[E]ven a monopolist, as long as [it] has no purpose to restrain competition or to enhance [its] monopoly, and does not act coercively, retains this right . . . to freely exercise [its] own independent discretion as to the parties with whom [it] will deal."[20]

In the *Russell Stover* decision, the Eighth Circuit held that a candy producer's policy of communicating its designated resale prices to retailers and terminating those retailers who would sell below the designated prices does not constitute an illegal conspiracy to fix retail prices, reversing an FTC finding that such conduct did indeed constitute a violation of the Sherman Act.[21] Notably, in this instance, the Commission sought to have the court overrule the *Colgate* doctrine which provides that a manufacturer may unilaterally refuse to continue to deal with downstream market participants who do not honor the announced seller's price.[22]

Finally, in *E.I. du Pont,* although the court noted that the FTC is not necessarily limited to challenging conduct that violates the antitrust laws themselves, and may also be able to challenge conduct that violates the "spirit of the antitrust laws," the Second Circuit nevertheless overturned an FTC decision holding that various parallel price-signaling and other practices by oligopolists were not unfair methods of competition.[23] Importantly, the Second Circuit stated that the FTC had conceded "that price uniformity is normal in a market with few sellers and homogeneous products such as that in the antiknock compound industry."[24] Thus, in the court's view, "the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[25] To that end, the Second Circuit then took the opportunity to set forth a more specific standard for unfair methods of competition than had been described in some of the aforementioned cases, stating that "at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of a legitimate business reason for its conduct."[26]

Implications for Little FTC Acts

A majority of states have adopted "Little FTC Acts" that are patterned after some portion of the substantive language contained in Section 5(a)(1) of the FTC Act. Of the twenty-eight Little FTC Act states, twenty-two statutes contain the phrase "unfair methods of competition."[27] Moreover, sixteen Little FTC Acts continue to utilize the FTC's "Cigarette Rule," also called the "S&H Rule,"[28] despite the fact that the Cigarette Rule was effectively abandoned by the FTC in 1980 and replaced by the FTC's Policy Statement on Unfairness.[29] The FTC's Policy Statement on Unfairness was subsequently codified with some modifications by Congress in 1994.[30]

The Cigarette Rule uses three disjunctive factors in determining whether an act or practice may be deemed "unfair." Specifically, (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[31] Although the FTC abandoned the Cigarette Rule in 1980, the Cigarette Rule remains the guiding principle, and indeed the methodology, utilized for the past forty-three years by a majority of Little FTC Act states.

Importantly, most Little FTC Acts contain a provision that state courts construing the Act should be "guided by," or "give due consideration and great weight" to the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act.[32]

Moreover, Little FTC Acts in several states provide for business standing for private rights of action.[33] The availability of a private right of action for businesses has been a key source of decisional law by the states' highest courts construing the states' Little FTC Acts.

Conclusion

What lessons can we draw from the continued and outsized importance of the Cigarette Rule in a majority of Little FTC Act states forty-three years after its abandonment by the FTC?

Let's posit that the 2022 "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" is subsequently rescinded by a later group of FTC Commissioners, and/or tangible manifestations of the 2022 Statement such as the proposed non-compete rule are rejected by the federal courts. Could the 2022 Statement still serve as a guiding principle regarding the meaning of unfair methods of competition in Little FTC Act states?

In light of the creative and expansive use of the Cigarette Rule over the past four decades by Little FTC Act litigants, and more particularly, in those states that authorize business standing, coupled with the sheer breadth of the 2022 Statement, the 2022 Statement may well become, in essence, the reincarnation of the Cigarette Rule as a means to dramatically expand the unfair methods of competition component of Little FTC Acts, an area of law that has generated a paucity of case law to date, in stark contrast to the quite significant body of Little FTC Act unfairness and deception jurisprudence.

"Verbum sat sapienti est!"[34] ■

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[1] Fed. Trade Comm'n, Pol'y Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 (Nov. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[2] To be clear, we do not contend that the FTC cannot prevail in its efforts to move the proverbial needle. Rather, there may well be severe impediments in its path that it will have to overcome, including litigation challenging the theories central to the 2022 Statement.

[3] As just one example, Connecticut's Little FTC Act. the Connecticut Unfair Trade Practices Act ("CUTPA"), has generated as many as a thousand opinions in certain years.

[4] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (hereinafter, "The 2015 Statement")

[5] Fed. Trade Comm'n, On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021) https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

[6] Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, FTC File No. (July 1, 2021) https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf

[7] Commissioner Wilson has since resigned from the Commission.

[8] Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," FTC File No. P221202 (Nov. 10, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf

[9] See note 8, *supra*, at 4.

[10] *Id.* at 2.

[11] *Id*. at 3.

[12] Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, FTC File No. P201200-1 (Jan. 5, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

[13] Fed. Trade Comm'n, Non-Compete Clause Rulemaking (Jan 5, 2023) https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

[14] See note 8, *supra,* at 9-13. The 2022 Policy Statement and the Proposed Rule present the question whether the FTC possesses authority to adopt trade regulation rules with respect to unfair methods of competition. In 1973, the D.C. Circuit held in Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) that the FTC did have the authority to implement substantive rules implicating competition pursuant Section 6(g) the FTC Act, 15 U.S.C. § 46(g). Shortly after, however, the Magnuson-Moss Act

was enacted and expressly authorized the FTC to adopt substantive rules regarding unfair and deceptive acts and practices. *See* Pub. L. No. 93-637, 88 Stat. 2183 (1975), codified as Section 18 of the FTC Act, 15 U.S.C. § 57a(a)(1)(B). The legislation, however, was unclear regarding the FTC's authority to adopt substantive competition rules. *See* 15 U.S.C. § 57a(a)(2). This may perhaps serve as evidence that Congress did not intend to authorize the FTC to make binding rules regarding unfair methods of competition.

[15] *See also* Daniel Gilman and Gus Hurwitz, *The FTC's UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason*, ICLE Issue Brief (Nov. 16, 2022) ("The combination of an assertion of over broad and loosely defined substantive coverage of conduct, together with an assertion of broad remedial and legislative powers, previews an aggressive agency with heavy-handed enforcement and rule-making to come." *Id*. at 7).

[16] Boise Cascade Corp. v. F.T.C., 637 F.2d 573 (9th Cir. 1980).

[17] *Id.* at 580-81.

[18] *Id*. at 582.

[19] Official Airline Guides, Inc. v. F. T. C., 630 F.2d 920 (2d Cir. 1980).

[20] *Id*. at 927-28.

[21] Russell Stover Candies, Inc. v. F.T.C., 718 F.2d 256, 260 (8th Cir. 1983).

[22] U.S. v. Colgate & Co., 250 U.S. 300 (1919).

[23] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984).

[24] *Id*. at 139.

[25] *Id.*

[26] *Id*.

[27] Robert M. Langer, John t. Morgan & David L. Belt, Connecticut Unfair Trade Practices, Business Torts and Antitrust, § 2.2 and Appendix K (Connecticut Practice Series No. 12, 2022-23 Ed.)

[28] *Id.* at § 2.2 and Appendix M; *see* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

[29] Fed. Trade Comm'n, FTC Policy Statement on Unfairness, *appended to FTC v. Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), (Dec. 17, 1980) https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[30] 15 U.S.C. § 45(n).

[31] *See* note 28, *supra.*

[32] ABA Antitrust Law Section, State Consumer Protection Law, 5-6 (1st ed. 2022). There is no appreciable distinction between the application of FTC precedent in the "guided by" states and the "due consideration and great weight" states. The states include Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, and West Virginia. Indeed, even in a few states whose statutes do not contain a direction by the legislature to look to FTC precedent, courts do in fact sometimes cite to FTC precedent. *See, e.g.,* State ex re. Miller v. Vertrue, Inc., 834 N.W. 2d 12, 34 (Iowa 2013).

[33] *See, e.g.,* Linkage Corp. v. Trustees of Bos. Univ., 425 Mass. 1, 679 N.E.2d 191 (1997); Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984); Rohrer v. Knudson, 349 Mont. 197, 203 P.3d 759 (2009) Johnson v. Beverly- Hank & Assoc., 328 N.C. 202, 400 S.E.2d 38 (1991); State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980); ASRC Energy Services Power and Communications, LLC v. Golden Valley Elec. Ass'n, Inc., 267 P.3d 1151 (Alaska 2011); Plath v. Schonrock, 314 Mont. 101, 64 P.3d 984 (2003); Huff v. Autos Unlimited, Inc., 124 N.C.App. 410, 477 S.E.2d 86 (1996); Furr v. Fonville Morisey Realty, Inc., 130 N.C.App. 541, 503 S.E.2d 401 (1998).

[34] "A word to the wise is sufficient."