A Suggestion for the Revival of Section 5

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The recent opinions issued by a divided Federal Trade Commission in *Negotiated Data Solutions* (*N-Data*)[1] 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."[2] 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."[3]

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."[4] Without full knowledge of the facts,[5] 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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[1] *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 Statment]; 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].

[2] *N-Data* Commission Statement, *supra* note 1, at 2 (quoting FTC v. Ind. Fed'n of Dentists, 467 U.S. 447, 454 (1986)).

[3] *Id.* (citations omitted).

[4] Majoras *N-Data* Dissenting Statement, *supra* note 1, at 3.

[5] 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,[6] 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.[7] 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*.[8] 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."[9]

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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[10] 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."[11]

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.[12] 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."[13]

Actually, the Commission seeks to influence the development of antitrust law today without reliance on the potential flexibility of Section 5. *PolyGram*,[14] 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*.[15] The agency has also recently under-

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[6] *See* Kovacic *N-Data* Dissenting Statement, *supra* note 1.

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

[8] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[9] *See* Winerman, *supra* note 7, at 2.

[10] *See* 15 U.S.C. § 16(a); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 981 n.1087 (6th ed. 2007).

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

[12] FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999).

[13] FTC v. Dean Foods Co., 384 U.S. 597, 618–19 (1966) (Fortas, J., dissenting).

[14] PolyGram Holdings, Inc. v. FTC 416 F.3d 29 (D.C. Cir. 2005).

[15] 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.[16]

Not all of the Commission's recent initiatives have been in aid of expanded enforcement. In 2003, the Commission unanimously adopted a Policy Statement,[17] 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.[18]

Finally, workshops like the one at which an earlier version of this article was presented[19] 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*[20] and *Rambus*.[21] 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.[22] 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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16 Thomas B. Leary, *The Muris Legacy*, ANTITRUST SOURCE, Nov. 2004, http://www.abanet.org/antitrust/at-source/04/11/Nov04Leary1129.pdf.

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

18 *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).

19 *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.

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

21 Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

22 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 they 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*.[23] 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."[24]

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*.[25] 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[26] 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.[27] 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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[23] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[24] *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).

[25] 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.

[26] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizonal 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 . . . .").

[27] 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,[28] 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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[28] 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.[29] 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.[30] 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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[29] 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).

[30] *See* Thomas B. Leary, *Unfairness and the Internet*, 46 Wayne L. Rev. 1711, 1713–14 (2000).