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I. INTRODUCTION

Over the last few years, the Federal Trade Commission ("FTC")has awakened Section 5's "unfair methods of competition" prong from its slumber and ignited a debate about when, if ever, it is proper to use Section 5 to reach conduct beyond the Sherman Act's four corners.[2] Complicating matters is the dearth of federal court guidance on the issue. It has been a quarter of a century since any federal court has opined on Section 5's scope[3] and nearly 40 years since the Supreme Court last chimed in.[4] Consequently, discussions about Section 5's reach often sound as if they are occurring in a doctrinal vacuum with proponents of Section 5 relying on the statute's legislative history; opponents arguing that, as a policy matter, there should rarely be a need to resort to Section 5; and those in the middle trying to achieve consensus on limiting principles.

While the Supreme Court has said nothing during this period about Section 5, it has been vocal about its views on antitrust common law more generally, asserting that antitrust rules need to be administrable and predictable.[5] That emphasis has undoubtedly spurred the important search for limiting principles, but the identification of those principles should only be part of the Section 5 doctrinal equation. If and when the Commission provides the federal courts with an opportunity to revisit Section 5, the Commission is most likely to succeed if it persuades the courts that it has applied Section 5 in a predictable fashion. The Commission can do so if it pleads conduct-specific theories of liability (as opposed to just an "unfair method of competition") and, in consent orders and opinions, identifies conduct-specific tests that govern those theories of liability.

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[2] For simplicity, I use the term "Section 5" to refer to the Commission's use of Section 5's "unfair method of competition" prong to conduct that the Commission chooses not to challenge under other federal antitrust laws.

[3] *See, e.g.*, 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).

[4] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972).

[5] Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109, 1120-21 (2009) (Roberts, C.J.) (noting that the Court has "repeatedly emphasized the importance of clear rules in antitrust law"); *see also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) (stating that antitrust rules "must be clear enough for lawyers to explain them to clients"); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) (noting that "law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients" and that "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve").

II. THE SEARCH FOR LIMITING PRINCIPLES

The standard debate over Section 5's reach begins with Section 5's broad and open-ended prohibition on "unfair methods of competition," involves a passing citation to *Sperry & Hutchinson* where the Supreme Court held that Section 5's unfair competition prong reaches conduct beyond the antitrust laws, and ends with the trilogy of cases decided by the Second and Ninth Circuit in the early 1980s. The debate then turns to what limiting principles one can draw from those cases.

Commissioners, practitioners, scholars, and economists have offered a variety of such limiting principles in an effort to describe Section 5's "outer limits." Some of those limiting principles are doctrinal (the FTC should only use Section 5 where it can show anticompetitive effects), some are policy-oriented (the FTC should only use Section 5 in cases where the Commission can establish a unique expertise), and some are more theoretical (the FTC should use Section 5 to fill in "gaps" in existing Sherman Act law). Although it appears that a consensus has emerged that Section 5 should only be used where there is evidence of anticompetitive effects (or in the case of incipient or attempted conduct, likely anticompetitive effects), there is little agreement on much else and, even where there is agreement, the issues are more complicated than they appear.

To take one example, the suggestion is frequently made that Section 5 should serve as a "gap filler"—i.e., where a party is engaged in conduct that causes harm to competition but where the Sherman and Clayton Acts do not provide a cause of action.[6] That raises the question of what qualifies as a "gap"? Is there a "gap" if one lower federal court has opined that the Sherman Act may cover a particular category of conduct? Or is it the case that a single federal court's determination that certain conduct is not covered by the Sherman Act is sufficient to create a gap? Is the argument for a "gap" more or less persuasive depending on how many lower courts have evaluated the conduct under the Sherman Act? Are appellate decisions entitled to more weight in the analysis of "gaps" than district court decisions?

One response to these questions is to define the existence of a "gap" with reference to Supreme Court precedent. If the Supreme Court has held that conduct is *per se* legal or should be adjudged under a particular Sherman Act or Clayton Act standard, one can draw the conclusion that a gap does not exist. A second response would be to require a threshold analysis of whether conduct is subject to the Sherman or Clayton Act; once a decision is made that the "gap" does exist, then Section 5 could apply. There may be other approaches as well. Or these subsidiary issues may suggest that the issue of gap filling raises more questions than answers.

Along the same lines, there again appears to be some agreement that the Commission should limit its use of Section 5 to areas where the Commission's institutional design or expertise gives it a particular advantage over private plaintiffs, generalist courts, and/or lay juries. This again, however, is an open-ended principle because the Commission can legitimately lay claim to a special antitrust expertise in every antitrust case. The most frequently cited example here are cases involving novel or incipient forms of anticompetitive conduct. The Commission's expertise in

[6] *See* Susan A. Creighton & Thomas G. Krattenmaker, Some Thoughts About the Scope of Section 5, Remarks before the FTC's Section 5 Workshop (Oct. 17, 2008), *available at* http://www.ftc.gov/bc/workshops/section5/docs/screighton.pdf (defining a "gap-filling" case as "one that may satisfy the economic requirements of antitrust, but fails one of the legal elements of Section 1 (usually the "agreement" requirement) or Section 2 (usually the "monopoly power" element")").

antitrust, the thinking goes, makes it optimally suited to opine in the first instance about the difficult question of whether such incipient or novel conduct should fall within the antitrust laws' reach. Another area where the Commission might have a special claim to expertise involves antitrust cases premised on allegations of deception. With its dual antitrust and consumer protection missions, the Commission is again better suited to identify in the first instance whether deceptive conduct is occurring and whether that conduct is causing harm to competition and consumers. There may be other areas where the Commission's expertise should be accorded deferential weight.

The point here is not to diminish the importance of this limiting principle debate, but only to demonstrate that applying limiting principles may be harder than it initially appears. Firms, however, need concrete guidance to understand when their conduct may trigger a Section 5 violation. As the Antitrust Modernization Commission observed, antitrust standards should be "clear and administrable" so that businesses can comply with them and courts can administer them.[7] Likewise, it appears federal courts likely will be less receptive to Section 5 claims if they suspect the FTC is pursuing a case built upon a vague notion that a defendant engaged in an "unfair" method of competition. But the Commission cannot be expected to catalog in a vacuum every possible act that implicates Section 5.Congress intended for the Commission and courts to identify "unfair methods of competition" over time as a means to go after novel forms of conduct. Limiting principles therefore serve an important role because they provide some structure to Section 5, yet still provide the Commission with the broad discretion. Nevertheless, if the Commission wants to offer concrete guidance, is there more that it can do?

The evolution of the case law in the Section 2 context offers some guidance. On its face, Section 2's broad prohibition on "monopolization" does not offer much more in the way of guidance than Section 5's broad prohibition on "unfair" methods of competition. As a result, the Supreme Court has spent more than a century attempting to define the single test that should govern monopolization with the ultimate result being that a Section 2 analysis turns broadly on whether there is (1) a firm with monopoly power that (2) is engaging in exclusionary conduct. If the ambiguity in the law that precipitated the need for the DOJ Section 2 Report (to say nothing of the events that accompanied and followed it) is any indication, this vague "one size fits all" approach to govern each "category" of Section 2 conduct may ultimately not be workable. Moreover, the Supreme Court has signaled in the Section 2 context that it believes antitrust law requires workable rules. As a result, more specific tests for various categories of conduct, including exclusive dealing, predatory pricing, and bundling, have increasingly proven to be the norm.

III. POSSIBLE AREAS FOR A CONDUCT-SPECIFIC SECTION 5 ANALYSIS

Much as the courts have done in the Section 2 context, the Commission can respond to concerns that Section 5 is too broad to provide businesses and practitioners with sufficient guidance by using an analytical framework that incorporates both broad limiting principles and conduct-specific tests. Recognizing that numerous others have devoted considerable energy to identifying the appropriate limiting principles, the remainder of this Essay will focus on identifying certain classes of conduct that are arguably within Section 5's scope and may be logical candidates for conduct-specific tests.

[7] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATION 3 (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.

One area where the Commission has already perhaps identified such a test is the "invitation to collude" context. The Commission has obtained consent decrees in half a dozen such cases.[8] According to the Analyses to Aid Public Comment and the complaints filed in each of those cases, proof of an invitation to collude typically requires evidence that (1) one firm made an offer to another firm (which may be communicated explicitly or implicitly), and (2) had that offer been accepted, it would have constituted an illegal agreement under Section 1 of the Sherman Act. Over the years, commentators have tended to agree that invitation-to-collude cases probably demonstrate an appropriate use of Section 5. Much of that agreement stems from the fact that invitation-to-collude cases (which are essentially "attempted conspiracy" cases) bear a close proximity to traditional Section 1 cases; using Section 5 to reach such conduct therefore does not seem particularly novel or far-fetched. It is also possible, however, that the comfort that practitioners have acquired with invitation-to-collude cases results from the fact that describing an invitation-to-collude violation is straightforward; counseling one's client on when a Section 5 violation may arise is doable.

A second area where a conduct-specific test might be appropriate involves deception cases in the standard setting context. Following the D.C. Circuit's decision in *Rambus*,[9] there is good reason to suspect that, if the Commission determines deceptive conduct in the standard setting context may be causing anticompetitive effects, Section 5 may provide the best (if not only) vehicle for going after such conduct. The Commission had an opportunity to articulate such a test in *N-Data*, where it accepted a consent order to settle charges that N-Data violated Section 5 by, among other things, engaging in an unfair method of competition. In its Analysis to Aid Public Comment, the Commission explained that N-Data had reneged on its predecessor's licensing commitment by forcing licensees to renegotiate the royalty rate on patents that had been incorporated into an industry standard.[10] When it came time to articulate how this conduct constituted an "unfair method of competition" under Section 5, the Commission relied on limiting principles to explain its rationale, concluding that (1) N-Data engaged in "coercive conduct"; (2) N-Data's conduct adversely affected competition; and (3) as a policy matter, Section 5 was particularly appropriate because many of the third parties that N-Data harmed lacked a remedy because they were not in privity with N-Data and because the Commission's failure to intervene would threaten standard setting more generally.

Because the Commission's analysis was focused on limiting principles and case-specific policy rationales, it ultimately appeared more fact-bound than it perhaps needed to be. Had the Commission articulated its reasoning in a way that more clearly established standards for a potential Section 5 standard setting claim—repudiation of an *ex ante* assurance, reliance by the industry on that assurance, injury to competition and consumers, and an absence of a pro-

[8] In re Valassis Communications, Inc., Docket No. C-4160, FTC File No. 051 008 (Complaint); MacDermid, Inc., Docket No. C-3911, FTC File No. 991-0167, 1999 FTC LEXIS 191 (Decision & Order); Stone Container Corp., 125 F.T.C. 853 (1998); Precision Moulding Co., 122 F.T.C. 104 (1996); YKK (USA) Inc., 116 F.T.C. 628 (1993); A.E. Clevite, Inc., 116 F.T.C. 389 (1993); Quality Trailer Products Corp., 115 F.T.C. 944 (1992); cf. United States v. American Airlines, 743 F.2d 1114 (5th Cir. 1984) (finding an invitation to collude to be a violation of Section 2 of the Sherman Act).

[9] Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008) (finding that the FTC failed to prove a Section 2 violation in conjunction with deceptive behavior in the standard setting context).

[10] Analysis of Proposed Consent Order to Aid Public Comment, In the Matter of Negotiated Data Solutions LLC, File No. 051 0094 (Jan. 23, 2008), available at http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

competitive business justification—the Commission might have avoided some of the criticism that its decision was, much like Section 5, "too broad to survive without further qualification."[11]

An additional discrete Section 5 theory of liability may be a "course of conduct" claim. Although it remains for the parties to litigate and the Commission to decide the elements of such a claim,[12] such a claim may logically reside under Section 5.First, the Commission is uniquely suited to make the hard decisions about whether and under what circumstances to allege a course of conduct violation. If one of the purposes of Section 5 is to give the Commission unique authority to go after certain classes of conduct, one of the best uses of that authority is when the Commission's administrative framework provides it with a procedural and substantive advantage over private plaintiffs.The Commission has that advantage when it is sorting through the threshold issue of whether it should even allege a course of conduct claim. The Commission's Bureau of Competition can engage in an extensive investigation to determine precisely what specific conduct it believes a firm engaged in before it files suit. The Commission's Bureau of Economics can make an initial determination of whether there is reason to believe that the firm's conduct has an anticompetitive effect and how that anticompetitive effect should be calculated. And the Commission sitting as an expert government agency can then evaluate whether to exercise its prosecutorial discretion to initiate a case based on a course of conduct theory.

Second, lodging a course of conduct claim in Section 5 eliminates the risk that private plaintiffs will use meritless federal "course of conduct" claims to go on fishing expeditions. Specifically, critics of course of conduct theories argue that they allow plaintiffs to broadly allege that a firm engaged "in a lot of bad conduct" and punch their ticket to discovery. Thus, the thinking goes, declaring course of conduct claims to be cognizable in their own right (as opposed to requiring allegations of separate cognizable antitrust violations) creates an end-run around *Twombly* and would open the floodgates to costly discovery. Those policy concerns largely disappear if a course of conduct claim is only cognizable under Section 5.[13]

Third, and along the same lines, the Commission's institutional design advantages carry over into the decision-making on the merits. The substantive concern with a course of conduct theory is that decision-makers will simply predicate liability based on a series of legal acts. That risk may exist before a generalist judges and lay juries which are perhaps more susceptible to lumping bad conduct together or not knowing the nuances of *Brooke Group*, *linkLine*, and *Leegin*, to name a few. The Commission, however, has considerably more experience with antitrust law including identifying cognizable anticompetitive effects and, unlike a lay jury, is not vulnerable to the same superficial stories of "unfair conduct" that might cause the latter to go astray. The Commission is therefore better suited to make the determination in the first instance of what the elements of such a claim should be, whether those elements have been proven, and whether its decision comports with existing law and will hold up on appeal.

[11] Thomas B. Leary, *A Suggestion for the Revival of Section 5*, Comments before the FTC's Section 5 Workshop, available at http://www.ftc.gov/bc/workshops/section5/docs/tleary.pdf.

[12] I leave for another day the discussion of what the precise elements of a course of conduct claim might be and simply observe that such an independent claim may exist.

[13] *But see* Dissenting Statement of William E. Kovacic, *In the Matter of Negotiated Data Solutions*, FTC File No. 051-0094, available at http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

IV. CONCLUDING OBSERVATIONS

If *Valassis, Rambus, N-Data*, the Commission's Section 5 workshop, and the public remarks of several of the Commissioners are any indication, there is a renewed interest at the Commission in applying Section 5 beyond the Sherman Act. Chairman Leibowitz, and Commissioners Kovacic and Rosch have suggested that the "contraction" or "shrinkage" that has occurred in federal antitrust law provides one potential justification for a possible use of "free-standing" Section 5 claims.[14] While there are a multitude of explanations for why the antitrust pendulum has swung towards a more limited reach for Sections 1 and 2, one of those explanations is that the Supreme Court has pressed for clear and administrable rules. This trend suggests that if the Commission is to use Section 5 and prevail in the federal courts, it needs to give doctrinal shape to Section 5.Conduct-specific tests would be an important step in that direction.

More generally, a turn toward conduct-specific tests would have three added benefits apart from increasing the Commission's chance of success during appellate review. First, the articulation of conduct-specific tests would settle the question of Section 5's application to certain recurring practices. If a case comes before the Commission on appeal, the Commission would have the opportunity, drawing on its experience in a particular field or industry, to opine on the elements of such a claim and whether or not those elements are satisfied. In the event of an appeal, a federal appellate court would have an opportunity not only to rule on Section 5's scope, but to evaluate whether or not a conduct-specific claim is cognizable and under what circumstances. That process of lawmaking sets up an opportunity to provide more clarity than decisions about whether conduct constitutes an "unfair method of competition" ever could.

Second, such tests would respond to the criticism that the Commission does not take the threat of false positives (or over-enforcement) and the deterrence of pro-competitive behavior seriously because its application of Section 5 is overly fact-bound. If legal ambiguity deters businesses from engaging in pro-competitive behavior, clearer rules could start to remove some of the ambiguity.To be sure, an inevitable criticism of the Commission (and the courts) developing conduct-specific tests for Section 5 on a case-by-case basis is that a firm cannot know at the outset what those "categories" of prohibited conduct are until they find themselves entangled in Section 5 litigation.But the same criticism can be said to apply to all of antitrust law: so long as the antitrust laws continue to rely on dynamic, common law foundation, there are rarely clear cut rules that provide absolute certainty.Moreover, the fact that Section 5's remedies are prospective, rather than compensatory or punitive, arguably makes Section 5 better suited than other antitrust laws for lawmaking through this process.

Third, the Commission could identify such tests in conjunction with consent decrees, where much of the legal work in the Section 5 context thus far has occurred. Although those tests would still lack a federal court's imprimatur, they would provide more guidance to firms and

[14] *See, e.g.*, Jon Leibowitz, *Tales from the Crypt: Episodes '08 and '09: The Return of Section 5*, Remarks before the Section 5 Workshop 4 (Oct. 17, 2008), available at http://www.ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf; William E. Kovacic, *The Application of Section 5 of the Federal Trade Commission Act*, Remarks before the ABA Fall Forum (Nov. 12, 2009), slides accompanying talk *available at* http://www.ftc.gov/speeches/kovacic/091112abaforum.pdf (discussing the retrenchment of the Sherman Act and Clayton Act by the Supreme Court from 1975 to the present as a possible justification for using Section 5); In the Matter of Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (concurring statement of Commissioner J. Thomas Rosch), available at http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf.

practitioners about the types of conduct that the Commission believes are likely to fall within Section 5's reach.

Ultimately, if the Commission pursues more Section 5 claims, its success will turn on whether it strikes the very difficult balance between articulating rules specific enough to provide guidance to the business community, but broad enough to maintain its authority to attack novel or incipient forms of anticompetitive conduct as Congress intended. Because Section 5 will never be subject to the same persistent scrutiny in the federal courts as the Sherman and Clayton Acts, the Commission could go a long way towards achieving that goal by exercising its expertise and doing the heavy doctrinal lifting in the first instance.