JONES DAY

AUGUST 2006

ANTITRUST

SECTION 5 OF THE FTC ACT: *DÉJÀ VU* ALL OVER AGAIN?

Regular readers of these *Commentaries* will remember the antitrust policy dichotomy frequently described in these pages—the "do no harm" school of antitrust and the "can we help?" school. The "do no harm" school has (generally) been in ascendancy for most of the past three decades or so; since these approaches can be roughly associated with Republican and Democratic administrations, respectively, the recent paucity of the latter has left little opportunity for expansive antitrust.

But that does not mean that the impulse is dead and buried. Instead, it is in hibernation, ready to be aroused like a bear from his winter sleep once the proper political environment is recreated. This is hardly a revelation, but nevertheless it is useful to be reminded periodically that these interventionist instincts remain, quiet but alive, within many in the antitrust community. And so we have been, with the concurring opinion of Commissioner Leibowitz in the Federal Trade Commission's *Rambus* decision. There, Commissioner Leibowitz articulates a serious argument for the rebirth of enforcement of Section 5 of the FTC Act.

To paraphrase, failure to appreciate past errors will lead us to repeat those errors, and Commissioner Leibowitz spends about 18 pages failing to appreciate the past errors of Section 5 enforcement. Much of that time is spent arguing that Section 5 was intended by Congress to reach beyond the antitrust laws—a point that is hard to debate but seems largely irrelevant to the question of whether it would be desirable to actually use the broad authority that the language of Section 5 seems to provide. Nevertheless, it is interesting that the Commissioner notes this flabby language was prompted by the fact that "many within and outside of Congress viewed the Supreme Court reasonableness test (in the *Standard Oil* decision) as judicial invention." But think about this for a moment: Does anyone really want to argue that the creation of the Rule of Reason in *Standard Oil* was a

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bad decision? It may well have been judicial legislation, but if it was, it transformed impossibly broad legislative language into something that could be practically applied. The notion that we should pay allegiance to Section 5 because it was the product of Congressional unhappiness with an interpretation that probably saved the Sherman Act from oblivion is hardly compelling—especially when the language of Section 5 suffers from exactly the same defect, *i.e.*, the lack of practical, workable boundaries.

So let us agree *arguendo* that Section 5's language is broad enough to encompass practically anything. Is this a problem or an opportunity? It can be the latter only if (1) it is susceptible to coherent application, and (2) if the benefits of bringing this hoary statute back to life outweigh the risks. And here is where your antitrust philosophy comes into play. If you are a member of the "do no harm" school, it is hard to imagine passing this test. If, on the other hand, you believe that intelligent application of an unbounded statutory power by whoever happens to be the majority of FTC Commissioners at any given moment can improve the competitive environment in the United States, you are officially a card-carrying member of the "can we help?" school of antitrust enforcement, and might well welcome another tool. Commissioner Leibowitz apparently does.

Still, he is only one of five FTC Commissioners, and as a lone voice in the wilderness perhaps would not deserve this attention. Unfortunately, he is not alone on this subject, since Commissioner Rosch recently mused in a speech that Section 5 could appropriately be used in what he described as "out of round" Sherman Act cases—which apparently means cases involving conduct that at least arguably could not be reached by the Sherman Act but nevertheless deserved condemnation (at least in the view of the FTC). And the FTC recently voted 5-0 to issue a complaint (settled with a consent decree) alleging a stand-alone violation of Section 5 (albeit in very limited circumstances that might not be subject to the concerns laid out here). So there is enough smoke here to worry about a possible conflagration.

Section 5 prohibits "unfair methods of competition." What does that mean? Commissioner Rosch concludes that prior cases create two limiting principles: (1) There must be proof of an anticompetitive purpose and the lack of legitimate business justification, and (2) there must be "some evidence, direct or circumstantial," of "actual or incipient" anticompetitive effect. Commissioner Leibowitz, on the other hand, dismisses the past FTC losses as fact bound and thus largely irrelevant. Instead, he asserts that Section 5 is "a flexible and powerful Congressional mandate to protect competition from unreasonable restraints, whether long-since recognized or newly discovered, that violate the antitrust laws, constitute incipient violations of those laws, or contravene those laws' fundamental policies." This may be the scariest sentence written by an FTC Commissioner since the days of Mike Pertschuk, but he then goes on to lay out what he sees as the appropriate constraints. First, he would have it reach "only" (I could not resist the quotes here) actions that are "'collusive, coercive, predatory, restrictive, or deceitful,' or otherwise oppressive, and [are] without a justification grounded in [] legitimate, independent self-interest." (Actually, this is an even scarier sentence, so I will stop ranking.) Second, the conduct must bear "a realistic potential for causing competitive harm, [but] more manifest injury should not be required."

If we needed any evidence of why unleashing Section 5 would benefit no one other than antitrust lawyers, these articulations are certainly it. Even Commissioner Rosch, who looks very measured by comparison, would be willing to apply Section 5 to conduct that *seems to be* anticompetitively motivated if there is *circumstantial* evidence of *incipient* anticompetitive effect. But we have learned by hard experience to not give much weight to anticompetitive intent in antitrust enforcement because it is so hard to distinguish from the aggressive competitive intent that we promote as a core concept in our market economy. And even where we do consider intent, we take special care to look for real anticompetitive effects, so as not to allow the antitrust laws to blunt potentially pro-competitive conduct. Commissioner Rosch's standards could easily mean one thing to one Commissioner, and a wholly different thing to another—which is, after all, the core problem with Section 5 to start with.

But Commissioner Rosch's standards look like they were written by Bill Baxter when compared to the nonstandards advanced by Commissioner Leibowitz. Let's look at the terms individually. "Collusive"—that could be workable if it means agreement, but we already have the Sherman Act to deal with that. If it means something other than agreement, what would that be exactly? "Coercive"—would this mean *really* coercive conduct, like a gun to the head or kidnapping your children, or

(more likely) is it aimed at conduct like offering a very attractive price in return for higher volumes of business? "Predatory"—the Sherman Act already covers predatory conduct by single firms that amounts to monopolization or attempted monopolization, so to be meaningful this would have to be something more. What would that be? "Restrictive"—does this mean "unreasonably" restrictive, in which case it duplicates the Sherman Act, or does it include "restrictive" conduct that is not reached by the Sherman Act but happens to not appeal to a majority of FTC Commissioners? "Deceitful"—where does this fit in the panoply of anticompetitive conduct? The FTC Act and other statutes (*e.g.*, the Lanham Act) already reach false advertising. And *Rambus* itself shows that "deceitful" conduct can be reached under Section 2 of the Sherman Act. So, would this merely duplicate those statutes or, more likely, reach something else that we can't imagine at the moment? And finally, "or otherwise oppressive"—what in the heck does this mean? Are we now to decide whether some business conduct amounts to inappropriate bullying (at least in the FTC's eyes), and thus expand the policies underlying the Robinson-Patman Act just at the time that many people want to repeal it? As to anticompetitive effects, Commissioner Leibowitz says it is sufficient if the anticompetitive effect is "only suspected or embryonic." Sounds a lot like you get to make it up.

Perhaps it is worth recalling what happened the last time—more than two decades ago now—the FTC actually tried to seriously use Section 5. In *Boise Cascade*, the Ninth Circuit held that the Commission could not use Section 5 to get around the lack of evidence of actual agreement or anticompetitive effect. The Commission in that case was attacking an industry standard, but noncollusive, price system. In *Official Airline Guides*, the FTC tried to hold a publisher liable for making a unilaterally logical business decision to favor large carriers over small ones. The Second Circuit held that prohibiting this independent conduct by a nonparticipant in the allegedly affected market "would give the Commission too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry." Here again, the FTC had tried and failed to prove an actual agreement between OAG and the favored airlines. And in *Ethyl*, four years after those two cases, the Second Circuit rejected an attempt to once again attack noncollusive industry standard practices, stating that without appropriate standards, "the door would be open to arbitrary or capricious administration of Section 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition." And of course, let's not forget the "shared monopoly" cases in the oil and cereal industries that the FTC, seeing the writing on the wall, abandoned following this string of appellate defeats.

Of course, if the FTC could not resist the masochistic impulse to go down this road again, the appellate courts could again rein in the inevitable excesses. But that would take years of wasted resources, and would create immeasurable adverse effects on business behavior, as antitrust counselors tried to predict which side road the FTC would choose next—and being inherently a conservative group, would almost certainly discourage perfectly efficient and competitive behavior. This would be bad enough, but the collateral consequences might be even more significant. The antitrust laws today benefit from as broad a degree of acceptance and understanding as has probably ever existed. Of course, there are a few (like *The Wall Street Journal* editorial writers) who think that no antitrust laws would be better than what we have now, and perhaps a slightly larger contingent on the left that pines for the good old days of "big is bad," but the antitrust center is bigger and broader than it has ever been. So the arguments today are largely on the margins—sometimes important, but rarely critical. Revitalization of Section 5 would change this picture. It would signal the potential for a retreat to the antitrust of the past or, perhaps, the rather less bounded "competition" policy that is applied by many non-U.S. regulators less constrained by statutes and case law (and sometimes common sense).

There is no good argument for opening this Pandora's box. The world has survived quite nicely without Section 5 for the last 20+ years. The fact that at least some at the FTC are unhappy with the way that courts have interpreted the antitrust laws (especially the Sherman Act) in particular areas, and would like to get around those annoying constraints imposed by generalist judges who just don't understand the competitive environment like the experts at the FTC, is hardly a good reason for a change in practice. Commissioner Leibowitz quotes, with apparent endorsement, a statement from Senator Newlands at the time of the debate on the FTC Act and Section 5 in 1911 to the effect that "five good men"

(a reflection of the times) could hardly make mistakes about whether a particular practice "is contrary to good morals or not." But we should be long past the time that we are willing to entrust any five people, however well qualified, with the power to make unbounded decisions about what kind of business conduct is desirable or not.

Finally, it is worth responding to the argument, made by both Commissioners Rosch and Leibowitz, that Section 5 enforcement (presumably even with its obvious flaws) is OK because it does not have the potential to do "collateral damage," to use Commissioner Rosch's phrase. A finding of a Sherman Act violation can have collateral estoppel or *prima facie* evidentiary effect in subsequent damages actions, while this may not be the case with Section 5 findings. And, as Commissioner Leibowitz points out, the FTC "nearly always" brings FTC cases as administrative litigation, and decisions "generally" result "only" in cease and desist orders, and "on occasion, injunctive measures to help preserve or restore conditions for vigorous competition in the markets." The Commission would only seek disgorgement or equitable monetary relief, he says, where the violation is "relatively clear." So given all these considerations, says Commissioner Leibowitz, Section 5 enforcement is especially well suited for application "in situations involving unseasoned legal or economic theories, innovative business strategies, new or complex markets, or a substantially altered regulatory context."

Two points: First, as noted earlier, the potential "collateral damage" of a renewed Section 5 assault on American business includes the fracturing of the antitrust consensus that is now more than two decades old. Perhaps this is inevitable; after all, the steady state of antitrust over the last hundred years has more often been conflict than consensus, and oil prices and other recent events are certainly testing the current consensus. But it seems a shame to hasten the end of this very productive state of affairs unnecessarily, especially when there has been no case made (or even attempted, for that matter) that the lack of Section 5 enforcement over the last 20 years has had any adverse effects at all. What terrible conduct has been immunized over the last 20 years in the absence of Section 5 enforcement? Until someone can answer that question, there is no excuse for opening this door.

Second, and potentially much more important to the FTC, a revitalization of Section 5 enforcement would threaten the hard-won good reputation and general respect it has gained over the last two decades. It is not an overstatement to say that the FTC was, prior to this period, regarded by many as ineffective and unfocused, and thus more dangerous than useful as an independent agency. Today, many would argue that the FTC has passed the DOJ's Antitrust Division as the most respected antitrust enforcement agency in the U.S., and at a minimum it is equally well regarded by almost every knowledgeable observer. Diving into the muck of Section 5 enforcement would put this accomplishment in jeopardy and could even affect the way courts looked at the FTC's non-Section 5 efforts.

All of this is unnecessary. Section 5 enforcement is unnecessary. Section 5 enforcement is dangerous. Section 5 enforcement is highly likely to be harmful to the American economy. To be an FTC Commissioner inevitably means to be faced with the question of whether and how Section 5 should be used to expand the reach of the Sherman Act. The right answer is never, or hardly ever. This Commission has used it once this century. That's enough.

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