

“Tales from the Crypt”
Episodes ’08 and ’09: The Return of Section 5
(“Unfair Methods of Competition in Commerce are Hereby Declared Unlawful”)
Remarks of Commissioner Leibowitz
Section 5 Workshop
October 17, 2008

Good afternoon, I’m Jon Leibowitz, one of the FTC Commissioners.

Let me start by thanking the Commission staffers for producing this workshop and everyone for attending, especially the participants sitting on our panels. Technically, it is part of my job to understand Section 5 of the FTC Act — and I do have my own opinions on the subject. At the very least, I know enough to say with confidence that we have gathered the real experts here today, and it is a great pleasure to learn from them about this topic which, in the future, may be very central to the life of our agency.

Let me assure both those of you with little faith and those of you who have had the faith to sit through all of today’s panels: we aren’t planning to resurrect a statutory zombie worthy of “Tales from the Crypt.” But we are planning to learn from the past to ensure effective enforcement in the future.

Birth of a Statute Prohibiting Unfair Methods of Competition

Imagine a United States where wealth has become increasingly concentrated in the hands of a few. Imagine that the prevailing philosophy in the country is a school of thought that distrusts government intervention and emphasizes a *laissez faire* approach. Imagine also a federal judiciary, and especially a Supreme Court, that is hostile to vigorous enforcement of the antitrust laws.

What’s the year?

I know, it feels like it’s 2008 to me, too.

But the year is actually 1914.

As the FTC approaches its centennial, the antitrust world looks an awful lot like it did in the period that preceded the creation of the agency in 1914.¹ There are some differences today, of course. Back then, the antitrust laws were young, and competition policy was *sexy*. But the cramped reading of the Sherman Act that we see in federal courts today does resemble, to some extent, the interpretation of the antitrust laws by the Supreme Court early in the last century.

Even when the government *won* in those cases, it often won just barely, as in *Northern Securities*. In that case, only five of the justices found that the Sherman Act was relevant to mergers. Justice Oliver Wendell Holmes, Jr., in dissent, proclaimed about the Sherman Act that “[t]he court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used.”²

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

² *Northern Securities Co. v. U.S.*, 193 U.S. 197, 403 (1904) (Holmes, J. Dissenting).

The Standard Oil case of 1911, in which the Supreme Court adopted “rule of reason” analysis for the Sherman Act’s prohibition on “restraints of trade,” was an even greater flashpoint. Many within and outside of Congress viewed the Supreme Court’s “reasonableness” test as a judicial invention that threatened to undermine Congress’ aim in passing the Sherman Act. In fact, William Jennings Bryan announced that “the trusts have won” in response to that decision, even though it resulted in the dissolution of Standard Oil.³

These concerns actually made competition policy a hot-button issue in the 1912 election between Wilson, Taft and Roosevelt, and ignited a bipartisan rush to create an agency with a mandate more expansive than that of the antitrust laws. Roosevelt, for example, spoke about antitrust as he accepted the Progressive Party nomination for President, noting that it “has occasionally done good, has usually accomplished nothing, has generally left the worst conditions wholly unchanged, and has been responsible for a considerable amount of downright and positive evil.”⁴ He proposed creating a commission that would have many powers beyond the antitrust laws, including the power to stop the “elimination of competition by unfair or predatory practices.”⁵ Wilson adopted a similar position after the election, actually addressing a joint session of Congress to propose “Additional Legislation for the Control of Trusts and Monopolies” in 1913.

Congress reacted expeditiously. Senator Cummins of Iowa, one of the main proponents of the Federal Trade Commission Act, emphasized that the reason for the law was, “to go further and make some things offenses” that were not condemned by the antitrust laws. As Senator Cummins explained to his colleagues, “the only purpose of Section 5 [is] to make some things punishable, to prevent some things, that can not be punished or prevented under antitrust law.”⁶ Congress did make some attempts to identify the sort of conduct that the FTC should be able to prohibit, but eventually gave up. As the Senate Report put it, “there were too many unfair practices to define,” so it was left up to the Commission “to determine what practices were unfair.”⁷

All of you probably have the FTC Act memorized in its entirety, but it helps me to recite what ended up as law back in 1914: “That unfair methods of competition in commerce are hereby declared unlawful.”⁸ Congress could have simply given the Commission the ability to enforce the Sherman Act. But it didn’t. Instead, the plain text of the statute makes it clear that Congress intended to create an agency with authority that extended well beyond the limits of the antitrust laws.

Throughout the 20th century, the Supreme Court has consistently affirmed this expansive view of the Agency’s authority. In 1934, for example, in *Keppel Brothers*, the Court held that, “[i]t would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into

³ Winerman, 71 Antitrust L.J. at 13.

⁴ *Id.* at 24.

⁵ *Id.*

⁶ 51 CONG. REC. 12, 454 (1914) (statement of Sen. Cummins).

⁷ S. Rep. No. 63-597, at 13 (1914) (internal quote omitted).

⁸ Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C §§ 41-58).

violations of the Sherman Act, if that had been the purpose of the legislation.”⁹ Other cases, including *FTC v. Brown Shoe Company* and *FTC v. Motion Picture Advertising Service Company*, while perhaps not reading the statute quite as broadly, nevertheless clarified that Section 5 reaches both “practices which conflict with the basic policies” underlying the antitrust laws and incipient violations of the antitrust laws.¹⁰ Similarly, in *Sperry & Hutchinson*, the green stamp case, the Court made clear that the Commission was to “consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”¹¹ More recently, in *Indiana Federation of Dentists*, the Court described Section 5’s unfairness standard as “an elusive one, encompassing *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.*”¹²

How Far Should We Go?

So everyone can agree (I’ve decided) that the FTC Act goes beyond the metes and bounds of the Sherman Act. The more important question is: how far beyond should we go?

To those points, it is instructive to think about the “monster” that many believe was created the last time we systematically tried to enforce Section 5 beyond the Sherman Act — the late 1970s, in an effort that culminated in Commission losses in circuit courts in *Ethyl*, *Boise Cascade* and *Official Airline Guides*.¹³ Of course, one reason I think we should learn from these cases is that many in the corporate antitrust bar—and in the audience—seem to have flash-backs to “the lessons of the 1970s” whenever we talk about Section 5. I hope it will give comfort to many of you to know that we do read those cases and understand their excesses.

But another reason is that these cases were decided at a time when antitrust was very broadly—some of us might say very “creatively”—applied. Unlike today — or 1914 for that matter — the federal courts in the 1960s and 1970s favored an expansive view of what was prohibited by antitrust. Take, for example, the 1966 *Von’s Grocery* decision involving a merger between the third largest grocery chain in Los Angeles and the sixth largest, a deal which would have led to a combined company with less than eight percent of the market.¹⁴ (The top eight firms together had less than fifty percent of the market.) Yet the Court found that the merger violated the Clayton Act based largely on increases in concentration, holding that it was “simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before.”¹⁵

⁹ *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 310 (1934).

¹⁰ *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

¹¹ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

¹² *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (citations omitted) (emphasis added).

¹³ *Official Airline Guides 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*”).

¹⁴ *U.S. v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

¹⁵ *Id.* at 278.

Is there anyone in this room who possibly believes that such a deal should be challenged today? I doubt it would even reach a second request.

You can all see that the Commission, to go beyond the then dominant interpretation of the antitrust laws and reach the penumbra that is Section 5, had to venture very far indeed from the types of conduct that we would now consider anticompetitive. That leads to the concern that animated the panels in *Ethyl*, *Boise Cascade* and *Official Airline Guides*. Without putting too fine a point on it—and let me apologize here for moving from monster to baseball imagery—the Commission crowded the plate and the courts threw us a brush back pitch. Actually, several.

During the last three decades, we never really left the on-deck circle again. But because of the breadth of the antitrust laws for some of this period, we didn't need to.

During these last three decades, however, we have also seen a dramatic retrenchment in the scope of the antitrust laws. Cases like *Von's Grocery* and *Albrecht* gave way to more reasonable decisions like *Matsushita*, *Sylvania* and *Brooke Group*.¹⁶ Clearly this has often been the right direction for the law to go. But given the even more restrictive Supreme Court opinions of just the past few terms—I am thinking of *Trinko*, *Twombly* and *Leegin* but you may each have your own favorites—it seems reasonable to say that the Sherman Act is no longer the broad mandate protecting consumers that it once was.¹⁷

The Supreme Court's rationale underlying these decisions is, I believe, a justifiable concern about the toxic combination of treble damages and class actions (a monster of a different color). But I also believe that the result, at least in the aggregate, is that some anticompetitive behavior is not being stopped—in part because the FTC and DOJ are saddled with court-based restrictions that are designed to circumscribe private litigation. Simply put, consumers can still suffer plenty of harm for reasons not encompassed by the Sherman Act as it is currently enforced in the federal courts.

So the same rationale that motivated Congress to create the FTC in the first place and give us the authority to stop unfair methods of competition, requires us to use that statute again today.

What standards should apply when we use Section 5?

Well, that is part of the reason that we are holding this workshop – it is not entirely clear; really, not clear at all. Indeed, as I read through some of the excellent submissions—from my former colleagues Tom Leary, Susan Creighton and Tom Krattenmaker to my current colleague Tom Rosch, among others—all of us agree that there are circumstances in which the Commission ought to bring “pure” Section 5 cases. But none of us agree on precisely when the Commission should invoke this statute. If we do use Section 5—and I strongly believe we should—it is essential that we try to develop

¹⁶ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007).

a standard. Businesses deserve, if not certainty, then at least a sense of what behavior we are trying to reach.

To my mind, the beasts of the late 1970s and 1980s—*Ethyl*, *Official Airline Guides* and *Boise Cascade*—can give us useful guidance at least insofar as they make it clear that, when we go beyond enforcement of the antitrust laws, Section 5 is only violated by conduct that is not “normally acceptable business behavior” (a phrase straight out of the Second Circuit in *Ethyl*).¹⁸ To the limited extent that we have been enforcing Section 5 since then—in our invitation to collude cases—this is how we’ve been doing it.¹⁹ There is no clearer example of conduct that is not normally acceptable business behavior than an attempted felony!

There should be another element for a Section 5 violation though. Our powers to restrict unfair methods of competition, consistent with Congressional intent, should only extend to those anticompetitive schemes or practices that harm consumers. It should not be enough for the Commission to show just that a firm acted inconsistently with normally acceptable business behavior, because Congress did not create the Commission to be a national nanny or to mediate between firms that can generally protect themselves where consumers are not at risk. At the same time, however, the Commission should not be tied to the more technical definitions of consumer harm that limit applications of the Sherman Act when we are looking at pure Section 5 violations.

Where Can We Use Section 5?

In what categories of cases would it make sense to apply Section 5? Well, I would be reluctant to use it in the merger context—we don’t win cases as much as we might like but that statute itself works reasonably well. Nor would we be wise to use the broader authority whenever we think we can’t win an antitrust case, as a sort of “fallback.”

One category of potential cases involves standard-setting. *N-Data*, our consent from last spring, is a useful example. Reasonable people can disagree over whether N-Data violated the Sherman Act because it was never clear whether N-Data’s alleged bad conduct actually caused its monopoly power. However, it was clear to the majority of the Commission that renegeing on a commitment was not acceptable business behavior and that—at least in this context—it would harm American consumers. It does not require a complex analysis to see that such behavior could seriously undermine standard-setting, which is generally procompetitive, and dangerously limit the benefits that consumers now get from the wide adoption of industry standards for new technologies.

Section 5 might prevent conduct some pharmaceutical companies reportedly engage in. Branded pharmaceutical companies often launch newer versions of their existing drugs, which generally benefits consumers. However, certain strategies used in connection with launching a new product—for example, obtaining patents by inequitable conduct, misrepresenting information to the FDA, or destroying the distribution channel of their own existing product—seem to serve no purpose other than to undermine the

¹⁸ *E.I. du Pont de Nemours & Co.*, 729 F.2d at 138.

¹⁹ *See, e.g.*, In re Valassis Communications, Inc. (FTC File No. 051 008) (Mar. 16, 2006), available at <http://www.ftc.gov/os/caselist/0510008/0510008.shtm>.

ability of a generic to compete. This is often referred to as a form of ever-greening because it preserves the branded company's market power in perpetuity.

You could argue this conduct is illegal monopolization—and I think some of it may be. However, given the courts' ever-narrowing of the antitrust laws, it would be no surprise if courts reject that approach—even if the practice is unfair and causes tremendous harm to consumers. Surely such practices should then qualify as violations of Section 5 of the FTC Act.

Finally, the recent Justice Department Report, if adopted by the Courts, would dramatically limit the scope of Section 2 enforcement and require us to fill gaps. For example, what if the effect of some anticompetitive conduct isn't "disproportionate" to the claimed efficiencies but on balance causes harm? Or what if we see conduct, like loyalty or bundled discounts, that excludes firms that might be less efficient than the dominant firm but where the less efficient firm nonetheless constrains prices? We know that this could harm consumers but it is less than certain that such conduct would be considered a violation of Section 2.

Practical Checks on Section 5 Cases

Finally, lest anyone panic, there are other practical checks on FTC Section 5 authority, which are probably underappreciated by those who do not actually work at the agency, like the relatively narrow array of remedies afforded to us.

- Unlike the Byzantine Emperor Zeno (who ruled from 476 to 491 A.D.), the FTC does not have the authority to send monopolists into perpetual exile or order the forfeiture of all of their assets.
- Unlike the Department of Justice, which can put violators in prison, the Commission is generally only able to get injunctive relief for violations of Section 5, at least in cases brought before Commission ALJs. These outcomes are appealable, of course. And our ability to seek restitution or disgorgement is limited to the federal courts from the start, and subject to our internal policy of not pursuing monetary relief except in cases of clear violations.
- Far more importantly, unlike in most government antitrust cases, Section 5 violators do not find themselves subject to private antitrust actions under federal law— and probably under state baby FTC acts as well— certainly not for treble damages.²⁰

For this reason alone, the business community should embrace our use of Section 5.

In time, I believe it will.

Conclusion

For those of you who view with dread the possibility that the Commission is embarking on a new quest for cases like *Ethyl* or *Boise Cascade* – or that we are

²⁰ It is revealing that in all the comments submitted after our N-Data consent, not one cited a single example of a private suit based on an "unfair methods of competition" theory in a state court action.

disinterring them from the crypt: let me assure you, we are not. But for those of you who want us to abandon our congressionally mandated statutory responsibilities: let me assure you, we are not going to do that either. Some of the retrenchment from the 1960s makes sense, as Chairman Pitofsky acknowledges in his introduction to the new book on how the Chicago School overshot the mark.

But often it doesn't.

Or put differently, just because the Sherman Act no longer stops some types of bad conduct does not always mean that the conduct is no longer bad. Precisely what unfair methods of competition the Agency has an obligation to stop is the subject of our workshop today. But to stop none would be to ignore the reason the Commission was created way back in 1914.

And we certainly shouldn't ignore the next panel, so let us move on to them.