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THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

# **The Wisdom of Using the “Unfair Method of Competition” Prong of Section 5**

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A. Douglas Melamed  
WilmerHale LLP

## The Wisdom of Using the “Unfair Method of Competition” Prong of Section 5

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### I. INTRODUCTION

The basic question I am addressing concerns the wisdom of using the "unfair method of competition" prong of Section 5 of the Federal Trade Commission Act to prohibit conduct that does not violate the Sherman Act or the other antitrust statutes (the Clayton Act and the Robinson-Patman Act, all of which are collectively referred to herein as the "antitrust laws"). I will address that question as a policy matter. I do not address the question whether Section 5 can, as a matter of law, properly be construed to give the Federal Trade Commission ("Commission") the authority to prohibit such conduct.<sup>1</sup> Even though the statute can be so construed, the Commission must still resolve the policy question whether it is wise to do so. In the first place, Section 5 was enacted more than 90 years ago, long before the current understanding of the requirements of sound competition policy. Moreover, the Commission has, and does and should use, discretion not to press its authority to the limit by bringing all of the cases that it has statutory

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\*Partner in WilmerHale's Regulatory and Government Affairs Department, and member of the Antitrust and Competition Practice Group. This paper contains comments prepared for submission to the Federal Trade Commission and expresses my personal views, not those of any client or other entity.

<sup>1</sup>For simplicity, I will use the term "Section 5" in these comments to refer only to the "unfair method of competition" prong of Section 5. These comments do not address the scope of the separate consumer protection prong of Section 5.

authority to bring. Thus, the issue whether Section 5 should be used to prohibit conduct that does not violate the antitrust laws is properly addressed as a policy question.

One possibility would be to use Section 5 where substantive antitrust analysis would condemn conduct as anticompetitive but the antitrust statutes themselves do not prohibit the conduct. Under this approach, for example, an anticompetitive acquisition by an unincorporated entity could have been condemned under Section 5 prior to 1980, when Section 7 of the Clayton Act applied only to acquisitions by corporations. Similarly, an invitation by one competitor for another to enter into a naked conspiracy such as a price fixing agreement might be deemed to violate Section 5 today, on the ground that such an invitation threatens injury to competition and is without redeeming value, even though such an invitation, if rejected, might not violate the antitrust laws; it would not violate Section 1—because no agreement would have been reached—and it would not violate Section 2 if the parties do not have monopoly power individually or collectively.

Application of Section 5 to prohibit such conduct is the least problematic version of an expansion of Section 5 to apply to conduct that does not violate the antitrust laws because this use of Section 5 relies on antitrust principles for analyzing whether the conduct in question is anticompetitive. Using general authority under Section 5 to prohibit such conduct, however, might be thought to dishonor a more specific legislative decision to limit the reach of the antitrust laws.

The remainder of these comments addresses the broader issue of whether Section

5 should be used to prohibit conduct that is for substantive reasons beyond the reach of the antitrust laws, because it either is not anticompetitive conduct or does not injure competition as those terms are understood in the context of the antitrust laws. In my view, Section 5 should not be used to prohibit such conduct, for several reasons.

## **II. UNLESS TETHERED TO THE ANTITRUST LAWS, SECTION 5 WILL INEVITABLY BE TOO AMBIGUOUS**

It is well-established that antitrust law needs to be clear and unambiguous so that firms can understand what is required of them, outcomes of cases are reasonably predictable and thus perceived as fair, and the law does not because of its ambiguity deter precisely the kind of aggressive competition and creative entrepreneurship that the antitrust laws are intended to encourage. As the Antitrust Monopolization Commission put it in its recent Report,<sup>2</sup> antitrust standards should be "clear, predictable, and administrable, so that businesses can comply with them and courts can administer them."

Section 5 falls far short of this standard. The key term—"unfair method of competition"—on its face is almost meaningless, and the few litigated Section 5 cases over the years have done little to clarify its meaning. It would have meaning if it were construed to mean "anticompetitive conduct," as that term has come to be understood for antitrust purposes.<sup>3</sup> Beyond that, Section 5 would be hopelessly vague.

The ambiguity cannot be overcome by careful articulation by the Commission of new Section 5 principles. First, as the antitrust laws demonstrate, commercial practices

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<sup>2</sup>P. 29

<sup>3</sup>The antitrust laws are not themselves entirely pellucid. But their meaning is sufficiently clear in general, and the remaining areas of ambiguity fall within narrowing interstices of the law.

are too vast and varied to be unambiguously guided by any realistically imaginable set of principles. Second, a Commission's articulation of principles would be of limited value in removing ambiguity for the additional reason that there is nothing in the *law* to prevent a subsequent Commission from articulating different principles. Third, if the Commission were somehow able to adopt a clear, comprehensive and enduring set of principles—by, for example, promulgating formal rules under the Federal Administrative Procedural Act (“APA”)—it would necessarily replace antitrust principles, which evolve by a common law process to adapt to new market circumstances and economic learning, with rigid, soon-to-be anticompetitive regulation.

To be sure, the antitrust laws themselves use vague phrases, such as "restraint of trade" or "substantially lessen competition." But the antitrust laws have been given meaning through a robust common law process. The Sherman Act was enacted nearly 120 years ago, and the Clayton Act more than 90 years ago. In the intervening decades there have been thousands of cases construing their statutory provisions, and the cases and commentary have given those vague provisions substantive content and have made their meaning over a wide range of matters sufficiently clear.

Section 5 will not be clarified by a similar common law process. In the first place, the antitrust laws have had a decades-long head start, and there exists for them a body of law elaborating upon the meaning of the general statutory provisions far greater than anything imaginable for Section 5 in the foreseeable future. Moreover, it is not just the passage of time that accounts for the difference. The antitrust laws are enforced by

countless plaintiffs—two agencies of the federal government, state governments, and private parties. There are hundreds of antitrust cases each year, each of which contributes in some small way to the cumulative common law process that has given meaning to the antitrust laws. By contrast, Section 5 is enforced only by the Commission, and there is no reason to believe that the Commission could be expected to resolve more than a handful of Section 5 cases each year. In light of this unavoidable dearth of Section 5 cases, there could not possibly be a sufficient body of law to give meaning to the vague provisions of Section 5, even after several years.

The problem is exacerbated by the fact that the majority of government proceedings are resolved by consent decree, rather than by adjudication. Enforcement by consent decree is inherently problematic because consent decrees reflect the views of the Commissioners about the reach of the statute, rather than the authoritative views of the courts. The consent decree process typically consists of a short complaint and summary description of the case by the Commission (or the Antitrust Division), coupled with a decision by the respondent not to contest the charges. Although the truncated process serves many useful purposes, it also inevitably leaves implicit assumptions unexamined and critical steps (and flaws) in enforcers' analysis unexposed. In short, consent decrees not only do not reflect judicial determination of the pertinent legal issues, but often do not illuminate with precision even the views of the Commission.

The Commission's recent consent decree in the *N-Data* matter is illustrative.<sup>4</sup> The Commission challenged a course of conduct by N-Data after a long investigation. The

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<sup>4</sup>I was counsel for N-Data in that matter.

Commission decided at the conclusion of the investigation that the conduct alleged did not violate the antitrust laws because it did not injure competition. The Commission decided, however, to challenge the very same conduct under Section 5. Recent judicial decisions construing Section 5 had held that conduct can be deemed to violate Section 5 only if it injures competition, and the Commission acknowledged and appeared to acquiesce in this requirement in its statement for public comment accompanying the *N-Data* consent decree. The Commission has never, however, explained how the conduct alleged to be unlawful in that case could have injured competition for purposes of Section 5, given the fact that it did not injure competition for purposes of the antitrust laws. If the matter had been litigated, the Commission would have had to explain and justify its conclusion. Without such explanation, the injury-to-competition element of the Section 5 offense is almost meaningless.

Moreover, even if the Commission had explained its view of Section 5 with sufficient clarity, the *law* would remain unacceptably vague. Without authoritative *judicial* interpretation of Section 5, its scope will reflect little more than the personal views of a majority of the Commissioners at any point in time. The current Commission might believe, for example, that its expansive reading of Section 5 in the *N-Data* case is limited to the factual context there—standard setting—but there would be nothing to prevent a future Commission majority from applying Section 5 in a very different way. And it is inconceivable that there will be enough *judicial* determinations of the scope of Section 5 in the foreseeable future to give real meaning to the statute. The unavoidable

result would be rule by individuals, rather than law.

In sum, if construed to reach beyond the antitrust laws, Section 5 would inevitably be too vague to send useful signals to the marketplace and to provide appropriate incentives for firms to conform their conduct to the requirements of the law. The occasional Section 5 case that would be litigated would reflect only a dispute between the then-prevailing views of the Commission and the defendant. Because of the predictable heavy reliance on consent decrees, Section 5 will come to mean little more than what a majority of the Commission thinks it means at any particular time. One Commission's determination of the meaning of Section 5 would not be binding on the next. The result would be an unpredictable intrusion of the Commission into the marketplace that would threaten the most basic objectives of sound competition policy—enabling markets to work efficiently without distortion.

### **III. THE FEDERAL TRADE COMMISSION SHOULD NOT ENFORCE COMPETITION LAW STANDARDS DIFFERENT FROM THOSE APPLIED BY THE JUSTICE DEPARTMENT**

At present, both the Justice Department ("DOJ") and the Commission enforce the antitrust laws. The substantive antitrust standards that they are required to apply are the same. While there are differences from time to time in the choices of the agencies as to the exercise of discretion within the requirements of those standards, neither agency can successfully challenge under the antitrust laws conduct that is found to comply with the substantive requirements of the antitrust laws enforced by the other.

Expanding Section 5 to reach beyond conduct that violates the antitrust laws would change that because it would enable the Commission to challenge, and in effect to prohibit, conduct that is beyond the reach of DOJ. One result would be that conduct could be illegal for a firm or industry that is subject to review by the Commission under the clearance agreement between the Commission and DOJ, even though that same conduct would be legal when engaged in by those firms or industries that are subject to review by DOJ. That is not equal justice. Differences of that nature would engender a sense of unfairness by firms that perceive they are treated differently simply by reason of their assignment under the clearance agreement, and such differences would breed a disrespect for law in general and for the competition laws in particular.

Differences between the substantive standards applied by the two agencies could also undermine the very purposes sought to be served by the antitrust laws. This conflict of purposes is rooted in the fact that, as a matter of sound competition policy, optimal enforcement is not the same as maximum enforcement.

For example, consider predatory pricing. The Supreme Court and lower courts have for years made clear that conduct can be deemed to be unlawful predatory pricing only if, among other things, the defendant's price is below an appropriate measure of cost. The law embraces the below-cost test even though the cases acknowledge, and economists have demonstrated, that some pricing above cost can harm competition and reduce economic welfare. The law reflects a judgment that exposing firms to antitrust liability if they cross the difficult-to-discern line between desirable and undesirable

above-cost pricing would on balance harm competition—by deterring aggressive, pro-competitive price competition—more than would a legal rule that would permit the rare instances of anticompetitive above-cost pricing.

If, however, Section 5 was construed to prohibit above-cost pricing under certain circumstances, it would conflict with the judgment on which the predatory pricing standards of the antitrust laws are based and would thus undermine the substantive objectives of the antitrust laws. Such a construction of Section 5 would have precisely the effect of deterring desirable conduct that the limitations on the antitrust laws are intended to prevent.<sup>5</sup>

This problem, too, is compounded by the likelihood that Section 5 would be enforced largely by consent decree. As explained above, enforcement by consent decree enables the Commission to prohibit conduct, and create incentives for firms to avoid conduct, that has not been adjudicated to be illegal. The result would be signals to firms and the marketplace that reflect the discretion of the Commission, rather than the accumulated wisdom of the common law process by which general statutes like the Sherman Act evolve and are given meaning.

It might be objected that enforcement of Section 5 in this way would not have perverse effects on the economy because, it might be argued, Section 5 cases will be so rare that they will not change the incentives of firms in the marketplace. But if that is the case, there is no basis for enforcing Section 5 at all. If Section 5 enforcement does not

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<sup>5</sup>Because treble damage remedies are not generally available for Section 5 violations, the magnitude of overdeterrence is likely to be less than that caused by unclear or overbroad antitrust standards. But the difference is only one of degree, and the difference is of little or no significance to the extent that private remedies are available for violations of state Baby FTC Acts and those statutes are construed to parallel Section 5.

create incentives for firms to behave in more desirable ways, it would be in effect little more than a vehicle for arbitrary, hindsight punishment of conduct deemed by the Commission at certain moments in time to be undesirable. If Section 5 enforcement does not create incentives that promote desirable competition, it will not further competition or antitrust objectives.

The premise of this section of my comments is that enforcement of Section 5 to reach conduct that does not violate the antitrust laws would mean that some firms and industries would be subject to substantive standards different from those applicable to other firms and industries.<sup>6</sup> This premise might be challenged by those who suggest that, if DOJ cannot bring an antitrust case because of limitations in the antitrust laws, the Commission could follow a terminated DOJ investigation by bringing a Section 5 case against the very same conduct. It is, however, unlikely that DOJ would, as a general matter, refer such cases to the Commission because DOJ would not want to cede jurisdiction over the firms or industries at issue.

Moreover, successive investigations by the Commission and DOJ would create other problems. In the first place, firms and industries subject to DOJ would in general face the risk of duplicative and unfair burdens because they, unlike industries subject to Commission review, could face two successive investigations, rather than just one. The prospect of successive reviews by DOJ and the Commission would thus alter but not avoid the problem of conflicting legal regimes applicable to different firms or industries.

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<sup>6</sup>Of course, such differences are sometimes chosen by Congress when it enacts sector specific legislation. But the differences addressed here would reflect only the allocation of firms and industries pursuant to the clearance agreement between the Commission and DOJ. That allocation does not reflect a Congressional determination that different substantive standards should apply to different firms or industries.

In addition, such duplicative review would increase legal compliance and administration costs for the economy as a whole. As is the case whenever there is duplicative review of the same transaction, it would also systematically increase the likelihood of false positives, i.e., the prosecution of unsound cases, because it would double the number of federal agencies that could cause a false positive.<sup>7</sup> And sequential reviews would compound the problem of vagueness and uncertainty created by enforcement of Section 5 to reach conduct that does not violate the antitrust laws because it would subject even more firms to those uncertainties.

Not surprisingly, the three most recent past chairs of the Commission, Republicans and Democrat alike, have publicly stated that Section 5 should not be construed to reach conduct that does not violate the antitrust laws. All have expressed concern about the application by the Commission of substantive rules that differ from the substantive rules applied by DOJ.<sup>8</sup>

#### **IV. THE PROCESS FOR ADJUDICATING SECTION 5 CASES IS INADEQUATE**

Alleged violations of the antitrust laws are ordinarily litigated in Article III courts, in proceedings that begin at the district court level. By contrast, Section 5 disputes are litigated in administrative proceedings at the Commission. Judicial review in a court of

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<sup>7</sup>It would of course also reduce the risk of false negatives. But given the abundance of potential antitrust plaintiffs, there is little reason to believe that there is in general a greater risk of false negatives than of false positives.

<sup>8</sup>See 16 ANTITRUST (Summer 2008) (Muris: "... different substantive standards should not apply for the FTC and the DOJ.... More importantly, to untether Section 5 from the Sherman Act is a mistake." Pitofsky: the result that "behavior that is legal if the [DOJ] sues you becomes illegal if the...Commission sues you.I think that is to be avoided."); Dissenting Statement of Chairman Majoras in *N-Data* (January 23, 2008).

appeals is available after a final Commission decision, but review of fact-finding by the Commission is confined to the narrow "substantial evidence" test.

Administrative adjudication of antitrust issues is a deeply flawed process. It is not suitable for the task of generating competition-law decisions that are sufficiently reliable and well-founded that they can be counted upon to send appropriate signals to economic actors about the conduct that the law requires of them.

#### ***A. Inappropriate Allocation of Decision-Making Responsibility***

Under the Commission's rules, after the Commission votes out a complaint alleging a violation of Section 5, the members of the Commission and their immediate advisors are walled off from the adjudicative process by *ex parte* restrictions. In effect, the Commissioners are thereafter to function as judges, rather than law enforcement officials. From that point on, until the final decision by the Commission, the prosecution of the case is handled by Commission staff. This walling-off is essential for Commission decisions to meet even minimal standards of due process.

The problem is that all cases evolve as they are litigated after the complaint is filed, in response to new facts learned in discovery, interim legal rulings by the judge, or the refinement of factual and legal analysis in the course of the adversary process. An important component of any litigation is adapting to this evolution. In the case of law enforcement proceedings brought by the government, the adaptation entails the exercise of prosecutorial discretion as to what direction the case should take in light of the new developments. Under the Commission's *ex parte* rules, those decisions are made by the

staff, not by the responsible political officials who decided to issue the complaint in the first instance.

The problem is not that the staff lacks the ability or integrity to litigate the cases. Far from it. It is rather that enforcement by the Commission entails the power of the federal government. We ordinarily and properly expect that important, often discretionary, decisions about the use of that power will be made by responsible political officials. If they are wise, they will draw upon the experience, knowledge, and judgment of the staff. But it is those officials who should make the decisions.

When Section 5 cases are litigated in the administrative process, however, these decisions are made by the staff; and the staff cannot be expected always to reflect the Commission's views.

In the recent *Rambus* case, for example, the Commission sought to influence the development of the law regarding standards setting.<sup>9</sup> The Commission drafted a lengthy complaint that articulated its view of the facts as it then understood them and its view about how the antitrust laws should be applied to those facts.

After the *ex parte* wall was erected, however, the Commission lost control of the case. One result was that the staff litigating the case moved for a default judgment, and subsequently renewed the motion, on the basis of alleged facts unrelated to the substantive antitrust principles raised by the Commission's complaint. The administrative law judge ("ALJ") denied the motion. If the ALJ had granted the motion, the case would not have furthered the Commission's interest in establishing a substantive antitrust

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<sup>9</sup>I represent Rambus in this case.

precedent. The decision whether to abandon pursuit of substantive antitrust principles in favor of a default victory against the particular respondent involved in that case should have been made by the responsible political officials—the Commissioners—who issued the complaint, not by the staff.

For another example, the Commission in 1991 brought a case against the *College Football Association* ("CFA") alleging that certain conduct by the CFA and its members regarding the sale of rights to televise college football games violated the antitrust laws. At essentially the eleventh hour, the Commission decided to add Capital Cities/ABC ("ABC") as a respondent in the case.<sup>10</sup> ABC was a telecaster that had acquired rights to televise most of the CFA's games. After preliminary discovery, the respondents filed summary judgment motions arguing that the Commission did not have jurisdiction over the CFA or its members because they were all nonprofit organizations. Staff argued that the case should continue against ABC, even if summary judgment were granted in favor of the CFA. ABC argued, to the contrary, that the Commission had never manifested a desire to bring a lawsuit against ABC independent of the CFA and that it was for the Commission to make that decision. The ALJ granted the motions for summary judgment on behalf of both the CFA and ABC. On appeal, the Commission affirmed the decision and thus made clear its agreement with ABC that it did not intend to sue the telecaster if it could not bring a case against the competing rights holders. If the ALJ had denied ABC's motion for summary judgment, however, ABC would have had to go through a very costly discovery process and to defend the substantive antitrust case, even though

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<sup>10</sup>I represented ABC in that case.

the Commission had no intention of subjecting ABC to such a case. It was for the Commission, not the staff, to decide whether to sue ABC; but it was only by grace of the ALJ's ruling that the Commission was able to make that decision.

In short, cases evolve between the time the complaints are filed and the time final briefs are submitted. The evolution often requires important substantive judgments and exercises of discretion by the prosecutor as to whether to pursue a case and how to pursue it. Those decisions should be made by the Commissioners—the responsible political officials who decided to issue the complaint. Under the procedures necessarily applicable to Section 5 proceedings, however, those decisions are made at the staff level.<sup>11</sup>

### ***B. Unreliable Fact-Finding***

Much more serious are concerns about the Commission's administrative fact-finding process. There is substantial reason to suspect that that process does not meet the standards of rigor and independence that we do and should expect of adjudicative decisions in the law enforcement process.

#### **1. Sherman Act Cases**

Andrew Ewalt, who was until recently a colleague at my law firm, assembled data that I believe demonstrate this point. He examined all cases adjudicated before an ALJ at the Commission over the 25-year period from 1983 to 2007. He focused in particular on Sherman Act cases litigated and decided on the basis of disputed facts. Over that 25-year

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<sup>11</sup>Recently proposed revisions to the Commission's rules would ameliorate this problem because they would permit certain dispositive motions to be heard in the first instance by the Commissioners, rather than by the ALJ. See 73 Fed. Reg. 58832-58858 (October 7, 2008). These revisions would not, however, cure the problem because decisions to file or contest such motions, and other important decisions regarding the substantive shaping of the case, would continue to be made by the staff while the Commissioners are walled off by the *ex parte* rules.

period, *respondents did not win a single such case*. The staff won 16 cases and lost none. That record now covers the 26-year period from 1983 to 2008.

Notably, respondents had greater difficulty winning before the Commission than before the ALJs. Respondents actually won four of the sixteen cases before the ALJ. But the Commission reviews all ALJ decisions *de novo*. The Commission reversed all four ALJ decisions in favor of respondents. The Commission affirmed all 12 ALJ decisions against respondents. These data can be summarized as follows:

	<u>Total</u>	<u>Respondent Wins at Trial</u>	<u>Respondent Wins Before Commission</u>
Sherman Act cases with disputed facts	16	4	0

This 16-0 record is astonishing. One would expect roughly a 50-50 split of litigated cases because, as a general matter, parties litigate only close cases and settle cases where it is clear which party has the better case. A 16-0 record is far afield from any reasonable expectation of the outcomes of litigation.<sup>12</sup>

The Commission's undefeated streak cannot be explained by flawless case selection. First, to imagine that the Commission's case selection decisions are flawless defies human nature. Second, if the Commission's case selection was flawless, respondents would settle and never litigate. Third, the Commission and DOJ have far less success when litigating cases initiated in federal court, so they are demonstrably not flawless in selecting sound cases. Finally, the Commission has lost a fair number of those

<sup>12</sup>In the case of government proceedings involving injunctive relief, such as Section 5 cases, it is possible that one would expect a slight tilt in favor of the government. The government might be unlikely to pursue a case that it knew to be weak, but a private litigant might contest a strong case in the hope that some form of "Hail Mary" defense would prevail. But a slight tilt is a far cry from 16-0.

16 cases on appeal to the Courts of Appeal, even though the courts have only limited opportunity to review fact-finding by the Commission and are generally focused on the Commission's conclusions of law. In recent years, for example, courts of appeal have vacated Commission decisions in *California Dental*, *Schering Plough*, and *Rambus*.

Some at the Commission have suggested recently that problems with administrative adjudication lie centrally with the ALJs, who are said sometimes to lack experience or sufficient antitrust knowledge. But if ALJs were the problem, one would expect to see a large reversal rate of their decisions as the presumably more knowledgeable and capable Commission reviewed their work, and there would be no reason to expect their mistakes to be biased against respondents. In fact, the data above show that ALJs who ruled against respondents were uniformly affirmed and that they were reversed only when they ruled in favor of respondents.

A complete explanation of the Commission's 16-0 record would require detailed examination of all of the cases, records of the Commission, and the like. It seems plausible, however, to suggest that the explanation for the Commission's astonishing record might include more subtle and unavoidable attributes of administrative adjudication. The point was put best by the distinguished former Commission Chairman, Phillip Elman, in his dissent on a related topic from the Commission's decision in *In the Matter of The House of Lord's, Inc.*<sup>13</sup>:

As I have noted elsewhere, the stresses and strains on administrative adjudication are especially acute when the result in a particular case may have a bearing upon a general policy or program to which the agency is committed. *Unlike judges, who sit as neutral and detached adjudicators, agency members who are responsible*

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<sup>13</sup>FTC Dkt. No. 8631, (Jan. 18, 1966)

*for deciding the particular case are also responsible for advancing the goals and effectuating policies of the statutes which the agency administers. Its success or failure is measured by the general results or lack of them which the agency achieves in carrying out its statutory mission. Unlike a judge, an agency member cannot overlook the effect which a decision in a particular proceeding may have on related proceedings before the agency. The fusion of functions within the administrative process affords great benefits and flexibility of action; but it also gives rise to dangers which agency members must acknowledge, and resist as best they can.*

As I understand it, the implication of Chairman Elman's analysis is this: The Sherman Act cases are usually selected by the Commission to establish a legal principle or further an enforcement policy objective. The Commissioners quite appropriately have a stake in their policy objectives. Because of that, however, and despite their best intentions, they cannot avoid having that policy objective influence their resolution of what are often difficult, close, and subtle questions involving the facts and law of a particular case. The Commissioners, in other words, unavoidably lack sufficient independence to live up to the standards that we normally require for fact-finding by adjudicative tribunals.

Indeed, the problem might be a bit more troubling than that. I have no reason to think that the *ex parte* wall is breached within the Commission. But imagine, for example, a Commission that has decided as a matter of policy to seek opportunities to apply the antitrust laws to the settlement of patent litigation between proprietary and generic pharmaceutical companies. Imagine that, while one such case is pending before an ALJ and the Commissioners are walled off from that case by *ex parte* rules, the Commissioners are regularly discussing with the Bureau of Competition and the Bureau

of Economics—whose personnel are not walled-off from the litigated case by the *ex parte* rules—policy and factual issues raised by other, similar cases that the Commission is considering before bringing enforcement actions. Surely these discussions and the resolution by the Commission of the policy issues raised by them are likely to influence the Commission's judgment when the first case comes before them in their appellate, "judicial" capacity. In that situation, the Commissioners might have, not just a general commitment to the policy agenda implicated by a particular case, but a specific set of preconceptions about the types of issues that arise in similar cases and about how they should be resolved.

My point is not that all cases are affected or that outcomes in all or even many are changed by these phenomena. Nor is it that respondents have never won or can never win a case litigated before the Commission. It is rather that, despite the best efforts of the Commissioners and the *ex parte* rules, there is substantial reason to believe that Commissioners inherently and unavoidably lack the independence that we expect from adjudicative fact-finders. That is likely to affect the outcomes in at least some cases and might explain, at least in part, the Commission's 16-0 record over the past 26 years.

Indeed, the perception that the Commission shares the policy objectives of the staff in cases adjudicated in the administrative process is apparently held, perhaps implicitly, by people at the Commission. According to one press report, for example, a lead trial attorney in the Commission's case against Rambus explained his strategy as follows: "I was confident that we would win before the Commission, but we needed to

set it up in a way that made it bulletproof before the federal courts.”<sup>14</sup> That attorney's confidence about the Commission might have been misplaced, but it plainly reflects an expectation that the Commission lacked the independence from preconceptions that he expected from an independent judiciary.

## 2. In General

The numbers discussed above are limited to Sherman Act cases involving disputed facts. Administrative adjudication before the Commission entails more than that. As noted, however, Mr. Ewalt looked at all Commission cases adjudicated before an ALJ during the 25-year period from 1983 to 2007. Here are the results.

<b>FTC Cases Litigated in the Administrative Process (1983-2007)</b>			
	Total	Respondent Wins at Trial	Respondent Wins Before Commission
Consumer Protection	19	1	0
Sherman Act	20	7	2
Other (R-P and §8)	3	0	1
<u>Clayton Act §7</u>	<u>18</u>	<u>7</u>	<u>10</u>
Total	60	15	13

Overall, the Commission won nearly 80 percent of the cases. That result itself suggests a process that is tilted in favor of the Commission and against respondents. One would not expect, and federal court adjudication records of the agencies suggest that the one should not expect, such a lopsided record in an unbiased adjudication process.

More interesting than the overall numbers, however, is the breakdown of the numbers by category. Sherman Act cases with disputed facts and consumer protection

<sup>14</sup>Competition Law 360 (February 13, 2008), <http://www.competition.law360.com/Secure/printview.aspx?id=46486>.

cases combined show a record of 35 wins for the Commission and none for respondents. And the Commission won 95 percent (37 out of 39) of all Sherman Act and consumer protection cases, and 93 percent (39 out of 42) of all non-merger cases.<sup>15</sup>

It is only merger cases in which respondents appear to have a reasonable chance of winning before the Commission.<sup>16</sup> In fact, respondents won a slight majority of merger cases litigated in the administrative process and actually did better at the Commission than before ALJs.

The record of respondents in merger cases might be thought to refute concerns about the independence of the Commission. On reflection, however, I think the merger data are consistent with those concerns. In the first place, those data seem unequivocally to refute both the idea of flawless case selection by the Commission and any notion that flawed ALJs somehow prevent the Commission from ruling in favor of respondents.

Moreover, merger cases are different from the others in ways that might explain the differences in the numbers. First, a number of the merger cases were those in which the Commission failed to obtain, or chose not to seek, a preliminary injunction in federal court. Those were presumably weak cases. The strongest cases, on the other hand, in which the Commission obtained an injunction, usually resulted in an abandoned merger and were thus not litigated before the Commission. For these reasons, the sample of merger cases reflected in these data was likely biased toward weak cases that the respondents should win.

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<sup>15</sup>The two Sherman Act cases that the Commission lost were resolved on summary judgment, on the basis of undisputed facts. The respondents won the *College Football Association* case (1994), discussed above, on a jurisdiction issue that was unrelated to the substantive issue raised by the case. The respondent won the *New England Motor Rate Bureau* case (1989), a price fixing case, on a state action issue.

<sup>16</sup>The Robinson-Patman and Section 8 cases are too few for any conclusion.

More important, Sherman Act and consumer protection cases are selected by the Commission in the exercise of its discretion and are often chosen to further the Commission's specific policy agendas. That would be true as well with cases brought under an expanded view of Section 5. By contrast, Section 7 cases are brought largely as a result of a "minding the inbox" process. Parties are required by the Hart-Scott-Rodino Act to notify the Commission of most mergers likely to violate Section 7 and to enable the Commission or DOJ to review each such merger before it is consummated. The agencies thus review all such mergers, not just those selected to further a particular policy objective of the agencies. By contrast, in the nonmerger context, where transactions are not routinely notified to the Commission, the agencies have to decide what kinds of cases to look for.

Also, for a variety of reasons, private parties rarely challenge mergers, and even the states rarely challenge mergers that are not challenged by the Commission or DOJ. Thus, by contrast to nonmerger cases, the agencies cannot reasonably, and do not, ignore run-of-the-mill violations in order to allocate scarce enforcement resources to further their specific policy or law reform objectives. Instead, they persuade Congress to appropriate funds sufficient for a comprehensive merger enforcement program.

The upshot is this: By contrast to nonmerger cases, where the Commission is a policy advocate, the Commission's role in merger enforcement is more like that of a traffic-cop or an independent referee. A much smaller percentage of merger than nonmerger cases is closely related to a specific policy objective of the Commission. Not

surprisingly, the results of those cases are more consistent with what one would expect when adjudicative decisions are made by an independent tribunal.

In short, the substantive reach of Section 5 should not be expanded because doing so would expand the scope and importance of administrative adjudication before the Commission. That adjudication appears not to be sufficiently reliable to be counted upon to send the kind of sound, clear signals to the business community that competition policy requires.

## **V. CONCERNS ABOUT DEFECTS IN THE ANTITRUST LAWS DO NOT PROVIDE A SUFFICIENT BASIS TO EXPAND SECTION 5 IN THE FACE OF THESE PROBLEMS**

Some at the Commission have suggested that they are unhappy with judge-made restrictions on the scope of the antitrust laws. These individuals believe that antitrust law has been too conservative and that Section 5 might provide a useful way to expand the reach of federal enforcement in the competition law area. In short, they argue, a broad reading of Section 5 would enable the Commission to bring cases that would not pass muster under antitrust laws, but that these individuals would regard as prudent competition law cases.

### ***A. In General***

I believe this is a bad idea, for a number of reasons. For one thing, using Section 5 can correct only for underenforcement, not overenforcement.

A more important problem falls in the category of "be careful what you wish for."

Probably all antitrust lawyers regard some cases or doctrines as mistaken—some because they wrongly favor the plaintiff (false positives), others because they wrongly favor the defendant (false negatives). But most of us probably believe that much—maybe most—antitrust law is sound and should not be changed.

The problem is that, while most of us agree that there are *some* ways in which antitrust laws can be improved, we do not agree on *which* ways it should be improved. If today's Commission legitimizes the use of Section 5 to circumvent what it believes to be defects in antitrust law, there will be little to prevent a future Commission from using Section 5 to circumvent a different defect; and what that future Commission regards as a defect might be something that today's Commission would regard as very desirable. In other words, legitimizing the use of Section 5 this way might—and will probably—undermine the objectives of the very Commission that legitimizes its use.

Moreover, using Section 5 to circumvent perceived defects in limitations on antitrust doctrine does not improve antitrust law. It entails, in effect, an opting out of the common law process by which the antitrust laws have evolved and have become increasingly sound. The antitrust laws are more widely enforced than is Section 5 and will thus inevitably have broader application than Section 5. The most valuable response to perceived problems with the antitrust laws is therefore to work to improve them. DOJ's success with the *Microsoft* and *Dentsply* cases and the Commission's success with *Three Tenors* demonstrate how the antitrust agencies can influence the evolution of antitrust doctrine. Using Section 5 diverts from and undermines that process.

*B. The Problem of Private Litigation*

Some at the Commission have expressed the view that antitrust doctrine is hampered by the courts' fear of abuse by private plaintiffs. Thus, they argue, the Commission should use Section 5 because its scope need not be restricted by concerns about private plaintiff abuse that have induced the courts to constrict the reach of the antitrust laws.

The premise of this argument—that antitrust law is narrowed because of fear of abuse by private litigants—is overstated. While some courts have, to be sure, expressed concern about abuse by private litigants, judicial opinions overall have expressed much broader concerns about the burdens of antitrust discovery and the fear that ambiguous or difficult-to-apply antitrust standards will deter efficient, pro-competitive, aggressive competition. Recent Supreme Court decisions in *Twombly*, *Trinka*, and *Weyerhaeuser*, for example, have expressed concerns about the burdens of antitrust litigation that are not limited to private cases. The large percentage of government antitrust cases that are settled by consent decree, rather than litigated, suggests that those concerns are well-founded.

Moreover, there are, and courts have used, other, more precisely focused tools to deal with problems caused specifically by private antitrust litigation. These include development of the "antitrust injury" requirement, recent cases that have tightened the requirements for class actions, and the stricter pleading requirements imposed by *Twombly* and its progeny.

Furthermore, this rationale would justify broadening Section 5 only for those specific antitrust doctrines that have been narrowed for fear of abuse by private parties but would not have been narrowed if only government agencies could enforce the law. It is not clear what those doctrines are, and it seems rather certain that any effort to broaden Section 5 to deal with those doctrines would also broaden Section 5 for use by future Commissions to deal with other doctrines where the substantive restrictions on the antitrust laws cannot be so explained.

In any event, whatever marginal benefits there might be from using Section 5 to circumvent perceived defects in the antitrust laws are likely to be dwarfed by the problems discussed above. Avoiding an occasional false negative is not worth those problems.

## **VI. CONCLUSION**

The "unfair method of competition" prong of Section 5 of the Federal Trade Commission Act should not be used to prohibit conduct that does not violate the antitrust laws. Instead of seeking to expand Section 5, the Commission should focus on improving the antitrust laws. Instead of increasing administrative adjudication for Section 5 cases or antitrust cases, the Commission should seek legislative changes, to the extent necessary, so that it can enforce the antitrust laws in district court, like all other antitrust plaintiffs.