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Sharis A. Pozen & Anne K. Six
Skadden

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Sharis A. Pozen & Anne K. Six[1]

When Congress enacted the Federal Trade Commission Act in 1914, almost 25 years after enacting the Sherman Act, it purposely created a different statute with different goals and different parameters. As many have pointed out in the ongoing Section 5 debate, the use of the "elusive"[2] term "unfair methods of competition"[3] was a considered choice. Not only did Congress not define the Commission's powers in terms of the traditional antitrust laws, it also refused to delineate what would constitute an "unfair method of competition." As the legislative history of the Federal Trade Commission Act shows, Congress recognized the futility of attempting to frame a definition that would embrace all unfair methods of competition and, instead, provided "broad and flexible authority"[4] to the Commission with the aim to "protect society against oppressive anti-competitive conduct"[5]

As Commissioner Joshua D. Wright explained in his June 19, 2013 proposed Section 5 policy statement, the malleable language used by Congress in the Federal Trade Commission Act assigned the task of identifying unfair methods of competition to the Commission.[6] Congress did not, however, require that the Commission prescribe any official, conclusive definition of unfair methods of competition, or even issue formal guidelines. Indeed, it was noted in a House Conference Report on the bill that would eventually be enacted as the Federal Trade Commission Act that the task of defining unfair methods of competition was considered "impossible"[7] and that there was "no limit to human inventiveness in this field."[8]

Accordingly, for nearly a hundred years now since the Federal Trade Commission Act's enactment, the Commission and the business community have functioned without an official definition or formal guidelines. Even after the Commission's 2008 workshop exploring the scope of Section 5 and repeated calls for additional guidance, the Federal Trade Commission's current Chairwoman, Edith Ramirez, has somewhat resisted issuing a definition of unfair methods of

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[1] Sharis Pozen is a partner in the antitrust and competition group in Skadden's Washington D.C. office; she formerly was Acting Assistant Attorney General, Antitrust Division, at the Department of Justice. Anne K. Six is an associate in the same office.

[2] *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[3] 15 U.S.C. § 45(a)(1) (2012).

[4] .*E.I. DuPont de Nemours & Co. v. Fed. Trade Comm'n*, 729 F.2d 128, 136 (2d Cir. 1984).

[5] *Id*. at 136.

[6] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013), *available at* http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf.

[7] H.R. Conf. Rep. No.1142, 63d Cong., 2d Sess., 19 (1914).

[8] *Id*.

competition or formal guidelines, preferring instead to allow existing case law and the Commission's consent decrees impart guidance and preserve the flexibility Congress intended.[9]

Ramirez' reliance on existing guidance is certainly defensible in that a significant, albeit small, group of court decisions already provide appropriate contours for Section 5's interpretation. First and foremost, the holding of the Supreme Court in *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*,[10] that the Commission's enforcement authority under Section 5 extends beyond the letter and spirit of the traditional antitrust laws, remains viable. The Court in *Sperry & Hutchinson Co.* also taught practitioners and businesses that the Commission's powers under Section 5 were similar to that of a court of equity.[11] Overall, the case is sufficient to provide notice to businesses that the Commission's authority is broad and can incorporate a common understanding of fairness in the context of competition.

Existing appellate court decisions from the Second and Ninth Circuits offer additional guidance for businesses on the reach of Section 5, including limiting principles. For example, the Second Circuit decisions *Official Airline Guides v. Fed. Trade Comm'n*[12] and *E.I. duPont de Nemours & Co.*[13] together suggest that some measure of oppressiveness must be present before an action may be condemned as an unfair method of competition. In *Official Airline Guides*, the Second Circuit explained that the Commission could not simply substitute its own business judgment for that of a market participant where the participant was a monopolist whose decisions affected competition in another industry but who lacked any anticompetitive intent or coercive action.[14] Similarly, the Second Circuit stated in *E.I. duPont de Nemours & Co.* its view that in the context of an oligopoly:

> before business conduct may be labeled 'unfair' within the meaning of Section 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.[15]

In *Boise Cascade Corp, v. Fed. Trade Comm'n.,*[16] a case concerning conscious parallelism in the plywood industry whereby manufacturers of southern plywood adopted and maintained a system of delivered pricing which utilized the computation of rail freight charges from the Pacific Northwest in determining the price of southern plywood, the Ninth Circuit explained that the possibility of blurring the lines between legal and illegal conduct was a key factor in determining the scope of the Commission's enforcement authority under Section 5. The Court indicated that, in the context of delivered pricing, the Commission must find either collusion or actual effect on

[9] *See* Edith Ramirez, Roundtable Conference with Enforcement Officials, American Bar Association Section of Antitrust Law Spring Meeting (April 12, 2013) ("I'm a firm believer that it is appropriate for the Commission to develop the law on an incremental, case-by-case basis."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun13_full_source.authcheckdam.pdf.

[10] 405 U.S. 233, 244 (1972)

[11] *Id.*

[12] 630 F.2d 920 (2d Cir. 1980).

[13] 729 F.2d 128 (2d Cir. 1984).

[14] *Official Airline Guides*, 630 F.2d at 927.

[15] *E.I. DuPont de Nemours & Co.*, 729 F.2d at 139-40.

[16] 637 F.2d 573 (9th Cir. 1980).

competition to make out a Section 5 violation.[17] The Court also suggested that the use of Section 5 when well-forged Sherman Act case law existed and governed the conduct at issue was unwarranted.[18]

Moreover, clues as to how the Commission has been willing and would be willing in the future to implement its prosecutorial discretion under Section 5 can be divined from consent decrees and other Commission actions. The Commission's consent decrees in the *Quality Trailer Products*,[19] *Valassis*,[20] and *U-Haul*[21] cases, for example, have demonstrated that invitations to collude, both private and public, without regard to their effect, may be condemned under Section 5 as unfair methods of competition.

Similarly, the standard-setting cases *N-Data*,[22] *Bosch*,[23] and *Google/MMI*[24] have revealed that the Commission often considers reversals on commitments to license essential patents and technologies to be unfair and that it may use it Section 5 authority to prevent reneging companies from seeking injunctions.

Likewise, Commission consent decrees, such as that in the recent *Bosley*[25] case, signal the types of information exchanges among competitors that raise concerns under Section 5 and provide guidance concerning the safeguards that the Commission has required to maintain competition. Each of these consent decrees communicates considerable guidance to the market regarding the Commission's enforcement discretion.

This kind of statutory interpretation evolution and guidance through civil jurisprudence and agency decisions is common, especially in antitrust. For example, the Supreme Court, explaining in *State Oil Co. v. Kahn*[26] how *stare decisis* is not an inexorable command in the context of a vertically imposed maximum price restriction, stated that "[i]n the area of antitrust, law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience."[27]

Speaking of the Sherman Act, the Court further explained that "Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[28] Just

[17] *Id*. at 582.

[18] *Id*. at 576-77, 582.

[19] *See In the Matter of Quality Trailer Prods Corp.*, 115 F.T.C. 944 (1992).

[20] *See In the Matter of Valassis Commc'ns, Inc.*, Dkt. No. C-4160, *available at* http://www.ftc.gov/os/caselist/0510008/0510008.shtm.

[21] *See In the Matter of U-Haul Int'l Inc. and AMERCO*, Dkt. No. C-4294, *available at* http://www.ftc.gov/os/caselist/0810157/index.shtm.

[22] *See In the Matter of Negotiated Data Solutions L.L.C.*, Docket No. C-4234, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[23] *See In the Matter of Robert Bosch GmbH*, Docket No. C-4377, *available at* http://www.ftc.gov/os/caselist/1210021/index.shtm.

[24] *See In the Matter of Motorola Mobility LLC and Google, Inc.*, Dkt. No. C-4410, *available at* http://www.ftc.gov/os/caselist/1210120/index.shtm.

[25] *See In the Matter of Bosley, Inc. and Aderans Am. Holdings, Inc. and Anderans Co., Ltd*, Dkt. No. C-4404, *available at* http://ftc.gov/os/caselist/1210184/index.shtm.

[26] *State Oil Co. v. Kahn*, 522 U.S. 3 (1997).

[27] *Id*. at 20.

[28] *Id*. (internal citations omitted).

as the equally ambiguous term "restraint of trade" has developed through Sherman Act jurisprudence, the term "unfair methods of competition" too can develop a common and flexible understanding through incremental interpretations of the broadly drafted Section 5.

Existence of guidance in the form of case law and consent decrees does not mean that there won't be those who try to expand or contract the parameters of Section 5, as proponents of formal guidelines fear. There almost certainly will be. The Commission is well structured, however, to thwart overreaching. The mandated bi-partisan, five-member makeup of the Commission ensures that no single Commissioner has the power to effectuate opinions regarding Section 5's scope without the agreement of others. Moreover, the Commission's decisions are appealable to federal court. And while the Commission's interpretations of Section 5 are entitled to some deference or weight as an expert agency, the courts ultimately have the authority to determine the scope of the statute.

The recent speeches presented by Commissioner Wright[29] and Commissioner Maureen K. Ohlhausen[30] proposing guiding principles for the use of Section 5, as well as the spirited discussions among stakeholders in response to the Commissioners' statements, are exceedingly valuable to the marketplace of ideas and should be commended. Nonetheless, we should question whether formal guidance or an official policy statement is really needed—given the history, rich jurisprudence, and structural safeguards in place at the Commission—and whether continuing to judiciously and incrementally develop guidance is the path best suited to maintaining the flexibility of the Commission that Congress intended.

[29] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority (June 19, 2013), *available at* https://www.ftc.gov/speeches/wright/130619section5recast.pdf.

[30] Maureen K. Ohlhausen, Comm'r Fed. Trade Comm'n, Section 5: Principles of Navigation (July 25, 2013), *available at* http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf.