

SECTION 5 OF THE FTC ACT: DARK CLOUD OR SILVER LINING?

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I. INTRODUCTION

The use of Section 5 of the FTC Act¹ as an independent basis for finding antitrust liability has garnered increasing attention from the Federal Trade Commission, culminating in the recent enforcement action against Intel.² The Intel complaint, as well as speeches by Commissioners, articles, and other references have sparked speculation as to whether the FTC is going to employ the statutory provision as a distinct enforcement mechanism on a more regular basis. This supposition raises important questions about the jurisprudential and doctrinal limits of Section 5, which enigmatically prohibits “unfair methods of competition.” Neither Congress nor the courts have specified how this proscription differs from those imposed by the federal antitrust statutes, such as the Sherman and Clayton Acts. Commenting from the business community reveals an underlying concern that, without any guidance on exactly what type of conduct will run afoul of Section 5, businesses cannot plan accordingly.³ At the same time, while no one may relish being on the receiving end of an adverse judgment, from a business perspective, there may be a hidden benefit in that a “pure” Section 5 judgment arguably does not support a private right of action—that is, a plaintiff cannot use a Section 5 judgment as prima facie evidence against the defendant in follow-on litigation. The FTC clearly is aware of this small relief and in part uses the narrow reach of the statute to justify its use of Section 5. The challenge then in evaluating the real significance of the FTC’s rejuvenated Section 5 enforcement program lies in determining the scope of conduct subject to Section 5.

Practitioners may find some guidance from actions in the California courts as to how the FTC will address the scope of a “pure” Section 5 claim. While Section 5 as an independent basis for liability has largely remained unused in recent years, California courts have developed a relatively robust body of law under the state’s so-called “Baby FTC Act,” the Unfair Competition Law (“UCL”).⁴ Although obviously not binding on the FTC, the California courts’ treatment of the “unfairness” provisions of the UCL may shed some light

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1 15 U.S.C. § 45. The FTC Act was amended in 1938, which expanded the FTC’s jurisdiction over “unfair methods of competition” to include “unfair or deceptive acts or practices.” 52 Stat. 111 (1938), amending 15 U.S.C. § 45.

2 *In the Matter of Intel Corp.*, Docket No. 9341 (December 16, 2009) (complaint), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>.

3 *Interview: Federal Trade Commission’s Jon Leibowitz “I don’t think big business should be worried. I think they should embrace this trend.”* WALL ST. J., Jan. 31, 2010, available at <http://online.wsj.com/article/SB10001424052748704722304575037572444983454.html>; Jacqueline Bell, *Push for Section 5 Revival Puts Businesses on Alert*, LAW360, (Dec. 3, 2009) available at <http://competition.law360.com/articles/131436>.

4 Cal. Bus. & Prof. Code § 17200.

on how the FTC will proceed in drawing its Section 5 boundaries. This article first reviews the background and historic application of Section 5 of the FTC Act, then considers how the California courts have treated similar actions by state and private plaintiffs.⁵ Finally, it explores the possible lessons that California cases may teach us about future applications of the FTC Act.

II. BACKGROUND ON SECTION 5 OF THE FTC ACT

The Federal Trade Commission was established in 1914 to enforce the Federal Trade Commission Act, (“FTC Act”).⁶ Section 5 of that Act prohibits “unfair methods of competition...and unfair or deceptive acts or practices in or affecting commerce.”⁷ Congress purposely did not define what types of conduct would be deemed “unfair methods of competition” so as to allow the FTC’s authority to adapt and respond to new types of business practices.⁸ The FTC may directly enforce the Clayton and Robinson-Patman Acts, by bringing both a Section 5 claim as well as the underlying Clayton or Robinson-Patman Act claim. The FTC, on the other hand, does not have the power to directly enforce the Sherman Act but can do so through its Section 5 authority. For example, the FTC may bring a Section 5 claim to enforce the Sherman Act only alleging a Section 5 claim, but that claim is adjudicated based on Sherman Act jurisprudence.⁹ The FTC, however, may also bring a “pure” Section 5 claim, meaning that it is enforcing Section 5’s prohibition on “unfair methods of competition.” It is the “pure” Section 5 claim that is at issue in this article.

A. “Pure” Section 5 Case Law is Largely Undeveloped

The lack of case law focusing on “pure” Section 5 cases makes Section 5 something of a mystery. In the early 1980s, the Commission brought three “pure” Section 5 cases and, in all three, held that the defendants had engaged in unfair methods of competition. The

5 *Id.* § 17204. Unlike the FTC Act, which is enforced solely by the FTC, under the UCL, a private plaintiff can bring a claim for equitable relief “for the interests of itself, its members or the general public.”

6 Act of Sept. 26, 1914, Ch. 311, § 5, 38 Stat. 717, 719 (codified as amended at 15 U.S.C. §§ 41-58). The FTC also enforces other laws besides the FTC Act, including the Clayton Act and the Robinson-Patman Act.

7 15 U.S.C. § 45.

8 *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-41 (1972).

9 *See FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 455 (1986) (“the sole basis of the FTC’s finding of an unfair method of competition was the Commission’s conclusion that the Federation’s collective decision to withhold x rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act...Accordingly, the legal question before us is whether the Commission’s factual findings, if supported by evidence, make out a violation of Sherman Act § 1.”).

Commission was reversed each time, twice by the Second Circuit and once by the Ninth.¹⁰ These cases suggest that Section 5's reach is possibly no broader than the existing antitrust laws.¹¹ This was so even though the legislative history of the Act, as well as decisions by the Supreme Court before and after the 1980s cases, strongly suggests that Section 5 has greater reach than the antitrust laws.¹² Whether the 1980s appellate cases actually limit the FTC's Section 5 authority is heavily debated and is beyond the scope of this article.¹³ Still, the 1980s cases effectively stunted the FTC's use of Section 5 and the FTC has not publicly discussed the possibility of bringing "pure" Section 5 cases until recently.¹⁴

A vague statute coupled with virtually no case law creates profound problems of legal

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- 10 *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Du Pont de Nemours & Co. v. FTC* ("Ethyl"), 729 F.2d 128 (2d Cir. 1984).
- 11 *Boise Cascade*, 637 F.2d at 582 ("The law of delivered pricing is well forged, having been developed by the Commission and courts over years of litigation. As we concluded in part II, the weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a Section 5 violation for use of delivered pricing."); *Official Airline Guides*, 630 F.2d at 927 (finding that the Supreme Court has long recognized the established right of a trader or manufacturer engaged in an entirely private business to freely exercise her own independent discretion as to whom she will deal); *Ethyl*, 729 F.2d at 140 ("In the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."). See also J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Perspectives on Three Recent Votes: The Closing of the Adelpia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief, Address Before the National Economic Research Associates 2006 Antitrust and Trade Regulation Seminar 7 (July 6, 2006), <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>. [Hereafter *Rosch Speech*] ("I think that the decisions articulate important *limiting principles* for unfair methods of competition analysis.").
- 12 *FTC v. Motion Picture Adver. Serv.*, 344 U.S. 392, 394-95 (1953) ("The 'unfair methods of competition,' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act."); *FTC v. Brown Shoe*, 384 U.S. 316 (1966) ("[T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."); *Sperry & Hutchinson Co.*, 405 U.S. at 244 ("Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressional mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); *Indiana Fed'n of Dentists*, 476 U.S. at 454 (dictum) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons...").
- 13 For example, Chairman Leibowitz, then a Commissioner, suggested in his *Rambus* concurring opinion that at least *Boise Cascade* and *Ethyl* were overturned on evidentiary grounds, and were not overturned because the FTC lacked authority to bring the cases under Section 5. *In the Matter of Rambus, Inc.*, Docket No. 9302, 2006 WL 2330118, *8-9 (F.T.C. Aug. 2, 2006) (Comm'r Leibowitz, concurring).
- 14 The FTC has brought Section 5 cases in conjunction with other antitrust claims or Section 5 claims to enforce the Sherman Act. See e.g. *Indiana Fed'n of Dentists*, 476 U.S. at 465-66 (Supreme Court affirmed Commission's holding that the Federation engaged in unfair methods of competition in violation of Section 5 by its collective decision to withhold x-rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of Section 1 of the Sherman Act.); *In the Matter of Rambus, Inc.*, Docket No. 9302 (F.T.C. Aug. 2, 2006) (Section 5 case to enforce Section 2 of the Sherman Act); *In the Matter of Olin Corp.*, 113 F.T.C. 400 (1990) (ALJ held that the acquisition violated both Section 7 of the Clayton Act and Section 5 of the FTC Act).

certainty. Without knowing the metes and bounds of this particular statutory provision, it is difficult for attorneys to instruct their clients on what conduct could run afoul of Section 5. It is riskier at this time for businesses to engage in conduct that meets up against the edges of anticompetitive conduct. It appears the FTC is actively seeking such cases to test out and build its Section 5 power.

B. Indications Point to the FTC Increasing Its Use of Section 5

There has been a clear run-up of indications that the Commission intends to increase its use of Section 5 in situations where the conduct at issue may not meet the requirements for finding Sherman Act liability, including statements from Commissioner Rosch and Chairman Leibowitz. In July of 2006, Commissioner Rosch gave a speech¹⁵ about three recent actions, one of which was *In the Matter of Valassis Communications*.¹⁶ *Valassis*, an invitation to collude case, was the first “pure” Section 5 case in many years. Rosch commented that “a few cognoscenti are starting to ask whether *Valassis* was a harbinger of things to come or an outlier.”¹⁷ To address these concerns, Rosch stated that he did not believe that Section 5 is a “dead letter” and that the three 1980s appellate cases do not stand for the proposition that Section 5 is limited to the antitrust laws.¹⁸ In addition, the Analysis to Aid Public Comment in *Valassis* noted that an invitation to collude could be treated as an unfair method of competition where there was clear evidence of anticompetitive intent and of a dangerous probability of an anticompetitive effect.¹⁹ But in Rosch’s view, “there must be *some* evidence, direct or circumstantial, of actual or incipient anticompetitive effect, otherwise, the claim would arguably be too unbounded.”²⁰

A month after Commissioner Rosch’s speech, then Commissioner (now Chairman) Leibowitz, took the opportunity to make his own opinion known in his *Rambus* concurring opinion.²¹ *Rambus* is a Sherman Act Section 2 case that the FTC brought under Section 5 of the FTC Act.²² Commissioner Leibowitz concurred with the Commission’s opinion finding liability, but took the opportunity to share his belief that the FTC could have brought *Rambus* under a pure Section 5 theory. The Commissioner ended his concurring statement with a “call to arms” for expanding Section 5 enforcement:

As for our future enforcement efforts, the framers of the FTC Act gave

15 *Rosch Speech*.

16 *In the Matter of Valassis Commc’ns, Inc.*, FTC File No. 051-0008, 2006 WL 752214 (F.T.C. Mar. 16, 2006), available at <http://www.ftc.gov/os/caselist/0510008/060314do0510008.pdf>.

17 *Rosch Speech* at 6.

18 *Id.* at 7.

19 Fed. Trade Comm’n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Valassis Commc’ns, Inc.*, No. 051-0008, at 3-4 (2006), available at <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

20 *Rosch Speech* at 11 (emphasis in original).

21 *In the Matter of Rambus, Inc.*, Docket No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring).

22 The FTC cannot directly enforce the Sherman Act but can reach the same conduct with its “unfair methods” authority under § 5 of the FTC Act. See, e.g., *FTC v. Motion Pictures Adver. Serv.*, 344 U.S. 392, 394-95 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

the Agency a mandate—one unique to the Commission—to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional ‘penumbra’ around them. The framers also gave the FTC deliberative processes for examining suspected incipient or policy violations of the antitrust laws, and provided remedial measures dedicated more to protecting and restoring competition than to punishing malfeasors. Although the Agency has not ignored its Congressional mandate entirely, we need to build on this foundation and further develop this aspect of our enforcement responsibility—and to use all the arrows in our jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers.²³

On appeal, the D.C. Circuit did not address the question of whether Section 5’s reach was broad enough to reach conduct such as that alleged in *Rambus*.²⁴ It did, however, express doubts that a Section 5 claim would be successful given the evidence in the record.²⁵

Other prominent opinions have come from former Commissioner Leary and current Commissioner Kovacic. In February of 2009, former Commissioner Thomas Leary wrote an article entitled “*A Suggestion for the Revival of Section 5*.”²⁶ Leary argued that “Section 5 might be most useful in cases where the Commission does, in fact, have reason to believe that there has been a violation of the Sherman Act or the Clayton Act but where there is not yet an established body of precedent to support that view.”²⁷ Similarly, in November of 2009, Commissioner Kovacic addressed Section 5 enforcement at the American Bar Association’s fall forum.²⁸ Kovacic, after listing some of the problems the FTC has encountered in using its Section 5 authority, stated that regardless of these previous troubles, the FTC should bring Section 5 cases.²⁹ He believes that Congress gave the FTC

23 *In the Matter of Rambus, Inc.*, Docket No. 9302, 2006 WL 2330118 (F.T.C. Aug. 2, 2006) (Comm’r Leibowitz, concurring) at p. 21.

24 *Rambus* appealed the Commission’s decision to the D.C. Circuit, which reversed. *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (reversing the Commission’s decision because the FTC failed to prove that *Rambus*’s deceptive conduct actually caused harm to competition).

25 *Rambus*, 522 F.3d at 467 (Court expressed “serious concerns about the strength of the” Commission’s evidence).

26 Thomas B. Leary, *A Suggestion for the Revival of Section 5*, Antitrust Source, Feb. 2009, available at <http://www.abanet.org/antitrust/at-source/09/02/Feb09-Leary2-26f.pdf>.

27 *Id.* at 1. In this assertion, Commissioners Leary and Rosch seem to be in agreement. Rosch believes that *Valassis* was a proper Section 5 case since the alleged conduct, an invitation to collude, is not squarely covered by the Sherman Act. *Rosch Speech* at 11–12 (“Thus, in my view, *Valassis* was an ‘out-of-round’ Sherman Act case that could, and should, legitimately be brought simply and solely as an unfair method of competition case under Section 5—and the case involved the anticompetitive intent and incipient anticompetitive effect required by the Trilogy for a stand alone unfair method of competition claim.”). An invitation to collude is not unilateral conduct covered by Section 1 of the Sherman Act and multiple courts have concluded that there is no such offense under Section 2. See e.g., *Harkins Amusement Eters. v. General Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988); *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F.Supp. 381, 390 (D. Md. 1990). But see *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984) (only case finding an invitation to collude to be a Section 2 violation).

28 Ron Knox, *Kovacic says Section 5 Enforcement Must Adapt*, (Nov. 13, 2009), available at <http://www.global-competitionreview.com/news/article/19362>.

29 *Id.* at 1–2.

this power for a reason: “to go after potentially anticompetitive behavior in whatever form it might take, even if collusion or attempted monopolization” is not present.³⁰

The implications of these combined statements is that the FTC is committed to using its Section 5 power, that the FTC acknowledges it should do so with principles designed to capture anticompetitive conduct, and there must be some evidence of actual or incipient anticompetitive effect.

C. The Need for Guidance on the Scope of Section 5

As the indications that the FTC plans to begin utilizing its power under Section 5 increase, some are becoming more vocal in protest—mainly over the lack of guidance or standards as to what exactly a Section 5 claim entails. Law360 recently published an article about the “Federal Trade Commission’s growing signals that it is poised to breathe new life into Section 5.”³¹ The article notes that the U.S. Chamber of Commerce released a “sharply worded statement arguing that any attempts to expand the FTC’s authority beyond standard antitrust laws ‘bears a heavy burden of justification.’”³² The Chamber asks that the FTC provide “significant notice and guidance to the business community” before bringing pure Section 5 cases.³³

While the Chamber perhaps overstates the point, the Chamber’s statement reflects a broader concern that businesses need standards and guidelines before the FTC brings “pure” Section 5 claims. Indeed, the Supreme Court acknowledged as much long ago in *Sperry & Hutchinson*,³⁴ where the Court restated its expansive view of the FTC’s authority under Section 5 but held that the Commission’s holding could not be affirmed because the FTC had not articulated any standards.³⁵ Even though the FTC’s enforcement power is arguably broader than the antitrust laws, its power is not limitless.

III. “PURE” SECTION 5 CASES REDUCE THE RISK OF FOLLOW-ON PRIVATE DAMAGES SUITS

If the Commission does bring more “pure” Section 5 cases, there may be a small silver lining for defendants. Section 5 enforcement may represent a path by which the FTC can act to enjoin the competitive effects of business strategies with less risk of opening the defendant up to expensive and time-consuming private litigation. Of course, a private

30 *Id.* at 2.

31 Jacqueline Bell, *Push for Section 5 Revival Puts Businesses on Alert*, Law360, (Dec. 3, 2009), available at <http://competition.law360.com/articles/131436>.

32 *Id.*

33 U.S. Chamber of Commerce, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules “Above and Beyond Antitrust”?*, GCP: THE ANTITRUST CHRON., Sept. 2009, at 3, available at <http://www.uschamber.com/NR/rdonlyres/e3sp4kmveqppwjzvovo6rnhbv7izz46gk2idhii2ja6npw-4compiaoheuabc3s6gem2bcfkhbksu4mcmh75ym5pgc/0909antrust.pdf>.

34 *Sperry & Hutchinson Co.*, 405 U.S. at 248.

35 *Id.* (“The Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.”).

plaintiff may decide to bring an action against the defendant when it learns of the FTC's action, but the plaintiff will not be allowed to use the FTC decision to shortcut litigating its own case. Section 5(a) of the Clayton Act is the provision that makes an antitrust defendant vulnerable to a government judgment being used against it in subsequent private suits.³⁶ This law can be devastating to a losing antitrust defendant. Section 5(a), however, does not do so for pure Section 5 of the FTC Act claims.

Section 5(a) of the Clayton Act allows a private plaintiff to use a judgment or decree, rendered in an action brought by the United States under the antitrust laws, as prima facie evidence of an antitrust violation. In other words, if a defendant loses an antitrust case against the Department of Justice or the Federal Trade Commission, a follow-on private plaintiff can then use that judgment as prima facie evidence that the defendant violated the antitrust laws in the private plaintiff's case. There are, however, strict requirements before a private plaintiff is afforded this prima facie evidence. The plaintiff must show: (1) the prior judgment is final;³⁷ (2) the prior judgment was rendered in a "civil or criminal proceeding brought by or on behalf of the United States;" (3) the government action was brought under the "antitrust laws;" and (4) the judgment is not a consent decree entered before any testimony was taken.³⁸

Importantly, the "antitrust laws" referred to under Section 5(a) of the Clayton Act are defined to include the Sherman Act, the Clayton Act, and the Wilson Tariff Act.³⁹ The FTC Act is excluded. This means that the FTC Act is not an "antitrust law" for purposes of this prima facie evidence rule; if the FTC brings a "pure" Section 5 claim, even if the Commission finds against the defendant, a private plaintiff cannot then use that judgment against the defendant in a subsequent case. A negative judgment is never desired, but from a defendant's prospective, at least in the case of a "pure" Section 5 claim, the potential harm is not as severe.

At least two Circuit Courts have adopted this logic and concluded that private plaintiffs cannot use a Section 5 judgment as prima facie evidence against a defendant. The Eighth Circuit explained in *Yamaha v. FTC*, that while Section 7 of the Clayton Act is one of the "antitrust laws" within the meaning of Section 5(a) of the Clayton Act, Section 5 of the FTC Act is not.⁴⁰ The Ninth Circuit concluded the same: "Under Section 5, prima facie weight is given only to violations of the 'antitrust laws' as defined by the Clayton Act. This does not include violations of the FTC Act."⁴¹

36 15 U.S.C. § 16(a).

37 Congress passed the Finality Act in 1959, which makes FTC orders final for purposes of Section 5(a) of the Clayton Act. 73 Stat. 243, amending enforcement provisions of § 11 of the Clayton Act (15 U.S.C. § 21).

38 ANTITRUST LAW DEVELOPMENTS (Sixth), at 981.

39 Section 1 of the Clayton Act defines "antitrust laws." 15 U.S.C. § 12 (1958). The "antitrust laws" include the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209; Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730); and the Wilson Tariff Act (Act of August 27, 1894, c. 349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c. 40, 37 Stat. 667).

40 *Yamaha Motor Co. v. Federal Trade Com.*, 657 F.2d 971, 982 (8th Cir. 1981).

41 *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1032 at n. 4 (9th Cir. 2001); See also *In re Antibiotic Antitrust Actions*, 333 F.Supp. 317, 322-23 (S.D.N.Y. 1971) (plaintiffs were not entitled to prima facie effect under Section 5(a) of the Clayton Act as prior proceeding was not brought under the antitrust statutes).

Only a “pure” Section 5 judgment is exempted from Section 5(a) of the Clayton Act. For example, if the FTC brings a case under Section 7 of the Clayton Act, the Commission’s order could be used as prima facie evidence by a follow-on private plaintiff if that plaintiff can satisfy the requirements. Courts have given prima facie weight to such judgments. The Third Circuit in *New Jersey Wood Finishing Co. v. Minnesota Mining*, stated that it was “satisfied that final orders” in a FTC Clayton Act proceeding “are admissible under Section 5(a) [of the Clayton Act] as prima facie evidence.”⁴² The Ninth Circuit came to a similar conclusion in *Purex Corp. v. Proctor & Gamble Co.*⁴³

This protection afforded “pure” Section 5 judgments may include those where the FTC brings a Section 5 claim to enforce the Sherman Act, even though it is not technically a “pure” Section 5 case. As noted above, the FTC cannot enforce the Sherman Act directly and must do so through its “unfair methods of competition” power under Section 5. Recently, in January 2008, the Ninth Circuit was presented with just such a case. In *Hynix Semiconductor v. Rambus*, the plaintiff filed a motion requesting that the court grant prima facie evidentiary weight to findings made by the Commission in *Rambus*.⁴⁴ The Ninth Circuit refused, even though the FTC found that Rambus had violated Section 2 of the Sherman Act.⁴⁵

At first blush it may be hard to reconcile *Hynix* and *Purex* because they both involve private plaintiffs asking the court to grant prima facie evidence weighting to a FTC judgment. The difference between the *Hynix* Ninth Circuit decision and the *Purex* Ninth Circuit decision is that the FTC judgment involved in *Hynix* was a Section 5 decision. *Purex* also involved an FTC decision but instead of a Section 5 claim, it was a Section 7 of the Clayton Act decision. The Clayton Act is an “antitrust law” for purposes of the prima facie evidence rule and therefore can be afforded prima facie weight. Section 5 of the FTC Act is not an “antitrust law” and therefore cannot be afforded prima facie weight.

That being said, the FTC has acknowledged concerns about the precedential effect of Section 5 actions that incorporate Sherman Act claims. For example, on December 16, 2009, the FTC issued a complaint against Intel.⁴⁶ The complaint alleges Intel used anticompetitive tactics in violation of Section 5’s prohibition of “unfair methods of competition.” The complaint does not stop there. It also alleges illegal monopolization, attempted monopolization, and monopoly maintenance in violation of Section 5, but these could also be Sherman Act claims. Commissioner Rosch issued a separate statement, concurring and dissenting in the Commission’s complaint.⁴⁷ He concurred with the

42 *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 359 (3d Cir. 1964).

43 *Purex Corp. v. Proctor & Gamble Co.*, 308 F.Supp. 584, 589 (C.D. Cal. 1970) (“According to section 5(a) [of the Clayton Act], the Commission order [finding liability under Section 7 of the Clayton Act] must be admitted in this case as prima facie evidence as to all matters respecting which the order would be an estoppel against Proctor had this action been brought by the Government.”).

44 *In the Matter of Rambus, Inc.*, Docket No. 9302 (F.T.C. Aug. 2, 2006).

45 *Hynix Semiconductor Inc. v. Rambus, Inc.*, 2008 U.S. Dist. LEXIS 53220, at *11 (N.D. Cal. Jan. 9, 2008).

46 *In the Matter of Intel Corp.*, Docket No. 9341, (Dec. 16, 2009) (complaint), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmt.pdf>.

47 *In the Matter of Intel Corp.*, Docket No. 9341, (Dec. 16, 2009) (Commissioner Rosch Concurring and Dissenting Statement), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

decision to issue a complaint alleging Section 5 claims, but dissented from the Sherman Act claims. He dissented because he sees no advantage in adding Section 2 claims—the conduct can be covered by Section 5 alone—and the “collateral consequences” of tacking on Section 2 claims “are very unfavorable for both Intel and the Commission.”⁴⁸ Rosch explains that Intel currently faces treble damage suits filed by the New York Attorney General under Section 2 as well as a number of Section 2 treble damage class action suits.⁴⁹ He reasons that “the Commission should not enable those plaintiffs to free ride off of the Commission’s work. Nor should it put itself in a position where an unfavorable outcome in those cases may be cited against it. Neither of these consequences can occur if the Commission proceeds solely under Section 5.”⁵⁰ Thus, while *Hynix* indicates that at least the Ninth Circuit would not allow these private plaintiffs to “free ride off of the Commission’s work,” this is far from settled. The extent of “collateral consequences” is unclear, but the Commission has placed Intel in greater jeopardy by tacking on the Section 2 claims.

Commissioner Rosch aptly recognizes that in developing the FTC’s Section 5 jurisprudence, nothing is gained by tacking on Sherman Act claims to a Section 5 claim. The same conduct can be covered by both laws and, by tacking on Sherman Act claims, the defendant is rendered vulnerable to follow-on private suits, conflicting outcomes can hinder the development of the law, and the FTC loses some of its leverage in obtaining a settlement. There is no reason for the FTC to bring both claims.

Section 5 enforcement actions may have precedential effect in other contexts as well. While it does seem that the virtue of having the FTC bring a pure Section 5 claim is that private plaintiffs will not be afforded the use of that judgment in their own proceedings, it is possible these judgments could be used as evidence under state law. The Commission in *Negotiated Data Solutions* explained that it based liability on Section 5 alone in part because private parties cannot use FTC intervention premised on Section 5 alone to support claims for treble damages in subsequent federal antitrust suits.⁵¹ Commissioner Kovacic, in his *Negotiated Data Solutions* dissenting statement, points out that the Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition or unfair acts or practices.⁵²

IV. CALIFORNIA’S TREATMENT OF “UNFAIRNESS” UNDER THE UCL

The FTC has just begun to look at increasing the use, or potentially even expanding the scope, of Section 5. It is unknown what type of conduct beyond Sherman Act and

48 *Id.* at 3.

49 *Id.*

50 *Id.* at 3–4.

51 *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094 (Jan. 23, 2008) (Analysis of Proposed Consent Order to Aid Public Comment), available at <http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf> (“It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court. See Herbert Hovenkamp, *Federal Antitrust Policy* at 588 (2d ed. 1999).”).

52 *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094 (Jan. 23, 2008) (Dissenting Statement of Commissioner Kovacic), available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

Clayton Act violations the FTC will consider “unfair” and whether it will only use its Section 5 power to challenge conduct that cannot be reached by the antitrust laws. California law may prove instructive in this regard. The California courts have already faced the questions that the FTC is now facing, namely, what type of conduct is proscribed as being “unfair”?⁵³ For example, in *Chavez v. Whirlpool*, the California Court of Appeal held that conduct that has already been deemed “fair” under the antitrust laws, meaning the conduct did not violate the antitrust laws, cannot then be deemed “unfair” under the UCL.⁵⁴ The California courts have decided that there is not going to be a gap between what is unfair and fair – the UCL is for conduct that either violates the Cartwright Act or has not already been reviewed under the Cartwright Act.⁵⁵

The California courts’ approach to the development of its UCL may be a preview of what is in store for Section 5. The FTC does appear to be set on a path of developing its Section 5 jurisprudence but it may not be the massive expansion of FTC power that the business community presently fears. Should the FTC pursue a relatively narrow, “California-style” definition of “unfairness,” then the FTC’s decision to bring more Section 5 cases may prove not to significantly expand the reach of the FTC to cover new types of conduct,⁵⁶ but instead, to primarily change the jurisprudential framework so that the FTC can test the legitimacy of more types of business behaviors without the distorting factor of the threat of follow-on private litigation.

V. CONCLUSION

At this point, Section 5 of the FTC Act remains vague and undefined. The boundaries of conduct covered by “unfair methods of competition” potentially encompass conduct that violates the spirit, but not the letter of the antitrust laws; yet what this means is still unknown. Now, the FTC seems poised to develop Section 5 jurisprudence but should

53 Cal. Bus. & Prof. Code § 17200 states that “unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Section 5 of the FTC Act prohibits “unfair methods of competition...and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45.

54 *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001) (“we hold that conduct alleged to be ‘unfair’ because it unreasonably restrains competition and harms consumers, such as the resale price maintenance agreement alleged here, is not ‘unfair’ if the conduct is deemed reasonable and condoned under the antitrust laws.”). *Chavez* was a case brought by a consumer, which is treated differently than an “unfair” action brought by a competitor. In *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 187 (1999), the California Supreme Court adopted the following test for future UCL cases among competitors: “When a plaintiff who has claimed to have suffered injury from a direct competitor’s ‘unfair act or practice’ invokes section 17200, the work ‘unfair...means conduct that threatens an incipient violation of an antitrust law, or violates the law or otherwise significantly threatens to harm competition.”

55 Cal. Bus. & Prof. Code § 16700.

56 Section 5, however, does reach incipient violations. See *FTC v. Motion Picture Adver. Serv.*, 344 U.S. 392, 394-95 (1953) (“The ‘unfair methods of competition,’ which are condemned by § 5 (a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act -- to stop in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn as ‘unfair methods of competition’ existing violations of them.”).

do so responsibly. The Supreme Court and the three 1980s appellate decisions make clear that the reach of Section 5 is not without limits. The FTC should provide guidance to businesses so that they understand the potential ramifications of their business strategies. We do not know how the FTC will ultimately decide to develop its Section 5 power but the California courts have given us a preview of what is likely to happen through its own jurisprudence. If the FTC does choose to use its enforcement powers under Section 5 and bring “pure” Section 5 claims, the one silver lining is that a private plaintiff’s ability to use the FTC’s judgment against the defendant in follow-on private suits is greatly reduced.