Appropriate Role(s) for Section 5

Susan A. Creighton and Thomas G. Krattenmaker

Like any other interesting legal question, the issue of how far Section 5 of the Federal Trade Commission Act enables the FTC to reach has many facets and a long history. Supreme Court dicta seem to afford the Commission the widest possible discretion, but some subsequent circuit court cases do not, at least on the surface, seem so hospitable. The articles and book chapters devoted to this vexing question are too numerous to list.

To try to move the discussion forward, we focus on a somewhat more modest task: identifying the different possible roles for Section 5, assuming the agency stays within the current bipartisan consensus that antitrust seeks only to further consumer welfare without sacrificing productive efficiency. In other words, we seek to identify not what the FTC can do, but what it should do to strengthen antitrust law while remaining committed to the bedrock consumer welfare function of antitrust. We do so by developing a typology that draws on recent FTC cases to delineate three rationales that have been advanced to justify where Section 5 can usefully be deployed.

We call these the "frontier," "yes, but," and "gap-filling" rationales. While all three may have an appropriate role, for the reasons described below, we believe that the "frontier" and "yes, but" cases are the ones that should be most squarely at the heart of the agency's enforcement agenda. The "gap-filling" cases are the ones that appear most open-ended, and risk straying from antitrust's consumer welfare standards.

***Susan A. Creighton** was Director, Bureau of Competition, Federal Trade Commission from 2003–2005, and is a Partner at Wilson Sonsini Goodrich & Rosati. **Thomas G. Krattenmaker** was an attorney in the Bureau of Competition from 2003–2007, and is Of Counsel with Wilson Sonsini Goodrich & Rosati. This article is based on the authors' presentation at the FTC Workshop on Section 5 as a Competition Statute, Oct. 17, 2008.*

The Basic Limiting Principle: Protecting Consumer Welfare by Fostering Competition as the Central Purpose of Section 5

When asking how much authority the FTC might plausibly claim under Section 5, one very simple approach immediately appears. One could say that where Section 5 is employed to condemn conduct because it is anticompetitive, Section 5's reach should be the same as (neither broader nor narrower than) the conduct proscriptions of the Sherman and Clayton Acts. As attractive as this might be from a policy perspective, however, as a matter of statutory interpretation, it seems evident that this is not what the 1914 Congress that enacted Section 5 (and the 1938 Congress that amended it) intended. In a comparatively recent pronouncement on this issue, the Supreme Court examined the legislative history underlying Section 5 and its amendment by the Wheeler-Lea Act and concluded in no uncertain terms that:

> [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally 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.[1]

[1] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

Nothing the Court has written since calls that expansive view into question.

Even if the FTC *can* reach conduct not otherwise proscribed by other antitrust laws, the question remains, *should* it? And, if so, why?

As an initial limiting principle, we would argue that in its implementation of Section 5, the FTC should leave fully intact the current bipartisan antitrust consensus that antitrust is designed to protect competition, not competitors; that it protects against the use of market power, not efficient conduct; and that it seeks to prevent diminution of consumer welfare, and to do no more than that. This consensus is embodied in such otherwise disparate key decisions and documents as the Supreme Court's decision in *Leegin*,[2] the D.C. Circuit's *Microsoft* decision,[3] the agencies' Horizontal Merger Guidelines,[4] and the Commission's opinion, affirmed by the D.C. Circuit, in *Three Tenors*.[5] Section 5 should not, we submit, be allowed to impose antitrust liability for conduct that does not threaten these fundamental principles of antitrust. The latitude that Congress built into Section 5 should not be used to sacrifice efficient behavior for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.

Reviewing judges are not necessarily disregarding the Supreme Court's dicta concerning Section 5 when they hold the Commission's feet to the fire by requiring that competition cases be competition cases . . .

Because this is, so far as we can tell, a consensus position, we know of no current forceful challenge to it. If, in performing its competition-protecting mission, the agency should be sacrificing efficiency or consumer welfare for other goals, we do not know what those goals are or why Section 5 is an appropriate means to pursue them.

Treating the consumer welfare goal as the central limiting principle seems to us not only right as a matter of competition policy, but appears to be an inescapable requirement of the trilogy of cases, decided in the 1980s, that rejected somewhat more extravagant views of Section 5.[6] Reviewing judges are not necessarily disregarding the Supreme Court's dicta concerning Section 5 when they hold the Commission's feet to the fire by requiring that competition cases be competition cases—that is, they must rest on proof of probable actual competitive effects, measured by the consumer welfare standard. So, even if the Commission wanted to extend Section 5 to reach conduct not within the ambit of current antitrust policy, we doubt that reviewing courts would permit this, notwithstanding some of the more elastic phrases in cases like *Sperry & Hutchinson*.[7]

Role(s) for Section 5: A Legal Tool to Reach Anticompetitive Effects

Where, then, should Section 5 come into play in the antitrust enforcer's approach? As an initial screen we would ask: Does the conduct at issue have the same effect, from an economic competition policy perspective, as the types of conduct that are subject to liability under the Sherman Act? If the *economic* effect of the conduct is the same, the presumption is that the case ought to be brought under the Sherman Act.

Therefore, the second step of the inquiry is to ask: Is there nonetheless some *legal* reason to bring the challenge under Section 5 rather than the Sherman Act? Drawing on cases filed by the

[2] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[3] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[4] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), *available at* http://www.ftc.gov/bc/docs/horizmer.htm.

[5] PolyGram Holding, Inc., FTC Docket No. 9298, 2003 WL 21770765, *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf, *aff'd*, PolyGram Holdings, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[6] *See* Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (*Ethyl*).

[7] FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

FTC during the past several years, we have identified three different rationales that might be used to justify bringing a case under Section 5. We call them the "frontier," "yes, but," and "gap-filling" rationales.

The "frontier" rationale argues that there are some cases that meet all of the legal requirements for a Sherman Act claim, but involve new forms of anticompetitive conduct that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis. Former FTC Commissioner Tom Leary has made strong arguments for the application of Section 5 in this context.[8] The "yes, but" argument comes into play when a case would meet all the economic and legal requirements of a Sherman Act claim, but cannot be brought under the Sherman Act because of legal limitations imposed for reasons unrelated to the goals of antitrust law. The application of Section 5 in these circumstances is grounded in the notion that the concerns that led to these legal limitations in the Sherman Act (principally the concern regarding private treble-damage actions) cannot justify shielding otherwise anticompetitive conduct from FTC scrutiny.

Depending on the facts, each of these different potential rationales for the invocation of Section 5 might have been used to justify an enforcement action brought by the FTC during the past several years.

Finally, the "gap-filling" rationale might be invoked if a case would satisfy the economic requirements of antitrust, but fails one of the legal elements of Section 1 (such as the "agreement" requirement) or Section 2 (such as the "monopoly power" element).

Depending on the facts, each of these different potential rationales for the invocation of Section 5 might have been used to justify an enforcement action brought by the FTC during the past several years. Consider, for example, an action challenging unilateral conduct in the standard-setting area. Former Commissioner Leary has noted that because *Rambus*[9] involved a type of conduct that has only recently received careful antitrust scrutiny, the FTC might better have brought the case exclusively under Section 5—a "frontier" rationale. On the other hand, in *Unocal*,[10] another case involving standard setting, a "yes, but" rationale might have been considered in deciding whether to invoke a stand-alone Section 5 action because Noerr was an important defense asserted in that case. Finally, *N-Data*[11] appears to have been supported by the majority under a "gap-filling" rationale, inasmuch as the Commissioners in the majority acknowledged that the facts in that case did not support a claim under the Sherman Act.

In our view, the "frontier" and "yes, but" cases seem to be the safest and most compelling applications of a separate Section 5, at least so long as these rationales are not used to skip over a rigorous analysis of whether the legal elements of a Sherman Act claim otherwise are met. The "gap-filling" cases may provide the greatest potential for mischief, if the scope of such cases is not narrowly and rigorously circumscribed. One of the matters to which the Commission and its critics may want to give more considered attention are the legal limits that should be imposed on Section 5 in these "gap-filling" circumstances if important elements such as an "agreement" or "monopoly power" are not present.

In the balance of this article, we discuss some additional examples of each type of case that we have identified.

---

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

9 Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

10 Union Oil Co. of Cal., FTC Docket No. 9305, Opinion of the Commission (July 7, 2004) (rejecting *Noerr* defense and remanding for trial), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

11 Negotiated Data Solutions LLC, FTC File No. 51-0094 (Sept. 23, 2008) (complaint), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf.

1. Frontier Cases. Perhaps the least controversial application of a stand-alone Section 5 claim should be its use in "frontier" settings, where Section 5 could provide an avenue for redressing anticompetitive acts or practices that have newly emerged and have not yet been fully absorbed into the fabric of the Sherman or Clayton acts. Whether it be the elaborate information dissemination schemes of the 1920s[12] or the unwarranted Orange Book listings of the 1990s,[13] we know from experience that new forms of anticompetitive behavior will arise from time to time. It would appear to be a clear opportunity to take advantage of the FTC's experience as an expert body to bring its analytic resources to bear on such new forms of anticompetitive behavior.

Because courts may be reluctant to impose liability where behavior is new and unfamiliar, Section 5 may have advantages in these "frontier" cases due to its prospective application and lack of provision for private damages recovery (much less treble damages or class actions). Former Commissioner Leary gives *Schering*[14] and *Rambus* as examples of cases that might have been better brought exclusively under Section 5 because "the Commission was primarily interested in establishing some ground rules applicable to settlement of patent disputes between pioneer and generic drug manufacturers (*Schering*), and to the conduct of companies who participate in standard-setting bodies (*Rambus*)."[15]

Another example of a case that might have been a good candidate for "frontier" status, had it been handled by the FTC, was *United States v. AT&T*,[16] the case that led to the break-up of the U.S. telephone monopoly. *AT&T* was essentially two cases, one challenging monopolization of long distance service and the other claiming monopoly over telecommunications equipment. Both were well grounded in the economic policy underlying the Sherman Act, but each rested on asserted behavior—discriminatory interconnection in the long distance phase of the case, predatory cross-subsidization in the equipment phase—for which clear Sherman Act precedent was lacking.[17] Because the case settled before verdict, we will never know if the courts would have balked at reading the Sherman Act to cover the challenged conduct, but surely judicial reluctance was a risk. An action under Section 5 would have been particularly appropriate given that the government's goal was to obtain structural relief, not to punish the defendant, deter similar acts, or clear the way for private treble damage actions.

Perhaps the principal risk from a stand-alone Section 5 action in this context is that, precisely because the conduct is new, the "frontier" rationale might too easily become a means for the Commission to short-circuit asking the hard analytical questions imposed by the rigorous standards of the Sherman Act—questions that become all the more important when considering new forms of conduct. There is also the risk that, by bringing the case exclusively under Section 5, the Commission ironically might weaken its influence as an expert voice in the antitrust debate regarding the proper application of the Sherman Act.

To guard against these tendencies, the Commission in "frontier" cases would need to analyze and litigate the case precisely as it would under the Sherman Act, with the only exception being

---

[12] *See, e.g.*, Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[13] *See In re* Buspirone Patent Antitrust Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

[14] Schering-Plough v. FTC, 402 F.3d 1056 (11th Cir. 2005).

[15] Leary, *supra* note 7, at 3.

[16] *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) (ruling on consent decree).

[17] For a comprehensive description of the antitrust theories underlying the government's case in *United States v. AT&T*, see THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW & POLICY 376-410 (2d ed. 1998).

that it would explicitly limit the relief sought because of the novelty of the challenged conduct. Otherwise the Commission might find that even if it is more likely to "win" a pure Section 5 claim, it might come at the cost of having failed to develop a broader consensus that the conduct is anticompetitive and precisely why it deserves condemnation.

2. "Yes, But" Cases. A different group of cases that might warrant challenge under Section 5 are what might be called the "yes, but" cases. These are cases where, strictly on the *antitrust* merits and the terms of the antitrust statutes, the conduct would be condemned, but legal concerns extrinsic to the antitrust statutes cause courts to pull back from recognizing a Sherman Act claim. Like the "gap filling" cases, they address anticompetitive conduct that escapes Sherman Act condemnation because of a legal shortcoming. The "yes, but" cases, however, involve legal constraints imposed for reasons having nothing to do with antitrust law or policy. Indeed, for some of these cases, Section 5 might sensibly permit the Commission to take advantage of unique aspects of Section 5—particularly its deliberate limitations to prospective relief only, and then only in cases brought by a federal expert agency—to reach conduct that, but for the invocation of non-antitrust policy considerations, would be condemned as anticompetitive and harmful to consumer welfare. Drawing on recent history, here are some potential examples:

Anticompetitive Conduct Protected by Antitrust Immunities. The FTC has devoted considerable resources to seeking to restrict the growing scope of doctrines such as *Noerr*,[18] which is a classic "yes, but" defense: the conduct is anticompetitive, but non-antitrust concerns are invoked to shield it from Sherman Act scrutiny. Given the substantial differences between the Sherman Act and Section 5, however, might it not be the case that some of the anticompetitive conduct protected by *Noerr* against Sherman Act liability might nonetheless be subject to limited prospective relief under Section 5?

The *Noerr* doctrine is neither an antitrust principle[19] nor a rule of constitutional law.[20] *Noerr* is a principle of statutory interpretation, and at least some of the concerns that apparently drove the *Noerr* Court are not applicable to Section 5. For example, to the extent that the *Noerr* doctrine is driven by the fear that antitrust liability will "chill" protected speech, Section 5 cases—limited to prospective cease and desist remedies and in cases filed only by an expert impartial government agency—should prove much less chilling than Sherman Act litigation.

The FTC challenged conduct allegedly protected by *Noerr* in the Orange Book listing cases. Although the Commission prevailed in these cases on straightforward Sherman Act grounds,[21] the FTC might well have brought these cases under Section 5. For another example, several courts have held that threats to litigate can be shielded from antitrust proscription by *Noerr*,[22] and some litigants have even argued that settlements might be *Noerr*-protected.[23] But there can be little question that litigation threats and settlements can, under the wrong circumstances, cause material anticompetitive injury without yielding any efficiency benefit. Such acts are not, in any way, shape, or form constitutionally protected petitioning conduct. Whatever the merits of seeking to protect such

18 Eastern RR. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

19 One of its most recent applications was to the National Labor Relations Act. *See* BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

20 We know of no one who has ever suggested that all conduct immunized by *Noerr* was already independently shielded from antitrust scrutiny by the First Amendment.

21 *See e.g.*, *In re* Buspirone Patent Antitrust Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

22 *See, e.g.*, Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983).

23 *See, e.g.*, Andrx Pharms. v. Biovail Corp. Int'l, 256 F.3d 799 (D.C. Cir. 2001) (rejecting argument that terms of patent litigation settlement were immune from antitrust scrutiny under *Noerr*).

conduct from the chill of private enforcement, would the FTC not be on firm ground in ordering a firm to cease and desist from threats to litigate if those threats produce only anticompetitive consequences or from settlement of litigation that merely creates, and then distributes the rewards from, market power? Particularly where the anticompetitive consequences are clear, the lack of any justification is evident, and the risk of unlimited liability is avoided, it seems to us that challenging anticompetitive conduct protected by *Noerr*—but not the First Amendment—could be a salutary use for Section 5.

Similarly, the state action doctrine[24] reflects the very sound principle that the antitrust laws should not be read to impose on the states the laissez-faire regime of *Lochner v. New York*.[25] If states want to displace competition and actively supervise the resulting regulated markets, then the Sherman Act will not be read to forbid that, just as the demise of *Lochner* means that the due process clause no longer stands as a barrier to states opting for regulation over competition. Again, however, we wonder whether Section 5 must have a reach in this area that is precisely coterminous with that of Section 1. For example, what about the state supervision that is in practice—for want of a better word—a sham? In truth, this is what the FTC confronted in the *Kentucky Movers* case.[26] What if the Commission examined the application, on very specific facts and on a case-by-case basis, of states' certificate of need statutes?[27] Why could the FTC not be permitted to void a specific application of such a statute in order to protect against what turned out to be, upon inspection, nothing more than a raw extension of market power? Particularly where the remedy is a simple cease and desist order, such a case seems to us potentially compelling. Further, providing the FTC—and only the FTC—with authority to examine with greater care the justification for a state's decision to displace competition as a disciplinary force, and the effects on consumer welfare of that displacement, should avoid fears of permitting anyone aggrieved by a regulatory regime anywhere in the economy to challenge that regime as a violation of the Sherman Act.

We are not experts with regard to non-judicially created statutory antitrust immunities. When enforcing the antitrust laws, if one encounters an immunity, one just moves on. Nevertheless, we do think it might be worthwhile to examine a series of statutory immunities or exemptions to see if they were enacted, for example, because of a fear that private, treble damages actions, perhaps including class actions, would be particularly harmful to that industry. If such an exemption is discovered and if the immunity does not expressly extend to the FTC Act, it might constitute a responsible and modest use of Section 5 to put these otherwise shielded practices under the antitrust microscope for the limited purposes of FTC investigation and potential cease and desist remedies.

Patents/Antitrust Interface. The edges where patent law and antitrust law interface are not smooth. The Sherman Act has proven not fully capable of responding to certain challenges stemming from behavior with patents that threatens consumer welfare. One obvious example: as presently construed, the *Walker Process*[28] doctrine seems to have a gaping legal hole. Most

---

[24] The state action doctrine is extensively reviewed and critiqued in the FTC's *Report of the State Action Task Force* (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[25] 198 U.S. 45 (1905).

[26] Ky. Household Goods Carriers Ass'n, FTC Docket No. 9309 (June 2005), *available at* http://www.ftc.gov/os/adjpro/d9309/050622opinionofthecommission.pdf.

[27] By "certificate of need statutes" we refer to state laws that restrict entry into certain professions, markets, or industries to those who can first convince the state authorities that there is a need for additional competition.

[28] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

courts read *Walker Process* to require that the antitrust plaintiff prove not only that the patent was procured by fraud on the patent office, but also that the patent was "enforced," in addition to the conventional Sherman Act elements.[29]

An "enforcement" requirement must find its justification in some law other than antitrust. If "enforced" means that a lawsuit alleging infringement must have been filed, then antitrust law leaves unremedied the threat of suit, directed at an alleged infringer or (often with even more serious consequences) the customers of the alleged infringer, even though the simple threat can have, under the wrong circumstances, very serious anticompetitive consequences. The Federal Circuit realized this problem in the *Hydril* case.[30] Under a "yes, but" rationale, Section 5 might be an appropriate vehicle to inquire into allegations of anticompetitive misuse of patents by means other than enforcement. Nor need such cases be confined solely to patents procured by fraud. Deceptive threats to sue for infringement can—where other conditions are present—have inefficient, anticompetitive consequences even if there are arguably valid patents underlying the threat.

Although we cannot prove it, we suspect that some of the limitations on antitrust enforcement in the patent area, such as those just mentioned, stem from the fear of unbridled liability for what could, on the surface, appear to be simply the exercise of a statutory right. To the extent that this is so, Section 5, precisely because it does not provide for unbounded liability, becomes a potentially more attractive tool for challenging inefficient anticompetitive cost-raising behavior where it occurs.

Cheap Exclusion. We have argued elsewhere that combating what we called cheap exclusion should be high on the list of enforcement priorities for the FTC's Bureau of Competition.[31] Exclusionary practices that are both inexpensive to undertake and incapable of yielding any cost-reducing efficiencies are "cheap" in both senses of that term and are most likely to appeal to any firm bent on acquiring market power by anticompetitive means. Section 5 could be a significant tool in preventing cheap exclusion, although most forms of cheap exclusion can and should be reached via straightforward application of the Sherman Act.

A common objection to antitrust enforcement against some types of cheap exclusion is that it might "make a federal treble damages case out of a common law tort." As we have noted elsewhere,[32] we do not agree with a legal principle that conduct should be immunized because it is already illegal under another legal principle. Nonetheless, to the extent that concerns about private enforcement under the Sherman Act could threaten to turn many state torts into a federal treble-damages claim, Section 5 might provide the obvious means for proscribing conduct that, while tortious under conventional state law, can at the same time create very substantial competitive harm. In such a case, Section 5 would be performing a "yes, but" role, overcoming a legal obstacle placed in the path of Sherman Act enforcement that is unrelated to antitrust law or policy.

3. Gap Filling Cases. Unlike "frontier" cases, where the conduct is novel but otherwise satisfies traditional Sherman Act requirements, and "yes, but" cases, where the elements of the Sherman Act would be met but for the invocation of some limiting rationale unrelated to antitrust, "gap filling" cases are ones where the conduct at issue does not (or arguably does not) meet one

---

[29] The cases dealing with this issue are collected and neatly summarized in Christopher R. Leslie, *New Possibilities for Asserting* Walker Process *Claims*, ANTITRUST, Summer 2007, at 48.

[30] Hydril v. Grant Prideco, 474 F.3d 1344 (Fed. Cir. 2007).

[31] Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

[32] *Id.* at 993–94.

of the elements of the Sherman Act. Most such cases likely raise questions regarding the "agreement" element of Section 1, or the "monopoly power" element of Section 2.

Perhaps the paradigmatic example of a "gap filling" case is an invitation to collude, such as the FTC's consent order in *Valassis*.[33] As alleged in the complaint, that case—which was settled without trial—involved an alleged invitation to collude in a market that constituted a durable duopoly with high barriers to entry. Invitations to collude do not fit easily within the language of either Section 1 (where is the agreement?) or Section 2 (where is the dangerous probability of success?), yet there is little doubt that attempted collusion is conduct that fits comfortably within the ambit of antitrust economic and policy analysis. The conduct, if consummated, would be illegal per se, and, even unaccepted, it may facilitate coordinated interaction by disclosing the solicitor's preferences. Meanwhile a simple, naked invitation to collude serves no procompetitive, efficiency-enhancing purpose.

Although the *Valassis* case was not controversial, the risk of an unbounded application of Section 5 is greatest in these "gap-filling" cases, and the Commission should give careful thought to the imposition of stringent requirements where "gap-filling" is the rationale for the stand-alone use of Section 5. We limit ourselves here to two further fact patterns where these issues may arise.

First, certain kinds of behavior may facilitate oligopolistic price stickiness, without generating any potential cost-saving efficiencies, yet still leave unmet the Sherman Act requirement for an agreement or concerted action. For example, consider refusals to quote other than delivered prices in the absence of any reason to explain why delivered pricing reduces transaction costs, or contractually committing with all buyers to announce publicly any price increase before the price increase goes into effect without any explanation as to why, in this industry, this practice might increase price competition. Under certain conditions, these practices—if followed by most firms in the market—can have serious anticompetitive consequences, even if there is no evidence of agreement on these terms among competing sellers. It would appear consistent with the policies underlying the Sherman Act to analyze such conduct under Section 5, although that raises the question of what limits should be imposed if Section 5 were to be used in this way.[34]

Another potential candidate for "gap filling" adjudication under Section 5 would be what is often referred to as "patent fishing." When firms acquire patents and then demand payments from probable non-infringers, but where the payments are much less than the costs of litigation, this behavior—especially where repeated many times—can significantly raise the costs of the producing firms. These increased costs are inefficiencies and will also likely yield higher prices and a diminution in consumer surplus. Depending on how the cost increases are spread, the fishing may also create entry barriers and give some firms market power. Yet, because the patent fisher does not itself gain from the market power that its fishing can create (or because the practice may reduce consumer welfare but without yielding monopoly profits to any market participant), it is not obvious that conventional antitrust would speak to this behavior. Section 5 might be an appropriate tool for investigating allegations of such conduct, but before filing such a complaint it is important to identify the elements that must be satisfied to bound this application of the statute.

[33] Valassis Commc'ns, Inc., FTC File No. 51-0008 (Mar. 14, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510008/060314do0510008.pdf.

[34] The *Ethyl* case, *supra* note 6, might well have been another well-grounded gap filling case, given the panoply of interlocking facilitating practices at issue. However, the trial record apparently was insufficient to convince the reviewing court that actual anticompetitive effects stemmed from the challenged conduct and the Commission was unable to persuade the court that the practices at issue lacked redeeming procompetitive value. Consequently, on the facts as found, *Ethyl* would not appear to be a candidate for a Section 5 "gap filling" case.

A Cautionary Conclusion

Although we have suggested a typology for evaluating whether particular conduct might be worthy of scrutiny under Section 5, we must emphasize that we are, of course, only speaking of proscribing behavior that is shown, after trial, to have serious, measurable anticompetitive consequences without promise of procompetitive benefits. Apart from per se cases, which might include certain kinds of egregious exclusionary acts, any case that does not meet that standard should not be brought under any antitrust regime, in our opinion. An interpretation of Section 5 that crossed this line would cause harm to our economy.

Finally, although we do believe that Section 5, enforced by the expert FTC, is in fact a good vehicle for what Congress intended—to define and proscribe forms of anticompetitive conduct, even if they are hard to analyze under existing Sherman Act precedents—the Commission should be exceedingly cautious in resisting the temptation to use Section 5 simply because, as a matter of statutory authorization, it thinks it can. ●