

AntitrustConnect Blog

Commissioner Wright Calls for FTC Policy Statement on Unfair Methods of Competition

Jeffrey May (Wolters Kluwer) · Tuesday, April 16th, 2013

FTC Commissioner Joshua D. Wright told attendees of the American Bar Association Section of Antitrust Law Spring Meeting on April 11 that he was hopeful that the Commission will issue a policy statement, articulating what constitutes an unfair method of competition in violation of Section 5 of the FTC Act. Saying it is the “Commission’s duty,” he expressed his belief that the current Commission is up for the task.

Wright’s remarks — “[What’s Your Agenda?](#)” — delivered at the meeting’s “Hot Topics” panel were added to the agency’s website late Monday.

Wright said he would kick off the process by offering a proposal, with certain limiting principles confining the scope of unfair methods claims soon. However, he did not offer a timeline.

According to Wright, Section 5 enforcement has fallen short of its theoretical promise as articulated by Congress, because the agency has not offered details on the provision. He noted that there are only “a handful of adjudicated decisions with any durable impact on antitrust doctrine or economic welfare.” Wright went on to say that “the Commission’s use of Section 5 has done little to influence antitrust doctrine and less to inform judicial thinking or to provide guidance to the business community.”

“There is little hope for Section 5 to play a productive role in antitrust enforcement unless the Commission articulates in a policy statement about precisely what constitutes an unfair method, how the agency will decide whether to bring unfair method claims, and a general framework including guiding and limiting principles for evaluating Section 5 cases,” said Wright.

Wright explained that a policy statement “must establish guiding principles for Section 5 theories of liability outside the scope of the Sherman or Clayton Acts.” At the very least, actionable conduct should result in harm to the competitive process and reduce economic welfare.

Two potential limiting principles were offered. First, Section 5 should not be used to evade existing antitrust law. A second potential limiting principle is a restriction that Section 5 unfair methods cases do not involve plausible efficiency claims.

Wright said that he believed his informal and public distribution of his own proposal would provide “a useful starting point for a fruitful discussion among the enforcement agencies, the antitrust bar, consumer groups, and the business community.” While Wright has time on his

side — his term does not expire until September 2019 — it is unclear whether he will be able to convince the three other commissioners (eventually four other commissioners) to issue such guidance.

Responding to a question about Section 5 enforcement at the Spring Meeting’s Enforcement Roundtable last Friday, FTC Chairwoman Edith Ramirez did not directly address Wright’s proposal to issue a policy statement. However, she suggested that the FTC would continue to develop this area of law through enforcement activity.

Ramirez believes that Section 5 is an important enforcement tool provided by Congress that ought to be used in a careful way. According to Ramirez, the agency has used its Section 5 authority appropriately.

FTC Bureau of Competition Director Reaction

FTC Bureau of Competition Director Richard A. Feinstein earlier Friday morning suggested that the agency has considered issuing guidance on the issue in recent years. In 2008, the FTC held a public workshop to examine the scope of the prohibition of unfair methods of competition under Section 5. The workshop considered types of business conduct that might be unfair methods of competition addressable by Section 5. While one of the goals of the workshop might have been to provide guidance, turnover at the Commission has prevented its issuance.

“The devil is in the details”, said Feinstein. He believes that the challenge for the agency is reaching a consensus on guidance that is worth providing.

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