

THE NEED FOR LIMITS ON AGENCY DISCRETION & THE CASE FOR SECTION 5 GUIDELINES

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Federal Trade Commission
December 16, 2013
Washington, D.C.

* The views expressed in this presentation are my own and do not necessarily reflect the views of the Commission or any other Commissioner.



Overview

- **Limits on Agency Discretion Generally**
- **Identifying the Section 5 Problem**
- **Need for Limits on Section 5 Still Exist**
- **Selecting a Principled Section 5 Standard**



Limits on Agency Discretion

- **Why Should An Agency Limit its Discretion?**
- **Primary and obvious cost: loss of flexibility**
- **Some Benefits:**
 - Enforcement credibility
 - Ability to influence and comment on existing law
 - Educate judges
 - Minimizing political risks
- **Examples: FTC experience with deception, unfairness, mergers**



Identifying the Section 5 Problem

- **Gap between Section 5 in theory and practice stems in part from the vague and ambiguous nature of the FTC's authority under the statute**
- **Section 5 today is as broad or as narrow as a majority of Commissioners believes it is**
- **Businesses cannot distinguish lawful conduct from unlawful conduct without guidance**



Identifying the Section 5 Problem

No responsive competition policy can neglect the social and environmental harms produced as by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demands.

-- Former Chairman Michael Pertschuk (1977)



Identifying the Section 5 Problem

An unfair method of competition includes:

actions that are collusive, coercive, predatory, restrictive, or deceitful, or other-wise oppressive, and do so without a justification that is grounded in legitimate, independent self-interest. (emphasis added)

-- Former Chairman Jon Leibowitz (2006)



Identifying the Section 5 Problem

- **Uncertainty surrounding scope of Section 5 is exacerbated by the administrative process advantages available to the FTC**
- **In the past nearly 20 years, FTC has ruled in favor of Staff on appeal in 100% of cases**
- **Win rate for antitrust plaintiffs appealing from district court is closer to 50%**

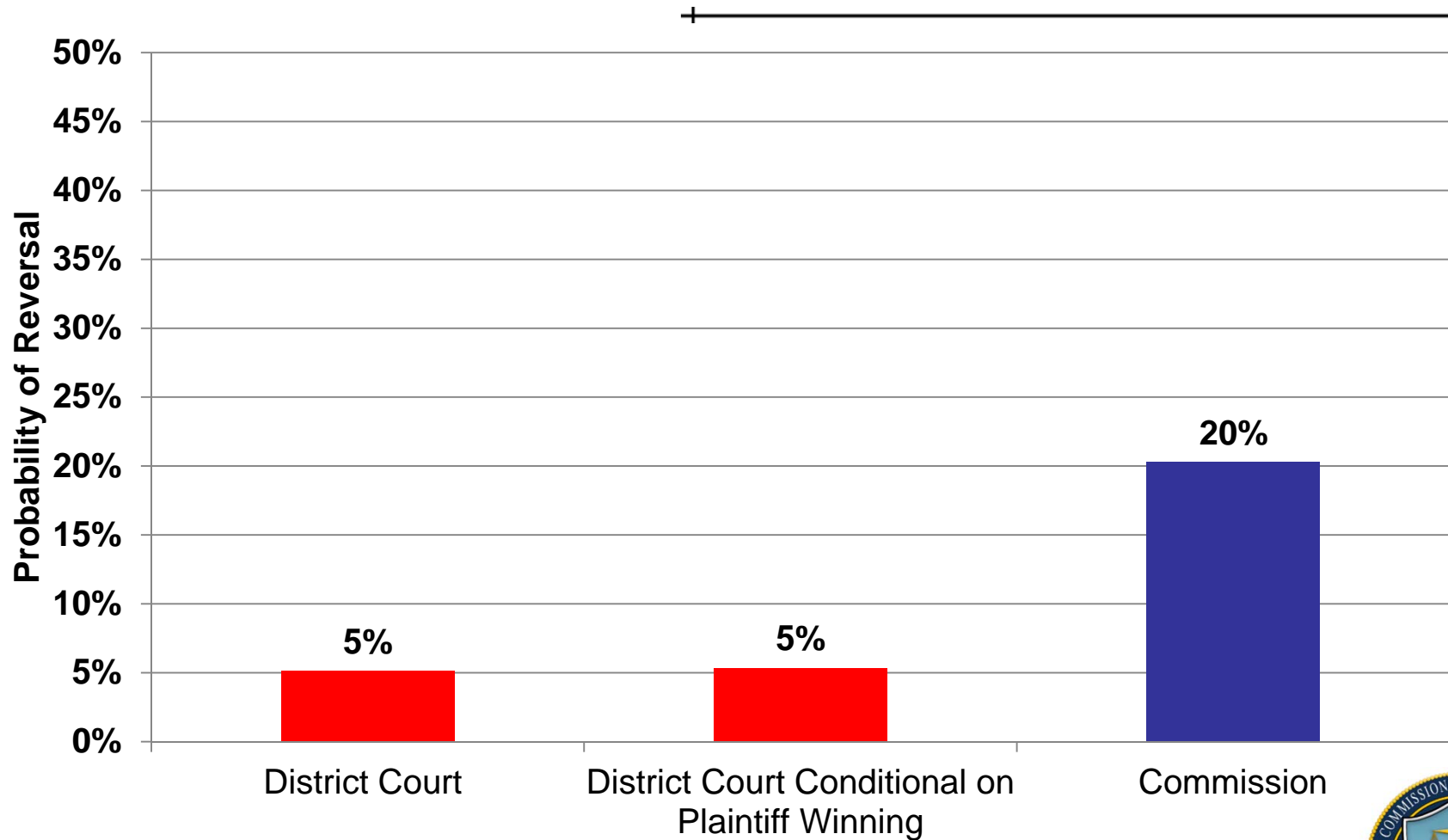


Identifying the Section 5 Problem

- **Two hypotheses to explain the 100% win rate on appeal to the Commission are:**
 - Commission expertise over private plaintiffs in picking winning cases; and
 - Institutional and procedural advantages for the Commission in administrative adjudication
- **Treatment of FTC decisions by courts of appeal puts expertise hypothesis into doubt**



Identifying the Section 5 Problem



Identifying the Section 5 Problem

- Combination of the FTC's administrative process advantages with Section 5's vague and ambiguous scope enables easy consents
 - Litigation unlikely where the Section 5 standard is a moving target and respondents appear to have the chips stacked against them
- Section 5 scope can account for the institutional differences between federal courts and agencies



Need for Limits on Section 5 Still Exist

- Some today still argue that Section 5 should be used expansively to attack all manner of conduct a majority of the Commission perceives as bad for consumers
- Former Commissioner Rosch recently stated the FTC should challenge PAEs because “we have a gut feeling” they are anticompetitive.



Need for Limits on Section Still Exist

- **Despite claims often made to the contrary, standalone Section 5 cases comprise a large portion of the FTC's enforcement agenda**
- **FTC brought four conduct cases this year; half were Section 5 enforcement actions**



Need for Limits on Section Still Exist

- **FTC claimed credit for consumer savings of roughly \$1 billion in FY 2012 from merger and non-merger enforcement actions**
- **Over 33% of these consumer savings are attributable to Section 5 standalone claims**
- **75% of consumer savings from FTC non-merger enforcement**



Selecting a Principled Section 5 Standard

- **Broad consensus in a number of key areas:**
 - **Most agree that Section 5 is broader than the traditional federal antitrust laws**
 - **Most agree that guidelines would be helpful, if not necessary, if the FTC uses Section 5 to reach conduct beyond the traditional antitrust laws**
 - **Most agree that one requirement of a Section 5 claim is showing “harm to competition”**



Selecting a Principled Section 5 Standard

- **Option 1:** Standalone UMC violation requires evidence of a violation of the traditional federal antitrust laws
- **Option 2:** Standalone UMC violation requires evidence of harm to competition and no cognizable efficiencies



Selecting a Principled Section 5 Standard

- **Option 3: Standalone UMC violation requires evidence of harm to competition and that the harms are disproportionate to any benefits**
- **Option 4: Standalone UMC violation requires evidence of harm to competition and that the harms outweigh the benefits**



Selecting a Principled Section 5 Standard

- There are only minor differences between these four possible Section 5 standards:
 - Each requires showing “harm to competition”
 - Primary difference is how the Commission treats efficiencies in standalone Section 5 cases
- Question is which option will maximize the rate of return Section 5 cases earn consumers



Selecting a Principled Section 5 Standard

- Important to remember Section 5 has failed to date because FTC has sought to do too much and called into question whether any limits exist
- Commission must recalibrate Section 5 with eye towards regulatory humility to save the statute
- Wright Proposed Policy Statement does this by targeting Section 5 enforcement efforts at most plainly anticompetitive conduct—that without redeeming efficiency justifications



Thank you for your time.

