



Federal Trade Commission

What's Your Agenda?

Remarks of Joshua D. Wright*

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I am delighted to be here today. Thank you to the ABA Section of Antitrust Law for having me and to Deb Garza and Hartmut Schneider for the invitation to share my views during today's session. I am also especially pleased any time I am able to

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my advisors, Jan Rybnicek and Joanna Tsai, for their invaluable assistance in preparing this speech.

participate on a panel along with my uncle, George Cary, who is properly given all of the credit and blame for my interest in and entry into the field of antitrust.

For those of you who know me a bit less well than George, I thought I would take the opportunity today to answer—or at least to begin answering—the question I have been asked most frequently since I started as a Commissioner three months ago: what is your agenda?

I should begin with the familiar disclaimer – the views I express here are my own and not necessarily those of the Commission or any other Commissioner.

Let me begin by sharing my views on a few issues I am especially interested in – issues I suspect will remain on the Commission’s competition mission radar screen for the foreseeable future and that I believe this Commission is well-positioned to address.

I. An Evidence-Based Approach to Section 5 at the FTC

George Stigler once began an article on well-tread ground in economic theory by announcing that “no one has the right, and few the ability, to lure economists into reading another article on oligopoly theory without some advance indication of the alleged contribution.”¹ And as well it should be the case with lawyers or economists purporting to say something new or interesting about the appropriate scope of Section 5 of the FTC Act as applied to unfair methods of competition. So let me begin by giving an advance declaration of three points I intend to focus upon today:

¹ GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* 39 (1983).

(1) Objective evaluation of the historical record reveals a remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the Commission;

(2) 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; and

(3) I'm optimistic that *this* Commission can put an end to the state of affairs the agency finds itself in – that is, approaching nearly a century of operating without a policy statement articulating its views on the appropriate application of its signature statute in unfair methods of competition cases.

Let me begin by discussing Section 5 in theory.² Congress intended Section 5 to reach business conduct outside the scope of the traditional antitrust laws, including the Sherman Act and the Clayton Act. A key rationale for the existence of a competition statute reaching behavior not otherwise unlawful under the Sherman Act and Clayton Act involves a familiar refrain for most students of administrative law: an expert

² For an excellent discussion of Section 5, see William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010). See also Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980). On the role of Section 5 in the creation of the Federal Trade Commission, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

administrative tribunal would be delegated the authority to interpret its operative statute in a manner that was flexible to changes in the marketplace and capable of expanding beyond current judicial interpretations. The authority to expand the current interpretations of then existing antitrust laws would be placed in an expert body with authority not only to bring enforcement actions, but also to conduct studies of business practices to understand their competitive implications.³ In theory, this broader authority granted the expert agency—the Federal Trade Commission (“FTC”)—would be tempered by restrictions upon available remedies. In this case, the remedies available to the Commission would be lighter than those available under the Sherman Act both directly and in the more indirect sense that interpretations of Section 5 would not carry collateral effects in private litigation.

The institutional design features of Section 5 described above were intentional and were undertaken with great hope these choices would, as former Chairman Bill Kovacic and Marc Winerman have described it, “help make the Commission the preeminent vehicle for setting competition policy in the United States.”⁴ The FTC’s unique policy authority would allow competition policy research and development that would complement its enforcement mission and guide Commissioners in identifying the appropriate standards of liability. Ultimately, “courts would eventually look to the

³ Report of the Senate Committee on Interstate Commerce, S. REP. NO. 597, 63d Cong., 2d Sess. 8-9 (1914) (the FTC would have the “information, experience, and careful study of the business and economic conditions of the industry affected”).

⁴ Kovacic & Winerman, *supra* note 2, at 932.

Commission for guidance about how to frame and apply antitrust rules.”⁵ Thus, the combination of these institutional design features and expertise would generate sound competition rules and reliable guidance for the business community.

Nearly a century after Section 5 was designed and its theoretical promise articulated, I believe it is now safe to subject it to an objective evaluation of whether it has lived up to that promise and in any case, to document its contributions to competition enforcement in the United States.⁶ Indeed, the creators of the FTC intended for, and encouraged, the Commission to rely upon the body of information it accumulated over time in executing its mission and contemplated that Section 5 would be flexible enough to adapt to changes in empirical learning.

What does a frank assessment of the 100 year record of Section 5 tell us about its contribution to the competition mission? Or as I might put it, has Section 5 lived up to its promise of nudging the FTC toward evidence-based antitrust?⁷ I believe the answer to that question is a resounding “no.” There is no shortage of scholars and commentators filling the empty vessel of Section 5 with visions or further promise or

⁵ *Id.* at 923.

⁶ Some have argued the true promise of Section 5 lies not only in the improving domestic competition policy and enforcement decisions, but also in spurring convergence with the EU and other international jurisdictions. See Albert A. Foer, FTC Workshop on Section 5, Section 5 as a Bridge Toward Convergence (Oct. 17, 2008), available at <http://www.ftc.gov/bc/workshops/section5/docs/afoer.pdf>.

⁷ See Joshua D. Wright, Commissioner, Fed. Trade Comm’n, Remarks at the Beijing Competition Law Center, Evidence-Based Antitrust Enforcement in the Technology Sector (Feb. 23, 2013) available at <http://www.ftc.gov/speeches/wright/130223chinaevidence.pdf>.

purpose of, for example, creating convergence among international jurisdictions,⁸ shifting the attention of competition policy from economic welfare to consumer choice,⁹ or incorporating behavioral economics into modern antitrust.¹⁰ History, however, tells us that Section 5 has fallen far short of its intended promise.¹¹ Section 5 has not produced more than a handful of adjudicated decisions with any durable impact on antitrust doctrine or economic welfare. Indeed, it is the Sherman Act and not Section 5 that has proven the more flexible instrument of antitrust law in terms of adjusting to economic learning and changes in market conditions.¹²

Consider the history of Section 5 in the important area of dominant firm conduct. Evaluating an admittedly cramped measure of success—appellate court endorsements of FTC efforts to premise liability on Section 5 theories—former Chairman Kovacic and

⁸ See Foer, *supra* note 6.

⁹ Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using “Consumer Choice” Analysis*, 8 ANTITRUST SOURCE 3 (Feb. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287218. But see Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405 (2013) (demonstrating the advantages of economic welfare over consumer choice as an antitrust objective).

¹⁰ Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1583-85 (2011).

¹¹ Kovacic & Winerman, *supra* note 2, at 933 (“in practice, the FTC’s application of Section 5 has played a comparatively insignificant role in shaping U.S. competition policy”).

¹² See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 887, 879 (2007) (overruling *Dr. Miles* to allow vertical price restraints to be judged by a rule of reason); *Verizon Communs., Inc. v. Trinko, LLP*, 540 U.S. 398, 409 (2004) (finding that a unilateral refusal to deal did not violate Section 2 of the Sherman Act when the competitor’s conduct did not demonstrate a “willingness to forsake short-term profits to achieve anticompetitive ends”); *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (holding that vertical maximum price fixing is not a per se violation of the Sherman Act, and the transactions should be analyzed under a rule of reason).

Marc Winerman find little evidence of success despite considerable efforts.¹³ Expanding the definition of success to include consent decrees with lasting influence on doctrine and firm behavior would not improve matters. Thus, it is no surprise the authors conclude the “FTC experience with Section 5 is generally a bleak record” and that “[t]he Commission must confront this history directly and understand why the list of failures is considerably longer than the list of accomplishments.”¹⁴

After one hundred years the balance of evidence more than suggests 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. This void is not a small matter for an administrative agency whose institutional blueprint contemplated such a significant role for Section 5. In my view, it is the Commission’s duty to provide that guidance. But beyond our obligation as responsible stewards of the FTC and consumers through execution of our competition mission, there is considerable risk to the agency of continuing on its current path of putting Section 5 to use without providing guidance. I simply do not believe that path is sustainable or sound competition policy. Section 5 will not live up to its promise of offering an

¹³ Kovacic & Winerman, *supra* note 2, at 941 (“The FTC’s record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring . . . [O]ne needs to go back to the 1960s to find cases in which the Commission succeeded on appeal in a case applying a Section 5 theory”).

¹⁴ *Id.* at 940.

analytically coherent contribution to competition policy if the Commission continues not to offer guidance.

The Commission, however, has another choice available. It can and should issue a policy statement clearly setting forth its views on what constitutes an unfair method of competition as we have done with respect to our consumer protection mission.¹⁵

But what would be included in a Section 5 policy statement? To begin with, any Section 5 policy statement must establish guiding principles for Section 5 theories of liability outside the scope of the Sherman or Clayton Acts. It must articulate a theory of unfair methods violations that is consistent with antitrust concepts.¹⁶ In my view, a necessary but not sufficient condition for such a theory would be that unfair methods claims, like other antitrust claims, must result in harm to the competitive process and, in turn, reduce economic welfare.

A Section 5 Unfair Methods of Competition Statement must also articulate *limiting principles* confining the scope of unfair methods claims. A variety of limiting principles have been proposed by scholars and commentators including the so-called “gap-filling” rationale suggested to justify—among other things—invitation to collude cases in which an unfair method claim is seen as providing a mechanism to reach

¹⁵ See, e.g., FTC Policy Statement on Unfairness (1980), *appended* to Final Order, Int’l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* <http://ftc.gov/bcp/policystmt/ad-unfair.htm>; FTC Policy Statement on Deception (1983), *appended* to Final Order, Cliffdale Assocs., Inc. 103 F.T.C. 110, 174 (1984), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

¹⁶ Kovacic & Winerman, *supra* note 2, at 945.

conduct that does not support a claim under traditional antitrust laws. Alternatively, commentators have also suggested a potentially fruitful avenue would be to limit the use of Section 5 to cases announcing a new principle or relying upon a novel theory of liability.¹⁷ While these and other proposed limiting principles are worthy of discussion, I'm skeptical they provide enough guidance to solve the Section 5 debate.

With respect to the gap-filling rationale, one must answer the fairly metaphysical question of "what is a gap?"¹⁸ While this rationale has the desirable feature of explaining invitation to collude cases, about which there appears to be considerable consensus, I'm not convinced it can provide a sufficient basis for a high-level articulation of the Commission's views concerning what constitutes an unfair method.

The "frontier" rationale operates under the premise that expert tribunals will outperform generalist judges in evaluating new competition-based theories of liability. This may or may not be the case.¹⁹ But further analysis and discussion would certainly be warranted before the Commission adopted this rationale for application of Section 5 in light of both the historical and modern evidence concerning the relative performance

¹⁷ Former Commissioner Leary has described these as "frontier" cases. *See, e.g.,* Thomas B. Leary, *A Suggestion for the Revival of Section 5*, ANTITRUST SOURCE (Feb. 2009), available at <http://www.ftc.gov/bc/workshops/section5/docs/tleary.pdf>; Susan B. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, ANTITRUST SOURCE (Feb. 2009), available at <http://www.wsgl.com/PDFSearch/creighton0209.pdf>.

¹⁸ *See e.g.,* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks at the ABA Antitrust Section Spring Meeting, *The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?* (Mar. 25, 2009) (stating Section 5 could be used as a "gap-filler" in areas other than invitations to collude and Robinson-Patman Act cases), available at <http://www.ftc.gov/speeches/rosch/090325abaspring.pdf>.

¹⁹ *See* Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. OF ANTITRUST ENFORCEMENT at 1 (Dec. 2012).

of expert agencies interpreting Section 5 in unfair methods cases and generalist judges applying the Sherman Act.

While I do not mean to provide an exhaustive list of potential limiting principles, let me identify two candidates consistent with a desire to avoid the pitfalls exposed by the historical record discussed above, for which there may well be consensus, and that could potentially provide a path forward for Section 5 to achieve its original promise set forth in the intellectual blueprints of the FTC.

First, Section 5 should not be used to evade existing antitrust law. Where courts have proven competent to evaluate a particular type of business conduct under the traditional antitrust laws, there is little reason for the Commission to step in under its unfair methods authority.²⁰ This is especially the case when Section 5 is used to take advantage of a weakened requirement to prove consumer harm in the rigorous manner required in, for example, Section 2 cases.²¹ Evading the consumer welfare proof requirements of existing Sherman Act jurisprudence reduces the credibility of the

²⁰ See Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Google's Search Practices, *In the Matter of Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013) ("To the extent a standalone Section 5 claim is based on a refusal to deal or conditional refusal to deal theory, Section 5 cannot be used to evade the requirements of the Supreme Court's *Trinko* decision.").

²¹ For a further discussion of problems emanating from using Section 5 to evade established Section 2 precedent, see Joshua D. Wright, *An Antitrust Analysis of the Federal Trade Commission's Complaint Against Intel*, George Mason L. & Econ. Research Paper No. 10-27 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1624943.

agency, runs the risk that procompetitive conduct will be condemned under Section 5,²² and circumvents the healthy development of Sherman Act jurisprudence in the courts.

Some commentators have argued that competition agencies should be free of the strict requirements established by Section 2 jurisprudence because the Supreme Court introduced those requirements in response to some perceived undesirable features of private litigation, including the potential collateral consequences to consumers brought on by follow-on actions in the event of a false positive.²³ However, that position gives insufficient attention to the Supreme Court's consistent teaching in Section 2 cases that its concerns about the collateral costs of private litigation are also a function of the difficulty of identifying and distinguishing procompetitive single-firm conduct from anticompetitive conduct rendering the probability of error quite high.²⁴ Again, and in light of the historical record discussed above, without convincing empirical evidence that expert agencies outperform generalist judges in antitrust cases, the position that it

²² Even without the threat of treble damages and follow-on private litigation, Section 5 enforcement may have significant collateral consequences, such as follow-on actions at the state level under state consumer protection laws and over deterring procompetitive conduct. *See id.* at 22-23.

²³ *See* Statement of Chairman Leibowitz & Commissioner Rosch, *In the Matter of Intel Corporation*, FTC Docket No. 9341 (Dec. 16, 2009); Howard Shelanski, Bureau of Economics Deputy Director for Antitrust, Fed. Trade Comm'n, Statement Before the House of Representatives Committee on the Judiciary Subcommittee on Courts and Competition Policy, *Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries* (June 15, 2010).

²⁴ *See Verizon Communs., Inc. v. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of § 2 liability."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("Mistaken inferences . . . especially costly, because they chill the very conduct that the antitrust laws are designed to protect.").

is sound competition policy to evade the limitations the Supreme Court has imposed upon antitrust plaintiffs through the use of Section 5 is without a credible basis.

A second potential limiting principle is a restriction that Section 5 unfair methods cases – as is the case with invitation to collude cases – do not involve plausible efficiency claims. Not only does the lack of efficiency justification reduce any potential collateral consequences associated with false positives, but determining the presence of absence of cognizable efficiencies also plays to a core institutional strength of the Commission. The Commission’s learning and expertise in this regard has already influenced the evolution of the Merger Guidelines, and is applied on a regular basis.

This discussion of potential guiding and limiting principles of Section 5 unfair methods claims is not meant to provide a comprehensive look at the possible alternative formulations the Commission might have to offer courts and the business community with respect to its view on what constitutes an unfair method of competition. However, as we approach the FTC’s 100th year, I cannot think of any contribution this Commission can make to the FTC’s competition mission, or investment it can make to secure the institutional integrity of the agency into the future, than to issue an Unfair Methods Policy Statement. While the views I’ve expressed here are only my own, let me also add that I firmly believe this Commission is up to this important task and I look forward to working with my fellow Commissioners. In that spirit, I will soon informally and publicly distribute a proposed Section 5 Unfair Methods Policy Statement more fully

articulating my views and perhaps even providing a useful starting point for a fruitful discussion among the enforcement agencies, the antitrust bar, consumer groups, and the business community.

II. The FTC and Public Restraints of Trade

One hallmark of an evidence-based approach to antitrust enforcement is that agency resources should be allocated to generate the highest rate of return for consumers. In many antitrust cases, the threshold question of whether the underlying business conduct makes consumers better or worse off is a complicated one requiring a significant investment of resources. But the agency is well-served to pursue conduct that economic learning teaches is clearly anticompetitive without such a significant investment of resources. An agency sensitive to efficiently executing its competition mission will look for low hanging fruit—in other words, it will identify and bring enforcement actions to prevent conduct that is clearly anticompetitive and thus bring immediate and certain benefits for consumers.

Public restraints upon trade represent precisely this type of increasingly rare low hanging fruit and, thus, should be a more central concern of U.S. competition policy.²⁵ The legal hurdles facing enforcement against public restraints often render policy advocacy the primary weapon for the FTC in this area; and it is a weapon the FTC has

²⁵ See James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 Boston U. L. Rev. 1555 (2010), available at <http://www.ftc.gov/speeches/kovacic/2010convergencecomment.pdf>.

wielded effectively and consistently over time. The FTC also has brought enforcement actions to challenge public restraints in recent years in appropriate cases. I support vigorous use of both tools and want to discuss a handful of recent examples.

A. Policy Advocacy

i. Passenger Vehicle Transportation Services

One area in which the FTC has actively promoted policies at the state and local levels that allow competition to flourish is the passenger vehicle transportation services market. Earlier this year, the Colorado Public Utilities Commission (“CPUC”) proposed several changes to regulations governing taxicabs, executive cars, limousines, and other passenger vehicle services.²⁶ Relying upon their vast expertise in this industry, FTC staff submitted comments to the CPUC expressing concerns that the proposed regulatory changes may stifle innovation and hurt competition in the market for passenger vehicle services.²⁷

The proposed rule changes, and many like them in jurisdictions across the country, emerge in response to the growing use of new software applications that allow consumers to arrange and pay for passenger vehicle transportation services using smartphones. The applications often rely upon GPS technology to allow consumers to

²⁶ CPUC Docket No. 13R-0009TR (Open Date Jan. 7, 2013), *available at* https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=13R-0009TR.

²⁷ FTC Staff Comment to the Colorado Public Utilities Commission Concerning Proposed Rules Regulating Transportation By Motor Vehicle, 4 Code of Colorado Regulations 723-6 (Mar. 2013), *available at* <http://www.ftc.gov/os/2013/03/130703coloradopublicutilities.pdf>.

locate nearby vehicles and track their arrival, and can enable drivers to calculate fares based on distance traveled and other metrics. The applications also can facilitate demand pricing and enable customers to make payments using credit cards.

These technologies represent an innovative new form of competition in a market that has seen little change in the past several decades. They may also raise novel consumer protection issues. As state and local jurisdictions grapple with how best to respond to these changes, the FTC is well positioned to provide guidance in identifying regulations that impede competition without offering countervailing consumer benefits. Over the past several decades, the FTC has developed considerable expertise in analyzing issues related to the market for passenger vehicle transportation services.²⁸ For instance, in the 1980s, FTC staff prepared a comprehensive report on taxicab regulation.²⁹ The FTC also has brought enforcement actions against two cities alleging they worked with taxicab operators to pass anticompetitive regulations.³⁰ Finally, the

²⁸ See generally Can the FTC Save Uber, SLATE, (Mar. 12, 2013), available at http://www.slate.com/articles/technology/future_tense/2013/03/uber_lyft_sidecar_can_the_ftc_fight_local_taxi_commissions.single.html.

²⁹ Mark W, Frankena & Paul A, Paulter, An Economic Analysis of Taxicab Regulations (1984) (FTC Bureau of Economics Staff Report), available at <http://www.ftc.gov/be/econrpt/233832.pdf>.

³⁰ The FTC brought these actions against Minneapolis and New Orleans. The complaints were withdrawn after Minneapolis revised its regulations to permit more competition and Louisiana passed legislation authorizing the conduct at issue. See generally Fed. Trade Comm'n, 1985 ANNUAL REPORT 5 (1985), available at <http://www.ftc.gov/os/annualreports/ar1985.pdf>.

Commission has submitted several advocacy filings related to taxicab regulations to local and state authorities.³¹

In its comment to the CPUC, FTC staff raised concerns that the proposed rule changes likely would inhibit the use of smartphone applications without providing any countervailing consumer benefits. FTC staff urged Colorado to develop a regulatory framework that maintains appropriate consumer protections while allowing for flexibility and experimentation that can foster innovative methods of competition. For instance, FTC staff cautioned that one proposed rule change requiring charter contract services, such as executive cars and limousines, to charge a specific fixed price appeared overbroad because it would effectively preclude demand pricing that could help allocate resources efficiently. As advances in technology continue to revolutionize how consumers purchase passenger vehicle transportation services, the FTC can and should play an important role in encouraging a commonsense regulatory response. Our advocacy efforts in this market are an excellent example of how the FTC can leverage its expertise by identifying anticompetitive state and local regulations and promoting policies that protect consumers and allow for new methods of competition.

³¹ *E.g.*, FTC Staff Comment to the Colorado Public Utilities Commission Concerning Application of Union Taxi Cooperative for Permanent Authority to Open A Tax Service (Nov. 3, 2008), *available at* <http://www.ftc.gov/os/2008/11/V090000cotaxis.pdf>.

ii. Saint Joseph Abbey v. Castille

Another area in which the FTC has been able to use its extensive experience to assess the impact of state regulations on competition is the funeral industry. Just last month, the Court of Appeals for the Fifth Circuit issued a decision in *Saint Joseph Abbey v. Castille* striking down a Louisiana law granting funeral homes the exclusive right to sell caskets.³² In holding that there was no rational relationship between the challenged law and Louisiana's interest in consumer protection, the Fifth Circuit relied heavily on an amicus brief submitted by the FTC that argued that restraints on third-party casket sales deny consumers benefits from competition with independent casket vendors.³³

In 1984, the Commission promulgated the Funeral Industry Practices Rule ("Funeral Rule") in response to widespread use of unfair and deceptive practices among funeral providers. In addition to prohibiting certain specific types of misrepresentations, the Funeral Rule mandates that funeral providers give consumers itemized price lists for funeral goods and services. In particular, the rule requires funeral providers to offer separate pricing for burial services where the customer provides the casket. The Funeral Rule thus facilitates informed consumer choice and promotes competition by ensuring consumers have the information necessary to comparison shop.

³² No. 11-30756, 2013 WL 114957 (5th Cir. Mar. 20, 2013).

³³ Brief for the FTC as Amicus Curiae, *St. Joseph Abbey*, 2013 WL 114957 (5th Cir. Mar. 20, 2013), available at <http://www.ftc.gov/os/2011/12/111227amicusbrief.pdf>.

At issue in *Saint Joseph Abbey* was whether Louisiana could lawfully prohibit retailers not licensed as funeral establishments from selling caskets. The case involved an abbey that for generations made simple wooden caskets to bury its monks. To earn additional income, the Abbey began selling the caskets to the general public. The abbey sold the caskets at prices significantly lower than those offered by funeral homes. Despite the obvious benefits to consumers, the Louisiana Board of Embalmers and Funeral Directors (the “State Board”) ordered the abbey to stop selling caskets because the abbey was not a licensed funeral establishment. The abbey filed for a declaratory judgment challenging the law as an unconstitutional restraint on economic liberty whose sole purpose was to protect the private financial interests of the funeral industry. In assessing whether there was a legitimate rational basis for Louisiana’s law restricting third-party casket sales, the Fifth Circuit tested the State Board’s argument that the law prevents predatory sales by third-party sellers and protects consumers from purchasing caskets not suitable for the intended burial space. The Fifth Circuit also pointed to the FTC’s decision not to expand the Funeral Rule’s scope to cover third-party casket sellers as evidence that the Louisiana law was unnecessary to protect customers from predatory sales. The FTC expressly concluded during a 2008 review of the Funeral Rule that there was no “evidence indicating significant consumer injury by third-party sellers.”³⁴

³⁴ 73 Fed. Reg. 13740, 13745 (Mar. 14, 2008).

The court ultimately held the Louisiana law unconstitutional because it had no other purpose than to protect the funeral industry from competition. The FTC was able to articulate clear and compelling reasons why the law neither facilitated consumer choice nor promoted competition, and made a significant contribution to the Fifth Circuit's understanding of the competitive dynamics in the funeral industry. The case provides yet another example of the FTC efficiently allocating resources by leveraging its expertise to combat anticompetitive state regulation through its advocacy function.

B. Enforcement Actions Involving Public Restraints

The FTC also has seen success in challenging public restraints upon trade through enforcement actions, including the Commission's suit challenging the merger between Phoebe Putney Memorial Hospital ("Phoebe") and Palmyra Medical Center ("Palmyra"). Earlier this year the Commission won a major victory when the Supreme Court unanimously ruled that the state action doctrine does not immunize the hospital merger from scrutiny under the federal antitrust laws. The decision is an important development in U.S. competition policy and the FTC's ability to challenge anticompetitive conduct involving state entities.

As any antitrust student knows, the state action doctrine permits government entities to work outside the federal antitrust laws when they act pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition.³⁵ What

³⁵ *Cnty. Communs. Co. v. Boulder*, 455 U.S. 40, 52 (1982).

has been less clear is what exactly a state must do to trigger the state action doctrine. In clarifying when the doctrine applies, the Supreme Court explained that, “given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state-action immunity is disfavored.’”³⁶ With this in mind, the Court clarified that potentially anticompetitive conduct by state entities is protected only when the state has “foreseen and implicitly endorsed the anticompetitive” behavior being challenged as consistent with the state’s policy goals.³⁷

By clarifying the scope of state action immunity, the Court not only breathed new life into the FTC’s case but, more importantly, strengthened the FTC’s ability to challenge clearly anticompetitive public restraints that may have escaped antitrust review under earlier less restrictive interpretations. The FTC should continue to vigorously enforce the antitrust laws to challenge clearly anticompetitive public restraints to the benefit of consumers.

The FTC’s investments in protecting consumers from public restraints - in the form of its advocacy efforts and law enforcement – are examples of areas where the Commission can generate significant gains for consumers and should remain a priority for the agency for years to come.

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³⁶ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S.Ct. 1003, 1010 (2013) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

³⁷ *Phoebe Putney*, 133 S.Ct. at 1013.

I hope sharing my views on a few of these important topics gives some sense of the issues that I'm interested in, my views with respect to which issues the FTC should prioritize in the years to come, and my approach to antitrust analysis. Thank you for your time.