



Federal Trade Commission

Reflections on Procedure at the Federal Trade Commission

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I. INTRODUCTION

Initially, I intended to discuss with you some of the things I'd learned over the years about trying antitrust cases. After all, I had one of the best mentors in the world in Bill Schwarzer, who went from the McCutchen firm to the federal bench in 1976, where he had a brilliant career as one of the Nation's great federal district judges. I also had the privilege of observing some of the great litigators of our time – Joseph Alioto, Morris Doyle, Chuck Douglas, Bill Cavanaugh, Bill Simon, just to name a few – try antitrust cases. And I've had my own experiences – good and bad – to draw on. But the curriculum here is rich in that regard, and the faculty is superb. So I decided to leave those remarks to others.

Instead, I'd like to voice some radical thoughts today about how we conduct business at the Commission. Because they are radical let me stress that they are just my own thoughts (though they may be shared by at least one of my colleagues, more circumspect than I, with whom I have discussed some of these subjects and who may also comment on them shortly. In

¹ 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 attorney advisors Holly Vedova and Kyle Andeer for their invaluable assistance in preparing this paper.

fact, some of the thoughts I'm going to voice come from that colleague). I voice these thoughts now out of fairness. I don't think it's appropriate for me to spring them on parties or their counsel who are completely unaware of them.

This is not the first time I've questioned the way business has been conducted at the Commission. Our Chairman, Bill Kovacic, has encouraged all of us at the Commission to engage in self-criticism. In that spirit, I have explored several provocative questions at recent conferences held by the Bates-White and NERA. One question is whether the Commission spends too much time investigating matters pre-complaint and arguably over-prepare our cases.² Another question is whether we at the Commission have arguably ceded our judicial role to the federal district courts in some cases in recent years.³

II. Administrative Litigation at the FTC: Developments

There have been some noteworthy recent developments bearing on the second concern. For one thing, in its recent *Whole Foods* decision, the panel decision of the D.C. Court of Appeals adopted our core argument on appeal that the standard the federal district courts are to use in deciding whether to issue a preliminary injunction pending a plenary trial in Part 3 is different than the standard applicable at the plenary trial. In a 13(b) preliminary injunction proceeding, the Commission only needs to demonstrate that there is a substantial ground for

² J. Thomas Rosch, Commissioner, A Peek Inside: One Commissioner's Perspective on the Commission's Role as Prosecutor and Judge, Remarks before the NERA 2008 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico, July 3, 2008, at 9-10, *available at*: <http://www.ftc.gov/speeches/rosch/080703nera.pdf>.

³ *Id.* at 14.

litigation in part 3 and that the injunction is in the public interest.⁴ In a plenary trial, Complaint Counsel must prove its claim by a preponderance of the evidence. Whole Foods has moved for rehearing and rehearing en banc, but its petition concedes that core distinction, and application of the correct standard will help prevent federal district courts from usurping the Commission’s adjudicatory function.

For another thing, the Commission has taken various steps to reform Part 3. Specifically, that adjudicatory process has been criticized as being too protracted.⁵ Statistics bear out those criticisms. The average part 3 proceeding in the last 10 years has lasted 33.5 months from complaint through Commission decision (which may then be appealed to the federal appellate courts). That compares with the average federal court antitrust case, which has lasted 24 months from complaint through district court judgment (which may then be appealed to the federal appellate courts.). But that is only the average.

Some federal courts have demonstrated that these matters can be handled much more quickly. Take arguably one of the most complex antitrust cases in recent memory – *United States v. Microsoft*. Trial began a mere five months after the complaint was filed in that case.

⁴ FTC v. Whole Foods Market, Inc., 533 F.3d 869 (D.C. Cir. 2008); *see also* FTC v. H.J. Heinz Co. 246 F.3d 708, 714 (D.C. Cir. 2001).

⁵ *See, e.g.*, FTC v. Freeman Hosp., 1995-1 Trade Cas. (CCH) 71,037, at 74,893 n.8 (D. Mo. 1995) (“The average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed.”), *aff’d*, 69 F. 3d 260 (8th Cir. 1995); *see also* National Dynamics Corp. v. FTC, 492 F.2d 1333, 1335 (2d Cir. 1974) (remarking upon the “leisurely course typical of FTC proceedings”); J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST ABA 12 (Spring 2006); *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 116 n.168 (1989).

Indeed, merger cases (which don't require jury trials) take even less time from complaint through federal court judgment. For example, in *United States v. Oracle*, Judge Walker issued his opinion approximately 7 months after the complaint was filed. Discovery in that case was global in scope and the parties took nearly a hundred depositions in less than three months. Judge Walker did a masterful job in managing the case from beginning to end. Counsel for the parties routinely seek expedited pre-trial proceedings in preliminary injunction (section 13(b)) proceedings because they want to close the deal as soon as possible. I don't blame counsel for doing that but the lessons to be drawn from those cases is that when the stakeholders involved in the litigation – the parties *and* the judge – are motivated, even the most complicated matters can move quickly.

The disparity between federal courts and administrative litigation exists despite the fact that federal district court dockets are much more substantial than the docket handled by Commission administrative law judges or by the Commission. It is also important to note that antitrust cases in federal district courts may have the added complexity of jury trials. This has led some, including the Antitrust Modernization Commission, to suggest that all Commission merger challenges be tried in the federal district courts instead of in part 3 proceedings.⁶ I disagree with that suggestion. It conflicts with the intent of Congress to entrust antitrust cases, including merger cases, to the Commission as a specialized and expert tribunal best equipped to adjudicate those cases.⁷ Moreover, the Commission believes the part 3 process can be made

⁶ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, , Ch. II.A at 131 (April 2007) *available at*: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁷ *See, e.g.*, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION - A STUDY IN

more expeditious without undercutting that Congressional intent.

To that end, in the *Inova* case the Commission appointed a Commissioner to preside over the administrative hearings to ensure that they moved expeditiously. Perhaps more importantly, the Commission announced that it would render its final order and decision within 90 days after receiving notice of an appeal (assuming no cross appeal).⁸ But that procedure was used pending adoption of Commission rules to govern the scheduling and other management of part 3 proceedings by the Commission's Office of Administrative Law Judges. The Commission and its staff are nearing the end of a multi-year effort to study its rules with an eye towards improving the efficiency and timing of administrative litigation. I expect the Commission will publish amendments to its Part 3 rules for comment in the very near future. I also expect the Commission to address its own timing issues and I for one would like to see us routinely abide to the commitments made in *Inova*. My hope is that those amendments will impose tighter deadlines throughout the administrative process to ensure that our proceedings move much more quickly than they have in the past. There is no reason why we should not be able to move as quickly as a federal district court – or even more quickly given our lighter dockets.

If adopted, these measures will reflect my own convictions that protracted part 3 proceedings have at least three undesirable consequences. First, in merger cases, protracted part 3 proceedings may result in the parties abandoning transactions before their antitrust merits can

ADMINISTRATIVE LAW AND PROCEDURE 22, 98 (1924) (The Commission was “conceived to be a body . . . especially qualified to pass on questions of competition and monopoly.”).

⁸ FTC Press Release “FTC and Virginia Attorney General Seek to Inova Health System Foundation’s Acquisition of Prince William Health System,” (May 9, 2008) *available at*: <<http://www.ftc.gov/opa/2008/05/inova.shtm>>.

be adjudicated. In fact, that argument is sometimes advanced as a reason for federal district courts to deny preliminary injunctive relief in Section 13 (b) proceedings.⁹ Second, in all antitrust cases, protracted Part 3 proceedings may result in substantially increased litigation costs for the Commission and for the clients whose transactions or practices are challenged. More specifically, protracted discovery schedules and pretrial proceedings may be good for the litigators, but they can result in nonessential discovery and motion practice that can be very costly to both the Commission and those clients. Third, I'm not convinced that protracted part 3 proceedings improve the quality of decisions. To the contrary, there is probably some truth to the adage that often "justice delayed is justice denied."

In sum, one way or the other, Part 3 is likely to become an effective and viable adjudicatory process. But I would suggest that the Commission not stop with Part 3 reforms, and the balance of my remarks will focus on other aspects of the Commission's modus operandi that should be re-examined.

III. Part II Proceedings: What is the meaning of "reason to believe"?

A friend and former colleague challenged some of my thoughts about the use of Part 3 and administrative litigation at the Commission. He told me I'd missed the point – that the issue was not time it took to resolve administrative litigation but the perception that the deck was stacked against Respondents in those proceedings. He suggested that I seemed to be saying "trust us to get it right" and that the outside bar didn't trust us to do that. How could we claim to be objective arbiters when we almost always seemed to resolve the cases in favor of Complaint

⁹ See, e.g., *FTC v. Staples*, 970 F.Supp.1066, 1093 (D.D.C. 1997) (the court noted that its decision to grant the Commission's motion for a preliminary injunction would "most likely kill the merger.").

Counsel. My first reaction was “how dare you accuse us of being unfair to Respondents?” But then I got to thinking about whether he was right about the perception of the outside bar, and more importantly, about whether the perception was reality. I began to ponder whether we at the Commission were handling competition cases in a fashion that was fundamentally wrong and why that might be so. It is those thoughts that I voice today.

Whether you are the Assistant Attorney General of the Antitrust Division or a Commissioner at the Federal Trade Commission, a critical question is your standard for issuing a complaint. I know many of you in the audience may hold out hopes for one of these positions in the new administration next year. I would urge you to think about this question – and make your standard clear to the staff. For those of us at the Commission, the starting point is the FTC Act. A Commissioner voting for a complaint must find that he or she has a “reason to believe” that the potential Respondent is engaged in practices that violate the Act *and* “a proceeding by [the Commission] . . . would be to the interest of the public.”¹⁰ The FTC Act and the Congressional record do not shed any more light on the meaning of “reason to believe.” The case law sheds precious little light on that subject too.

Respondents have periodically sought to dismiss a complaint on the grounds that the Commission lacked a “reason to believe” that there was a violation of the FTC Act at the time it issued the complaint.¹¹ The courts have refused to entertain these challenges. For example, nearly thirty years ago, the Supreme Court in *Standard Oil* held that “the Commission’s issuance

¹⁰ 15 U.S.C. 45(b).

¹¹ See, e.g., In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., Andrx Corp., Docket No. 9293, 2000 FTC LEXIS 137 (2000); In the matter of Boise Cascade Corp., Docket No. 9133, 97 F.T.C. 246 (1981); Exxon Corp., 83 F.T.C. 1759-60 (1974).

of a complaint . . . is not “final agency action” under § 10 (c) of the APA [and] it is not judicially reviewable before administrative adjudication concludes.”¹² The Supreme Court in *Standard Oil* sounded a cautionary note, however, albeit in dicta. In closing, the Court noted in a footnote that it did “not encourage the issuance of complaints by the Commission without a conscientious compliance with the “reason to believe” obligation. The adjudicatory proceedings which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation. Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to these burdens.”¹³ One should recognize, however, that the Commission had a much busier litigation docket at that time than it does today.

What is the appropriate standard then? That question is left to the discretion of each individual commissioner but let me offer a few thoughts. Obviously the Commission must meet the same minimum standard as other plaintiffs and satisfy the plausibility threshold articulated by the Supreme Court in *Twombly*.¹⁴ But I also think “reason to believe” is something more than simple plausibility.

Should a Commissioner issue a complaint only if he or she has concluded that there is a very high likelihood (say, about 90%) that the staff would prevail in litigation. One could argue that such a standard has some unfortunate consequences. First, requiring that degree of certitude

¹² FTC v. Standard Oil Co. of California, 449 U.S. 232, 246 (1980).

¹³ *Id.* at 247, n.14.

¹⁴ Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

means that very few complaints are issued. Professors Baker and Shapiro have criticized the Justice Department for not bringing enough cases.¹⁵ The analysis they used is subject to equal criticism (relying as it did in part on the views of anonymous members of the Washington D.C. antitrust bar), and the Commission came out relatively unscathed. But that is not my point. My point is that when one uses a 90% threshold in deciding whether to litigate cases, very few complaints are going to be issued. And that has been what's happened since I've been here. We've litigated only a handful of transactions or practices each year during that time.¹⁶ Our litigation docket is minuscule compared with the dockets of the federal district courts before whom I used to appear. And, as I say, those judges had substantial civil and criminal dockets to administer, and they had to cope with juries in most of the antitrust cases they handled. Frankly, taking these factors into account, the time it takes us to resolve litigated cases is an embarrassment.

Second, a very high "reason to believe" standard means that staff's pre-complaint (part 2) investigations sometimes take too long and they are neither fair nor transparent. Believing that Commissioners will only vote out antitrust complaints if they conclude that Complaint Counsel are almost certain to prevail (or Respondents almost certain to lose), the staff only brings cases

¹⁵ See Jonathan B. Baker and Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST ABA 29 (Summer, 2008).

¹⁶ In 2007, the Commission filed and litigated three lawsuits. See *FTC v. Foster et. al.*, 2007-1 TRADE CAS. (CCH) ¶ 75,725 (D.N.M. 2007); *FTC v. Equitable Res., Inc.*, 512 F.Supp. 2d 361 (W.D. Pa. 2007); *FTC v. Whole Foods Market, Inc.*, 505 F. Supp. 2d 1 (D.D.C. 2007). So far in 2008, the Commission has filed three lawsuits. See *FTC v. Cephalon, Inc.*, 551 F.Supp. 2d 21 (D.D.C. 2008); *FTC v. Inova Health System Foundation and Prince William Health System*, Civil Action No. 1:08CV460-CMH/JFA, File No.: 061 0166 (E.D.Va. 2008); In the Matter of Polypore International, Inc., Docket No. 9327 (Complaint filed Sept. 10, 2008).

to the Commission table after they have conducted a pre-complaint investigation in which they have left no stone unturned. Depending on the staff attorneys involved, it may take a very long time to turn over all of the stones. This is not only true in non-merger cases. As long as I've had anything to do with the merger practice, there have been widespread and vociferous complaints about the burden and expense involved in responding to pre-complaint second requests.

Moreover, the pre-complaint investigation is not a level playing field. Staff can and do engage in "one-way" discovery during this period; Respondents can engage in no discovery until after a complaint is issued. This "one way" discovery conducted by the staff, particularly when coupled with the "leave no stone unturned" approach, can be enormously burdensome and expensive for Respondents. Finally, if and to the extent that the staff's pre-complaint discovery consists of investigational hearings or CIDs involving third parties, it is not transparent.¹⁷ Respondent's counsel are not present or involved, as they are in the post-complaint discovery process. And, the more demanding the "reason to believe" standard, the greater the pressure to conduct pre-complaint investigations this way.

Third, application of a very high standard also induces staff to present recommendations to the Commission that are primarily based on complex economic analysis rather than on the stories about competitive effects that are told by non-economic evidence. That's entirely understandable. After all, as to mergers, the Commission has seemingly provided staff with a cookbook in the form of the Merger Guidelines, and the recipes in that cookbook seem to call first and foremost for critical loss or simulation studies based on economic analysis. In presenting their recommendations to a Commissioner who is likely to vote against a complaint

¹⁷ The investigatory process is sometimes a "black box" for the Commission too.

recommendation unless there is a very high degree of certitude that Complaint Counsel is likely to prevail, it is natural that the staff would focus first and foremost on the recipes in the Commission's own cookbook. The problem is that, as the experienced trial lawyers told us at the hearings on Unilateral Effects, while those economic analyses have value, what matters the most to lay trial judges considering antitrust cases (and what they most clearly understand) is the competitive effects story told by non-economic evidence. The decision in the *Staples* case seems to bear out this observation.¹⁸

Finally, by far the most important consequence of the use of that very high "reason to believe" standard is that it has arguably skewed our decision-making process at the Commission. Let me put it to you bluntly. Do you believe that if the Commission has ten cases on its docket which are voted out on the premise that there's a 60% chance Complaint Counsel will prevail, Complaint Counsel is likely to prevail with the same frequency that it will likely prevail if the Commission has two cases per year on its litigation docket which are voted out on the premise that there is a 90% prospect that Complaint Counsel will prevail? (That's a rhetorical question.) Putting a sharper point on it, isn't it probable that in the latter scenario the decision to issue the Complaint will morph into the dispositive decision respecting liability? (That's another rhetorical question.)

IV. THOUGHTS

Let me turn now to my radical thoughts. What would happen if a 60% probability were

¹⁸ See The Enforcer Tapes: Colorado, Comments, Questions and Answers, Charles James and Timothy J. Muris, ABA Section of Antitrust Law Post Annual Meeting, Colorado Springs, August 9, 2001, at 3, the AntitrustSource, Nov. 2001, *available at*: <http://www.abanet.org/antitrust/at-source/01/11/colorado.pdf> (then Chairman Muris stating that while Judge Hogan regarded the extensive econometric in *Staples* "as a wash.").

deemed a sufficient reason to believe to vote out an antitrust complaint? What would be the consequences? The first consequence is that there would almost certainly be a hue and cry in the bar (and the business community). It would be said that the Commission was opening the floodgates to questionable and costly antitrust litigation. But think about it further.

To begin with, we would still have to be mindful of the Supreme Court's admonition in *Standard Oil* that we have "a well-grounded reason that unlawful conduct has occurred" before issuing a complaint.¹⁹

However, it might encourage the staff not to "front end load" their investigations, including their second requests, with the time, burden and expense that that takes and the unfairness and the lack of transparency that investigations conducted that may entail. It might incentivize the staff instead to make complaint recommendations as soon as the evidence supports a conclusion that liability is probable and to conduct discovery for the most part after a complaint has issued, like litigants in private antitrust cases in the federal courts currently do. And, if the objectionable features of "front-end loading" continued, it could motivate the Bureau of Competition front office and/or the Commission to reform the part 2 investigatory process, and indeed, the second request process, accordingly. In fact, the Bureau of Competition front office is already imposing investigatory deadlines that are far shorter than those that had heretofore existed.

Additionally, it might encourage the staff to focus first and foremost not on what staff thinks the Commission wants to see in the staff's complaint recommendation, based on the Merger Guidelines, but to focus instead on the story of competitive effects that is told by the

¹⁹ Standard Oil, 449 U.S. 247 n.14.

evidence. Beyond that, it could encourage the Commission to focus on whether it is probable that that story will support liability since that, according to the trial lawyers at the Unilateral Effects hearing is what counts in the end.

Furthermore, it would almost surely increase the number of complaints issued. At first blush, that may seem terrible to the antitrust bar and the business community because post-complaint discovery and trials (even judicial trials) in antitrust cases are burdensome and expensive. But if the trade-off for that burden and expense is the elimination of much of the part 2 pre-complaint burden and expense, as well as the unfairness and lack of transparency that attend the pre-complaint lengthy investigational process, the burden and expense may well be reduced.

Finally, it might increase the frequency of decisions in favor of Respondents. To be sure, that is no certainty. A friend of mine who was a Commission ALJ many years ago – and one of the best and brightest but most acerbic litigators I ever knew – once confided in me that whatever shortcomings existed in the staff’s trial expertise and experience were often trumped by the Respondent’s admissions and documents. But even if the perception of unfairness does not dissipate, at least we will have the comfort of knowing that the perception is not reality.

I know these thoughts are provocative. They are intended to be. More specifically, they are intended to provoke debate about what the “reason to believe” standard should be and what consequences may flow from that. I hope you will participate in that debate.