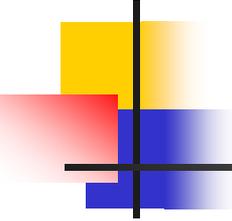


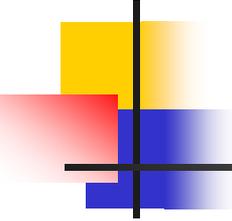
The Application of Section 5 of the Federal Trade Commission Act

William E. Kovacic
U.S. Federal Trade Commission
ABA Fall Forum, Washington, D.C.
November 12, 2009



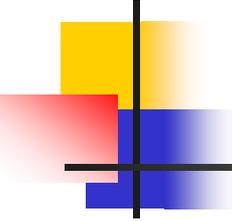
Overview

- The Case for Applying Section 5
- Cautions
- Next Steps
- Caveat: Personal Views
- See Kovacic & Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, Antitrust L.J. (Forthcoming 2009)



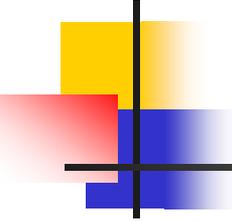
The Case for Section 5

- Legislative Aims: Theory of Section 5
- Theory Meets Practice
- Reconsideration



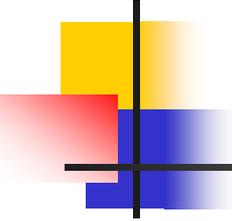
“Unfair Methods of Competition”: Legislative Aims in 1914

- Install Upgrades to Antitrust System
 - Administrative process and data collection
- Address “Incipient” Infringements
- Counteract Rigidity of Courts
- Elastic Charter and Limited Remedies
- More Responsive to Congress



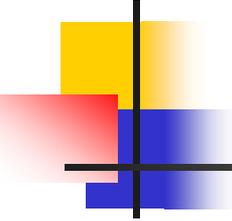
Division of Tasks: Department of Justice and FTC

- Justice Department
 - Criminal prosecution and Section 2 cases
- FTC
 - Non-per se violations
- Compare: 1969 ABA Report
 - DOJ: clear cut violations
 - FTC: “unsettled areas of the law”



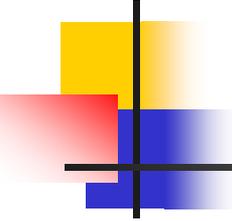
Inherent Tensions and Difficulties

- Obtaining Deference from Courts
- Extensions of Doctrine: Political Hazards
- Clayton Act & §5: Incipient Incipiency?
- Attaining Deference
 - Integration of economics/research tools
 - Administrative process
 - Appointments



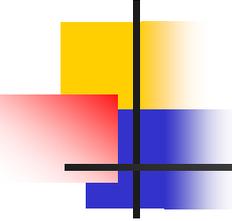
Theory Meets Practice: Limited Significance of Section 5

- No Federal Court Findings of Liability Premised Only on §5 since 1968
- No Supreme Court Endorsement of FTC Views in a Dominant Firm Conduct Case
- Consider: Name Ten Distinctive FTC Contributions to Antitrust Jurisprudence (Settlements Excluded)



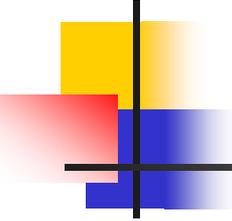
What Happened?

- Sherman Act Expansion: 1940-1970
 - Example: Section 2 – *Alcoa* to *Berkey*
 - Example: No-Fault proposals in 1970s
- Clayton Act Expansion: 1950-1972
 - Example: Merger control
 - See also: *Kodak v. FTC* (S. Ct. 1927) (§ 5 not available to close § 7 assets loophole)



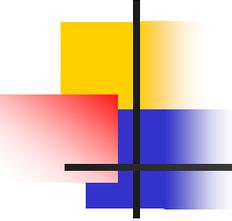
Effect on Section 5

- Some Broad Statements of Authority
 - Example: *Sperry & Hutchinson* (1972)
- FTC Operates at Fringe of Expanding System



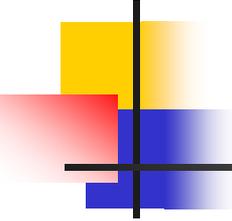
FTC v. Brown Shoe Co. (1968)

- Exclusive Dealing: 766 out of 70,000
- Contracts: Terminable at Will by Both
- Strong Influence of *Brown Shoe* (1962)
 - “Trend toward vertical integration”
 - “Of the approximately 1000 shoe manufacturers in 1959, the top 70 manufacturers accounted for approximately 54 percent of shoe production in that year.”



FTC's Conception of §5 Goals

- *Brown Shoe*, 62 F.T.C. 679, 720 (1963)
 - “[W]e must take account of the fact that historically one of the purposes of the antitrust laws, over and above purely economic considerations, has been to preserve ‘ . . . an organization of industry in small units which can effectively compete with each other ’ ”



Reconsideration

- Retrenchment of Sherman and Clayton Acts: 1975 to Present
 - Dominant firm conduct, mergers, vertical restraints
 - Clayton Act incipency largely vanishes
- Chicago/Harvard Double Helix
 - Substantive and institutional concerns

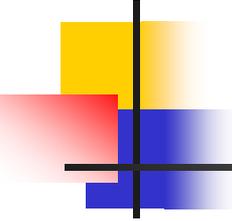
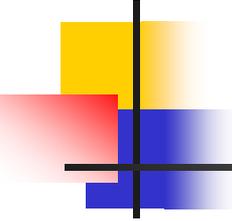


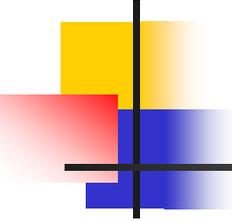
Illustration: Dominant Firm Conduct

- Last Government S. Ct. Case: *Otter Tail*
- Concerns with Private Rights
- Reassessment of Institutional Comparative Advantage
- Shared Views of Chicago and Harvard
 - Examples: *Trinko* and *Credit Suisse*



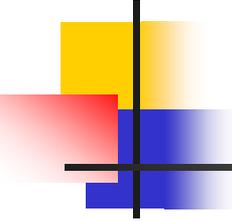
Example: Concerted Action

- Concerns for Private Rights and Excessive Deterrence
- Example: *Twombly*



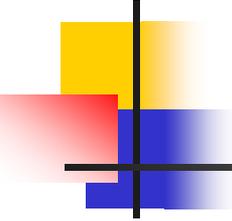
Implications for Section 5

- No (or Fewer) Collateral Effects
- More Trusted Plaintiff
- Counteract Undue Curtailment of Antitrust Doctrine



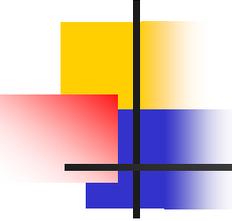
Cautions

- Lack of FTC Success in Courts
- Possibilities for Political Backlash
- Need for Principled Standards



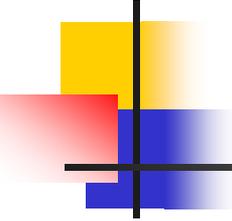
In Litigation, Is Section 5's Elasticity a Mirage?

- No Litigated Victories Since the 1960s
- Section 5 in Practice
 - *OAG*
 - *Ethyl*
 - *Boise Cascade*
 - *Abbott Laboratories*
 - And the Others: *Exxon, Kellogg*



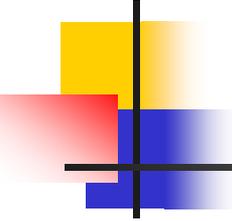
Judicial Reluctance: Reasons

- FTC Fails to State Compelling Framework or Limiting Principles
 - Section 5 as cure all
 - *S&H* fallback
- Judicial Doubts About Foundation
- *Compare: NData* (UMC? UDAP, Both?)



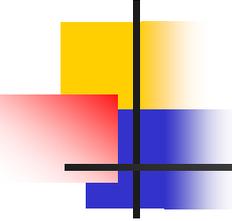
Political Consequences

- From Congress or the White House
- Examples of Backlash
 - *Cement Institute*
 - *Kellogg and Exxon*



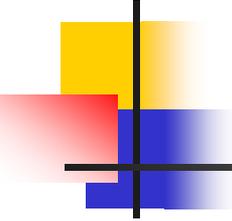
Concern About Standards

- Extensions of Sherman and Clayton Act Concepts?
- Extensions Based on Demonstrable Effects?
- Incorporation of Extrinsic Norms?
 - Which?



Next Steps

- Policy Statement, Guidelines or Rules:
The 2008 Proceedings
- How Does a §5 Case Differ from a
Stand-Alone Sherman or Clayton Case?
 - Doctrinal gaps: invitations to collude
 - Institutional considerations



Concluding Thoughts

- Crucial Rationale for FTC's Creation
- Conceptual Attractions
- Problems in Implementation
 - Why will next iterations be better?