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The Emerging Antitrust Philosophy of FTC Commissioner Rosch

BY JONATHAN GLEKLEN

WHEN PRESIDENT GEORGE W. BUSH nominated J. Thomas Rosch to fill a seat on the Federal Trade Commission in 2005, it appeared that the seat was going to a member of the traditional antitrust establishment. Rosch, a Republican, had led both the ABA Antitrust Section and the California State Bar's Antitrust and Trade Regulation Section.[1] After serving as the Director of the FTC's Bureau of Consumer Protection in the 1970s, Rosch was a partner in two prominent Northern California law firms, where he had defended an airline, an automaker, an NFL team, and a microprocessor manufacturer in antitrust lawsuits.[2]

Nothing in this background suggested that after Senate confirmation Commissioner Rosch would push for the most aggressive expansion of antitrust enforcement at the FTC in decades. While many of Commissioner Rosch's ideas have not gained the support of a majority of current Commissioners, he is now the most outspoken in seeking to broaden the application of Section 5 of the FTC Act and Section 7 of the Clayton Act.

Commissioner Rosch's term runs through December 2012, and his views are only likely to become more important as President Obama has the opportunity to name a new Chairman and fill a vacant Democratic seat on the Commission.

Commissioner Rosch's emerging antitrust philosophy as revealed by his Commission statements and speeches demonstrates that after some tentative initial steps, he has become an advocate for an unprecedented expansion of Section 5. That expansive approach to Section 5 has recently been coupled with a push to broaden the reach of Section 7 substantially beyond existing precedent.

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Ovation and Commissioner Rosch's View of the Scope of Section 7

In mid-December of last year, the FTC filed a complaint in federal district court challenging Ovation Pharmaceuticals, Inc.'s consummated acquisition from Abbott Laboratories of NeoProfen, a drug used to treat PDA, a serious congenital heart defect in newborns.[3] The FTC's complaint alleges that Ovation's acquisition (which was not reportable under the HSR Act) was a merger to monopoly in a market for drugs used to treat PDA, and that as a result of the acquisition Ovation raised prices on its own drug, Indocin, by nearly 1,300 percent.

If, as the FTC alleges, NeoProfen and Indocin are substitutes and the only two drugs approved to treat PDA, the challenge fits well within the contours of traditional merger analysis. Commissioner Rosch's concurring statement, however, is far more interesting.[4] Commissioner Rosch supported the complaint challenge to the acquisition of NeoProfen, but argued that the Commission also should have challenged Ovation's acquisition of Indocin, the first PDA drug on the market.[5]

The acquisition of Indocin did not "lessen competition" or "tend to create a monopoly" in the usual sense. Ovation was not in the PDA market at the time of that first acquisition and had no drugs for PDA in development, so the merger was not a horizontal merger involving actual or potential competition. Nor was Ovation in any vertically related market (as a customer of PDA drugs or as a supplier of ingredients used in PDA drugs), so traditional vertical merger analysis would not apply either. Rather, Commissioner Rosch believed that Section 7 was implicated because Ovation raised the price of Indocin substantially after acquiring the drug from Merck. Believing that Merck likely kept the price of Indocin below monopoly levels because of reputational concerns, he concluded that Section 7 was implicated because "Merck's sale of Indocin to Ovation had the effect of enabling Ovation to exercise monopoly power in its pricing of Indocin, which Merck could not profitably do prior to the transaction."[6]

In support of the theory, Commissioner Rosch pointed to old conglomerate merger cases:

> It could be seen as a variant of a number of Supreme Court and lower federal court cases that have held that a transaction that may result in a substantial lessening of competition or create a monopoly due to considerations neither horizontal or vertical in nature will violate Section 7. *See, e.g.*, *FTC v. Procter & Gamble*, 386 U.S. 568, 577 (1967) ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."); *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965) (acquisition of firm with a monopoly by a firm that did not compete in the monopoly market held to violate Section 7 when the acquiring firm protected the monopoly power it acquired by purchasing a new entrant that the acquired firm would not have purchased).[7]

While these cases have been discredited and widely criticized,[8] Commissioner Rosch cited the Areeda and Hoven-

kamp treatise for the proposition that this "precedent . . . has not been overruled."[9]

Commissioner Rosch's approach is substantially out of step with the consensus that has developed regarding the scope of Section 7 over the last forty years. Indeed, even the discredited old conglomerate merger cases generally involved structural concerns, such as entrenching a dominant firm (as was the case in *Procter & Gamble*) or potential competition (as in *Ekco Products*). Ovation, in contrast, involved only the acquisition of a product by a firm that would choose to exercise its lawfully-acquired monopoly power.

It seems difficult to fit Ovation's acquisition of Indocin within even the broad language of Section 7. The acquisition did not "lessen competition" or "create a monopoly" because, as the only FDA-approved drug, Indocin, faced no competition and already had a monopoly. The limits of Commissioner Rosch's approach are also far from clear. Would the theory apply only where structural factors (such as Merck's ownership of other drugs and thus its reputational concerns) limit pricing, or could the theory apply to the acquisition of products from lawful monopolists that are simply incompetent at exercising their monopoly power?

Commissioner Rosch argued that his theory is "similar" to the Merger Guidelines' approach to the acquisition of a "maverick" firm, which recognizes that an acquisition may be anticompetitive where it "would eliminate the pretransaction constraint."[10] But the acquisition of a maverick changes the competitive dynamics of a market. Even if, as Commissioner Rosch believes, Merck's sale of Indocin transferred the asset to a firm that lacked Merck's reputational constraints on its pricing, the sale did not "substantially lessen competition" between Merck and another firm in a way that permitted a price increase. As one commentator has noted, Merck could have avoided the reputational constraints on pricing by putting Indocin in the hands of a subsidiary operating under a different name or by dropping the products whose reputation would have been harmed had it raised the price of Indocin.[11] Surely none of these steps would have raised antitrust concerns.

Commissioner Rosch's proposed expansion of Section 7 liability is unprecedented. It remains to be seen whether the courts will accept it if he garners a majority of Commissioners in an appropriate case to support his approach.

Approach to Section 5

Background on Section 5. The FTC is not empowered to sue directly under Sections 1 or 2 of the Sherman Act. Rather, the Commission challenges anticompetitive conduct (other than mergers and price discrimination) under Section 5 of the FTC Act, which declares "unfair methods of competition . . . unlawful."[12] The Wheeler-Lea Amendments to the FTC Act expanded the agency's Section 5 jurisdiction to include "unfair or deceptive acts or practices."[13]

Conduct that violates the Sherman Act will also violate Section 5.[14] The Supreme Court has also held that Section 5 reaches conduct that "does not infringe either the letter or the spirit of the antitrust laws."[15] Notwithstanding this broad language, the FTC's efforts to extend Section 5 beyond the scope of the Sherman Act have met with mixed success.

Courts generally have not hesitated to apply Section 5 in cases that were similar to traditional Sherman Act cases but did not fall precisely within the metes and bounds of Sherman Act precedent. For example, the Supreme Court upheld Section 5 liability in a case that while not strictly a tying arrangement, involved conduct that the Court concluded had the "central competitive characteristic" of a tying agreement.[16] Courts have also upheld the application of Section 5 to address "incipient" violations of the Sherman Act, where conduct has not yet been shown to have anticompetitive effects but "conflict[s] with the basic policies of the Sherman and Clayton Acts."[17]

However, efforts to extend Section 5 to conduct that clearly would be permissible under the Sherman Act have met with less success. In the *Official Airline Guides* case, the Second Circuit rejected an FTC Section 5 challenge to a monopolist's arbitrary unilateral refusal to deal with a firm that was not a competitor, holding that "enforcement of the FTC's order would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[18] In *Boise Cascade*, the Ninth Circuit rejected an FTC attack on consciously parallel behavior in an oligopolistic industry where there was no evidence of actual collusion, because the FTC's approach to Section 5 would "blur the distinction between guilty and innocent commercial behavior."[19] And in *Ethyl Corp.*, another Second Circuit case, the court held that unilaterally adopted policies that the FTC viewed as "price signaling" did not violate Section 5 because, *inter alia*, the FTC's approach to the FTC Act failed "to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable," thus opening the door to "arbitrary or capricious administration of § 5."[20]

In response to these losses in court, in the early 1980s the FTC stepped back from its push to expand Section 5 beyond conduct that offended "the 'basic policies' of the antitrust laws," concluding that Section 5 should not be "used to reshape those policies when they have been clearly expressed and circumscribed."[21] Until recently, the FTC's only use of Section 5 in conduct cases had been in cases involving an "invitation to collude," in which there was no violation of Section 1 because no agreement had been reached.[22]

Initial Steps to Reinvigorate Section 5. During his Senate confirmation hearing in November 2005, when asked whether the Commission should be given additional statutory authority to attack "price gouging," Commissioner Rosch endorsed the more limited view of the role of Section 5 adopted by appellate courts in the 1980s:

> [D]espite the fact that the Supreme Court has held that Section 5 of the FTC Act is broader than the Sherman Act, lower courts have expressed a view that it is in fact co-exten-

> sive with the Sherman Act. If and to the extent that this Committee and the Senate and the Congress believe that the FTC should go beyond the Sherman Act in Section 5, then I believe that that power must come from the Congress.[23]

In a July 2006 speech, however, Commissioner Rosch addressed the Commission's use of Section 5 in the *Valassis* invitation to collude case that it had brought earlier in the year, and he began to "flesh out" what he called his "tentative—very tentative, I should stress—thinking about when a stand-alone unfair methods of competition claim might be brought."[24] While noting that the Commission had not used Section 5 to challenge conduct that would not also violate the Sherman Act in many years, Commissioner Rosch rejected the view that Section 5's prohibition of unfair methods of competition was a "dead letter."[25]

After reviewing the broad language in the Supreme Court decisions interpreting Section 5, Commissioner Rosch sought to put the appellate decisions limiting Section 5 in context. He rejected as "too cramped" prior FTC efforts that rejected *Official Airline Guides* as wrongly decided and that characterized the reach of *Ethyl* as "very narrow," concluding that those cases "articulate important *limiting principles* for unfair methods of competition analysis."[26] Rather, he read the Second Circuit cases as properly requiring "proof of anticompetitive *purpose* (and the lack of legitimate business justification)," and the Ninth Circuit's *Boise Cascade* decision as requiring "proof of actual or incipient anticompetitive *effect*."[27] He also read the cases as allowing a role for standalone Section 5 theories only when the conduct at issue was not "plainly governed by the Sherman Act."[28] And raising a theme that would be repeated in the Commission's *Negotiated Data Solutions* decision, Commissioner Rosch emphasized that the risks of Section 5 enforcement were limited and unlikely to inflict what he called "collateral damage," because a finding of a Section 5 violation would not have collateral estoppel or prima facie evidentiary effect in follow-on private treble damages antitrust actions and would not provide "a basis, even theoretically, for follow-on federal or state criminal actions based on the Sherman Act or its state law equivalents."[29]

Less than a month after Commissioner Rosch's speech, the Commission issued its decision in the *Rambus* standard-setting case.[30] The Commission's unanimous decision, written by Commissioner Pamela Jones Harbour, relied solely on Sherman Act Section 2 standards to find a violation of Section 5.[31] Commissioner Jon Leibowitz issued a concurring opinion, arguing that Rambus's conduct "might well have been challenged solely as a pure Section 5 violation," and "writ[ing] separately to discuss and reemphasize the broad reach and unique role of Section 5."[32] The Leibowitz concurrence rejected what he characterized as "cramped or confused views" that saw Section 5 as generally limited to violations of the Sherman or Clayton Acts, concluding that "a review of Section 5's legislative history, statutory language, and Supreme Court interpretations reveals a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize."[33] Commissioner Leibowitz explained that he hoped his twenty-page detailed exegesis of Section 5 legislative history and precedent would "encourage the Commission (and its staff) to develop further and employ more fully this critical and unique aspect of our statutory mandate" and "use all the arrows in [its] jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers."[34]

Curiously, given his interest in Section 5, Commissioner Rosch did not join the concurrence.

The* Negotiated Data Solutions *Decision. Things remained quiet on the Section 5 front for more than a year, with no cases or speeches addressing standalone Section 5 liability. That changed with the Commission's January 2008 decision in *Negotiated Data Solutions*.[35]

Negotiated Data Solutions was a standard-setting patent holdup case, but it is quite different from the FTC's prior actions against Dell, Unocal, and Rambus. Those three cases proceeded on a monopolization theory, requiring that both market power and anticompetitive conduct be demonstrated. In the earlier *Dell* and *Unocal* consent decrees, and in the *Rambus* decision, the Commission found that the respondents had engaged in deceptive conduct toward the standard-setting organization (SSO) in an attempt to induce the SSO to adopt the respondent's patented technology as part of the standard, enabling each respondent to obtain monopoly power anticompetitively.[36]

Negotiated Data Solutions was different. Negotiated Data Solutions (N-Data) was the successor in interest to certain patents (owned by National Semiconductor) claiming technology that had been incorporated in the IEEE's Fast Ethernet standard. The FTC claimed that N-Data had breached National Semiconductor's promise to license the patents for $1,000 to any firm that implemented the standard. Thus, there was no claim that N-Data (or its predecessors) had acquired or maintained its alleged monopoly power anticompetitively, only that N-Data had exercised that power in a way that National Semiconductor had promised it would not.

This type of claim does not fit comfortably within Section 2, which requires the anticompetitive acquisition or maintenance of monopoly power (or a dangerous probability of obtaining such power by acting anticompetitively).[37] Without directly explaining why there was no Section 2 violation, the FTC majority of Commissioners Rosch, Leibowitz, and Harbour proceeded on a pure Section 5 theory, not linked to a violation of Section 2.[38] The majority concluded that N-Data's conduct constituted both an "unfair method of competition" and an "unfair act or practice" (a provision previously applied only in consumer protection matters) in violation of Section 5. Commission Chairman Deborah Majoras issued a vigorous dissent, arguing that the Commission was improperly expanding Section 5 liability and that it had not "not identified a meaningful limiting

principle that indicates when an action—taken in the standard-setting context or otherwise—will be considered an 'unfair method of competition.'"[39] She similarly opposed expansion of liability for an "unfair act or practice" because the victims—if there were any—were large computer companies, not individuals or small businesses that lacked the ability to protect themselves.[40]

While the majority opinion in *Negotiated Data* does little to explain why a Section 5 violation was found or to identify limiting principles for its application, Commissioner Rosch has offered a somewhat more comprehensive analysis in a number of speeches after the decision. First, he has made clear that he did not believe that the challenged conduct supported a Section 2 claim because "[t]he conduct in the case—the breach of the licensing commitment—did not cause N-Data to either acquire or maintain its monopoly power. The monopoly power exploited by N-Data was conferred by the standard setting organization and the subsequent marketplace adoption of the standard."[41] Even though the conduct did not fit within the Sherman Act, Commissioner Rosch believed that it was critical that the FTC attack it. Quoting the Commission's Analysis to Aid Public Comment, he said:

> Even if N-Data's actions did not constitute a violation of the Sherman Act, they threatened to raise prices for an entire industry and to subvert the IEEE decisional process in a manner that could cast doubt on the viability of developing standards at the IEEE and elsewhere. The threatened or actual effects of N-Data's conduct have been to increase the cost of practicing the IEEE standards, and potentially to reduce output of products incorporating the standards.[42]

Commissioner Rosch explained his view that the conduct fell squarely within the proper scope of a standalone Section 5 claim based on the principles he had first set out in his July 2006 speech. He accepted the limiting principles adopted by the appellate decisions limiting Section 5, but believed that N-Data's conduct satisfied the requirement of *Official Airline Guides* that conduct be "coercive" because the conduct was "inherently 'coercive' and 'oppressive'" given the "standard setting context in which the conduct occurred" because "those practicing the Fast Ethernet standard satisfied this requirement because the market lacked any practical alternatives."[43] He also reiterated his view that a Section 5 violation required an actual adverse effect on competition, concluding "that requirement was satisfied here, given the importance of the breached commitment to the *ex ante* competition that precedes the adoption of a standard like the standard at issue in that case."[44]

While a helpful clarification, Commissioner Rosch's explanation is less than completely satisfying. How was N-Data's conduct any more "oppressive" or "coercive" than any other breach of contract by a firm? Commissioner Rosch notes his belief that the firms implementing the Fast Ethernet standard "lacked any practical alternatives," but as Chairman Majoras writes in her dissent, "[p]arties often enter into contractual commitments involving asset-specific investments, creating the potential for opportunism."[45] It would likely not be much easier for Dell to vacate its leased manufacturing facilities than it would be to redesign its Fast Ethernet networking equipment, but would a landlord's breach of a lease agreement also be an "unfair method of competition"? And while it is helpful to know that Commissioner Rosch believes that there must be an adverse effect on competition, it is far from clear where he believes that such an effect could be found in the *Negotiated Data* case. Whose competition was harmed? Not the competition between firms proposing technology for inclusion in the IEEE standard—there was no evidence of alternatives to National Semiconductor's technology that might have been selected. Nor was there any evidence of harm to competition among the firms that were N-Data's licensees (or that refused to take a license). Unlike, for example, an exclusive license that foreclosed some competitors in the network equipment business and advantaged others, it is difficult to see why there should be any effect on competition at the level of N-Data's customers, unless N-Data raising the prices paid by all competitors at that level constitutes "harm to competition."

New Applications of Section 5

Although the FTC has not brought any standalone Section 5 cases since *Negotiated Data Solutions*, in two speeches Commissioner Rosch has suggested applications of Section 5 that would mark an even greater departure from Sherman Act principles.

A Section 5 Attack on "Patent Trolls." Commissioner Rosch took on the subject of so-called "patent trolls" in a May 2008 speech, suggesting that he thought there may be a role for Section 5 to play in cases of patent "hold up" outside the standard-setting process.[46] He offered the following example:

> Suppose a firm acquires one or more patents from a third party who never sought to license or otherwise assert its patents in a market. The new patent holder never seeks to develop, license, market or otherwise invest in the technologies covered by the patents. Instead, it simply puts them in its pocket and waits for others to develop products that may infringe on the acquired patents. Eventually the patent holder identifies a feature or component of the product that it believes infringe on its patents and it seeks to assert the patents against all firms manufacturing the product. The patent holder enjoys some additional leverage because redesign of the product to avoid the patent would be expensive and time consuming. Thus, the patent holder can engage in patent "hold up."[47]

Commissioner Rosch expressed the view that the firm's acquisition of the patents might violate Section 2 as monopolization of a market for the intellectual property required to manufacture certain products.[48] It is hard to see how this might be the case, however, as the antitrust laws are indifferent when whatever monopoly power the patents convey merely changes hands but is not increased. As Judge Posner has described:

> If the invention is patentable, it does not matter from an antitrust standpoint what skullduggery the defendant may have used to get the patent issued or transferred to him. The power over price that patent rights confer is lawful, and is no greater than it otherwise would be just because the person exercising the rights is not the one entitled by law to do so.[49]

Commissioner Rosch recognized, however, that the Second Circuit's decision in *SCM Corp. v. Xerox Corp.*,[50] could stand as a barrier to an antitrust claim because it rejected antitrust liability for patent acquisitions where the market that would be foreclosed by the acquisition did not exist at the time of the acquisition. But even if there could be no Sherman Act claim, Commissioner Rosch believed that there could be a role for Section 5, which would not be limited by *SCM*'s interpretation of the Sherman Act.[51]

But why should Section 5 apply to this fact pattern? Citing *Ethyl*, Commissioner Rosch thought that a Section 5 claim would depend on "evidence of 'oppressiveness' in the form of an 'anticompetitive intent' or the 'absence of a legitimate business purpose.'"[52] There is, however, nothing anticompetitive about using patent rights to extract a royalty, and the exercise of valid patent rights does not offend the antitrust laws.[53] Demanding a high royalty rate does not offend antitrust principles, whether or not a patent is involved.[54] Applying Section 5 to conduct that the Supreme Court has expressly held to be not only permitted, but also encouraged under the antitrust laws, would run directly afoul of the FTC's holding in *General Foods* that Section 5 should not be used to "reshape" the policies of the antitrust laws "when they have been clearly expressed."[55]

A Section 5 Attack on Specialty Hospitals? Commissioner Rosch's most extreme proposal for the application of Section 5 came in a November 2008 speech.[56] In the speech he discussed the issue of physician-owned specialty hospitals, hospitals that "offer a select set of specialized treatments instead of the broader selection of acute care offered at full service hospitals," and that as a result "leave the lion's share of the most costly obligations, such as emergency care and uninsured care/charity care, to the full service hospitals."[57] After noting various legislative and regulatory proposals to address this issue, he concluded:

> The only firm conclusion I've reached is that full service hospitals should not be saddled with the full burden of charity care costs. That is simply not fair. There should be some mechanism to ensure that specialty hospitals carry their share of the burden.
>
> This may be an area in which the Commission might consider a challenge to physician or hospital practices under Section 5 of the FTC Act, which prohibits "unfair methods of competition.". . . Many of the disputes surrounding specialty hospitals are over issues of fairness, and arguably are not straightforward antitrust violations; that fits within my own view of a potential Section 5 case. . . . I don't see any easy answers here, but Section 5 challenges might identify what is acceptable behavior and what is not.[58]

It is difficult to see how an attack on specialty hospitals that don't carry their "fair share" of charity care costs could fit within even Commissioner Rosch's broad view of the scope of Section 5. Even if the specialty hospitals' conduct could be characterized as a form of "free riding," it should not affect the dynamics of competition between specialty hospitals and full service hospitals unless the costs of providing indigent care force full service hospitals to raise their prices. And even if that were the case, free riding is not generally considered anticompetitive because it is not exclusionary—conduct that reduces a firm's costs is considered *pro*competitive.[59] Nor does free riding seem "coercive" or "oppressive" as required by *Official Airline Guides*. Indeed, if free riding constitutes a violation of Section 5, there are dark days ahead for discount electronics retailers and generic drug companies.

Conclusion

It is not hard to understand Commissioner Rosch's concern with the conduct he has written and spoken about that I have described in this article. Higher drug prices in *Ovation*, unexpected higher royalty payments in *Negotiated Data*, the need to pay royalties or redesign a product to avoid infringement, and specialty hospitals' avoidance of the burden of indigent care all sound "unfair." But surely Congress did not intend that the FTC's power to prohibit "unfair methods of competition" should extend to finding a violation of the FTC Act any time that a firm does not "act nice." As Commissioner Rosch himself noted at the FTC's hearings on Section 5, the Commission needs to "avoid creating a rudderless, unbounded standard acceptable to whoever happens to be the majority of the FTC Commissioners at the time."[60] ■

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[1] See S. Hearing 109-318, Nominations of J. Thomas Rosch and William E. Kovacic to be Commissioners of the Federal Trade Commission, Hearing Before the Committee on Commerce, Science, and Transportation, United States Senate, 109th Cong. 5 (Nov. 14, 2005) [hereinafter Senate Nomination Hearing].

[2] See Hall v. Am. Airlines, 118 Fed. Appx. 680 (4th Cir. 2004); England v. Chrysler Corp., 493 F.2d 269 (9th Cir. 1974); Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d 727 (N.D. Ill. 2005); see also J. Thomas Rosch, FTC Commissioner, Some Views on the European Microsoft Case, Remarks Before McGill University Faculty of Law Symposium Montreal 8–9 (Oct. 29, 2009) (noting representation of microprocessor manufacturer).

[3] FTC v. Ovation Pharms., 0:2008cv06379 (D. Minn. filed Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf. PDA is an abbreviation of "patent ductus arteriosus."

[4] Concurring Statement of Commissioner J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

[5] In a separate concurrence, Commissioner Leibowitz indicated that he agreed with Commissioner Rosch's proposed approach. Concurring Statement of Commissioner Jon Leibowitz, Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

[6] Rosch Concurring Statement, *supra* note 4, at 1.

[7] *Id.*

[8] The Department of Justice's Non-Horizontal Merger Guidelines contemplate enforcement only in cases of potential competition or vertical mergers that foreclose competitors, facilitate collusion, eliminate a disruptive customer, or permit evasion of rate regulation. U.S. Dep't of Justice, Non-Horizontal Merger Guidelines § 4 (1984), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.pdf. *See generally* Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in* GE/Honeywell*: Causes & Lessons*, ANTITRUST, Fall 2001, at 20 (discussing the "old, discredited, 'Big is Bad' doctrine from the 1960s.").

[9] *Id.* (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1140.1 (2d and 3d ed. 1998–2007 and supplemented 8/08)).

[10] *Id.* at 2 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.12 & n. 20).

[11] Joshua Wright, No Ovation for FTC's Latest Enforcement Theory, Truth on the Market Blog, http://www.truthonthemarket.com/2008/12/17/no-ovation-for-ftcs-latest-enforcement-theory/ (Dec. 17, 2008).

[12] 15 U.S.C. § 45.

[13] 15 U.S.C. § 45(a)(1).

[14] FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394–95 (1953).

[15] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972). *See also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons . . . .").

[16] Atl. Refining Co. v. FTC, 381 U.S. 357, 369 (1965).

[17] FTC v. Brown Shoe Co., 384 U.S. 316, 319, 321 (1966). *See also* Grand Union Co. v. FTC, 300 F.2d 92, 99 (2d Cir. 1962) (FTC Act intended "to stop in their incipiency acts which when full-blown would lead to monopoly or undue hindrance of competition").

[18] Official Airline Guides, Inc. v. FTC., 630 F.2d 920, 927 (2d Cir. 1980).

[19] Boise Cascade Corp. v. FTC, 637 F.2d 573, 581–82 (9th Cir. 1980).

[20] Ethyl Corp. v. FTC, 729 F.2d 128, 138–39 (2d Cir. 1984).

[21] General Foods Co., 103 F.T.C. 204, 352 (1984) (rejecting application of Section 5 to an alleged attempt to monopolize where there was no dangerous probability of success). *See also* Kellogg Co., 99 F.T.C. 8 (1982) (rejecting "shared monopoly" theory in cereals industry); Exxon Co., 98 F.T.C. 453 (1981) (terminating an investigation into shared monopoly in the petroleum industry).

[22] *See* Valassis Commc'ns, Inc., FTC File No. 051-0008, Decision and Order, *available at* http://www.ftc.gov/os/caselist/0510008/0510008.htm; Stone Container Corp., 125 F.T.C. 853 (1998); Precision Moulding Co., 122 F.T.C. 104 (1996); YKK (U.S.A.) Inc., 116 F.T.C. 628 (1993); Quality Trailer Prods., 115 F.T.C. 944 (1992). The Department of Justice has successfully challenged such an invitation as attempted monopolization in violation of Section 2. *See* United States v. Am. Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984); *see also* United States v. Microsoft Corp., 65 F. Supp. 2d 1, 22–24 (D.D.C. 1999), *aff'd on other grounds*, 253 F.3d 34 (D.C. Cir. 2001). The DOJ has also attacked invitations to collude under mail and wire fraud statutes that the FTC has no jurisdiction to enforce. *See, e.g.*, United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990).

[23] Senate Nomination Hearing, *supra* note 1, at 23.

[24] J. Thomas Rosch, Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the *Valassis* Complaint & the *Weyerhaeuser* Amicus Brief, at 6 (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

[25] *Id.* at 7.

[26] *Id.* at 10 (citing General Motors Corp., 99 F.T.C. 464, 580 n.45 (1982) (arguing that *Official Airline Guides* was wrongly decided) and Coca-Cola Co., 117 F.T.C. 795, 915 n.24 (1994) (reading *Ethyl* narrowly)).

[27] *Id.* at 10–11.

[28] *Id.* at 11.

[29] *Id.* at 7–8.

[30] Rambus, Inc., FTC Docket No. 9302 (2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

[31] *Id.* at 27 n.125.

[32] Rambus, Inc., FTC Docket No. 9302 (2006), Concurring Opinion of Commissioner Leibowitz, *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

[33] *Id.*

[34] *Id.* at 2, 21.

[35] Decision & Order, Negotiated Data Solutions, LLC, FTC File No. 0510094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122do.pdf.

[36] Rambus, Inc., FTC Docket No. 9302, 2006 WL 1330117, at 3 (Aug. 2, 2006) ("Through a course of deceptive conduct, Rambus exploited its participation in [the SSO] to obtain patents . . . incorporated into [the new] standards."); Unocal, 138 F.T.C. 1 (2004) (finding that Unocal deceived the SSO for the California EPA into including its patented combination of fuel properties into California's new standards for the composition of gasoline); Dell, 121 F.T.C. 616 (finding that Dell deceived an SSO into including its patented technology in the new standard for a video bus).

[37] *See* Verizon Communc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (monopolization standard); Spectrum Sports v. McQuillan, 506 U.S. 447, 456 (1993) (attempted monopolization standard).

[38] *See* Analysis to Aid Public Comment, Negotiated Data Solutions, LLC, FTC File No. 0510094 at 6 n.2 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

[39] Dissenting Statement of Chairman Majoras, Negotiated Data Solutions, LLC, File No. 0510094 at 4 (2008). Commissioner William Kovacic also authored a brief dissent in which he agreed with Chairman Majoras that Negotiated Data had not engaged in an unfair method of competition or unfair act or practice. *See* Dissenting Statement of Commissioner Kovacic, Negotiated Data Solutions, LLC, FTC File No. 0510094, at 1 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf. Commissioner Kovacic also invited public comments on two points of law. First, he expressed concern that the Commission's decision could potentially expand existing liability under state consumer protection statues modeled on the FTC Act, where—unlike the FTC Act—such laws allow private treble damages suits for unfair acts or practices or unfair methods of competition. *Id.* Second, he contended that the settlement's failure to clarify the relationship between the two theories of liability would appear to suggest that the Commission's unfairness authority could now be read to incorporate unfair methods of competition as well. *Id.* at 2

[40] *Id.* at 5–6.

[41] J. Thomas Rosch, Section 2 and Standard Setting—Rambus, N-Data and the Role of Causation 13 (Oct. 2, 2008), *available at* http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf. *See also* J. Thomas Rosch, One Retrospective View of the Commission's Activities 4 (Nov. 6, 2008), *available at* http://www.ftc.gov/speeches/rosch/081106roschwashingtonstatebarassoc.pdf ("I didn't think N-Data had engaged in an 'exclusionary practice'—which is another element of a traditional Section 2 violation—because N-Data had not engaged in deception or any other form of manipulation of the ex ante competition for incorporation [in] the standard, which was responsible for the monopoly power.").

[42] J. Thomas Rosch, Commissioner, Patent Trolls: Broad Brush Definitions and Law Enforcement Ideas 5 (May 31, 2008), *available at* http://www.ftc.gov/speeches/rosch/080531roschlecg.pdf (quoting Analysis of Proposed Consent Order to Aid Public Comment, Negotiated Data Solutions LLC, FTC File No. 051 0094, at 4, *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf)).

[43] Rosch, Section 2 and Standard Setting, *supra* note 41, at 12.

[44] *Id.*

[45] Majoras Dissenting Statement, *supra* note 37, at 5.

[46] Rosch, *supra* note 42.

[47] *Id.* at 12.

[48] *Id.*

[49] Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 265–66 (7th Cir. 1984).

[50] 645 F.2d 1195 (2d Cir. 1981).

[51] Rosch, *supra* note 42, at 13.

[52] *Id.* at 13–14 (quoting E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139–40 (2d Cir. 1984)).

[53] *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969) (the "heart of [the patentee's] legal monopoly" is the "right to invoke the State's power to prevent others from utilizing his discovery without his consent."); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24 (1964) ("The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*.");

[54] *See* Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."); Brulotte v. Thys Co., 379 U.S. 29, 33 (1964) ("A patent empowers the owner to extract royalties as high as he can negotiate with the leverage of that monopoly.").

[55] Gen. Foods Corp., 103 F.T.C. 204, 365 (1984).

[56] J. Thomas Rosch, Enforcement Strategies in the Health Care Industry (Nov. 17, 2008), *available at* http://www.ftc.gov/speeches/rosch/081117abahealthcaresummit.pdf.

[57] *Id.* at 9, 10.

[58] *Id.* at 12–13.

[59] *See, e.g.*, Ocean State Phys. Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1111 n.11 (1st Cir. 1989) ("The fact remains that achieving lower costs is a legitimate business justification under the antitrust laws.").

[60] J. Thomas Rosch, Remarks Before FTC Section 5 Workshop at 5 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/rosch/081017section5wksp.pdf.