PUBLICATION

Recent Enforcement Under Section 5 of the FTC Act: So That's What a Standalone Claim of Unfair Competition Looks Like [Ober|Kaler]

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Last August, the Federal Trade Commission issued its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act [PDF] (Statement), in an effort to provide clarity with respect to the types of conduct subject to a standalone claim of unfair competition under Section 5 of the FTC Act, and the analytical framework that might apply. Among other things, the FTC noted that the scope of Section 5 "encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."

According to the Statement, the FTC will follow certain principles when analyzing and prosecuting standalone claims under Section 5, namely:

- The Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- The act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- The Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

In "Federal Trade Commission Guidance Addresses Stand-alone Claims of Unfair Competition Under Section 5 of the FTC Act" (Health Law Alert 2015: Issue 15), we noted that the cryptic nature of the Statement raised a number of questions. For example, defining what violates the "spirit of the antitrust laws" could be subject to serious debate, and cause problems for the courts and seasoned antitrust practitioners. Furthermore, the announced intention to pursue claims regardless of any substantial harm to competition adds an unprecedented wrinkle to the FTC's enforcement authority, and runs contrary to the history of case law repeatedly rebuffing the FTC's prior efforts to bring standalone claims under Section 5 not otherwise subject to the antitrust laws.

The recent enforcement action against Drug Testing Compliance Group, LLC (DTC Group) provides an interesting case study and highlights the concerns identified above. According to the FTC's complaint [PDF], DTC Group sells various services relating to drug and alcohol testing to commercial drivers and commercial trucking firms. Other companies sell competing services, and competition appears to be mainly based on price.

Concerned about the aggressive price competition, the president of DTC Group met with the principals of one of its competitors in an effort to persuade that competitor to enter into a market allocation agreement. Specifically, DTC Group's president proposed a reciprocal agreement whereby each would refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to

that customer. DTC Group's president referred to this arrangement as a “First Call Wins” agreement, and each would be assured that they would not be undercut by a lower price at some later date.

Clearly, had an “agreement” been reached to allocate customers as DTC Group's president had proposed, such an agreement would have amounted to a per se violation of Section 1 of the Sherman Act. However, and based on the absence of facts in the FTC's complaint, it appears that no agreement was reached. Furthermore, as an “attempt” to reach an agreement does not violate Section 1 of the Sherman Act, no such claim was raised. Instead, the FTC pursued an enforcement action predicated on the “invitation to collude” as a standalone claim under Section 5 of the FTC Act.

Because DTC Group and the FTC quickly settled [PDF] with DTC Group agreeing not to engage in similar conduct and, among other things, exposing its books and records to FTC scrutiny for the next four years, we are left to speculate how this enforcement action might have fared were it subjected to court review. Nevertheless, the decision by FTC to prosecute this attempt as a standalone violation of Section 5 of the FTC Act is significant, and disturbing. Clearly the attempt to collude had no effect on competition or consumers, and could not, standing alone, have caused harm to either. Furthermore, given the apparent lack of interest by DTC Group's competition to enter into such an agreement, there was no danger that the “invitation,” if left unchallenged, would have or could have harmed competition. As a result, it is not clear, how, if at all, the FTC followed the principles it outlined in the Statement. Furthermore, it appears as though the FTC has crafted a new category of per se unlawful conduct, namely efforts to collude are now per se violations of Section 5 of the FTC Act, if such efforts, had they actually resulted in an agreement, would have resulted in a per se violation of Section 1 of the Sherman Act. In short, the FTC's efforts to expand upon historical theories of antitrust liability continue.