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## FTC Section 5 guidance may lead to more litigation, former commissioner says

PaRR Confirmed

The Federal Trade Commission (FTC) made a serious admission in its recent policy guidance on Section 5 of the FTC Act, according to former Commissioner Joshua Wright.

In its [statement](#) last month, the FTC acknowledged that the agency ought to use traditional antitrust laws where they apply, rather than the unfair methods of competition, or Section 5 provisions, Wright noted at an event today (22 September) in Washington, DC sponsored by the Federalist Society, a conservative think tank.

“That to me is a major concession,” he said, adding that its importance will grow over time as new Section 5 cases work their way through the agency.

Wright joined a majority of his fellow commissioners who voted 4-1 to approve the Section 5 guidance. He left the FTC shortly afterward to become director of the Global Antitrust Institute at George Mason University School of Law.

The problem with Section 5, he noted, was that unfair methods of competition had never been defined till now. It was whatever three commissioners wanted it to be, Wright said.

Nor has there been any case law to define the scope of the FTC’s Section 5 authority, he pointed out, because of the FTC’s authority to litigate Section 5 cases through the agency’s own administrative legal proceeding. That power has allowed regulators to settle such cases on whatever terms they wanted.

The new policy guidance may lead to more litigation, Wright said, which, in this area of law, is probably needed to settle what the boundaries of the agency’s authority are.

Asked what he would have done had he stayed one more year at the FTC, Wright said, “In terms of agenda items that I wanted, none were more important to me than Section 5.”

by Susan Mandel in Washington DC

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