

The Curtain Rises Again on FTC Act Section 5

A photograph of a modern building's curved glass facade, showing multiple stories with dark window frames and light-colored glass panels, set against a clear sky.

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Section 5 of the FTC Act prohibits “unfair methods of competition.” Section 5, which has been endorsed by many as necessary to fill gaps in the Sherman Act, yet criticized by others as vague and unbounded, has now reemerged as an important enforcement tool, even as partisan control of the FTC has shifted. In this regard, the FTC’s recent consent agreement with Pharmacy Benefit Manager (“PBM”) Express Scripts incorporates a broad reworking of the PBM’s pricing based on a standalone Section 5 theory. Other enforcement actions based on Section 5 theories include prohibiting non-compete agreements between employers and employees, such as in Gateway Services. None of the underlying complaints rely on the Sherman Act — there are no allegations of collusion or monopolization. Although the implications for non-competes and PBMs are substantial, the use of Section 5 may have considerably broader implications beyond those areas.

For decades, Section 5 has occupied an uneasy position alongside the Sherman Act. The Supreme Court in FTC v. Sperry & Hutchinson Co. held that Section 5 empowers the Commission to reach practices beyond the “letter or spirit” of the antitrust laws. Subsequent courts, however, urged caution and clearer limiting principles. In the 1980s, courts rejected the FTC’s use of Section 5 in particular fact scenarios, but did not categorically reject theories beyond the Sherman Act. The 1990s saw a more strategic deployment, using a “gap-filling” approach to address conduct that posed substantial competitive risk and had little pro-

competitive potential, but did not meet the technical elements of collusion or monopolization. Invitations to collude fit neatly into this category.

In 2022, the FTC during the Biden administration characterized a broader range of conduct as potentially “coercive,” “exploitative,” or “restrictive” and therefore in violation of Section 5. Republican commissioners criticized the new policy statement as overbroad.

Many expected the FTC under the second Trump Administration to cabin Section 5. For example, in October 2025, the U.S. Chamber of Commerce wrote:

In late August [2025], pharmacy benefit managers (PBMs), as part of a still early proceeding around a flawed proceeding brought by Chair Khan, filed a motion to dismiss the case. Their reasoning: the case relies on FTC Khan’s Section 5 policy statement and that policy statement is not the law.

Instead, enforcement has maintained its aggressive stance.

Two areas illustrate this continuity.

First, non-competes. Although the Trump FTC abandoned the Khan-era rule banning most non-compete agreements, it has continued to pursue non-competes under Section 5 through case-by-case enforcement. In a recently resolved action involving a pet cremation services provider, Chairman Ferguson explained:

The rule’s vacatur does not prevent the Commission from doing what it should have been doing all along — addressing noncompete agreements through enforcement actions against companies that misuse them in violation of the law. The Commission’s enforcement actions, including consent agreements, have a much wider effect than just on the direct subjects of those actions.

In that matter, the FTC alleged that post-employment non-compete clauses constituted unfair methods of competition, even absent a traditional Sherman Act theory. The agency did not allege collusion or monopsony power. Rather, it framed the conduct as limiting worker options and lowering wages — reflecting a broader conception of competitive harm.

Second, PBM pricing. In 2024, under the Biden Administration, the FTC issued a complaint against three PBMs — Express Scripts, Caremark, and Optum — alleging that their formulary practices prioritized high list prices and rebates over patient affordability. The PBMs unilaterally created formularies that allegedly resulted in higher prices for subscribers. The allegations did not involve Sherman Act monopolization or collusion, but rather Section 5 unfair methods of competition. The FTC described its complaint as alleging that the PBMs “unfairly... created a competition system that prioritizes the size of rebates” over affordability to patient subscribers. And it described that alleged conduct as “coercive, exploitative and restrictive,” concepts taken from the 2022 Policy Statement.

Notably, the Trump FTC declined to retreat from that Section 5 theory. Instead, it secured a consent agreement in this action where no Sherman Act counts were included. The case signals bipartisan acceptance — at least in certain contexts — of Section 5 as a mechanism to police pricing structures and competitive incentives beyond classic predation or collusion.

Significantly, these recent enforcement actions (plus the non-compete rulemaking) have raised issues not unlike those in the series of cases lost by the FTC in the 1980s when the FTC similarly viewed its Section 5 authority expansively. For example, when the Second Circuit in the 1984 Ethyl decision set aside an FTC Section 5-based final order, it observed that, “as the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.” Here, the PBM complaint breaks new ground. Traditional antitrust doctrine, reflected in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, emphasizes that a single firm’s high prices — even monopoly prices — are often its reward for successful competition and a driver of innovation. The PBM complaint and consent order indicate that a pricing structure that allegedly results in higher prices for consumers may be unlawful even absent collusion or exclusionary conduct.

The PBM action continues the post-1980s trend where Section 5 matters have been resolved through consent decrees rather than fully litigated judgments. As of now, Express Scripts is the only one of the three major PBMs to enter a consent agreement, leaving open the slight possibility that there may yet be a litigated judgment — and, potentially, appellate decision — evaluating the scope of Section 5. It seems increasingly likely that Caremark and Optum will consent now that the first domino has fallen. In this regard, the January 21 Order Staying Administrative Proceeding “allow[ed] time for Complaint Counsel to engage in parallel settlement discussions with other Respondents.” On March 3, the Commission further extended the stay, and the hearing on the Motion to Dismiss was reset to April 17.

The result is renewed FTC Section 5 enforcement without appellate review, providing additional guidance on the limits of Section 5.

The Section 5 “revival” thus appears durable, at least for the next several years. The bipartisan comfort with using Section 5 as a flexible tool indicates that the doctrine will likely continue to shape competition policy.

Key Takeaways

1. Section 5 Is No Longer Dormant — and It Is Bipartisan.

The assumption that a change in administration would narrow Section 5 authority has not materialized. Both Democratic and Republican commissioners have endorsed its use in targeted contexts. Businesses should expect continued enforcement of Section 5 for conduct that falls outside the scope of the Sherman Act.

2. The FTC’s Continued Enforcement of a More Expansive Section 5 Requires Competition-Adjacent Compliance Beyond Traditional Antitrust Law.

From the 1990s until the 2020 Khan era, Section 5 enforcement had not strayed dramatically from Sherman Act principles. Conduct with little potential upside, such as invitations to collude, was the primary target. When the second Trump Administration began, given prior Republican criticism of Section 5 untethered to the Sherman Act, some believed that Section 5 would be reined in. But recent consent agreements show that is not the case. Conduct that may not have been subject to scrutiny under Section 5 prior to 2020 remains a potential target, particularly if there is a plausible story to tell that consumers or workers are harmed by the

conduct. Compliance analysis should continue to extend beyond traditional antitrust checklists.

3. Clarity Is Limited.

Because much of Section 5 expansion occurs through consent decrees, judicial guidance remains sparse. This increases regulatory uncertainty and places greater weight on risk assessment and proactive compliance planning. While the PBM case looked to provide an excellent opportunity for greater clarity, recent developments suggest that appellate review may not be forthcoming.



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