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To Accompany

ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY

FOURTH EDITION

By

Andrew I. Gavil
Professor of Law
Howard University School of Law

William E. Kovacic
Global Competition Professor of Law and Policy
George Washington University Law School
Visiting Professor, Dickson Poon School of Law, King's College London

Jonathan B. Baker
Professor of Law Emeritus
Washington College of Law
American University

Joshua D. Wright
Lodestar Law & Economics

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Preface

We are pleased to bring you the 2023 *Update* to Gavil, Kovacic, Baker & Wright's ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (4th ed. 2022). This is the first update to the Fourth Edition and covers developments of significance that we wanted to bring to your attention. As in the past, adopters should feel free to share this *Update* with their students as a Supplement to the Casebook.

Although there are no new principal cases, we note important developments and new cases as well as updates to some of the Notes and Sidebars. As we noted in Chapter 5 of the Fourth Edition, the FTC and DOJ announced their intention to issue new merger guidelines in early 2022. A draft of those Guidelines was released in July 2023, and we include a brief overview and some "teaching points" that adopters might use to discuss their potential impact. We will provide additional thoughts when they are finalized.

As always, we welcome your reactions and feedback on this *Update* or any aspect of the book.

Andrew I. Gavil
William E. Kovacic
Jonathan B. Baker
Joshua D. Wright
Washington, D.C.
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Chapter 1:
Defining Competition Policy for a Global Economy

(p. 45) Insert at the end of the Policy Exchange on Antitrust and Inequality

In addition to whether antitrust can address inequality, a lively debate has surfaced regarding the role, if any, that antitrust might plan in promoting sustainability-related goals. Although the discussion has advanced to policymaker levels outside the U.S., it is emerging as a topic of discussion in the U.S., too. To explore the issue, see Columbia Center on Sustainable Investment, *Antitrust & Sustainability: A Landscape Analysis* (July 2023), https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis. For an international perspective, see the Background Note, speaker presentations, and Delegation Submissions presented at the program on Sustainability and Competition held at the Organization for Economic Cooperation & Development (OECD) in December, 2020. https://www.oecd.org/daf/competition/sustainability-and-competition.htm.

Chapter 2:
Concerted Action by Competitors

(p. 169) Insert at the end of the carryover paragraph at the top of the page:

Fully litigated challenges to joint ventures are rare. In *United States v. American Airlines Group Inc*., __F.Supp.3d __, 2023 WL 3560430 (D. Mass. 2023), the Department of Justice successfully challenged the "Northeast Alliance" (NEA), a joint venture between American Airlines and Jet Blue. Under the NEA, which went into effect in early 2020, "the two carriers essentially agreed to operate as one airline for most of their flights in and out of New York City and Boston." The Justice Department, joined by the District of Columbia and six states, challenged the agreement under Section 1 of the Sherman Act as an unreasonable restraint of trade and sought to enjoin its continued operation.

In a lengthy opinion, which we only briefly summarize, the court agreed and enjoined the NEA. Citing *Dagher* and *NCAA v. Alston*, which we will read later in this Chapter, the court observed that joint venture agreements "ordinarily are subject to the rule of reason, which involves some form of burden shifting but is not a rigid framework." As we shall see as this Chapter unfolds, that burden shifting typically requires an assessment of the evidence of anticompetitive effects, procompetitive justifications, if any, and finally, if there is evidence of both, some kind of overall evaluation of the principal tendencies of the conduct. Interestingly, as a prelude to its analysis, the court also noted that traditional methods of judicial assessment also remain relevant:

> despite its unusual complexity, this case requires the Court to call upon familiar tools of the judicial trade—observations of witness demeanor, common sense, and a general understanding of human behavior—as it evaluates the credibility and

> assesses the motivation of people describing their roles in conceiving, debating, and implementing business decisions on behalf of their employers.

The court concluded based on that assessment that the DOJ had provided ample evidence of direct competitive harm and indirect evidence of actual and likely harm. As to the direct evidence, the court found:

> … the NEA has materially altered the competitive landscape in a highly concentrated industry, and in a region with significant barriers to entry. It has accomplished this in at least three ways. It has reduced the number of competitors (and, thus, choices) by one in a setting where such a reduction is especially harmful. It has reduced JetBlue's independence and undermined its status as an important "maverick" competitor. And, it has allowed the defendants to engage in horizontal market division, a practice historically and consistently invalidated as a matter of antitrust law. Each of these three actual effects already have resulted from the NEA and, considered together, they amount to a powerful showing of serious anticompetitive harm.

The court then rejected the defendants' principal defense, that NEA strengthened the competitive position of American and Jet Blue vis-à-vis their two main rivals, as "not a valid justification," differentiating between effects that are beneficial to joint venture participants and effects that benefit competition. Indeed, that purpose was anti, nor pro-competitive. In sum, it held that "the plaintiffs have made a decisive showing of anticompetitive harm, against which the defendants have offered insubstantial evidence of cognizable procompetitive benefits." The case also includes discussions of "ancillary restraint" analysis, which is discussed below in Sidebar 2-4 (Casebook, p. 252), and the role of less restrictive means to achieve legitimate joint venture goals (the court concluded that there were none), which is discussed in the *Note on the State of the Rule of Reason After NCAA v. Alston* (Casebook, p. 236).

(p. 243) Insert at the end of the carryover paragraph at the top of the page:

Alston's rule of reason framework was generally followed in *United States v. American Airlines Group Inc.*, discussed *supra*, and in *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023), where the Ninth Circuit rejected antitrust claims by game developer Epic in its long running battle with Apple over Apple's restrictions on app developers and iOS device users. Epic claimed that Apple had violated both Sections 1 and 2 of the Sherman Act with various features of its licensing and contractual arrangements with app developers and consumers of iOS devices that channeled their interactions solely through Apple's App Store.

Although the court held that Epic made an adequate showing that Apple's restrictions had anticompetitive effects, it also concluded that Apple had met its burden of showing procompetitive rationales for its restraints and that Epic had failed to establish that Apple could have achieved those benefits through less restrictive means. It therefore rejected the federal antitrust claims.

Separately, however, it upheld Epic's claim under the California Unfair Competition Law (UCL). It concluded that Epic's failure to prevail on its federal antitrust claims did not foreclose its claims under the UCL. Apple's "anti-steering" restrictions, which precluded app developers from informing app users of out-of-app payment methods outside of the App Store, constituted an "unfair" practice under the UCL.

Adopters interested in constructing a distinct module around the antitrust treatment of Apple's business model and conduct could consider combining *Case Study: Testing the Antitrust Winds – Apple's Acquisition of Weather App Dark Sky,* with *Apple v. Pepper* (Casebook p. 1412), and an excerpt from *Epic*.

(p. 295) Insert at the end of the carry-over paragraph:

Characterization disputes also can arise from the government's decision to prosecute collective action as a criminal, rather than a civil, offense. Criminal Sherman Act prosecution has long been limited to per se offenses under Section 1—but should the government's decision to prosecute an alleged offense criminally using a per se approach, which limits potential defenses, be controlling for defendants and courts? In *United States v. Aiyer*, 33 F.4th 97 (2d Cir. 2022), the Second Circuit affirmed a district court's decision to exclude a criminal defendant's proffer of evidence that his conduct was not anticompetitive. The district court had also refused to conduct a pre-trial assessment to determine whether the case should go to the jury under a per se or more complete rule of reason standard. The Second Circuit reasoned that, given that the defendant had been indicted by a grand jury, the government was entitled to present its case to the jury under its per se theory.

Chapter 3:
Distinguishing Concerted from Unilateral Action

(p. 399) Insert after first full paragraph:

In two recent decisions, the Ninth Circuit declined to allow plaintiffs to proceed to trial on conspiracy claims for failure to allege plus factors sufficient to infer an agreement. *See In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig*., 28 F.4th 42 (9th Cir. 2022) (upholding district court decision dismissing complaint); *Honey Bum, LLC v. Fashion Nova, Inc*., 83 F.4th 813 (9th Cir. 2023) (affirming district court decision granting summary judgment to defendant).

(p. 421) Insert to bottom paragraph:

The Justice Department has continued to pursue no-poach agreements as criminal violations, but with mixed results. *See, e.g., United States v. Patel*, 2023 WL 3143911 (D. Conn. 2023) (granting

defendants' motion for judgement of acquittal in a criminal no-poach prosecution because "[a]s a matter of law, this case does not involve a market allocation under the per se rule."); *United States v. Manahe*, 2023 WL 2243599 (D. Maine 2023) (granting government's motion *in limine* to exclude evidence of procompetitive justifications because it was proceeding under a per se theory in a criminal no-poach case). For an example of a private class action based on charges that a no-poach agreement violated the Sherman Act, see *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247 (11th Cir. 2022) (current and former employees of fast-food franchisees plausibly pled "concerted action" for purposes of Section 1 challenge to alleged no-poach agreement).

Chapter 4:
Exclusionary Conduct

(pp. 556-57) Insert the following:

Successful monopolization claims are rare even for the government. In addition to proving monopoly power and exclusionary conduct, private plaintiffs must also overcome the adage that the antitrust laws "protect competition, not competitors." What might that mean? As we shall see in Chapter 5, that turn of phrase is associated with the Supreme Court's 1962 decision in *Brown Shoe*, a merger case, and it influenced the Court's reasoning in *Brunswick* (Chapter 1), which established the principal of "antitrust injury" for private parties which requires them to prove that their injuries flow from the anticompetitive effects of the challenged conduct. In monopolization cases, private plaintiffs must persuade courts that their injuries reflect market-wide adverse effects on competition, not merely harm to themselves, i.e. to a single competitor. For a recent example, see *Dreamstime.com LLC v. Google LLC*, 54 F.4th 1130 (9th Cir. 2022) (complaint alleging, inter alia, exclusionary "self-preferencing" and data collection practices alleged only harm "to a single customer" not to competition).

(p. 647) Insert at the end of the carryover paragraph:

Trinko continues to be cited frequently and has influenced the courts not only in cases involving alleged refusals to deal, but also for its broader non-interventionist philosophy. For a critique of *Trinko*, some suggestions for how it might be read more narrowly, and for an argument that "unconditional" refusals to deal should be distinguished from "conditional" refusals to deal, i.e. refusals to deal unless a trading partner abides by specified and exclusionary terms, see Andrew I. Gavil, *Trinko Creep*, https://www.promarket.org/2023/07/20/triko-creep/. *See also OJ Commerce, LLC v. Kidkraft, Inc.*, 34 F.4th 1232 (11th Cir. 2022) (citing *Viamedia* and endorsing the proposition that conditional refusals to deal are not controlled by *Trinko* and should be analyzed like exclusive dealing for their anticompetitive effects, but concluding that the evidence of effects was insufficient). *But see New York v. Meta Platforms, Inc.*, 66 F.4th 288, 305-06 (D.C. Cir. 2023) (rejecting government arguments that *Trinko* ought not be applied to Facebook's policy of prohibiting developers from using Facebook's platform to duplicate Facebook's core products).

Chapter 5:
Mergers and Acquisitions

(p. 738) Insert before start of text:

Note on the 2023 Draft Merger Guidelines

The casebook relies throughout on the 2010 Horizontal Merger Guidelines. On July 19, 2023, the Justice Department and Federal Trade Commission announced the release of new Merger Guidelines in draft, which cover all mergers, not just horizontal mergers. https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines. As of this writing, the comment period remains open. After the comment period, it is anticipated that the agencies will revise the draft and issue the guidelines in their final form, perhaps later this year.

The overall justification for the proposed revision is that merger enforcement has been too lax since the 1982 Guidelines were adopted and that the 2010 Guidelines no longer reflect government policy. The draft ("MGs" - available here: https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment) is a major rewrite of the Guidelines that is intended to provide the basis for challenges to a wider range of mergers. In contrast to the agencies' approach since 1982, they cover all forms of mergers - horizontal, vertical, and conglomerate - and have been substantially restructured. They are organized around thirteen Guidelines, any one of which might provide the basis for challenging a merger. And they now include extensive case citations, which the agencies believe support their approach. Much of the economic analysis that previously had been integrated into the Guidelines has been relocated to an Appendix.

The draft MGs were instantly controversial, have elicited a wide range of commentary, and are likely to generate a significant number of formal comments. Given their current (as of this writing) status as a "draft," we have not endeavored to prepare a comprehensive summary of their content. Instead, we have provided below some suggested prompts and teaching points to consider. Commentary has already been extensive and will likely continue to grow. For a sampling of the commentary and for additional readings, adopters might consider assigning one or more of the postings from ProMarket's symposium. *See* https://www.promarket.org/2023/07/26/announcing-the-promarket-merger-guidelines-symposium/. There are, of course, many other options, including the statements of the Commissioners that accompanied the release of the draft.

Here are a few suggested prompts, however, to consider in connection with this year's teaching of the role of agency guidelines and the content of the draft:

- **(p. 719) Insert before "Power Buyer Defense"**. The draft guidelines rely heavily on the assumption that the Supreme Court's merger decisions from 1960 to 1975 remain controlling ("binding precedent") and that more recent lower court cases do not adequately

reflect those decisions, the text of Section 7, or the intent of Congress as explained in *Brown Shoe* (Casebook, p. 692).

  - Are you persuaded of that position? Sidebar 5-1 (p. 707) is critical to an understanding of this position. Will lower courts agree and implement it? If they did, what would be the potential consequences? Consider footnote 12 in *Baker Hughes* (Casebook, p. 718).
  - Why might the draft guidelines also include a disclaimer (MG, p. 5) that "Citations to court decisions in these Guidelines do not necessarily suggest that the agencies would analyze the facts in those cases identically today."? Which cases might fall within that caveat?

- **(pp. 728-37) Sidebar 5-2 and Policy Exchange on the Role of Concentration in Horizontal Merger Analysis.** The draft guidelines take a strong position in favor of "structural" analysis and propose a range of new structural presumptions for horizonal mergers, vertical mergers, and "dominant" firms." Is the approach consistent with *Philadelphia National Bank* (Casebook p. 695) and *Heinz* (Casebook, p. 721)? Is there a basis for these presumptions in the cases?
  - **A Related Point –** Measuring market concentration. The MGs retain the use of Herfindahl-Hirschman index, which was first introduced in the 1982 Guidelines, but they revert to the use of an 1800 benchmark for defining highly concentrated markets. That was the benchmark used from 1982 until the 2010 Guidelines raised it to 2500. What is the basis for reverting to the 1800 benchmark? What effects might it have on merger enforcement (You might note that given the mathematical characteristics of the HHI, discussed at Casebook, p 792 & n. 21, the 1800 suggests heightened concern with "6 to 5" mergers.)
- **(p. 738) Unifying Theme – Market Power**. From 1982 to 2010, every iteration of the Horizontal Merger Guidelines asserted that an analysis of market power was crucial to merger analysis. The 2010 Guidelines put it this way: "The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." There is no similar statement in the draft MGs.
  - Why might the agencies have abandoned "market power" as the "unifying theme" of merger enforcement policy?
  - What unifying theme has taken its place? The draft MGs refer frequently to the text of Section 7 – "substantially to lessen competition or tend to create a monopoly." How do the MGs propose to interpret those terms?
- **(pp. 745-56; 778-79) Market Definition**. Consider Part III and Appendix 3 of the MGs together with the material in the Casebook on market definition, including the cases. The MGs carry-over references to the HMT and SSNIP in the Appendix, but they also appear to endorse use of the *Brown Shoe* factors for defining markets in Part III (Casebook, pp. 778-79). How do the MGs intend to use those factors? Do they make them relevant as a

rough approximation to the economic analysis in the appendix (hypothetical monopolist test), or as controlling even if inconsistent with the HMT?

- **(pp. 688-702; Sidebar 6-3 (p. 997); Trends Toward Concentration/Incipiency.** As the Casebook notes, the "may be" text of Section 7 and other provisions of the Clayton Act has long been read as providing an "incipiency" standard. Some of the cases (*Brown Shoe* and Philadelphia National Bank are examples) cited and relied upon in the MGs read that as the basis for condemning mergers in industries that were trending toward greater concentration, and they include Guideline 8, which cites such trends as an independent ground for opposing a merger. None of the Merger Guidelines since 1982 include a similar suggestion.
    - How well supported is Guideline 8 in the cases? Is Brown Shoe unambiguous with respect to how to weigh industry trends?
    - What effect might Guideline 8 have on merger enforcement policy?
- **(pp. 702-06; 847-69) Rebuttal Factors**. How do the MGs approach factors that might suggest that a merger is unlikely to be anticompetitive, what in litigation might function as "rebuttal factors" in Part IV? Do they clearly apply to mergers regardless of which Guideline they might fall under? A more skeptical attitude?
    - How do the MGs treat *FTC v. Procter & Gamble* (Casebook, pp. 858-59)?
    - Are efficiencies treated as a defense or an affirmative defense (Casebook, p. 865)?
- **(pp. 799-803) Mergers that Enhance Buyer Power.** How does Guideline 11 of the MGs propose to analyze mergers with effects on input markets, especially labor markets? How do they propose to resolve the policy questions discussed in the Casebook at pp. 801-02?
- **(pp. 880-906) Vertical Mergers.** Guidelines 5 and 6 both relate to vertical mergers. Guideline 5 appears to endorse the "incentive and ability" framework that has been followed in modern challenges to vertical mergers, at least to some degree. Does Guideline 6 go further? Is it an effort to supply a structural presumption for vertical mergers that the AT&T court found absent in merger law?
- **Technology-Focused Features**. Many provisions of the MGs seem targeted at "big tech." This seems especially true of Guidelines 7 (Entrench/Extend a Dominant Position), 9 (Serial Acquisitions), and 10 (Multi-Sided Platforms).
    - How do the Guidelines propose to define "dominance" and "platform"? How might they affect the analysis of mergers when they involve such firms?
    - What assumptions do these Guidelines make about the incentives for merger described at the outset of Chapter 5 when they are undertaken by firms that might fall within their definition of "dominant" and how might they alter those incentives? What are the potential policy implications of these Guidelines?

(p. 740) Insert at the end of Sidebar 5-3:

In mid-2023, the FTC proposed substantial modifications to the rules governing HSR filings. (https://www.regulations.gov/docket/FTC-2023-0040/document) The revisions would require that the parties submit various types of information about themselves and the transaction at the time of filing that previously would have not been required until the agencies had determined to issue a

second request (see Figure 5-2). The proposed rules will likely be modified before they are finalized and take effect: the FTC will publish final rules after reviewing comments on the proposed rules, after which they may be modified further before taking effect in response to review by the Office of Information and Regulatory Affairs of the Office of Management and Budget, as required by the Paperwork Reduction Act.

(p. 743) Insert at the end of the carryover paragraph:

But see New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023) (laches barred states' antitrust claim for injunctive relief under Section 16 of the Clayton Act in its *parens patriae* action).

(p. 800) Insert before the final paragraph:

The Justice Department succeeded in its bid to enjoin the merger of two large book publishers on the ground that the transaction would allow the merged firm to exercise buyer market power against key suppliers, by reducing advances paid to authors of new books. *United States v. Bertelsmann SE & Co.*, -- F.Supp.3d --, 2022 WL 16949715 (D.D.C. 2022). The proposed transaction was an acquisition by the parent of Penguin Random House of another large publisher, Simon & Schuster. The court applied the burden-shifting framework established in *Baker Hughes.* It adapted market definition analysis to the buyer market power setting by asking whether a hypothetical monopsonist would be able to reduce the price paid to suppliers, after accounting for supplier substitution. (This is the analogue to asking in a seller market power setting whether a hypothetical monopolist would be able to raise price, after accounting for buyer substitution.) The court found that the merger would harm competition through both unilateral effects and coordinated effects.

(pp. 870-74) Assign with Sidebar 5-9: Merger Remedies:

A divestiture played a substantial role in a district court's decision not to enjoin a large healthcare industry transaction, the acquisition of Change Healthcare by UnitedHealth Group. *United Sates v. UnitedHealth Group Inc*., -- F.Supp.3d --, 2022 WL 4365867 (2022). The merger had both a horizontal aspect and a vertical aspect. The court concluded that the Justice Department could not show harm to competition on its horizontal theory because the merging firms had committed to divest the business unit of Change that created the horizontal overlap. The government advocated treating the divestiture as a separate transaction from the merger, while the merging firms advocated treating the two as a single transaction. Under the government's approach, the defendants would have the burden of showing that the divestiture would prevent competitive harm; under the merging firms' approach, the government would have the burden of showing that the combined transaction would harm competition. The court was skeptical of the government's position, but ultimately held that the merger did not harm competition regardless of the approach employed. *See also FTC v. Microsoft Corp.*, -- F.Supp.3d --, 2023 WL 4443412 (N.D. Cal. 2023),

appeal docketed (Microsoft's commitments to supply acquired gaming firm's most popular offerings to rival gaming platforms vitiated any incentive it might have to foreclose competition post-merger). For a recent academic discussion of this and other issues involving "litigating the fix," see Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, ANTITRUST L.J. (forthcoming 2023), working paper available at https://ssrn.com/abstract=4255883.

(pp. 909-911) Assign with Discussion of Potential Competition:

Both the actual potential competition theory and the perceived potential competition theory were considered by the district court that declined to block an acquisition challenged by the FTC. *Federal Trade Commission v. Meta Platforms Inc.*, 2023 WL 2346238 (N.D. Cal. 2023). The acquiring firm, Meta, is not just the owner of Facebook. Its relevant business for the purpose of this merger case was its sale of virtual reality (VR) hardware. The acquired firm, Within Unlimited, developed VR software, most notably Supernatural, a subscription fitness service. The FTC viewed Meta as a potential competitor in a VR dedicated fitness app market, where Within was a market participant.

The court accepted the actual potential competition theory as viable notwithstanding the absence of a clear endorsement by the Supreme Court in its 1970s decisions considering it, because the theory has since been applied by multiple courts of appeals and various district courts. The court held that the actual potential competition doctrine required the plaintiff to show that Meta had a likelihood of entering "noticeably greater than fifty percent." It found on the facts that the FTC had failed to satisfy that standard because it did not possess capabilities unique to VR dedicated fitness apps: fitness content creation and studio production facilities. The court also held that that the FTC's proof involving the subjective perceptions of current market participants was insufficient to satisfy the perceived potential competition theory.

In deciding the case, the court applied legal doctrines concerned with the acquisition of firms that do not currently participate in a market but are expected to enter it in the near future (which the casebook terms "future rivals," notwithstanding the use of the term "potential competitors" in those doctrines). The casebook suggests that these analytical approaches do not appear to apply to the acquisition of firms considering entry and making investments that would facilitate entry but without concrete plans to enter (which the casebook terms "potential competitors"), nor with the acquisition of firms with capabilities that could be used to enter but are not taking steps to do so ("nascent competitors"). The facts found by the district court might indicate that Meta was not a potential competitor (using the casebook's terminology) and perhaps also not a "nascent competitor" (though that is less clear). The casebook at pp. 911-912 discusses legal issues that would be raised were the FTC to have framed its challenge as the acquisition of a nascent competitor.

Guideline 4 of the 2023 Draft Merger Guidelines seek to build out the theories of actual and perceived potential competition and can be assigned with this discussion.

Chapter 6:
Anticompetitive Distribution Practices

(p. 1149) Insert at the end of the carryover paragraph:

Although the FTC has expressed an interest in reviving its enforcement efforts under the Robinson-Patman Act, as of this writing no complaints have been announced. Private litigation under the Act continues, however, although successful cases post-*Reeder* are rare. In *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, -- F.4th -- (9th Cir. 2023), 2023 WL 4633263, seven wholesalers brought claims under Sections 2(a) and (d) of the Robinson-Patman Act against the producer of a caffeinated beverage, who sold its product to wholesalers, retailers, and individual consumers. The claims focused on the producer's allegedly favorable treatment of Costco Business Centers, which the court described as "stores geared toward 'Costco business members," such as restaurants, small businesses, and other retailers, but open to any person with a Costco membership" The plaintiffs alleged a secondary line violation of Section 2(a) for which they sought damages, and a Section 2(d) claim for which they sought injunctive relief, alleging that the defendant "offered them less favorable pricing, discounts, and reimbursements than it has offered Costco."

On summary judgment, the district court found that there was no genuine dispute as to three of the required elements of a Section 2(a) claim: the products were distributed in interstate commerce, they were of "like grade and quality," and they were sold by the defendant at different prices to the plaintiffs and Costco. The sole issue that remained for the jury, therefore, was whether there was competitive injury, which in turn required proof of contemporaneous sales and whether the plaintiffs and Costco were in competition with each other. The Section 2(d) claim was separately tried to the court because it sought only injunctive relief. The jury returned a general verdict for the defendant on the Section 2(a) claim and the district court denied the plaintiff's request for injunctive relief under 2(d) because it inferred from the jury's general verdict that the plaintiffs and Costco were not "customers competing" with each other, as is required under Section 2(d).

The appeal focused in significant part on the district court's jury instructions regarding "reasonably contemporaneous sales" to support the Section 2(a) claim, and the district court's decision to give a jury instruction on functional discounts. In a 2-1 decision, the Ninth Circuit held that the district court did not abuse its discretion in either its treatment of reasonably contemporaneous sales or in its decision that there was enough evidence to warrant a functional discount instruction to the jury. It faulted the district court, however, for inferring from the jury's verdict on the Section 2(a) claim that the plaintiffs and Costco were not in competition with each other such that Section 2(d) violation had not been established and reversed that portion of the judgment. The dissenting judge would have affirmed the district court in its entirety.

Although it was not challenged by the plaintiffs at trial or in the Ninth Circuit, the district court's decision to allocate the burden of proof with respect to functional discounts to the plaintiffs is questionable. In effect, the plaintiffs were required to *disprove* that the favorable price received by Costco qualified as a valid functional discount. The Ninth Circuit approved the approach, citing

the principal Supreme Court case on functional discounts, *Texaco v. Hasbrouck* (Casebook, p. 1140). But a closer examination of *Texaco* suggests the opposite: that "functional discounts" is a non-statutory *defense* that a favored purchaser must prove. *Contrast U.S. Wholesale*, 2023 WL 4633263, at *7, with *Texaco*, 496 U.S. at 561 & n.18.

Chapter 8:
Implementing Competition Policy Rules: The Structure of Antitrust Enforcement

(p. 1336) Insert at the end of the carryover paragraph:

See also Celestin v. Caribbean Air Mail, Inc. 30 F.4th 133 (2d Cir. 2022) (act of state doctrine did not apply to bar claims by U.S. residents with relatives in Haiti alleging that Haitian government officials and multinational corporations that facilitate remittances and telephone calls between the United States and Haiti engaged in price fixing conspiracy in violation of the Sherman Act).

(p. 1384) Add to string of citations at the bottom of the page:

See also Uetricht v. Chicago Parking Meters, 64 F.4th 827 (7th Cir. 2023) (claims brought against private entity that had been granted long-term concession to manage city's parking meters was barred by state action immunity because (1) city's authority under state law to regulate parking on city streets was clearly articulated and affirmatively expressed, and (2) city actively supervised private entity that was awarded the concession).

(p. 1396) Insert after second paragraph under "D. The Limited Role of Statutory Exemptions":

For a recent application of the statutory labor dispute exemption to a non-union association that qualified as a "labor organization," see *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306 (1st Cir. 2022).

(p. 1385) Insert at the end of the carryover paragraph:

See also Ellis v. Salt River Project Agricultural Improvement & Power Dist., 24 F.4th 1262 (9th Cir. 2022) (public utility was shielded from antitrust liability by LGAA).

(p. 1400) Insert before Sidebar 8-2:

NOTE ON CHALLENGES TO INDEPENDENT REGULATORY AGENCIES AND THE AUTHORITY OF THE FEDERAL TRADE COMMISSION

The Supreme Court has decided several cases which collectively may have important implications for the Federal Trade Commission and other federal independent regulatory agencies. In *Seila Law LLC v. CPFB*, 140 S.Ct. 2183 (2020), the Court ruled that the "for cause" only restrictions imposed by Congress on the President's authority to remove the head of the Consumer

Financial Protection Bureau were unconstitutional. In reaching that result, the Court majority emphasized that the CFPB lacked a governance structure like the one that had led the Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), to uphold the for-cause only removal protections for FTC commissioners. The *Seila* Court majority distinguished *Humphrey's Executor*, noting that the CFPB is governed by a single executive, whereas the FTC is a multi-member bi-partisan body. Justices Gorsuch and Thomas rejected the distinction and dissented asserting that they would have overruled the 85-year-old precedent.

Justices Gorsuch and Thomas may soon have the opportunity to persuade the Court it should reconsider *Humphrey's Executor*. In *Axon Enterprise, Inc. v. FTC*, 143 S.Ct. 890 (2023), the Court cleared the way for a respondent in administrative proceedings to go directly to federal district court to raise constitutional challenges to the structure and processes of the agency. Although the narrow issue in the case was limited to a question of federal jurisdiction, Axon sought to challenge the removal protections the Commissioners enjoy under the FTC Act (in effect setting up a reconsideration of *Humphrey's Executor*) and the Commission's integration of prosecutorial and adjudicative functions in the hands of its five Commissioners, both on constitutional grounds. Axon is now free to pursue its declaratory judgment action in federal district court.

But *Axon* is not the only case to raise these and other constitutional challenges to the FTC's (and other independent administrative agencies') structures and processes. Perhaps further encouraged by the Supreme Court's recent "major question doctrine" decisions in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) and *Biden v. Nebraska*, 143 S.Ct. 2355 (2023), similar challenges to the FTC are being raised in multiple fora, further increasing the likelihood that the Supreme Court will soon be called upon to assess the constitutionality of independent administrative agencies like the FTC. The Court's possible interest in doing so is evident in its June 2023 decision to grant a petition for a writ of certiorari in *SEC v. Jarkesy*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (Jun. 30, 2023).

Although *Humprey's Executor* is not directly at issue in *Jarkesy*, the Court granted the petition to consider three questions, all of which could affect the FTC as well as the SEC: (1) whether it is a violation of the Seventh Amendment for the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties; (2) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and (3) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection. The case will likely be argued this Fall.

(p. 1428) Insert after carryover paragraph:

As in *Apple v. Pepper*, once standing is established, litigation often turns to class certification, which can involve extensive discovery, expert testimony, and targeted briefing. *See, e.g, Comcast Corp. v. Behrand*, 569 U.S. 27 (2013). For a recent example, see *Olean Wholesale Grocery*

Cooperative v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (certifying classes of direct and indirect purchasers as well as individual end purchasers in price fixing case).

(p. 1437) Insert at the end of the carryover paragraph:

Lower courts have continued to elaborate on *Associated General*'s multi factor approach to standing. *See, e.g., In re Platinum and Palladium Antitrust Litigation*, 61 F.4th 242 (2d Cir. 2023).