2023–2024 Update

CASES AND MATERIALS ON

U.S. ANTITRUST IN GLOBAL CONTEXT

Fourth Edition

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AMERICAN CASEBOOK SERIES®

INTRODUCTION

We have the pleasure to announce that Sean Sullivan, Professor at the University of Iowa College of Law, is joining our Casebook. A warm welcome to Sean. –EF and DC.

Since publication of the 2020 edition of the Casebook, we have seen a significant change in the enforcement climate for U.S. antitrust. At the start of his administration, President Joe Biden announced an urgent need for more competition in the U.S. economy and more aggressive antitrust enforcement. He appointed antitrust enforcers who embrace aggressive antitrust enforcement to control market power and especially to control Big Tech, dovetailing with a set of legislative proposals that had high prominence but have not yet gotten sufficient traction for passage. We describe these developments below under Chapter 8: Looking Forward.

The framework for law under the Sherman and Clayton Acts remains essentially the same as presented in the Casebook. In 2021, the Supreme Court applied the rule of reason with a unique twist in a student athletes' case against the NCAA. Another Supreme Court decision limits FTC remedies. The Federal Trade Commission, under the leadership of Chair Lina Khan, has potentially widened the reach of the Federal Trade Commission Act by withdrawing a policy statement notionally limiting enforcement to consumer welfare and publishing a policy statement regarding the scope of Unfair Methods of Competition under Section 5 of the FTC Act. Both agencies have expressed expansive interpretations of the goals of antitrust to cover all market harms including those in labor markets, and have published new draft merger guidelines that reflect this broader reach. The antitrust agencies are closely scrutinizing acquisitions by firms with significant market power, especially in high tech and health care, including "killer acquisitions" of nascent competitors. High Tech/Big Data remains a sector to watch as jurisdictions around the world challenge the big platforms' power, conduct and acquisitions and the European Union has adopted a new regulatory regime for the biggest on-line platforms with a view to achieving "contestable and fair markets in the digital sector." (The quoted words are part of the title of the Digital Markets Act.) In the United States, both federal antitrust agencies, the States (almost all 50 of them), and private parties have launched antitrust cases against the biggest digital "Gatekeepers" — Google, Apple, Facebook, and Amazon. The claims against Google for monopolization violations in search and search advertising are due to go to trial in the fall (2023). A trial challenging Google's monopolization of the ad tech business is set for early 2024. The

Google cases may be the biggest monopoly cases to go to court in a quarter of a century.

We present selected developments below, as inserts to the Casebook pages.

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CHAPTER 2

CARTELS AND CLOSELY RELATED AGREEMENTS

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C. CHARACTERIZATION CASES (IS THIS A CARTEL?)

Insert to page 110, end of note 5.

College athletes have long been denied compensation by rules of the NCAA. They have been challenging those rules. A case challenging NCAA pay/financial aid caps came before the Supreme Court. The Supreme Court declared illegal under a rule of reason the NCAA rules restricting education-related benefits. (*See* National Collegiate Athletic Association v. Alston, 2021, *infra*, Insert to page 214, before * * *.) In a more expansive concurring opinion, also addressing the no-pay rules beyond education-related compensation, Justice Kavanaugh said: "Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem, because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work." Justice Kavanaugh also contrasted the billions of dollars in revenues that student athletes generate for colleges with the outcomes for student athletes, many of whom "are African American and from lower-income backgrounds, and end up with little or nothing. . . ."

Why aren't the agreements not to pay the student athletes illegal per se? Why aren't they at least categorized as inherently anticompetitive, subject to illegality after a quick look? Do Justice Kavanaugh's remarks reach beyond sports to recent criminal enforcement against employers' wage-fixing and no-poach agreements?

Insert to page 132, immediately below the box.

Beginning in about 2016, the Department of Justice Antitrust Division turned its attention to restraints in labor markets and discovered numerous agreements among rival companies not to solicit employees from one another and in some cases agreements to lower wages of classes of employees. In December 2020 it brought its first criminal wage-fixing case (agreement to lower wages to physical therapists and their assistants), and in January 2021 it brought its first criminal no-poach case (agreement of out-patient medical care centers not to solicit senior employees of each

other). The DOJ lost these cases, but had a later success when defendant pled guilty.

Are these agreements naked restraints and clearly illegal? Is criminal prosecution a good idea? Should any distinction be drawn between fixing wages and agreeing not to poach employees? Should any distinction be drawn between high skill and low skill employees? Should a franchisor be allowed to require its franchisees not to solicit each other's employees? What about franchisees agreeing to the same effect with each other?

Insert to page 148.

Other cases are in the works. In January of 2023, private plaintiffs filed a complaint against several Las Vegas Strip hotels alleging that the hotels have colluded on elevated room rates through the adoption of a common price recommendation tool. Media sources claim that the DOJ has opened an investigation into RealPage, rental pricing software used by landlords, presumably out of concern that price suggestions and information aggregation in this software may facilitate coordination on rent elevation.

F. THE INTERNATIONAL DIMENSION

Insert to page 186, after the citation to Animal Science Products (Vitamin C Litigation), subsequent case history.

On remand, the Court of Appeals again dismissed the case on comity grounds. In Re: Vitamin C Antitrust Litig., 8 F.4th 136 (2d Cir. 2021). Plaintiffs again petitioned for certiorari. Their petition was denied. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 143 S. Ct. 85 (2022).

CHAPTER 3

COLLABORATION AMONG COMPETITORS OTHER THAN CARTELS

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B. CONTEMPORARY CASES

Insert to page 214, before * * *.

NATIONAL COLLEGIATE ATHLETIC ASS'N V. ALSTON

594 U.S. __, 141 S. Ct. 2141 (2021).

Justice GORSUCH delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

[The opinion's factual background begins with a lengthy history of U.S. intercollegiate athletic competitions. It charts the growth of intercollegiate athletics, efforts to maintain amateurism, the way in which colleges and administrators profit handsomely from the commercial exploitation of

NCAA competition, and concludes that the NCAA has become "a massive business."]

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce."

The [district] court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand."

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid post eligibility internships. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." . . . Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. . . .

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full. . . .

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions in fact decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. . . . Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. . . .

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. . . .

II

A

[W]e focus only on the objections the NCAA does raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," or a 'quick look,' before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this . . . . And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. . . .

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as “a fact-specific assessment of market power and market structure” aimed at assessing the challenged restraint’s “actual effect on competition”—especially its capacity to reduce output and increase price.

As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the “ ‘twinkling of an eye.’ ” . . . That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (CADC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review “command[ed] between 5.1 and 6% of the relevant market.” Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, “there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business.” . . .

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed “considerable experience with the type of restraint at issue” and “can predict with confidence that it would be invalidated in all or almost all instances.” . . .

None of this helps the NCAA. The NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. . . . Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA’s status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. . . .

But this insight does not always apply. That some restraints are necessary to create or maintain a league sport does not mean all "aspects of elaborate interleague cooperation are." While a quick look will often be enough to approve the restraints "necessary to produce a game," a fuller review may be appropriate for others. . . . The NCAA's rules fixing wages for student-athletes fall on the far side of this line. . . . [T]he parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to Board of Regents, where this Court considered the league's rules restricting the ability of its member schools to televise football games. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. Board of Regents explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as " 'illegal per se.' " The Court declined to declare the NCAA's restraints per se unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." Our analysis today is fully consistent with all of this. . . .

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the Board of Regents Court commented on student-athlete compensation restrictions [saying: "There can be no question but that . . . preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."] . . . On the NCAA's telling, these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. Board of Regents may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in Board of Regents. . . . [T]he Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

Our confidence on this score is fortified by still another factor. Whether an antitrust violation exists necessarily depends on a careful analysis of

market realities. . . . If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. . . . Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. . . . By 2016, NCAA Division I schools raised more than $13.5 billion. From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. . . . In 2016, those annual television rights brought in closer to $1.1 billion.

* * *

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education."

* * *

To the extent [that the NCAA] means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

* * *

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well. When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for "'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." Should the plaintiff carry that burden, the burden then "shifts to the defendant to

show a procompetitive rationale for the restraint." If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. . . .

As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." . . . [T]he district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion.

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects collectively. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits individually. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." . . .

* * *

While we agree with the NCA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. . . .

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. . . .

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the least restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints " 'patently and inexplicably stricter than is necessary' " to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. . . .

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it "immune from § 1 scrutiny." . . .

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. . . .

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. . . . The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. . . . Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. . . .

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. . . .

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: " 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of

antitrust law.' " That review persuades us the district court acted within the law's bounds.

The judgment is Affirmed.

The *NCAA* majority decided a relatively narrow question: the legality of NCAA rules restricting player compensation for up to the entire cost of getting an education. An even larger issue for collegiate athletics still looms—whether NCAA rules prohibiting athletes from being paid the market value of their services (i.e., not limited to educational expenses) are also anticompetitive. Justice Kavanaugh's concurring opinion left little doubt as to his view of that issue, as illustrated by this excerpt from the concurring opinion:

> The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.
>
> Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.
>
> The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

QUESTIONS AND COMMENTS

1. The NCAA wanted either a rule of complete deference or a declaration of legality after a quick look. Is this a reversal of the quick look doctrine? The Court rejected the approach in these circumstances but did embrace it for appropriate circumstances. (What, for example?) It agreed that the NCAA should have latitude in running its operations.

2. Did the Court apply the rule of reason wisely? Would you have formulated the rule of reason differently? Why and how?

3. The Court reaffirmed prior holdings that U.S. antitrust does not give dispensation for social objectives beyond enhancing competition. Many other jurisdictions are now addressing themselves to two of the most salient social problems of our age – environmental sustainability and extreme and growing inequality of wealth and income, and they are considering whether and how to use competition law as one tool. Are these issues off the table for U.S. antitrust? Is that a good or bad thing?

4. As of the time of this Update, lawsuits challenging NCAA's limits on player compensation are pending. Various bills with respect to NCAA athletes—such as one permitting student-athletes to unionize and bargain collectively—are pending in Congress, so the issue ultimately may be decided by legislation rather than litigation.

D. MORE INTEGRATION: JOINT BUYING, SELLING, MARKETING, RESEARCHING–SHARING RISKS AND SAVING COSTS, OR GETTING POWER?

2. HEALTH CARE – AGENCY GUIDANCE

Insert to page 270.

In February 2023, the DOJ withdrew its 1996 statement, as well as related 1993 and 2011 statements concerning healthcare enforcement policy. In a press statement titled "Justice Department Withdraws Outdated Enforcement Policy Statements" the DOJ explained that changes in the healthcare landscape had rendered portions of these statements (such as those concerning information sharing) "overly permissive" and inaccurate as reflections of current agency enforcement policy. *https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements*.

CHAPTER 4

COLLABORATION AMONG COMPETITORS OTHER THAN CARTELS

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F. IS THERE AN OLIGOPOLY PROBLEM?—NON-COMPETITIVE BEHAVIOR WITHOUT COLLABORATION

Insert to page 302 before G.

A Rule Against Non-Compete Clauses

Some practices could have consequences beyond the facilitation of collusion. In 2023, the Federal Trade Commission initiated proposed rulemaking under Section 6(g) of the FTC Act for a rule to ban non-compete clauses in employment contracts as "unfair methods of competition" under Section 5 of the FTC Act. *https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.*

The proposed rule would be subject to narrow exemptions such as non-disclosure agreements, and client or customer non-solicitation agreements that do not prevent a worker from seeking or accepting employment after the conclusion of the worker's employment with the employer.

The proposed rule defines "non-competes" as a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer … whether a contractual provision is a non-compete clause would depend not on what the provision is called, but how the provision functions". The proposed rule is at the stage of public consultation. The FTC has also sought public comment on franchise agreements and business practices.

CHAPTER 4

MONOPOLY AND DOMINANCE

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A. INTRODUCTION

Insert to page 305, top of page.

In a handful of very early cases, the Supreme Court held that certain industrialists (dubbed the Robber Barons) violated the Sherman Act by buying up and stamping out rivals and creating huge “trusts” in various necessities of life. The most famous example is *Standard Oil*, Casebook pp. 39, 42. As a remedy for its violations, Standard Oil was dissolved; its assets were distributed to its stockholders. Seven successor regional companies were formed. Each remained dominant in its region. Casebook p. 45.

After this early period, and especially after trade barriers fell in the 1970s, the Justice Department attacked relatively few firms as monopolies that should be broken up, as opposed to cases of bad conduct that should be enjoined. Famously among the few is Alcoa (Aluminum Company of America, 1945 decision), which had an aluminum monopoly. The court would probably have ordered breakup had circumstances during the war effort not produced competitors. Casebook p. 315. Also famously among the few is AT&T, which had a structural monopoly spanning all related telecom markets. AT&T settled a Justice Department case in 1982 by consent decree that separated the long distance and local service functionalities of the firm. See Casebook pp. 305-06. Moreover, in 1994, the United States sued Microsoft, the first big network tech defendant. The district court found a monopolization violation and would have broken up the firm. The court of appeals affirmed in part but reversed on the remedy and expressed a view unsympathetic to breakup as a Section 2 remedy. Casebook pp. 434-35. Microsoft was not broken up.

For some years after the *Microsoft* case, antitrust had a low profile publicly. But the flag of anti-monopoly resurfaced prominently in the 2010s in the wake of the growth of the Internet, the explosive emergence of Big Tech/Big Data, claims of growing economic concentration, and extreme widening of the wealth-and-income inequality gap. Since approximately 2016, presidential candidates, the press, legislators, and other policymakers have declared: “America has a monopoly problem.” The biggest tech firms are popularly called monopolies, and a populist battle cry is: “Break them up.”

Are the Big Tech platforms monopolies? Do they have the economic power to place them within the sights of the Sherman Act prohibition of monopolization? If so, have they engaged in anticompetitive conduct of the type proscribed by the Sherman Act? If so, what is the proper remedy? Is breakup on the list? The materials in this chapter will help you answer these questions.

Meanwhile, the Big Tech/Big Data firms are in the eye of an antitrust storm around the world. The European Union has adopted the Digital Markets Act, which is essentially a combination of rules of antitrust, contestability, and fairness to be applied against the biggest "Gatekeepers." In addition, it has brought and is bringing competition law cases against the biggest tech firms, and some of these cases are working their way through the appeals process. Also taking high profile roles are Germany, the UK, and Australia, among others. The United States was slower to act, but now the Department of Justice and almost all states have sued Google, the Federal Trade Commission and almost all states have sued Facebook, the District of Columbia has sued Amazon as well as Google and Facebook, and private plaintiffs have sued Apple, Google, Amazon, and Facebook.

In cases in Europe and elsewhere, competition authorities have expressed concern that the major Big Tech/Big Data platforms wield power that, though perhaps not qualifying as traditional dominant firm power, nevertheless requires intervention. Enforcers and litigants are experimenting with ideas for lowering the bar to enforcement such as "strategic market status" and (in a new German law) "paramount significance for competition across markets." Like the EU, the UK is contemplating how it could complement competition case law with ex ante regulation (prohibiting specific conduct by rules). In the United States, legislation has been proposed, or is pending, that would prohibit the biggest gatekeepers from self-preferencing, require interoperability, allow developer apps to be sideloaded onto smartphone operating systems, shift burdens of proof especially in big mergers, prohibit start-up acquisitions by the biggest tech, and require breakups in certain cases of covered big platforms. It is hard to predict the likelihood of enactment for these bills. Meanwhile, President Biden has encouraged the antitrust agencies to take an aggressive line. (*See This Update*, *infra*, Insert to page 800, before C.)

C. MARKET DEFINITION AND MONOPOLY POWER

Insert to page 330, after note 5.

Allegations of single brand markets have not fared well since *Kodak*. In *Epic Games, Inc., v. Apple Inc.*, 595 F. Supp. 3d 898, (N.D. Cal. 2021),

Apple ejected the popular video game Fortnite from Apple's iOS App Store after Epic subverted Apple's developer agreement and code review system to offer gamers a non-Apple in-app payment system. Market definition was a point of significant contention. Epic argued that the court should recognize two single-brand markets: an *aftermarket* for iOS app distribution and payment, and a *foremarket* for smartphone operating systems. Apple responded that the relevant market was simply video game transactions. The district court struck a middle ground: roughly, mobile video game transactions. On appeal, the Ninth Circuit commented on how the antitrust treatment of single-brand markets had developed since *Kodak*.

EPIC GAMES V. APPLE

67 F.4th 946 (9th Cir. 2023).

M. SMITH, Circuit Judge:

* * *

ANALYSIS

* * *

I. Market Definition

. . . Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless. . . .

* * *

B. Single-Brand Aftermarkets

"[I]n some instances one brand of a product can constitute a separate market." *Eastman Kodak Co. v. Image Tech. Servs., Inc.* . . . More specifically, the relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket.*

In *Kodak*, the Supreme Court considered the question of whether a lack of market power in the foremarket (photocopier machines, generally) categorically precludes a finding of market power in the aftermarket (replacement parts for and servicing of Kodak-brand photocopiers), which Kodak had allegedly achieved by contractually limiting customers to Kodak-provided parts and services. The Supreme Court rejected Kodak's invitation to impose an across-the-board rule because it was not convinced

that the rule—which "rest[ed] on a factual assumption about the cross-elasticity of demand" in aftermarkets—would always hold true. The Supreme Court thus folded aftermarkets into the framework for assessing markets generally, evaluating cross-elasticity of demand to determine whether a hypothetical monopolist could profitably charge a supracompetitive price. . . . Explaining its skepticism . . . the Court reasoned that "significant" (1) information costs and (2) switching costs "could create a less responsive connection between aftermarket prices and [foremarket] sales," particularly where the percentage of "sophisticated purchasers" able to accurately life-cycle price is low. . . . That is, these conditions might "lock-in" unknowing customers such that competition in the foremarket cannot "discipline [competition in] the aftermarkets," meaning a hypothetical monopolist could price its aftermarket products at a supracompetitive level without a substantial number of customers substituting to other products. . . .

In *Newcal*, we considered how to square *Kodak* with our prior holding in *Forsyth* that contractual obligations are generally "not a cognizable source of market power." We reasoned that the "critical distinction" between *Kodak*, on the one hand, and *Forsyth*, on the other, is that "the Kodak customers did not knowingly enter a contract that gave Kodak the exclusive right to prove parts and services for the life of the equipment." Put otherwise, the "simple purchase of a Kodak-brand equipment" was not "functionally equivalent to the signing of a contractual agreement" limiting aftermarket choices. . . . Our knowledge-based distinction in *Newcal* flowed directly from the Supreme Court's emphasis in *Kodak* on a defendant's ability to use not "generally known" aftermarket restrictions to exploit unsophisticated consumers. . . .

* * *

D. Epic's Legal Challenges

With these principles in mind, we now turn to Epic's arguments that the district court committed legal error when it (1) held a market can never be defined around a product that the defendant does not license or sell, (2) required lack of consumer awareness to establish a *Kodak*-style market, (3) purportedly required a change in policy to establish a *Kodak*-style market, and (4) required Epic to establish the "magnitude" of switching costs. We agree with Epic on its first argument and, to the extent the district court did impose a change-in-policy requirement, Epic's third argument. But we reject Epic's second and fourth arguments as squarely foreclosed by *Kodak* and *Newcal*.

1. Unlicensed or Unsold Product Markets

First, the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems. To begin, this categorical rule flouts the Supreme Court's instruction that courts should conduct market-

definition inquiries based not on "formalistic distinctions" but on "actual market realities." . . . Moreover, the district court's rule is difficult to square with decisions defining a product market to include vertically integrated firms that self-provision the relevant product but make no outside sales. . . . Finally, the district court's rule overlooks that there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue. . . . It puts form over substance to say that such products cannot form a market because they are not directly licensed or sold.

2. Lack of Consumer Knowledge

Second, the district court did not err when it required Epic to produce evidence regarding a lack of consumer knowledge of Apple's app-distribution and IAP restrictions. Such a requirement comes directly from *Kodak* and *Newcal.* The former stated that it is "crucial" that aftermarket restrictions are not "generally known." The latter placed the burden on a plaintiff to "rebut the economic presumption that . . . consumers make a knowing choice to restrict their aftermarket options" when they make a foremarket purchase.

3. Change in Policy

Third, Epic argues that the district court erred by holding that a plaintiff can establish a *Kodak*-style aftermarket only if it shows that the defendant adopted its aftermarket restrictions *after* some portion of consumers purchased their foremarket durable goods. Had the district court actually imposed such an absolute change-in-policy requirement, it would have erred. As explained above, *Kodak* and *Newcal* require a showing of a lack of consumer awareness regarding aftermarket restrictions. A change in policy is of course *one* way of doing so; a consumer cannot knowingly agree to a restriction that did not exist at the time of the foremarket transaction. But it is not the *exclusive* means of doing so. Indeed, *Kodak* itself contemplated that some sophisticated, high-volume consumers would be able to accurately life-cycle price goods in the foremarket. Such life-cycle pricing would be impossible if those consumers were unaware that they would be restricted to certain vendors in the aftermarket.

* * *

4. Significant Switching Costs

Fourth, the district court did not err when it required Epic to produce evidence about the *magnitude* of switching costs. *Kodak* explicitly requires that switching costs—whether monetary or non-monetary—be "significant." This showing need not be extensive; among other things, a plaintiff can point to the "heavy initial outlay" of the foremarket good and brand-specific purchases. By requiring such a showing, the district court

was simply fulfilling its *Kodak* obligation of ensuring that switching costs are "significant."

E. Epic's Clear-Error Challenge

We now turn to the main thrust of Epic's market-definition argument: that it is entitled, as a factual matter, to a finding in favor of its proposed aftermarkets. Though Epic attempts to avoid the clear-error label, its argument requires it to carry the heavy of burden on appeal of showing that the district court clearly erred in finding that (1) Epic failed to show a lack of general consumer awareness regarding Apple's restrictions on iOS distribution and payment processing, (2) Epic failed to show significant switching costs, and (3) the empirical evidence in the record and the *Brown Shoe* practical indicia support a market of mobile-game transactions, not Epic's iOS-specific aftermarkets.

Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness—whether through a change in policy or otherwise. Epic identified a purported change in policy, contrasting the App Store's now-immense profitability with a pre-launch statement from Steve Jobs that Apple did not "intend to make money off the App Store['s]" 30% commission. The district court reasonably found this statement to simply reflect Jobs's "initial expectation" about the App Store's performance, not an announcement of Apple policy. Especially in light of the district court's finding that Apple has "maintained the same general rules" for distribution and payment processing since the App Store's early days, it did not clearly err in concluding that Epic failed to prove a lack of consumer awareness through a change of policy.

Nor did the district court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: "[T]here is *no evidence* in the record demonstrating that consumers are unaware that the App Store is the sole means of digital distribution on the iOS platform" (emphasis added). And on appeal, Epic fails to cite any evidence that would undermine the district court's characterization of the record.

Because of this failure of proof on the first prong of Epic's *Kodak/Newcal* showing, we need not reach—and do not express any view regarding—the other factual grounds on which the district court rejected Epic's single-brand markets: (1) that Epic did not show significant switching costs, and (2) that empirical evidence and the *Brown Shoe* factors rebut Epic's proposed aftermarkets.

Moreover, the district court's finding on *Kodak/Newcal*'s consumer-unawareness requirement renders harmless its rejection of Epic's proposed aftermarkets on the legally erroneous basis that Apple does not license or sell iOS as a standalone product. . . .

QUESTIONS AND COMMENTS

1. The remedy that Epic was seeking was a more open iOS App Store: one in which developers could transact with consumers with less restriction and perhaps in which developers and consumers could escape Apple's 30% fee on payment transactions. If this is the harm that Epic sought to remedy, what does consumer awareness of the restrictive practices have to do with anything?

2. The Ninth Circuit struggles to avoid its prior holding, in *Forsyth*, "that contractual obligations are generally 'not a cognizable source of market power.'" Is the *Forsyth* proposition correct? Can you think of any contractual obligations that confer the type of market power that antitrust law seeks to address?

For the Ninth Circuit's treatment of competitive effects in Epic v. Apple, see *This Update*, *infra*, Insert to page 445, before d.

Insert to page 338, above point D.

What is "monopoly" within the meaning of Sherman Act Section 2? If you were representing the Federal Trade Commission in an action against Facebook for monopolizing the U.S. market of personal social networking services, would you think it enough (for establishing monopoly) to allege that Facebook has "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)" since 2011 and that "no other social network of comparable scale exists in the United States." Would this allegation withstand Facebook's motion to dismiss?

The court, by Judge Boasberg, said, "No," and dismissed the complaint with right of the FTC to replead. *FTC v. Facebook, Inc.,* 560 F. Supp. 3d 1 (D.D.C. 2021). Noting first that the FTC's alleged market definition was only barely sufficient to pass the pleading stage, the court turned to the sufficiency of pleading monopoly power and said: "These allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — ultimately fall short of plausibly establishing that Facebook holds market power." The court continued:

> "The Court's decision here does not rest on some pleading technicality or arcane feature of antitrust law. Rather, the existence of market power is at the heart of any monopolization claim. . . . The FTC's Complaint says almost nothing concrete on the key question of how much power Facebook actually had, and still has, in a properly defined antitrust product market. It is almost as if the agency expects the Court to simply nod to the conventional wisdom that Facebook is a monopolist. After all, no one who hears the title of the 2010 film 'The Social Network' wonders which company it is about. Yet, whatever it may mean to the public, 'monopoly power' is a term of art under federal law

> with a precise economic meaning: the power to profitably raise prices or exclude competition in a properly defined market. To merely allege that a defendant firm has somewhere over 60% share of an unusual, nonintuitive product market — the confines of which are only somewhat fleshed out and the players within which remain almost entirely unspecified — is not enough. The FTC has therefore fallen short of its pleading burden."

Suppose that you are a staff attorney at the FTC and are asked to draft the relevant portions of an amended complaint. How will you seek to determine whether Facebook has monopoly power? What data will you get? What will you measure? Make some assumptions and propose a redrafted portion of the complaint. Then see Facebook II, denying the motion to dismiss the amended complaint. *FTC v. Facebook, Inc.,* 560 F. Supp. 3d 1 (D.D.C. 2021).

In considering whether Facebook has monopoly power for purposes of the Section 2 monopolization violation, is it relevant to consider Facebook's power for purposes of a duty not to block free speech? Justice Thomas commented on this subject in his concurring opinion dismissing as moot a case protesting former President Trump's blocking individuals from his Twitter account (*Biden v. Knight First Amendment Institute at Columbia University*, 594 U.S. __, 141 S. Ct. 1220 (2021). Here is an excerpt of what Justice Thomas said:

> If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude. . . .
>
> * * *
>
> The analogy to common carriers is even clearer for digital platforms that have dominant market share. Similar to utilities, today's dominant digital platforms derive much of their value from network size. The Internet, of course, is a network. But these digital platforms are networks within that network. The Facebook suite of apps is valuable largely because 3 billion people use it. Google search—at 90% of the market share—is valuable relative to other search engines because more people use it, creating data that Google's algorithm uses to refine and improve search results. These network effects entrench these companies. Ordinarily, the astronomical profit margins of these platforms—last year, Google brought in $182.5 billion total, $40.3 billion in net income—would induce new entrants into the market. That these companies have no comparable competitors highlights that the industries may have substantial barriers to entry.

> To be sure, much activity on the Internet derives value from network effects. But dominant digital platforms are different. Unlike decentralized digital spheres, such as the e-mail protocol, control of these networks is highly concentrated. Although both companies are public, one person controls Facebook (Mark Zuckerberg), and just two control Google (Larry Page and Sergey Brin). . . .
>
> Much like with a communications utility, this concentration gives some digital platforms enormous control over speech. When a user does not already know exactly where to find something on the Internet . . . Google is the gatekeeper between that user and the speech of others 90% of the time. It can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results. . . . Facebook and Twitter can greatly narrow a person's information flow through similar means. And, as the distributor of the clear majority of e-books and about half of all physical books, Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing.
>
> It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is.

Should the power discussed by Justice Thomas be relevant when assessing a case under Section 2? How is the power of a platform to restrict speech like the power to raise prices or exclude competitors? How is it different?

D. THE CONDUCT OFFENSE

1. THE PARADIGM

Insert to page 339, above *Lorain Journal*.

The DOJ has expressed an intent to reinvigorate criminal enforcement of Section 2. In 2023, it brought and settled a criminal Section 2 violation for the first time since 1979.

3. ESSENTIAL FACILITIES AND DUTIES TO DEAL

Insert to page 374, before point 13, as new point 12a.

12a. In *Trinko*, the Supreme Court rejected the idea that a monopolist has a heightened obligation to deal. However, the immense power of digital media platforms such as Google, Facebook, and Twitter to control speech has put pressure on that idea, including from unexpected quarters. In 2017, then-President Donald Trump blocked a number of his antagonists from interacting with him on Twitter. Aided by Columbia University's Knight First Amendment Institute, those individuals sued Trump, alleging that the President's social media account was a public forum from which they could not be excluded. The U.S. district court and U.S. Court of Appeals for the Second Circuit agreed and enjoined the President from blocking individuals based on their political views. By the time the case reached the U.S. Supreme Court, Trump was no longer in office and the case was dismissed as moot. *Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220 (2021). Justice Thomas agreed that the case should be dismissed as moot, but filed an interesting concurring opinion (*see This Update*, *supra*, Insert to page 338, above point D) questioning whether Twitter, rather than the President, should be the subject of regulation on who could or could not be excluded from a social media platform. Thomas suggested that online content platforms, especially ones with market power, might be common carriers subject to general non-discrimination obligations and that it was Twitter, not the former President, that had market power on its platform. Shortly after Justice Thomas released his opinion, Ohio's Republican Attorney General filed a lawsuit against Google, seeking a declaration that Google is a common carrier under Ohio law and that this status means that Google may not engage in self-preferencing. Google moved to dismiss; the motion was denied. *Ohio v. Google LLC,* 21-CV-H-06-0274 (Ohio Common Pleas, 2022). Is reviving nineteenth century common carrier principles a desirable way of dealing with twenty-first century digital dominance problems?

8. COMPLEX STRATEGIES TO MAINTAIN MONOPOLY: PRODUCT CHANGE, EXCLUSIVE DEALING, TYING, BUNDLING, BIG TECH

Insert to page 445, before d.

c1. Big Tech, platform monopolization and anticompetitive tying

Both Apple and Google require developers, such as the makers and venders of mobile games, to collect app-related payments through platform-specific payment systems. Apple and Google take as much as a 30% commission on each transaction processed in this way. Both platforms

forbid developers to steer users to alternative and cheaper means of payment.

The Northern District of California dismissed a monopolization claim against Apple for tying its in-app payment system to its app distribution store. The District Court held that since the payment system was integrated into the app store, it did not constitute a separate product that could be anticompetitively tied. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021). The Ninth Circuit disagreed with several of the District Court's legal conclusions, but not its final judgment.

EPIC GAMES V. APPLE

67 F.4th 946 (9th Cir. 2023).

M. SMITH, Circuit Judge:

Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1–2, and California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq*. Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple's App Store, requiring in-app purchases on iOS devices to use Apple's in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. . . .

After a sixteen-day bench trial involving dozens of witnesses and nine hundred exhibits, the district court rejected Epic's Sherman Act claims challenging the first and second of the above restrictions—principally on the factual grounds that Epic failed to propose viable less restrictive alternatives to Apple's restrictions. The court then concluded that the third restriction is unfair pursuant to the UCL and enjoined Apple from enforcing it against any developer. . . . Epic appeals the district court's Sherman Act [rulings]. . . . We affirm the district court . . . .

FACTUAL AND PROCEDURAL HISTORY

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled "native" apps that Apple had developed itself. Shortly after the iPhone's debut, Apple decided to move on from its native-apps-only approach and open the iPhone's (and later, the iPad's) operating system (iOS) to third-party apps.

This approach created a "symbiotic" relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market

with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. . . .

Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a "walled garden" in which Apple plays a significant curating role.[2] Developers can distribute their apps to iOS devices only through Apple's App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases . . . and subsequent in-app purchases . . . .

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties' appeals. First, Epic is a video game developer—best known for the immensely popular *Fortnite*, which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. . . . Second, Epic is the parent company of a gaming-software developer. . . . Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. . . .

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat $99 fee and execute the Developer Program Licensing Agreement (DPLA). The DPLA is a contract of adhesion; out of the millions of registered iOS developers, only a handful have convinced Apple to modify its terms.

By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS apps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to

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[2] Many game consoles—including the Microsoft Xbox, Nintendo Switch, and Sony PlayStation—provide ecosystems that can similarly be labeled "walled gardens."

license its IP to developers in exchange for a $99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit . . . . First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain mechanisms such as in-app links (the anti-steering provision). "Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP]." Nor can developers use "points of contact obtained from account registration within the app (like email or text) [to] encourage users to use a purchasing method other than [IAP]."

III. Apple and Epic's Business Relationship

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple's walled-garden approach. . . . In 2020, Epic renewed the DPLA with Apple but sought a "side letter" modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store) and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: "We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users . . . ."

Once Apple rejected its offer, Epic kicked into full gear an initiative called "Project Liberty": a two-part plan it had been developing since 2019 to undermine Apple's control over software distribution and payment processing on iOS devices, as well as Google's influence over Android devices. . . . Epic lowered the price of *Fortnite*'s in-app purchases on all platforms but Apple's App Store and Google's Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with "generating continuous media . . . pressure" on Apple and Google; and it ran advertisements portraying Apple and Google as the "bad guys" standing in the way of Epic's attempt to pass cost-savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update . . . to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple's IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter Epic activated the undisclosed code and opened its IAP alternative to users.

That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. . . .

IV. Procedural History

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2. Sherman Act Section 1: Restraint of Trade

The district court . . . rejected Epic's Sherman Act Section 1 restraint-of-trade-claim. . . .

At step one of the Rule of Reason, the district court found that Epic proved substantial anticompetitive harms through both direct and indirect evidence. Apple has for years charged a supracompetitive commission on App Store transactions that it set "without regard" for competition. That commission, in turn, creates an "extraordinary high" operating margin of 75% for App Store transactions. Moreover, Apple has market power in the mobile-games-transactions market, evidenced by its 52 to 57% market share and barriers to entry in the form of network effects. . . .

At step two of the Rule of Reason, the district court found that Apple established non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. The district court credited Apple's rationale that its restrictions seek to enhance consumer appeal and differentiate Apple products by improving iOS security and privacy. It also *partially* accepted Apple's rationale that the restrictions are a means of being compensated for third-party developers' use of its intellectual property—crediting it generally but rejecting it "with respect to the [App Store's] 30% commission rate specifically."

At step three of the Rule of Reason, the district court rejected Epic's proposed less restrictive alternatives (LRAs) as severely underdeveloped. As a purported LRA to Apple's app-distribution restriction, Epic primarily advanced a "notarization model" based on Apple's approach to security on the Mac operating system (macOS). …

* * *

ANALYSIS

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II. Sherman Act Section 1: Unreasonable Restraint

With the relevant market for Epic's antitrust claims established (mobile-game transactions), we turn to the district court's rejection of Epic's Sherman Act Section 1 restraint-of-trade claim. . . .

* * *

B. Rule of Reason Step One: Anticompetitive Effects

The district court did not err when it found that Epic made the Rule of Reason's required step-one showing. At step one, "the plaintiff has the

initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." Antitrust plaintiffs can make their step-one showing either "directly or indirectly."

"To prove a substantial anticompetitive effect *directly*, the plaintiff must provide 'proof of actual detrimental effects [on competition],' such as reduced output, increased prices, or decreased quality in the relevant market." Importantly, showing a reduction in output is one form of direct evidence, but it "is not the only measure."

To prove substantial anticompetitive effects *indirectly*, the plaintiff must prove that the defendant has market power and present "some evidence that the challenged restraint harms competition." Market power is the ability for a defendant to profitably raise prices by restricting output. . . . In other words, a firm with market power is a price-*maker*, not the price-*takers* that economic theory expects in a competitive market. Pursuant to this indirect-evidence route, "[t]he existence of market power is a significant finding that casts an anticompetitive shadow over a party's practices in a rule-of-reason case." . . . A plaintiff must also present "some evidence" that the defendant uses that market power to harm competition. . . . This inquiry need not always be extensive or highly technical. It is sufficient that the plaintiff prove the defendant's conduct, as matter of economic theory, harms competition—for example that it increases barriers to entry or reduces consumer choice by excluding would-be competitors that would offer differentiated products.

Here, the district concluded that Epic produced both sufficient direct and indirect evidence to show that Apple's distribution and IAP restrictions impose substantial anticompetitive effects. In terms of direct evidence, the court found that Apple has for years extracted a supracompetitive commission that was set "almost by accident" and "without regard" to its own costs and has produced "extraordinarily high" operating margins that "have exceeded 75% for years." The court found that "the economic factors driving" other platforms' rates "do not apply equally to Apple," with "nothing other than legal action seem[ing] to motivate Apple to reconsider pricing and reduce rates." With respect to indirect evidence, the district court found that Apple has market power: Apple had a mobile-games market share of 52 to 57% for the three years in evidence, and network effects and information restrictions create barriers to entry. The court found that Apple wielded that market power to foreclose would-be competitors like Epic from offering app-distribution and payment-processing alternatives—reducing innovation and Apple's own investment in the App Store in the process.

1. Direct Evidence

Apple challenges both the district court's direct-and indirect-evidence conclusions on several grounds—some legal, some factual. We are not persuaded that the district court erred at step one of the Rule of Reason.

First, Apple argues that the district court's direct-evidence conclusion cannot stand because Epic did not show that Apple's restrictions reduced output. We squarely rejected this argument in *O'Bannon.* There, the NCAA similarly argued that liability was foreclosed because output in the relevant market "increased steadily over time." "Although output reductions are one common kind of anticompetitive effect in antitrust cases, a 'reduction in output is not the *only* measure of anticompetitive effect.' " Nor does *Amex* displace our holding in *O'Bannon.* A showing of decreased output was essential in that case because the plaintiff "failed to offer any reliable measure of Amex's transaction price or profit margins" and "the evidence about whether Amex charges more than its competitors was ultimately inconclusive."

Second, Apple argues that Epic's evidence of supracompetitive pricing fails as a matter of law because Apple never raised its commission. A supracompetitive price is simply a "price[ ] above competitive levels." Apple cites no binding precedent in support of its proposition that the charging of a supracompetitive price must always entail a price increase, though we recognize that it ordinarily does.

Third, Apple attacks the supracompetitive-pricing finding on factual grounds by asserting that Apple charges a substantially similar commission as its competitors. That assertion is true as far as *headline* rates go, but the district court reasonably based its supracompetitive-price finding on *effective* commission rates instead of headline rates. The district court found Apple's reliance on headline rates to be "suspect" because, unlike the App Store, other platforms "frequently negotiate[ ] down" the rates they charge developers. The court noted that Amazon has a headline rate of 30% but an effective commission rate of 18%. And it credited testimony that game-console transaction platforms often "negotiate special deals for large developers." While the district court's finding that the Google Play Store (the App Store's "main competitor") charges a 30% rate seemingly undermines the characterization of Apple's commission as supracompetitive, we cannot say that the district court clearly erred absent evidence about the Google Play Store's effective commission—the metric that the district court at trial found to be the key to determining the competitiveness of a price in this market.

Fourth, Apple argues that the district court's direct-evidence finding fails as a matter of law because *Amex* requires Epic to establish anticompetitive effects on both sides of the two-sided market for mobile-game transactions (developers and users). Apple's argument falls short both legally and factually. We have previously held: "*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the 'market as a whole.' " In any event, the district court found that, while Apple's restrictions "certainly impact developers," there was "some

evidence" that the restrictions also "impact[ ] consumers when those costs are passed on."

2. Indirect Evidence

We are not persuaded by Apple's argument that the district court erred in concluding that Epic established indirect evidence of anticompetitive effects. Apple does not take issue with the district court's finding of a 52 to 55% market share (other than noting it was the court's "own . . . calculation"); nor does Apple challenge the court's barriers-to-entry finding. It instead argues that the finding that Apple wields its market power in an anticompetitive manner is speculative. But, supported by basic economic presumptions, the district court reasonably found that, without Apple's restrictions, would-be competitors could offer iOS users alternatives that would differentiate themselves from the App Store on price as well as consumer-appeal features like searchability, security, privacy, and payment processing. Indeed, it found competition in the PC-gaming market to be a "vivid illustration": Steam had long charged a 30% commission, but upon Epic's entry into the market, it lowered its commission to 20%. Epic's indirect-evidence showing was sufficient. . . .

C. Step Two: Procompetitive Rationales

The district court correctly held that Apple offered non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. If a plaintiff establishes at step one that the defendant's restraints impose substantial anticompetitive effects, then the burden shifts back to the defendant to "show a procompetitive rationale for the restraint[s]." A procompetitive rationale is "a [1] nonpretextual claim that [the defendant's] conduct is [2] indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."

Here, the district court accepted two sets of rationales as non-pretextual and legally cognizable. First, it found that Apple implemented the restrictions to improve device security and user privacy—thereby enhancing consumer appeal and differentiating iOS devices and the App Store from those products' respective competitors. Second, the court *partially* accepted Apple's argument that it implemented the restrictions to be compensated for its IP investment. While the court credited the IP-compensation rationale generally, it rejected the rationale "with respect to the 30% commission rate specifically." On appeal, Epic raises three arguments challenging Apple's rationales as legally non-cognizable.

1. Partial Acceptance of Apple's IP-Compensation Rationale

Epic argues that the district court may not credit Apple's IP-compensation rationale while finding that the rationale was pretextual "with respect to the 30% commission rate *specifically*" (emphasis added). We have held that IP-compensation is a cognizable procompetitive

rationale . . . and we find no error in the district court's *partial* crediting of that rationale here.

. . . Because the district court accepted only a general version of Apple's IP-compensation rationale (that Apple was entitled to "*some* compensation"), Epic at step three needed only to fashion a less-restrictive alternative calibrated to achieving that general goal, instead of one achieving the level of compensation that Apple currently achieves through its 30% commission. There is no legal requirement—as Epic suggests—that district courts make pretext findings on an all-or-nothing basis. When district courts at step two partially credit a rationale, step three will necessarily take that partial finding into account.

2. Cognizability of Apple's Privacy/Security Rationales

Epic and its *amici* next argue that Apple's security and privacy rationales are *social*, not procompetitive, rationales and therefore fall outside the purview of antitrust law. We reject this argument.

* * *

. . . Epic's argument characterizes Apple as asserting security and privacy as independent justifications in and of themselves. But, throughout the record, Apple makes clear that by improving security and privacy features, it is tapping into consumer demand and differentiating its products from those of its competitors—goals that are plainly procompetitive rationales. *See, e.g., Qualcomm* (listing enhanced "consumer appeal" as a legitimate procompetitive rationale); *O'Bannon* (considering the NCAA's amateurism rationale that "plays a role in increasing consumer demand"). Consumer surveys in the record show that security and privacy is an important aspect of a device purchase for 50% to 62% of iPhone users and 76% to 89% of iPad users worldwide. Even Epic's CEO testified that he purchased an iPhone over an Android smartphone in part because it offers "better security and privacy." And the district court found that, because Apple creates a "trusted app environment, users make greater use of their devices."

With Apple's restrictions in place, users are free to decide which kind of app-transaction platform to use. Users who value security and privacy can select (by purchasing an iPhone) Apple's closed platform and pay a marginally higher price for apps. Users who place a premium on low prices can (by purchasing an Android device) select one of the several open app-transaction platforms, which provide marginally less security and privacy. Apple's restrictions create a heterogenous market for app-transaction platforms which, as a result, increases interbrand competition—the primary goal of antitrust law. Antitrust law assumes that competition best allocates resources by allowing firms to compete on "all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost." If we were to accept Epic and its *amici*'s argument, then

no defendant could cite competing on non-price features as a procompetitive rationale.

To avoid this conclusion, Epic and its *amici* rely on a line of cases stemming from *National Society of Professional Engineers*. But neither that case nor its progeny support their argument that improved quality is a social, rather than procompetitive, rationale. Instead, the *Professional Engineers* line of cases holds that a defendant cannot severely limit interbrand competition on the theory that *competition itself* is ill-suited to a certain market or industry. . . .

* * *

3. Cognizability of Cross-Market Rationales

Epic finally argues that, even if Apple's security and privacy restrictions are procompetitive, they increase competition in a *different market* than the district court defined and in which Epic showed step-one anticompetitive effects, and thus are not legally cognizable at step two. In Epic's view, Apple's rationales relate to the market for smartphone operating systems (or the market for smartphones), while the anticompetitive effects of Apple's restrictions impact the market for mobile-game transactions.

The Supreme Court's precedent on this issue is not clear. While *amici* argued in *Alston* that cross-market justifications fail as a matter of law, the Supreme Court "express[ed] no view[ ]" on the argument. Dicta from one *per se* decision provides some support for Epic's position. *See United States v.* Topco Assocs.*, Inc.* (courts are unable "to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector"). But the Supreme Court has considered cross-market rationales in Rule of Reason and monopolization cases. *See Kodak* (relevant market of Kodak-brand service and parts; procompetitive rationale in market for photocopiers); *NCAA v. Bd. of Regents of Univ. of Okla.* (relevant market of college football television; procompetitive rationale of protecting the market for college football tickets). Our court's precedent is similar. While we have never expressly confronted this issue, we have previously considered cross-market rationales when applying the Rule of Reason.

We decline to decide this issue here. . . . Epic did not raise this argument below. Nor did it raise this argument in its opening brief before our court, denying Apple an opportunity to respond.

More importantly, we need not decide this issue because Epic's argument rests on an incorrect reading of the record. Contrary to Epic's contention, Apple's procompetitive justifications *do* relate to the app-transactions market. Because use of the App Store requires an iOS device, there are two ways of increasing App Store output: (1) increasing the *total* number of iOS device users, and (2) increasing the *average* number of downloads and in-app purchases made by iOS device users. Below, the

district court found that a large portion of consumers factored security and privacy into their decision to purchase an iOS device—increasing total iOS device users. It also found that Apple's security-and privacy-related restrictions "provide[ ] a safe and trusted user experience on iOS, which encourages both users and developers to transact freely"—increasing the per-user average number of app transactions.

D. Step Three: Substantially Less Restrictive Means

The district court did not clearly err when it held that Epic failed to prove the existence of substantially less restrictive alternatives (LRAs) to achieve Apple's procompetitive rationales. At step three of the Rule of Reason, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." When evaluating proposed alternative means, courts "must give wide berth to [defendants'] business judgments" and "must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives." . . . As such, this circuit's test—which the Supreme Court approved in *Alston*—requires a "*substantially* less restrictive" alternative. To qualify as "substantially less restrictive," an alternative means "must be 'virtually as effective' in serving the [defendant's] procompetitive purposes ... without significantly increased cost."

* * *

1. Proposed LRA to the Distribution Restriction

Epic argues that Apple already has an LRA at its disposal for the distribution restriction: the "notarization model" that Apple uses for app distribution on its desktop and laptop operating system (macOS). The notarization model sits somewhere between iOS's "walled garden" and the open-platform model that characterizes some app-transaction platforms. Unlike on iOS, the Mac Store (the Apple-run equivalent of the iOS App Store for Mac computers) is *not* the exclusive means for macOS users to download apps; instead, users can download apps from the Mac Store or anywhere else on the internet. Also unlike on iOS, a developer can distribute a macOS app to users without first submitting it to Apple. But, regardless of how the developer distributes that app, it will carry a warning that Apple has not scanned it for malware. The developer, however, can choose to submit the app to Apple. If the app passes Apple's malware scan, then the developer can distribute the app to users—again, through the Mac Store or otherwise—without the warning that accompanies unscanned apps.

The malware scanning that Apple performs in the notarization model is not the same as the full app review that it conducts on iOS apps. Importantly, the notarization model does not include *human* review—a contextual review that, as found by the district court, cannot currently be automated. As part of iOS human review, a reviewer confirms that an app

corresponds to its marketing description to weed out "Trojan Horse" apps or "social engineering" attacks that trick users into downloading by posing as something they are not. The reviewer also checks that the app's entitlements are reasonable for its purpose—rejecting, for example, a Tic-Tac-Toe game that asks for camera access and health data, while approving camera access for a social media app. On occasion, human review also detects novel, well-disguised malware attacks. Despite Epic carrying the burden at step three of the Rule of Reason, it was not clear before the district court—and still is not entirely clear—how Epic proposes that the notarization model translates from macOS to iOS. In particular, it is unclear whether the proposed model would incorporate human review and what type (if any) of licensing scheme Apple could implement to complement the notarization model.[17] Whatever the precise form of Epic's proposed notarization model, the district court did not err in rejecting it.

First, to the extent Epic argues that Apple could jot-for-jot adopt macOS's notarization model without adding human review, Epic failed to establish that this model would be "virtually as effective" in accomplishing Apple's procompetitive rationales of enhancing consumer appeal and distinguishing the App Store from competitor app-transaction platforms by improving user security and privacy. The district court ultimately found that the record contained "some evidence" that macOS computers experience higher malware rates than iOS devices. It also noted a third-party report that Android devices have higher malware rates than iOS ones due to Trojan Horse apps being distributed through open app-transaction platforms. And it credited Apple's anecdotal evidence that human review sometimes detects novel malware attacks that slip through malware scans. Moreover, the district court found "compelling" Apple's explanation of why human review is necessary "against certain types of attacks." And it found that "Epic Games did not explain how, if at all" a purely automated process could screen for such threats. It also noted that Epic's security expert testified that he did not consider fraud-prevention in his security analysis, that his opinion on the value-added of human app review "may change" if he did, and that automated protections "do not protect users against" social-engineering threats. Based on this record, the district court did not clearly err in finding that a process without human app review would not be "virtually as effective" as Apple's current model.

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[17] There is even some discrepancy between the injunctive relief Epic requests and the basic mechanics of the notarization system. As explained, the notarization model labels unscanned apps with a warning. Yet Epic requested an injunction that would prohibit Apple from in any way "impeding or deterring the distribution of iOS apps" through non-App Store "distribution channel[s]." A malware warning would seemingly steer some consumers back to the App Store—raising some question of whether it would violate the "impeding or deterring" prohibition.

Second, to the extent Epic proposes a notarization model that incorporates human app review, Epic failed to develop how Apple could be compensated in such a model for third-party developers' use of its IP. Epic argues that "app review can be relatively independent on app distribution" and envisions a model in which a developer would submit an app, Apple would review it, and then "send it back to the developer to be distributed directly or in another store." For example, Epic could submit a gaming app to Apple; Apple would scan it for malware and subject it to human review; and then Epic could choose to distribute it through the App Store, the Epic Games Store, or both.

While such a model would clearly be "virtually as effective" in achieving Apple's security and privacy rationales (it contains all elements of Apple's current model), Epic simply failed to develop how such a model would allow Apple to be compensated for developers' use of its IP. At closing argument, the district court asked Epic whether its requested injunctive relief would allow Apple to impose some sort of licensing fee. Epic responded that "Apple can charge," but it offered no concrete guidance on how to do so. Instead, Epic stated only that Apple "could charge certain developers more than others based on the advantage that they take of the platform" and that it "expect[s], given the innovation in Cupertino, that [Apple] would find ways to profit from their intellectual property and other contributions." The district court accordingly found that Epic's proposed distribution LRAs "leave unclear whether Apple can collect licensing royalties and, if so, how it would do so" and thus declined to consider them as "not sufficiently developed."

* * *

2. Proposed LRA to the IAP Requirement

Epic proposes access to competing payment processors as an LRA to Apple's IAP requirement. Like the distribution requirement LRA, this LRA suffers from a failure of proof on how it would achieve Apple's IP-compensation rationale. As the district court noted, in a world where Apple maintains its distribution restriction but payment processing is opened up, Apple would still be contractually entitled to its 30% commission on in-app purchasers. Apart from any argument by Epic, the district court "presume[d]" that Apple could "utilize[e] a contractual right to audit developers . . . to ensure compliance with its commissions." But the court then rejected such audits as an LRA because they "would seemingly impose both increased monetary and time costs."

E. Step Four: Balancing

Epic—along with several *amici*, including the United States and thirty-four state attorneys general—argue that the district court erred by not proceeding to a fourth, totality-of-the-circumstances step in the Rule of Reason and balancing the anticompetitive effects of Apple's conduct against its procompetitive benefits. We hold that our precedent requires a

court to proceed to this fourth step where, like here, the plaintiff fails to carry its step-three burden of establishing viable less restrictive alternatives. However, the district court's failure to expressly do so was harmless in this case.

We have been inconsistent in how we describe the Rule of Reason. Some decisions, when describing the Rule of Reason, contemplate a fourth step. Others do not. Because of the paucity of cases that survive step one (let alone require a court to exhaust the three agreed-upon steps), most of our decisions have not required us to actually proceed to the portion of the analysis where Epic and its *amici* argue balancing would occur.[19]

The exception is *County of Tuolumne*, which provides the most on-point guidance regarding the existence of a fourth step. There, we held: "Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage. We must balance the harms and benefits of the [challenged restrictions] to determine whether they are reasonable." We then concluded, with just one sentence of analysis, that "any anticompetitive harm is offset by the procompetitive effects of [defendant's] effort to maintain the quality of patient care that it provides."

Supreme Court precedent neither requires a fourth step nor disavows it. In the Court's two most recent Rule of Reason decisions, it discussed only the three agreed-upon steps. But the Court did not characterize that test as the *exclusive* expression of the Rule of Reason. *Alston* stated that the Court "has *sometimes* spoken of 'a three-step, burden-shifting framework," emphasized that those "steps do not represent a rote checklist" or "an inflexible substitute for careful analysis," and approvingly cited one of the Areeda and Hovenkamp treatises as using a "slightly different 'decisional model.' " (emphasis added).

We are skeptical of the wisdom of superimposing a totality-of-the-circumstances balancing step onto a three-part test that is already intended to assess a restraint's overall effect. Neither Epic nor any *amicus* has articulated what this balancing really entails in a given case. Epic argues only that the district court must "weigh[ ]" anticompetitive harms against procompetitive benefits, and the United States describes step four as a "qualitative assessment of whether the harms or benefits predominate." Nor is it evident what value a balancing step adds. Several *amici* suggest that balancing is needed to pick out restrictions that have significant anticompetitive effects but only minimal procompetitive benefits. But the three-step framework is already designed to identify such

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[19] In *Alston*, the Supreme Court cited an *amicus* brief reporting that courts have decided 90% of Rule of Reason cases since 1977 at step one. A similar *amicus* brief filed in this case echoes this statistic and reports that the figure rises to 97% when considering only post-1999 cases.

an imbalance: A court is likely to find the purported benefits pretextual at step two, or step-three review will likely reveal the existence of viable LRAs. . . .

Nonetheless, we are bound by *County of Tuolumne* and mindful of *Alston*'s warning that the first three steps of the Rule of Reason are not a "rote checklist." Therefore, where a plaintiff's case comes up short at step three, the district court must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits. In most instances, this will require nothing more than—as in *County of Tuolumne*—briefly confirming the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive. . . .

Turning to the record here, the district court's failure to explicitly reach the fourth step was harmless. Even though it did not expressly reference step four, it stated that it "carefully considered the evidence in the record and ... determined, based on the rule of reason," that the distribution and IAP restrictions "have procompetitive effects that *offset* their anticompetitive effects" (emphasis added). This analysis satisfied the court's obligation pursuant to *County of Tuolumne*, and the court's failure to expressly give this analysis a step-four label was harmless.

* * *

IV. Sherman Act Section 2: Monopoly Maintenance

We now consider Epic's Sherman Act Section 2 claim that Apple unlawfully maintained a monopoly. . . . A Section 2 monopolization claim "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

At step one, the plaintiff must establish that the defendant possesses monopoly power, which is the substantial ability "to control prices or exclude competition." Monopoly power differs in degree from market power, requiring "something greater." Like market power, monopoly power can be established either directly or indirectly.

At step two, the plaintiff must show that the defendant acquired or maintained its monopoly through "anticompetitive conduct." This anticompetitive-conduct requirement is "essentially the same" as the Rule of Reason inquiry applicable to Section 1 claims. . . . Where, like here, the plaintiff challenges the same conduct pursuant to Sections 1 and 2, we can "review claims under each section simultaneously." And if "a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2."

At step one in this case, the district court found that although Apple possesses "considerable" market power in the market for mobile-game transactions, that power is not durable enough to constitute monopoly power given the influx nature of the market. It then, at step two, echoed its Rule of Reason conclusion that Epic failed to establish Apple's restrictions were anticompetitive.

We affirm the district court's rejection of Section 2 liability. Epic does not argue on appeal that the district court clearly erred in finding that Apple lacks monopoly power in the mobile-games market. It argues only that the district court erred in rejecting its single-brand markets in which Apple would have a 100% market share—an argument we reject above. Moreover, even assuming Apple has monopoly power, Epic failed to prove Apple's conduct was anticompetitive.

* * *

CONCLUSION

To echo our observation from the NCAA student-athlete litigation: There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below. For the foregoing reasons, we **AFFIRM IN PART AND REVERSE AND REMAND IN PART.**

S.R. THOMAS, Circuit Judge, concurring in part and dissenting in part . . .

Does Apple have a duty to provide Epic or any developer access to users through its App Store? If so, what are the contours of that duty? If not, why does Apple have a duty to deal with Epic on terms other than what it chooses?

Similar claims to those that Epic brought against Apple have been filed against Google. Pending EU's investigation and the EU's adoption of the Digital Markets Act, Google has agreed that developers of non-gaming apps in the EU may provide alternative billing systems. *https://blog.google/around-the-globe/google-europe/an-update-on-google-play-billing-in-the-eea/*. Google also effected a similar change following legislation in South Korea. *https://support.google.com/googleplay/android-developer/answer/11222040?hl=en.*

c2. Big Tech and exclusion

The DOJ filed a Section 2 complaint against Google for monopolizing the search and search advertising market. DOJ's complaint specifically attacks Google's exclusionary agreements that require it to be set as the default search engine on mobile devices and worldwide; and in some cases, prohibiting preinstallation of a competitor search engine. The EU and India have previously sanctioned these practices and self-preferencing of Google's products in general search results as an abuse of dominance. Google v. European Commission, Judgment of the General Court, ECLI:EU:T:2022: 541; Umar Javeed v. Google, Case 39/2018, Competition Commission of India (Oct. 20, 2022), *https://www.cci.gov.in/search-filter-details/1207* [hereinafter Google Search (CCI)].

In a new complaint, in 2023, the DOJ and several state attorneys general allege that Google monopolized the digital ad tech stack. The digital ad tech stack is advertising technology comprising servers, networks, and exchanges, that website publishers depend on to sell advertisements and that advertisers rely on to buy advertisements and reach customers. The complaint alleges monopolization through acquisitions including nascent ad exchange through which digital advertising space can be auctioned, and DoubleClick, a publisher ad server. It also alleges monopolization through tying, self-preferencing, market manipulation, and refusal to grant rivals access to data. The DOJ seeks both monetary damages and the break-up of Google's ad-tech platform by divestiture of Google's ad manager suite which comprises Google's publisher ad server and ad exchange. *https://www.justice.gov/opa/press-release/file/1563746/download.* In April 2023, the District Court of Virginia refused Google's motion to dismiss the suit.

c3. Big Tech and Artificial Intelligence

On April 25, 2023, the FTC, the Civil Rights Division of the Department of Justice, the Consumer Financial Protection Bureau, and the Equal Employment Opportunity Commission issued a joint statement on enforcement efforts related to automated systems. *https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.* The joint statement recognizes that automated systems, which include Artificial Intelligence, are becoming increasingly commonplace and enforcers will be monitoring closely for any violations of law. The FTC has warned firms of Section 5 prosecution for using AI tools to further discriminatory impact or make unsubstantiated claims. The FTC has warned that the prohibition on deceptive or unfair conduct can apply to creators of tools that are "effectively designed to deceive" even if that is not the sole or intended purpose of these products.

d. The *Intel* Case, and the Possible Revitalization of Section 5 of the Federal Trade Commission Act

Insert to page 454, at end of FTC Section 5 Statement.

In the first two weeks of Lina Khan's chairship of the Federal Trade Commission, the Federal Trade Commission, by a 3-to-2 vote, withdrew the Section 5 Statement. On November 22, 2022, the FTC released a new policy statement regarding the scope of unfair methods of competition under Section 5. The new policy statement tethers the identification of unfair methods of competition to two main questions:

(i) Is the conduct "coercive, exploitative, collusive, abusive, deceptive, predatory," does it involve "the use of economic power of a similar nature," or is it "otherwise restrictive or exclusionary?"

(ii) Does the conduct "tend to negatively affect competitive conditions," for example, does it "tend[] to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers?"

An excerpt of the 2022 statement follows. The complete statement can be found at *https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.*

POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

November 10, 2022.

* * *

This statement supersedes all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act. . . . This statement is intended to assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act. In considering whether conduct, either in a specific instance or as a category, constitutes an unfair method of competition, the Commission will directly consult applicable law. This statement does not pertain to any other statutory provision within the FTC's jurisdiction.

* * *

In enacting Section 5, Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts. Congress

purposely introduced the phrase, "unfair methods of competition," in the FTC Act to distinguish the FTC's authority from the definition of "unfair competition" at common law. It also made clear that Section 5 was designed to extend beyond the reach of the antitrust laws. Concluding that a static definition would soon become outdated, Congress wanted to give the Commission flexibility to adapt to changing circumstances. . . . Both the House and Senate also expressed a common understanding that unfair methods of competition encompassed conduct that tended to undermine "competitive conditions" in the marketplace.

. . . Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.

* * *

UNFAIR METHODS OF COMPETITION

Relying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law, this statement describes the most significant general principles concerning whether conduct is an unfair method of competition under Section 5 of the FTC Act.

1. The conduct must be a method of competition

Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition. Conversely, violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition.

2. That is unfair

The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.

There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve

the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.

The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue. Instead, the second part of the principles examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent. Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions. Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.

POTENTIAL COGNIZABLE JUSTIFICATIONS

In the event that conduct *prima facie* constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence. There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether. In instances where a party chooses to assert justifications as an affirmative

defense, the FTC can draw on the Commission's long experience evaluating asserted justifications when enforcing Section 5, as well as its review of decided cases and past enforcement actions.

First, it would be contrary to the text, meaning, and case law of Section 5 to justify facially unfair conduct on the grounds that the conduct provides the respondent with some pecuniary benefits. At the same time, some practices may impact competitive conditions in a manner that both harms and benefits market participants other than the party; at times, the harms and benefits may redound to the same participants, and at times they may be disparately distributed – that is, a practice may harm some market participants while simultaneously providing legitimate benefits to others.

If parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well. The nature of the harm is highly relevant to the inquiry; the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind. In addition, whether harmed parties can share in the purported benefits of the practice may be relevant to the inquiry.

Some well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well. It is the party's burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. In addition, the asserted benefits must not be outside the market where the harm occurs. Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases.

Commissioner Christine Wilson dissented from the Section 5 policy statement. She disagreed with the move away from consumer welfare as the sole guide to a violation and charged the majority with, among other things, abandoning the rule of reason, seeking to advance "the welfare of inefficient competitors, 'workers', and other . . . politically favored groups," and rejecting precedent that required the agency to assess potential procompetitive effects.

An excerpt of Commissioner Wilson's dissenting statement follows. The full statement can be accessed at *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5.*

DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON REGARDING THE "POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT"

November 10, 2022.

* * *

Today, the Commission issues a Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement"). Unfortunately, instead of providing meaningful guidance to businesses, the Policy Statement announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful.

In the past, both the FTC and its sister agency . . . have issued clear and constructive guidance on enforcement policies and practices. The Policy Statement that the Commission issues today takes a very different approach. Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that "honest businesses" can map the boundaries of lawful conduct.

The Second Circuit explained that "the Commission owes a duty to define the conditions under which conduct. . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." Instead of heeding this admonition, the Policy Statement adopts an "I know it when I see it" approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning. It provides no methodology to explain which adjectives may apply in any given set of circumstances. The only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct "facially unfair," the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences. The instructions in the iconic Monopoly game provide an apt analogy: the respondent essentially will be told, "Go to jail. Go directly to jail. Do not pass go. Do not collect $200 "

But these concerns are only the tip of the iceberg. As explained below in more detail, the Policy Statement affirmatively takes several steps with sweeping implications.

- First, the Policy Statement abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct. The majority prefers a near-per se approach that discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate.
- Second, the Policy Statement repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust "protects competition, not competitors." The Commission will now seek to advance the welfare of inefficient competitors, "workers," and other unnamed but politically favored groups - at the expense of consumers.
- Third, the Policy Statement rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct.

In other words, the Policy Statement abandons bedrock principles of antitrust that long have been accepted by the Commission, the courts, the business community, and enforcers across the globe.

QUESTIONS AND COMMENTS

1. Evaluate both the majority statement and the dissent. What does each statement set out to do? How well does each statement achieve its goals?

2. Compare the new Section 5 statement to the 2015 statement. Casebook p. 453. Is the new statement an improvement? A step back?

3. Consider each of Commissioner Wilson's criticisms. To what extent they are well taken?

4. What do you predict will be the fate of the FTC statement? Will it be useful to firms in guiding their behavior? Will it survive a challenge as beyond the powers of the FTC?

8a. Examples from Big Tech

The Federal Trade Commission sued Facebook under Section 2 of the Sherman Act as incorporated into Section 5 of the FTCA for its past acquisitions of WhatsApp and Instagram and for exclusionary practices that prevented threatening rivals from interoperating with Facebook. As for the latter, Facebook allegedly had a policy of preventing rivals on its platform that had core functionality like Facebook from accessing applications that would allow them to reach users. A stated example of thwarted rivals was Vine; Facebook cut off its data access when Vine

developed an innovative new product and was trying to reach its users on Facebook. Facebook moved to dismiss. The court granted the motion, with a right of the FTC to file an amended complaint (which the FTC did). The dismissal was on two grounds: power and conduct. Pleading monopoly power, the FTC had alleged that Facebook had more than 60% of the personal social media market in the United States. The court, by Judge Boasberg, held that the FTC did not allege sufficient facts to show that Facebook had monopoly power. The court dismissed the exclusionary conduct claim on grounds that Facebook had no general duty to allow or grant interoperability to potential rivals on its platform. The court said:

FTC v. Facebook

560 F. Supp. 3d 1, 3 (D.D.C. 2021).

JAMES E. BOASBERG, United States District Judge

* * *

1. Refusal to Deal

    a. Legal Framework

The central principle that governs refusal-to-deal claims is that, as a general matter, a monopolist has "the right to refuse to deal with other firms," which includes the right to "refus[e] to cooperate with rivals." *Trinko* (2004). . . . That is because "[m]onopolists are both expected and permitted to compete like any other firm," and "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." This general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely "in order to limit entry" — in other words, because it wants to prevent that rival from competing with it. See, e.g., Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375–76 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors" and thus no duty "to extend a helping hand to new entrants [or] help [rivals] survive or expand . . . ."); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013) ("Even a monopolist generally has no duty to share . . . its intellectual or physical property with a rival."); FTC v. Qualcomm Inc., 969 F.3d 974, 993 (9th Cir. 2020) ("As the Supreme Court has repeatedly emphasized, there is no duty to deal under the terms and conditions preferred by a competitor's rivals.") . . . .

These decisions, to be clear, "are not premised on the view that [refusals to deal by monopolists] are incapable of harming competition"; obviously, "refusals to aid new entrants can indeed" have that effect. See Daniel A. Crane, Does Monopoly Broth Make Bad Soup?, 76 Antitrust L.J. 663, 669 (2010). Rather, the rule declaring unilateral refusals to deal essentially "per se lawful," or "presumptive[ly] legal[],"rests on three

overriding considerations of antitrust policy. First, and most importantly, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." [Second, courts are not central planners, and third, forced sharing may lead to collusion.] …

* * *

b. Application

i. Facebook Policies

Applying these principles, it is clear off the bat that Facebook's adoption of a policy of not offering API access to competitors did not, standing alone, violate Section 2. As set out above, a monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated, as Verizon's was in Trinko, by a desire "to limit entry" by new firms or impede the growth of existing ones. It follows that a firm's merely announcing its choice not to deal with competitors, whatever the motivation for doing so, cannot violate Section 2. The FTC's core argument for why the policies themselves are unlawful — that their promulgation was intended to, and did, "change[] the incentives of third-party apps that relied upon the Facebook ecosystem [and thus] deterr[ed] them from including features and functionalities that might compete with Facebook," . . . — misses the boat. The central teaching of the cases discussed above is that Facebook had no antitrust duty to avoid creating that deterrent. . . .

Facebook's general policy of withholding API access from competitors, moreover, was plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of act of announcing or maintaining a general no-dealing-with-competitors policy cannot, in and of itself, violate Section 2; rather, the analysis must focus on particular acts. . . . Consider an example from the Complaint: citing its policies, in early 2013 Facebook blocked the API access of Vine, a new app it viewed as a competitor, mere hours after its launch. . . . That decision was plainly lawful, per *Trinko*, because it was prospective: Facebook had not previously allowed Vine to access its APIs. Although the company was enforcing its "replicating core functionality" general policy against Vine, that fact makes no difference . . . .

The FTC filed an amended complaint, Facebook moved to dismiss, and the court denied the motion. *FTC v. Facebook, Inc.,* 560 F. Supp. 3d 1 (D.D.C. 2021).

QUESTIONS AND COMMENTS

1. Were Facebook's acts — to deprive rivals of benefits of interoperability — anticompetitive? Why were they not illegal? Was the court's dismissal of the interoperability claim required by *Trinko*?

2. The DOJ and states' actions against Google do not allege that Google discriminated in favor of itself when competing with apps on its platform, or that self-preferencing is a violation of Section 2 (or FTCA Section 5). Why not? Does the freedom to give some advantages to oneself have procompetitive properties, at least under the reasoning of *Trinko* and *Facebook*? Self-preferencing by major platforms is generally considered anticompetitive and illegal in Europe. What accounts for the US/EU divide? (Pending legislation would make it illegal in the United States.)

3. The Department of Justice and many states have sued Google for maintaining a monopoly in general search, search advertising, and general search text advertising, alleging a number of exclusionary acts that deprive rivals of the scale necessary to wage competition in these markets. Google accounts for approximately 90% of search. Exclusionary agreements allegedly cover about 60% of the market. Among other things, Google allegedly pays Apple $8 billion to $12 billion a year to be the exclusive search engine preloaded on Apple devices. Is this illegal? Why can't anyone download a search engine of their choice, free?

4. Apple owns one of the two operating systems for handheld devices such as smartphones and tablets. Google's Android is the other. Apple is a proprietary system, a walled garden, guarding the compatibility and security of its parts. When developers, such as Epic Games, which owns the popular Fortnite, want its offerings to be available on the Apple operating system, Apple requires the developers to go through Apple Play, and Apple Play charges 30% commissions on the developers' revenues. There is a work-around for users to access games on Apple devices, but Apple forbids developers from telling this to their users. Epic provided an in-game payment system for upgrades within Fortnite itself, but when Apple found out it threw Fortnite off the Apple iOS for violating its terms of agreement. If Apple had monopoly power (the court held, no; see above), would Apple have violated Section 2 of the Sherman Act? Does even a monopolist have the right to refuse to deal? *See* Epic v. Apple, 559 F. Supp. 3d 898 (N.D. Cal. 2021), appeal pending.

CHAPTER 5

MERGERS

■ ■ ■

A. INTRODUCTION

Insert to page 464.

Since 2020, the U.S. antitrust agencies and competition agencies around the world have continued to raise alarm about acquisitions by firms with significant market power. Particularly concerned with the power of Big Tech and its strategies to buy up all budding competitors, they are closely examining Big Tech platforms' acquisitions of start-ups. Several non-U.S. jurisdictions whose merger notification rules depended on the target's having significant revenues failed to catch acquisitions of interest and have revised their rules to broaden the net.

Acquisitions by Big Tech and Big Pharma have fueled conversation about killer acquisitions (acquisitions to kill the competition of a budding rival by buying the firm and either shelving it or melding and repositioning it), and nascent acquisitions (acquisitions of firms, which may be start-ups, that are not present-day competitors but are nascent competitors). The two categories overlap. Sometimes the acquiring firm alone has identified a particular start-up as a threatening nascent competitor – as was true of Facebook's acquisitions of WhatsApp and Instagram, which were cleared by authorities all over the world and are just now being challenged by the FTC and most states.

The FTC's monopolization case against Facebook was initially dismissed for insufficient allegation of the relevant market and the elements of a Section 2 monopolization claim. FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021). An amended complaint survived a motion to dismiss, opening the door to discovery and future litigation. FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 40 (D.D.C. 2022). The states, whose complaint against Facebook included both Section 2 and Section 7 allegations, had their action dismissed with prejudice for waiting too long to sue. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 13 (D.D.C. 2021). Dismissal was affirmed by the D.C. Circuit, which also stressed the need for caution in accepting claims that a platform like Facebook has a duty to allow others to operate on it under any particular terms. New York v. Meta Platforms, Inc., 66 F.4th 288, 297 (D.C. Cir. 2023).

Other "big merger" cases with potential and cross-market effects and not traditional or not clear horizontal effects are under examination in the

United States, Europe, the UK and other parts of the world. Meanwhile, President Biden has encouraged the U.S agencies to give greater scrutiny to mergers, particularly by dominant platforms, and particularly involving nascent competitors, serial acquisitions, accumulation of data, free products, and privacy.

The DOJ and the FTC are in the process of reviewing the merger guidelines to determine whether they are "overly permissive" and to ensure that they reflect current realities. They are expected to issue new merger guidelines. And in Congress bills are pending that would prohibit the dominant platforms from acquiring nascent or potential competitors (with a narrow defense), that would prohibit very large mergers (with a narrow defense) or shift burdens of proof, and that would substantially increase merger filing fees and the funding of the agencies.

B. CONTEMPORARY LAW AND ENFORCEMENT

1. THE GUIDELINES: INTRODUCTION

Insert to page 478, before 2. HHI Practice.

In January of 2022, the FTC and DOJ published a Request for Information on Merger Enforcement, asking for public comments on how the agencies could "modernize enforcement of the antitrust laws regarding mergers" and produce guidelines that would "adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions." *https://www.regulations.gov/docket/FTC-2022-0003/document.* In July of 2023, the agencies released draft Merger Guidelines, slated to supersede both the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines when adopted in final form. The draft merger guidelines are noteworthy in several respects.

For one, the draft guidelines invoke Supreme Court cases from the 1960s as "binding precedent" for various propositions about how mergers should be analyzed. This is a first for U.S. merger guidelines, which have—since the first merger guidelines were released in 1968—focused primarily on economic analysis and theories with no more than passing reference to statutes and cases. The draft guidelines' heavy reliance on cases from the 1960s is apparently intended to revive a more skeptical attitude towards mergers and to bring the perspective more in line a 1950 Congressional intent to stop significant concentrations in their incipiency. The cases cited have not been specifically overruled, but consider whether some of the propositions relied on are inconsistent or at least in tension with modern Supreme Court antitrust analysis.

Reliance on 1960s caselaw signals the apparent aspiration of the agencies to use these guidelines to change merger enforcement. The draft

guidelines declare, for example, that a merger may violate Section 7 of the Clayton Act "if it contributes to a trend toward concentration" and that a "trend toward . . . vertical integration" may inform assessment of vertical mergers. But, while language about trends toward competition can indeed be found in 1960s Supreme Court merger cases and in one paragraph of the 1968 Merger Guidelines, concerns about trends in concentration made no appearance in any other published merger guidelines before this draft and had all but disappeared from lower court opinions until recent years of Biden administration merger enforcement.

The draft guidelines also conspicuously lower the concentration thresholds that the agencies declare will identify problematic horizontal mergers. In the 2010 Horizontal Merger Guidelines, presumptive illegality applied to mergers resulting in post-merger HHIs of at least 2,500 and involving increases in concentration of 100-200 points. Now, in the 2023 draft, presumptive illegality applies at the earlier post-merger HHI of 1,800 and a change of 100 points or more. The agencies state that the draft guidelines build upon the agencies' learning and experience. But what learning and experience explains the change? Might availability of AI algorithms make it easier for oligopolists to coordinate? Or do the lower thresholds simply reflect the administration's aim to make antitrust more aggressive?

Finally, the draft guidelines depart from all prior merger guidelines in how they frame and present information. This is particularly evident in the 13 enumerated "guidelines" with which the draft merger guidelines open. In contrast to prior merger guidelines, which largely described agency practice in technical terms, several of the 13 guidelines are presented in normative terms: e.g., "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets" or "Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market." In further contrast to recent merger guidelines, the 2023 draft merger guidelines make few references to economic theories or analysis in the text of the document, instead relegating most of this discussion to appendixes. Why might the draft guidelines make these changes? Is the new format more accessible to individuals, including business executives, who are not technologically immersed in antitrust (a hope that the agencies have expressed)?

As this update memo is being prepared in August of 2023, the draft merger guidelines are being actively dissected and discussed by antitrust practitioners and commentators. The agencies may incorporate some of this feedback in revisions to the draft guidelines before final release.

The first few pages of the 2023 draft merger guidelines follow; the full document is available at *https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf*. Compare the tone and content of the draft guidelines to that of the 2010 horizontal merger guidelines. Casebook p. 865. Are the draft guidelines a step forward for government analysis? A

step backward? Do they sufficiently advise businesses to what mergers the agencies are likely to seek to block? If finalized in their current form, do you think the draft guidelines will be given deference by courts, as past guidelines have been?

DRAFT – FOR PUBLIC COMMENT PURPOSES – NOT FINAL

MERGER GUIDELINES U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION

I. Overview

These Merger Guidelines explain how the Department of Justice and the Federal Trade Commission (the "Agencies") identify potentially illegal mergers. They are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers.

The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act[1], 15 U.S.C. §§ 14, 18, 19. Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws.

Section 7 of the Clayton Act is the antitrust law that most directly addresses mergers and acquisitions.[2] Section 7 prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[3] Section 7 is a preventative statute that reflects the "mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency."[4]

The Clayton Act requires the Agencies to assess the risk to competition from mergers. As the Supreme Court has explained, "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect *"may be*

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950. Public Law 81-899. 64 Stat. 1125. and the Hart- Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a.
[2] Mergers may also violate, *inter alia.* Sections 1 and 2 of the Sherman Act or Section 5 of the FTC Act.
[3] 15 U.S.C. §'18.
[4] *Brown Shoe Co. v. United States,* 370 U.S. 294, 346 (1962) *("Brown Shoe").*

substantially to lessen competition.'"[5] This is because "[t]he grand design of... Section 7, as to stock acquisitions [and] the acquisition of assets, was to arrest incipient threats to competition which the [more broadly applicable] Sherman Act did not ordinarily reach."[6] Accordingly, in analyzing a proposed merger, the Agencies do not seek to predict the future or the precise effects of a merger with certainty. Rather, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation.

Across the economy, competition plays out in many ways and on a variety of dimensions. In recognition of this fact, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry."[7] The Agencies therefore begin their merger analysis with the question: how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?

The Agencies apply the following Guidelines to help answer this question. In some cases, "it is possible . . . to simplify the test of illegality" by focusing on discrete facts that, when present, suggest a merger is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects"[8]

Guidelines 1-8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be substantially to lessen competition or to tend to create a monopoly. Guidelines 9-12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies consider mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or trigger concern in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.[9] Concentration

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[5] *California v. Am. Stores Co.,* 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe,* 370 U.S. at 323).

[6] *United States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 170-71 (1964).

[7] *United States v. Gen. Dynamics Corp.,* 415 U.S. 486, 498 (1974) (quoting *Brown Shoe,* 370 U.S. at 321-22) *("Gen. Dynamics'').*

[8] *United States v. Phila. Nat'l Bank,* 374 U.S. 321, 362-63 (1963) *(Phila. Nat'l Bank).*

[9] *See, e.g., Phila. Nat'l Bank,* 374 U.S. at 363, *modified by Gen. Dynamics,* 415 U.S. at 498

refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The Agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the Agencies presume that a merger may substantially lessen competition based on market structure alone.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.[10] The Agencies examine whether competition between the merging parties is substantial, since their merger will necessarily eliminate competition between them.

Guideline 3: Mergers Should Not Increase the Risk of Coordination.[11] The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.[12] The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.[13] When a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.[14] The Agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine

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(see Section IV).

[10] *See, e.g., ProMedica Health System, Inc. v. FTC,* 749 F.3d 559, 568-70 (6th Cir. 2014), *cert, denied,* 575 U.S. 996 (2015).

[11] *See, e.g., Hospital Corp, of America v. FTC,* 807 F.2d 1381, 1387-89 (7th Cir. 1986) (Posner, J.).

[12] *See, e.g., United States v. Marine Bancorp.,* 418 U.S. 602, 623-26 (1974).

[13] *See United States v. AT&T,* 916 F.3d 1029, 1035-36 (D.C. Cir. 2019).

[14] *See, e.g., Ford Motor Co. v. United States,* 405 U.S. 562 (1972).

whether the merger would create a "clog on competition . . . which deprives rivals of a fair opportunity to compete."[15]

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.[16] The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration.[17] If a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.[18] If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.[19] Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The Agencies therefore apply these Guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.[20] Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

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[15] *Brown Shoe,* 370 U.S. at 324.
[16] *See, e.g., FTCv. Procter & Gamble Co.,* 386 U.S. 568, 577-78 (1967).
[17] *See, e.g., Gen. Dynamics,* 415 U.S. at 497-98; *United States v. Pabst Brewing Co.,* 384 U.S. 546, 552-53 (1966).
[18] *See* H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[19] *See, e.g., Mandeville Island Farms v. Am. Crystal Sugar Co.,* 334 U.S. 219, 235 (1948).
[20] *See, e.g., Denver & Rio Grande v. United States,* 387 U.S. 485, 504 (1967).

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The Guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

* * *

These Guidelines consolidate, revise, and replace the various versions of Merger Guidelines issued by the Agencies since the Department of Justice's first Merger Guidelines in 1968. This revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy.

To make their content both accessible to new readers and useful for experts, these Guidelines are organized at varying levels of detail:

- The Overview outlines the guidelines in summary form to help the public and market participants identify potential concerns and understand the Agencies' approach.
- Section II discusses the application of these Guidelines in further detail.
- Section III identifies some of the tools the Agencies use to define relevant markets; and
- Section IV explains how the Agencies approach several common types of rebuttal evidence.[21]

Several appendices follow these Guidelines. The Appendices describe evidentiary and analytical tools the Agencies often use.

- Appendix 1 discusses sources of evidence commonly relied on by the Agencies.
- Appendix 2 describes tools sometimes used to evaluate competition among firms.
- Appendix 3 discusses additional details regarding the process for defining relevant markets.
- Appendix 4 explains how the Agencies typically calculate market shares and concentration metrics.

These Guidelines create no independent rights or obligations and do not limit the discretion of the Agencies or their staff in any way. Although the Guidelines identify the factors and frameworks the Agencies consider

[21] These Guidelines pertain only to the consideration of whether a merger or acquisition is illegal. The consideration of remedies appropriate for otherwise illegal mergers and acquisitions is beyond its scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Guidelines must be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Guidelines neither dictate nor exhaust the range of evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of markets, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts in analyzing mergers, as they do in other areas of law enforcement.

These Guidelines include citations to binding legal precedent. Citations to court decisions in these Guidelines do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools to new learning, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Guidelines therefore cite binding propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities.

3. THE CASE LAW

b. Horizontal Mergers

iv. Mergers That May Eliminate Potential Competition

Insert to page 537.

Meta, formerly Facebook, is the largest digital social network in the country and the world. It owns the leading virtual reality headset, but does not offer virtual fitness apps. It proposed to acquire Within, which built the popular virtual reality fitness app, Supernatural. The FTC sought to enjoin this acquisition, arguing that Meta was—or was likely to become—a key player in the Virtual Reality ecosystem. The FTC alleged that the acquisition would eliminate both actual potential competition (future competition after Meta entered the virtual reality fitness app market) and perceived potential competition (competitive effects that the threat of Meta's entry was already having on competition). The Federal Court for

the Northern District of California found that the FTC failed to prove that the merger was anticompetitive. It held that the FTC did not prove Meta would have entered the virtual reality fitness market. The judge reaffirmed the controlling legal principles from *Marine Bancorporation*. See Casebook p. 537. FTC v. Meta, Case No. 5:22-cv-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023). The FTC did not appeal the ruling and dropped its parallel challenge before the Commission's Administrative Law Judge.

Should the FTC have challenged this merger? Is there a broader canvas on which the merger might be understood? Meta has expressed its ambition – at least at the launch of its new name – to draw everyone into the Metaverse, and for many hours of their days. Does this suggest a desire to fill all the slots that complete the Metaverse; to make it into one ecosystem that critical masses of people will not be able to resist? Is this good, bad, or neutral, from an antitrust standpoint? How could the FTC state its theory of harm, and what would the FTC have to prove to make an antitrust case based on this larger canvas?

Insert to page 541, as Question/Comment 3.

3. Visa, the largest on-line debit firm, proposed to buy Plaid, a San Francisco fintech start-up used by popular apps such as Venmo and Robinhood to connect users to their bank accounts. Visa proposed to pay $5.3 billion. Plaid had connections to about 200 million consumer bank accounts in the United States and, according to a Justice Department complaint, planned to leverage its connections to launch an online debit product that would compete with Visa at a lower cost to merchants. You are a staff attorney at the DOJ Antitrust Division. What would you have to show to establish that the merger is likely to be anticompetitive? Be specific. What facts would you need to prove to enjoin the merger? (After the Justice Department sued, the parties abandoned the merger.)

Insert to page 541, as new *v. Mergers resulting in monopsony or monopsonistic behavior.*

The traditional analysis of horizontal mergers differs little between mergers at risk of causing anticompetitive harm to buyers and mergers at risk of causing anticompetitive harm to sellers. This is one lesson of the DOJ's recent victory in its challenge to Penguin Random House's proposed acquisition of Simon & Schuster.

UNITED STATES V. BERTELSMANN SE & CO. KGAA

___ F.Supp.3d ____ (D.D.C. 2022).

FLORENCE Y. PAN, United States Circuit Judge

Penguin Random House ("PRH") is by far the largest book publisher in the United States. . . . Simon & Schuster, Inc. ("S & S") . . . is the third-

largest publisher in the U.S. . . . In March 2020, . . . Bertelsmann and PRH signed an agreement . . . to purchase S & S for $2.175 billion. The acquisition of S & S would cement PRH's position as the "number one" publisher in the United States, increasing its retail market share to almost three times that of its closest competitor.

In November 2021, the Antitrust Division of the United States Department of Justice ("the government") brought this action . . . seeking to block the merger . . . . The government's case sounds in "monopsony," a market condition where a buyer with too much market power can lower prices or otherwise harm sellers. . . . After a thorough review of the record and careful consideration of the parties' arguments, the Court concludes that PRH's acquisition of S & S is likely to substantially lessen competition to acquire "the publishing rights to anticipated top-selling books," which comprise the relevant market in this case. . . .

I. BACKGROUND

A. The Industry

The book industry is dominated by five major publishing houses — PRH, HarperCollins Publishers, S & S, Hachette Book Group, and Macmillan Publishing Group, LLC — which are known as the "Big Five." Together, the Big Five held nearly 60 percent of the market for the sale of trade books in 2021 (*i.e.*, books intended for general readership, as opposed to specialized books like textbooks or manuals). . . . The Big Five have achieved their market dominance in part by acquiring other publishers, contributing to a trend toward consolidation in the industry.

Some smaller publishers are well respected in the industry and compete against the Big Five — in both the upstream market for acquiring books for publication and in the downstream market for selling books to consumers. For instance, Scholastic is one of the largest children's book publishers and works with some of the same authors as the Big Five, . . . while Kensington, one of the largest remaining independent publishers, is a prominent purveyor of romance novels. . . . In addition, Norton is a prestigious publishing house specializing in narrative nonfiction and is favored by some best-selling authors like Michael Lewis. Other players in the industry include well capitalized, mid-sized publishers like Amazon and Disney, which each bring in over $100 million in annual revenues from publishing.

* * *

All publishers and editors are highly motivated to secure the rights to publish new books; indeed, identifying and acquiring books that people want to read is the essence of the business. Yet only 35 out of 100 books turn a profit, and breakout titles drive revenues — the top 4 percent of profitable titles generate 60 percent of profitability. . . . Publishing has

therefore been described by insiders as a "portfolio business": The business model is to acquire a large number of high-quality books, knowing that a substantial percentage of the titles will not be profitable. As PRH CEO Markus Dohle put it, publishers are "angel investors" that "invest every year in thousands of ideas and dreams, and only a few make it to the top." . . .

B. Acquiring Books for Publication

Books begin, of course, with authors. Authors often spend years developing their ideas, conducting research, and refining their manuscripts or proposals before submitting them for publication. . . . To support themselves, authors often rely on "advances" from their publishers. . . . An advance is an upfront payment against the royalties that an author may earn in the future.[3] The advance is the "single most important" term in a contract for publishing rights because in a "large number of cases, it may be the only compensation that the author will receive for their work." . . . In addition to the advance, authors care about working with editors who share their vision for the book and who can help them to "bring the book into the world." . . .

Authors generally are represented by literary agents, who use their judgment and experience to find the best home for publishing a book. They typically begin the process by submitting the book . . . to multiple imprints [a trade name for an editorial group] or editors on a preliminary basis, to gauge the level of interest in the project. . . . Agents prioritize submitting manuscripts and proposals to Big Five imprints because of their ability to pay; an agent might send out a second round of submissions that includes more smaller publishers if interest among the Big Five is not strong. . . .

* * *

C. The Competition for Books

Regardless of the method used to acquire a book's publishing rights, the amount that is paid is inexorably determined by competition. In an auction, a skillful agent can capitalize on enthusiasm for a book and play bidders off against one another, knowing that a publisher will "bid what . . . [it] need[s] to buy that book" because "it [only] takes one passionate editor at another imprint to win that book away." . . . It is not uncommon for editors and publishers to experience a "kind of auction fever," in which they change their sales expectations for a book and increase what they are willing to pay for it during a competitive round-robin auction. . . . The record contains numerous examples of books that sold for unexpectedly high advances and achieved other favorable terms for their authors due to

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[3] Royalties are payments made to the author based on a book's sales. . . . An advance is an upfront payment of those anticipated royalties; the author is not required to pay back the advance even if the book's actual royalties never exceed the amount of the advance. . . .

the bidding frenzy incited by competitive auctions. . . . Competition is also a key factor in one-on-one negotiations, where publishers must offer high advances because they know that the agent always has the option of breaking off negotiations and selling the book on the market. . . . In such situations, agents have bargaining leverage because the threat of taking the book to other publishers always lurks in the background. This is particularly true where a publisher is attempting to preempt the auction process. . . .

* * *

In competing for the most attractive new books, the Big Five have significant advantages over smaller publishers. Most critically, the Big Five have the capital to take chances and place bigger bets on a book's success; that is, they can offer higher advances for more books. . . . The Big Five also offer significant advantages in ensuring a book's presence in the media and visibility to its target audience. The Big Five publishers and their individual imprints have teams dedicated solely to selling, marketing, and publicizing books . . . . Those teams can secure author interviews on prominent programs like the Today Show, Good Morning America, or NPR, and can persuade senior book reviewers to closely read and review the book. . . . By contrast, smaller publishers might have a handful of staff doing all the editing, marketing, publicity, and sales work on a book. Although some of their books do well, that success is harder won and less frequent. . . . Self-published books are rarely published in print and are typically limited to online distribution. . . . In short, self-publishing cannot compete with the experience and resources of publishing companies. . . .

* * *

III. ANALYSIS

The government contends that the merger of PRH and S & S would harm competition to acquire the publishing rights to "anticipated top-selling books," resulting in lower advances for the authors of such books and less favorable contract terms. The defendants do not dispute that if advances are significantly decreased, some authors will not be able to write, resulting in fewer books being published, less variety in the marketplace of ideas, and an inevitable loss of intellectual and creative output. The defendants vigorously contest, however, whether advances would decrease after the merger: They contend that competition would not be harmed and that advances would actually rise.

A. Market Definition

[The parties agreed that the relevant geographic market is global but strenuously disputed the appropriate definition of the product market. The government argued that the relevant product market was for publishing rights to anticipated top-selling books, which it proposed to define as those above a $250,000 advance threshold. The Court adopted the government's proposed market, finding it consistent with various practical indicia

pressed by the government. The Court also noted that the government's expert witness testimony was not highly sensitive to the particular dollar threshold proposed by the government.]

B. Prima Facie Case

1. Market Concentration

. . . "That competition is likely to be greatest when there are many sellers, none of which has any significant market share, is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute." . . . Thus, demonstrating post-merger " 'undue' " market concentration "establishes a 'presumption' that the merger will substantially lessen competition." In *Philadelphia National Bank*, the Supreme Court held that a significant change in concentration that results in a combined market share of at least 30 percent is sufficient to establish the legal presumption that a merger violates Section 7. . . .

The government's expert, Dr. Hill, calculated market shares based on a comprehensive set of data from more than sixty publishers. According to his calculations, the merging firms account for nearly half (49 percent) of the publishing market for anticipated top-selling books, and the newly constituted "Big Four" that would emerge after the deal would control approximately 91 percent. . . . The second-largest market participant post-merger would be [Redacted] with 24 percent of the market, while [Redacted] and [Redacted] would have 10 percent and 9 percent, respectively. The non-Big Four would have the remaining 9 percent. . . . The post-merger market shares undoubtedly portray a highly concentrated market dominated by four main players, with the leading, merged company holding an "undue percentage share." The 49-percent share that the post-merger PRH would hold is far above the levels deemed too high in other cases. *See, e.g.*, [*Philadelphia National Bank*] . . . The substantial market share of the proposed combined entity justifies a strong presumption of anticompetitive effects. . . . Moreover, the high concentration must be considered in the context of an undeniable trend in consolidation in the publishing industry. *See* [*Pabst Brewing*] ("[A] trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anti-competitive effect of a merger may be.").

The post-merger market also would be unduly concentrated under the Herfindahl-Hirschman Index ("HHI"), a measure commonly used to evaluate market concentration. . . . Under the Merger Guidelines, if an acquisition (1) increases the HHI of a relevant market by more than 200 points and (2) results in a post-acquisition HHI exceeding 2500, it is presumptively anticompetitive. . . . Here, the post-merger HHI would be 3,111, with an increase of 891, well above the thresholds required to trigger the presumption under the Guidelines.

Based on the market-share analysis and the HHI analysis, the government has met its burden to establish that the proposed merger between PRH and S & S would produce "a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market." That showing alone is sufficient to establish a prima facie case. . . .

The government further notes that the market shares reflect the actual competitive dynamics in the market. . . . Dr. Hill's analysis of the data reveals that, as market shares would predict, the Big Five in fact dominate book acquisitions in the relevant market. Consistent with their market shares, when S & S loses a book, it most often loses to PRH; and when S & S wins a book, its most likely runner-up is PRH. . . . Also significant is the stability of the market shares held by the primary market participants over time. . . . This stability suggests that more weight should be assigned to market shares . . . and thus reinforces the presumption of anticompetitive effects based on market concentration.

2. Other Evidence

The government does not rely solely on the high degree of market concentration that would result from the merger, and the attendant presumption of anti-competitive harm; instead, the government also "bolster[s] its prima facie case by offering additional evidence." The government presents evidence that (1) the merger will cause anticompetitive effects from the elimination of competition between PRH and S & S, and (2) the higher concentration in the post-merger market will increase the risk of coordinated anticompetitive conduct by the largest publishers.

i. Unilateral Effects

… The government contends that PRH and S & S currently compete "fiercely" to publish anticipated top-selling books, and that eliminating direct competition between them is likely to harm authors. . . . The government's expert, Dr. Hill, conducted a variety of economic analyses that assess how closely PRH and S & S compete. Dr. Hill used four different methods to calculate "diversion ratios," which measure head-to head competition between the merging parties by asking the following question: If one merging party lowered advance levels, what percentage of its authors would "divert" their business to the other merging party, as opposed to diverting to other firms in the industry? A higher diversion ratio indicates that the merging parties are close competitors and that the merger is more likely to lead to harm. . . . All the methodologies employed by Dr. Hill pointed to the same conclusion: that PRH is S & S's closest competitor, and that S & S is a significant competitor to PRH. Specifically, Dr. Hill's diversion ratios indicate that if PRH lowered advances, between 19 and 27 percent of its authors would divert to S & S; and that if S & S lowered advances, between 42 and 59 percent of its authors would divert to PRH. . . .

The defendants' expert, Professor Snyder, calculated his own diversion ratios, using a less reliable data set assembled from the records of eighteen agents who responded to subpoenas ("agency data"). Although Professor Snyder's ratios were lower, he also found that PRH is S & S's closest competitor. Professor Snyder determined that the diversion ratio from PRH to S & S is 20 percent, and the diversion ratio from S & S to PRH is 27 percent.

The competition between PRH and S & S benefits authors by increasing advances paid for their books, and industry participants predict that the loss of that competition would be harmful to authors. . . . The merger would cause an inarguable loss of competition from the elimination of situations where PRH and S & S would have been the top two or the only two bidders for an anticipated top seller. Dr. Hill calculates that this should happen in approximately 12 percent of book transactions based on market share, while Professor Snyder calculates that it happened only 6 to 7 percent of the time in his data set. The government's evidence included 27 summaries of competitive episodes, over three and a half years, in which PRH and S & S drove up advances through direct, head-to-head competition. . . .

* * *

b. Economic Models

Dr. Hill used economic models to attempt to quantify the expected harm to authors from the merger. He conceded that the models are imprecise and do not perfectly reflect the way books are acquired in the publishing industry; but he performed the analyses to glean additional information about the likelihood of anticompetitive harm. Dr. Hill's primary model predicts that the merger would cause advances for PRH authors to decrease by about 4 percent (or $44,000); and would cause advances for S & S authors to decrease by 11.5 percent (or $105,000). Although the defendants challenge the applicability of the models and some of the inputs used by Dr. Hill, they fail to convince the Court that the models are worthless. The economic models generally corroborate the other evidence in the record that author advances would decrease in the wake of the merger.

* * *

ii. Coordinated Effects

Another avenue for the government to prove competitive harm is by showing a likelihood of "coordinated effects," which occur when market participants mutually decrease competition in the relevant market. . . . Coordinated effects can arise from an express or implied agreement among competitors . . . or from "parallel accommodating conduct" among competitors without a prior agreement . . . . Coordinated effects are likelier in concentrated markets; indeed, the idea that concentration tends to produce anticompetitive coordination is central to merger law. . . .

Therefore, when the government has shown that a merger will substantially increase concentration in an already concentrated market — as it has done here — "the burden is on the defendants to produce evidence of 'structural market barriers to collusion' specific to this industry that would defeat the 'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market."

As an initial matter, a history of collusion or attempted collusion is highly probative of likely harm from a merger. Thus, it is significant that in *United States v. Apple, Inc.*, the Second Circuit upheld a finding that between 2009 and 2012, all the "Big Six"[31] publishers, except for Random House, participated in a "horizontal conspiracy . . . to raise e[-]book prices." This coordination involved "numerous exchanges between executives at different Big Six publishers," "constant communication" among the publishers "regarding their negotiations with both Apple and Amazon," and "frequent telephone calls among the Publisher Defendants." . . . The Second Circuit concluded that the publishers engaged in "express collusion" that was a *per se* violation of antitrust law. Although Random House did not participate in the conspiracy, Penguin Books and S & S both did, and this "history of successful cooperation establishes a precondition to effective collusion — mutual trust and forbearance." The case portrays an industry already "prone to collusion," which may become "even more prone to collusion" after the proposed merger of its largest and third-largest competitors.

The *Apple* case provides the backdrop for trends in the industry that appear to demonstrate that the Big Five are already engaging in tacit collusion or parallel accommodating conduct when acquiring books. Recent years have seen the industry-wide standardization of certain contract terms — involving payment structure, audio rights, and e-book royalties — in ways that favor publishers over authors, suggesting that the top publishers have engaged in coordinated conduct. Advances used to be paid to authors in two installments, but publishers uniformly moved to paying them in three installments and then four installments, thereby delaying authors' compensation. After audiobooks became a significant source of revenue in the industry, publishers uniformly refused to acquire books without audio rights included, thereby limiting authors' ability to maximize their compensation and preventing authors from diversifying their sources of income. In addition, during the early years of e-books, publishers uniformly shifted e-book royalty rates from 50 percent to 25 percent, thereby reducing authors' compensation. Thus, in an industry where the competition to acquire anticipated top sellers is intense, the competing publishers nevertheless choose, almost always, not to gain advantage by offering more favorable contract terms. This phenomenon

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[31] This was before Penguin Books and Random House merged, so there was a "Big Six" instead of a "Big Five."

bespeaks a tacit agreement among the publishers to compete only on the basis of advance level because it collectively benefits them not to yield on other contract terms. . . .

* * *

Finally, it is significant that in a market already prone to collusion, where coordinated conduct already appears to be rampant, PRH's acquisition of S & S would reinforce the market's oligopsonistic structure and create a behemoth industry leader that other market participants could easily follow. . . . The Big Five publishers already control 91 percent of the relevant market. The merger would distill the Big Five to a Big Four, with an overwhelmingly dominant top firm, PRH-S & S, controlling 49 percent of the market and dwarfing its nearest competitors. In the newly reconfigured market, the top two firms, the merged entity and [Redacted] would have a 74-percent market share. Under such circumstances, coordinated effects are likely through "sheer market power" because the "post-merger market would feature two firms that control roughly three quarters" of the market. . . . The merger would thus increase the market's already high susceptibility to coordination.[33]

C. Rebuttal

The government is entitled to a presumption of anticompetitive effects and has also met its burden to establish a prima facie case. The defendants, therefore, now have the burden to rebut the government's case by "show[ing] that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." . . . "[B]ecause the burden of persuasion ultimately lies with the plaintiff, the burden to rebut must not be 'unduly onerous.' " However, "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." Here, the government has "made out a strong prima facie case" based on the highly concentrated market and affirmative evidence of likely anticompetitive effects. The defendants, therefore, "must make out a correspondingly strong rebuttal showing."

1. Existing Competition

The defendants assert that existing competition can and will constrain the merged company more than market shares or the government's evidence would suggest. The defendants point to competition from other

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[33] Other factors that courts have found relevant to an evaluation of the likelihood of coordinated effects include: differentiated products, transparent competitive outcomes, punishment mechanisms, and frequent purchases for small amounts. The Court sees no need to march through a discussion of those factors. Merger analysis is industry-specific and fact-intensive. … Where, as here, there is a strong risk of collusion based on history, current practices, and extreme market concentration, the Court finds it unnecessary to explore peripheral issues.

publishers, competition from self-publishing, and internal competition within publishing houses.

i. Other Publishers

The defendants argue that a combined PRH and S & S would be constrained by other publishers, who do not plan to lower their advance offers or change their bidding strategies. For example, HarperCollins's CEO Brian Murray testified that his company would not "hold back" in competing with the merged entity. Consistent with that testimony, HarperCollins did not project a decrease in its title count or its advance spending after the PRH-S & S merger was announced. The CEOs of other competitors, including Hachette and [Redacted] also stated that they would not change their bidding strategies in response to the merger. Therefore, the defendants argue, other existing publishers stand ready to prevent any unilateral anticompetitive effects from the merger.

The defendants' reliance on such assurances from their competitors is insufficient. It is not necessary for other publishers to change their maximum advances or bidding strategies for anticompetitive unilateral effects to occur. . . .

* * *

The defendants also argue that non-Big Five publishers would be a significant competitive constraint on a combined PRH and S & S. The evidence shows, however, that the smaller publishers lack the resources to compete regularly in the market for anticipated top-selling books. . . .

The defendants take the novel approach of aggregating all the non-Big Five publishers and characterizing them as a single force with a 9-percent market share — which allegedly makes their collective power to constrain the merged company comparable to that of a Big Five publisher. . . . The defendants offer no precedent to support this economic sleight of hand, and the methodology appears dubious. If market shares can be so readily manipulated by aggregating unaffiliated companies, why not aggregate all the publishers that are not PRH and S & S into a single, massive counterweight with a 51 percent market share? The defendants' approach appears incompatible with the way antitrust law approaches market concentration and its presumed effects on competition. . . .

* * *

ii. Internal Competition

The defendants argue that internal imprint competition increases competition in the market beyond that represented in market shares. That argument is undermined by the presumption that "[c]ompanies with multiple divisions must be viewed as a single actor, and each division will act to pursue the common interests of the whole corporation." . . . Consistent with economic principles and common sense, internal imprint

competition should be considered only to the extent that it maximizes the profits of the publishing house. . . .

* * *

iii. Self-Publishing

The defendants argue that self-publishing is a competitive constraint on the market, particularly for celebrity and romance authors. But, as previously discussed, self-publishing is not a reasonable substitute for traditional publishers in the market for anticipated top-selling books. . . .

2. Barriers to Entry and Expansion

The defendants argue that there are few barriers to entry that would prevent new or existing publishers from competing effectively with the merged company. New entrants to the market would presumably give authors alternative outlets to publish their books, thereby preventing the merged entity from lowering advances. . . . To constrain the new entity, "entry [by new competitors] must be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." "The expansion of current competitors is regarded as essentially equivalent to new entry, and is therefore evaluated according to the same criteria."

Contrary to the defendants' contentions, the evidence demonstrates that there are substantial barriers to entry and expansion in the publishing market for anticipated top-selling books. Established publishers have many advantages that are not easily replicated, including: (1) back lists that generate substantial and consistent revenue, which in turn supports risky acquisitions of high-advance books . . . (2) large and effective marketing, sales, and distribution teams that have relationships with media and retailers . . . (3) excellent reputations and track records of success that attract authors . . . and (4) lower variable costs due to economies of scale . . . . In addition, numerous publisher witnesses expressed concern about a lack of access to sufficient printing capacity, which limits the number of books that publishers can physically produce and thus limits opportunity for expansion. . . .

The best proof that would-be new competitors face formidable barriers to entry is the stability of market shares in the industry: No publisher has entered the market and become a strong competitor against the Big Five in the past thirty years. Moreover, the Big Five's market share in acquiring anticipated top-selling books has remained stable for the past three years. Thus, there is little evidence that new or existing publishers will grow at a pace and magnitude that would allow them to discipline a merged PRH and S & S. . . .

* * *

Two well-funded companies outside the Big Five highlighted by the defendants are Amazon and Disney. Amazon acquired several high-priced

books when it first started its publishing business about a decade ago, but it has failed to make significant headway in the industry. From 2019 to 2021, Amazon's share in acquiring the publishing rights to anticipated top-selling books declined from under [Redacted] to under [Redacted] Amazon also struggles with selling its books outside of its own platform. The Court therefore is not convinced that Amazon is a significant competitive constraint in the relevant market. . . .

* * *

3. Additional Arguments

* * *

ii. Efficiencies

The defendants argued at trial that efficiencies would limit the merger's anticipated competitive harm. Efficiencies alone might not suffice to rebut a prima facie case, but they "may nevertheless be relevant to the competitive effects analysis on the market required to determine whether the proposed transaction will substantially lessen competition." The Court, however, precluded the defendants' evidence of efficiencies, after determining that the defendants had failed to verify the evidence, as required by law. Efficiencies therefore play no role in the instant analysis.

CONCLUSION

The government has presented a compelling case that predicts substantial harm to competition as a result of the proposed merger of PRH and S & S. . . . The defendants have failed to show that the relevant market is not well defined; have failed to establish that the market-share data inaccurately reflects market conditions; and have failed to rebut the government's affirmative evidence of anticompetitive harm. . . .

Accordingly, the Court finds that the proposed merger of PRH and S & S violates Section 7 of the Clayton Act because it is likely to substantially lessen competition in the market for the publishing rights to anticipated top-selling books. The Court therefore will enjoin the merger. . . .

QUESTIONS AND COMMENTS

1. Should antitrust worry about the elite or aspiring elite authors when authors have myriad possibilities for distributing their books and the big publishers are facing intense competition from digital markets?

2. Was the court right to exclude evidence of efficiencies?

3. What do you make of the Court's repeated mentions of a trend toward concentration in this industry? That language appeared frequently in cases from the 1960s but had largely faded from opinions until just recently. What distinguishes a trend toward concentration from the ordinary maturation of an industry, with strong competitors remaining in competition while weak

competitors exit by acquisition or liquidation? What is the relevance of a trend toward concentration? When is such a trend indicative of anticompetitive effects?

4. Comment on the fact that this merger apparently did not harm consumers. The theory of the case related to harm only in an upstream market. What does this mean for the consumer welfare goal of competition law?

c. Non-Horizontal Mergers

i. Vertical Mergers

Insert to page 550, after the runover paragraph.

Illumina proposed to buy Grail for a price between $7 billion to $8 billion. Illumina is the dominant supplier of sequencing systems used by liquid biopsies. These sequencing systems are a necessary input to liquid biopsies. Grail is developing a revolutionary approach to cancer screening performed on blood samples that can detect a range of cancers before symptoms appear. This potential breakthrough promises to be life-saving for many people. Several other firms are working on the same approach. Grail is in the lead.

The FTC brought proceedings, as did the EU Competition Directorate-General. The parties closed their deal, risking a divestiture order at the end of proceedings. At the FTC, complaint counsel tried and lost its case before the Commission's administration law judge. *https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.* Complaint counsel appealed to the full Commission for *de novo* review. The Commission opinion, authored by Chair Khan, reversed the ALJ's decision and ordered Illumina to divest Grail. *https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.* The Commission (like the European Commission) found that the acquisition is likely to lessen competition and innovation in the market for early detection blood-sample cancer screening market. It found that Illumina is likely to remain the monopoly supplier of the essential sequencing system for the foreseeable future, that Illumina has the ability and incentive to withhold or degrade the supply of this necessary input from Grail's rivals, that competition among rivals — not clouded by preferences to Grail — would do more to save lives than the acquisition would, and that Illumina failed to substantiate its claims of merger-related efficiencies and innovation. The Commission ruled that proof that Illumina had either the incentive or ability to foreclose its rivals would have been enough. It also ruled that Illumina's open offer of non-discriminatory terms of supply (the offer of a fix) should be considered only at the remedy stage, and in any event was insufficient to cure competitive concerns with the merger.

Illumina has appealed the Commission's decision in the Fifth Circuit. The European Commission has likewise found the merger anticompetitive, and Illumina has likewise appealed.

Was this an easy case? A monopolist controlling an essential input was acquiring the major user of that input. But each side claimed that lives would be saved if it won. How should the Commission and courts deal with such a case, where lives hang in the balance? Does whoever has the burden of proof simply lose?

Notice Illumina's attempt to cure the matter by its open offer of non-discriminatory treatment. This is — in colloquial language — a proposed "fix" to the anticompetitive potential of the merger. An open question in much recent merger litigation is how to analyze cases in which the merging parties attempt to "litigate the fix:" coming forward with proposals to fix competitive concerns and arguing that, with such fixes in place, there is no justification for injunction of the underlying merger. Fixes may be behavioral promises (such as promises to continue to supply rivals on fair and non-discriminatory terms) or structural changes (such as contractual agreements to divest certain assets). Should courts or the Commission treat such fixes as changes to the underlying merger, so that the plaintiff must prove, given the fix, that a significant competition problem remains? Or should these fixes come into the case only at the remedy stage, so that the defendant has the burden of showing that the fix cures competitive concerns? The agencies generally take the latter position; merging parties generally take the former. As you will see in the two cases below, courts are often favorable to the defendants' position.

Another vertical merger tested a litigated fix when UnitedHealthcare recently proposed to buy Change Healthcare. Both companies were major providers of "first-pass" claims-editing software, which is used by insurers to determine when claims should be paid; but this horizontal overlap was fixed by a promised divestiture. The court held that the planned divestiture was a background fact of the market. The government was thus obligated to prove that the merger was anticompetitive even after accounting for the promised divestiture.

The government's (DOJ's) vertical claim was that UH, parent of the largest health insurer in the country, by acquiring Change, an independent, innovative electronic data interchange (EDI) clearing house, would gain access to a treasure trove of claims' data of rivals. The government argued that the merger would give UH the ability and the incentive to appropriate its rivals' data to strengthen its health plan arm and to withhold innovations from its customer/rivals and thus raise their costs, harming competition for national accounts and large group plans.

The court held that the DOJ had not adequately proved this case. It concluded from UH's past practices that UH had incentives to build

trusting relationships with its customers and that it was unlikely to misuse their information or withhold benefits that would drive up their costs — and that it already had access to much of this data. United States v. UnitedHealth Group, __ F. Supp. 3d __ (D.D.C. 2022). The DOJ abandoned its challenge.

In a third recent high-profile vertical case, the FTC sued to prevent Microsoft, owner of the dominant game-playing console Xbox (competing with Sony and Nintendo), from acquiring Activision/Blizzard, owner of a set of the most popular video games, notably, Call of Duty. The FTC alleged harm to competition in console, video game library subscription, and cloud gaming markets. The court denied the FTC's request for a preliminary injunction. The court said that the FTC had to prove that Microsoft had both the ability and incentive to foreclose its rivals' access to its library of games, and that it had proved neither. By the time the case came before the US court, Microsoft had already made commitments satisfactory to the European Commission; it entered into a 10-year contract with Nintendo to future Call of Duty titles, and it committed both publicly and in court to license Call of Duty to Sony. The judge treated these commitments as background facts rather than as remedy, thus affecting burdens of proof. Regarding cloud streaming, the court credited evidence that, after the merger, Microsoft's cloud-streaming competitors would gain access to the Activision content for the first time, enhancing competition in the cloud-streaming market. FTC v. Microsoft Corp. and Activision Blizzard, N.D. Cal. 2023, appeal pending.

What lessons do you draw from these cases regarding the challenges of winning vertical cases? Was the government's problem facts or law? Over recent years, courts have presumed vertical mergers to be efficient. Why? The agency leaders in the Biden administration want to reverse this presumption. On what grounds? What do the draft merger guidelines say about this? (*See This Update*, *supra*, Insert to page 478, before 2. HHI Practice.) Is their perspective likely to be persuasive? On what will this turn?

What lessons do you draw about the challenges of litigating the fix? Are the courts taking the right approach?

The agencies adopted new Vertical Merger Guidelines in 2020, updating the official guidance on nonhorizontal mergers for the first time since 1984. U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (2020). Some of the conservatism of the draft guidelines, casebook p. 550, was eliminated during revisions made to the vertical guidelines in response to public comments. Despite these changes, in 2021, the FTC withdrew its support for the Vertical guidelines, citing "flawed discussion of the purported procompetitive benefits" as a source of concern. While the DOJ did not join the FTC in withdrawing the 2020 guidelines,

draft merger guidelines released by the agencies in August of 2023 are set to supersede both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. (*See This Update*, *supra*, Insert to page 478, before 2. HHI Practice.)

ii. Conglomerate Mergers

Insert to page 552, as new final paragraphs.

Conglomerate mergers are those that are neither horizontal nor vertical, or at least have effects that go beyond these two traditional categories.

Potential competition problems are often potential horizontal problems, and thus we have dealt with Meta/Within above; but think of Meta/Within as also posing conglomerate issues. What are these issues? Can you formulate a theory of antitrust harm?

Look back at the excerpt from the proposed merger guidelines. Do any of the draft guidelines address conglomerate concerns? (*See This Update*, *supra*, Insert to page 478, before 2. HHI Practice.) How are these concerns treated? Is there a concern that the biggest of the digital players will gain power by acquiring a firm that fits within its ecosystem and adds capabilities, including data, that can be used across the ecosystem? If you were an enforcer trying to understand how such acquisitions can harm competition, what would be your hypotheses and approaches? If you were to edit the draft guidelines to be more precise about the anticompetitive harms from conglomerate mergers and how to prove them, what would you add? Do you suspect that further scrutiny of this line of enforcement will lead to clear theories of anticompetitive harm, or is opposition to conglomerate mergers simply repackaged hostility to bigness and efficiency?

D. MERGERS AND THE PUBLIC INTEREST

Insert to page 566, as new 2a.

2a. Public interests are increasingly considered in vetting mergers by jurisdictions around the world. Sustainability and other environmental concerns are now frequently weighed. U.S. law does not admit non-market arguments as part of the analysis but may consider harms other than seller market power. Harms that would arise in labor markets as a result of employer market power are an example. U.S. law also does not permit a national champion defense, though parties may still raise such considerations by the back door, as they did in T-Mobile/Sprint.

H. INTERNATIONAL DIMENSIONS OF MERGER LAW

Insert to page 584, at bottom of page.

Several mergers by US companies have been challenged and a couple of them prohibited by either the EU or the UK authority. Are there, or should there be, limits of jurisdiction, or should it be fair game for any country to control mergers with anticipated harmful effects in their territory? Effects jurisdiction tends to support the latter view. Especially since there is no international law of competition to control international mergers, would you expect national authorities to coordinate? If so, is there proper and improper coordination? Coordination has recently come under attack. In 2022, Illumina, a producer of next-generation sequencing platform, acquired Grail, a producer of non-invasive, early cancer detection liquid biopsy tests. (*See This Update*, *supra*, Insert to page 550, after the runover paragraph.) The FTC and the European Commission sought to unwind this acquisition for its potential to diminish innovation. The European Commission has prohibited this acquisition, which Illumina is attempting to annul. Illumina v. European Commission, Judgment of the General Court, ECLI:EU:T:2022:447. Illumina has parallelly filed a motion before the FTC to disclose the communication between agencies to assert its due process rights. Illumina alleges that the FTC improperly convinced the EU to bring a case. The Commissioners overruled the findings of the ALJ (who found insufficient proof of "probable and imminent harm to competition") and ordered divestiture. In re: Illumina and Grail, Docket No. 9401 (FTC, Mar. 31, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf*.

A similar concern may play out over Microsoft's attempted acquisition of Activision, a developer of popular video games, which is under simultaneous scrutiny in the US, UK, and EU. The European Commission found the merger anticompetitive and accepted Microsoft's promise of behavioral remedies — automatic 10-year licensing deals offered to competing cloud gaming services. Microsoft agreed to apply the commitment globally. The UK authority (CMA) found the merger anticompetitive and enjoined it, believing that the behavioral remedies were not sufficient; Microsoft would still have incentives to foreclose its rivals; the merger would give it a big advantage over its cloud-gaming rivals. As of this writing Microsoft has submitted a substantially revised deal to the CMA contemplating that it will not acquire cloud computing rights for outside of the European Economic Area to Activision games released in the next 15 years. When the US FTC brought suit in federal court for a preliminary injunction, the court treated Microsoft's behavioral undertakings as background facts and required the FTC to prove that, given those undertakings, the merger would harm competition. The court

found that the FTC fell short of its burdens, with and without Microsoft's undertakings.

Does the Microsoft/Activision multi-jurisdictional story suggest ideas for jurisdictional coordination? Should there be any obligation of convergence or deference to a [trusted] jurisdiction that has gone first? Was the US court right in its treatment of litigating the fix?

CHAPTER 6

VERTICAL RESTRAINTS: RESTRAINTS IN THE COURSE OF BUYING AND SELLING

■ ■ ■

G. DISCRIMINATORY PRICING: SECONDARY LINE—ROBINSON-PATMAN, ALGORITHMS

1. INTRODUCTION

Insert to page 708, after the second paragraph.

However, the Biden administration has raised the profile of the Robinson-Patman Act as an enforcement tool and has hinted at its revival, albeit with some caution that some portions of the statute may not merit revival. In a policy statement on rebates and fees in exchange for excluding lower-cost drug products, the FTC listed the Robinson-Patman Act as one of its potential enforcement tool.

Daniel Crane commented on such revival as democratically legitimate, even if the Robinson-Patman Act may not comport with contemporary notions of efficiencies.

REVIVING THE ROBINSON-PATMAN ACT

Daniel Crane, Network Law Review, Winter 2023,
https://www.networklawreview.org/cranes-cartel-three/.

* * *

. . . The Justice Department abandoned the Act in 1977. The FTC brought its last case in the 1980s. In 2007, the bi-partisan Antitrust Modernization Commission recommended that the R-P Act be repealed in its entirety. By 2007, that recommendation seemed almost superfluous. The Supreme Court had already carved down the R-P Act to the place that it had become essentially superfluous to the Sherman Act. Primary line price discrimination would require the same showing as predatory pricing under Section 2 of the Sherman Act, and secondary line price discrimination would only be cognizable when it resulted in an injury to competition as a whole.

* * *

. . . I heartily endorse the AMC's repeal recommendation. But we live in a democracy where the elected representative of the people is supposed to make the law, the executive branch is supposed to enforce it, and the courts are supposed to apply it. The abandonment of a federal statute by agencies and courts without repeal by Congress raises serious questions of democratic legitimacy and the rule of law.

. . . The executive branch also is within its rights not to enforce statutes that have fallen into desuetude—meaning that the statute has been neglected for so long that penal enforcement would violate due process norms. That may be a good argument against enforcing the R-P Act criminally, but not so much as to civil enforcement. More fundamentally, prosecutorial discretion cannot account for the behavior of the courts in failing to apply the R-P according to the plain meaning of its text and legislative history.

So a grumpy three cheers for the revival of the R-P Act. Let the FTC enforce it, let the courts apply it, and then let Congress repeal it.

QUESTIONS AND COMMENTS

1. How does the revival of Robinson-Patman enforcement fit with the priorities of the Biden administration's antitrust enforcers?

2. Is there a danger that Robinson-Patman enforcement can protect competitors at the expense of competition and consumers? Explain.

3. Can the agencies adequately protect against the danger?

4. What is the argument, consistent with democratic values, that the agencies can and should use prosecutorial discretion not to enforce the Robinson-Patman Act?

C. EXCLUSIONARY RESTRAINTS

3. TYING—MODERN ANALYSIS

Insert to page 658, before Illinois Tool Works.

EPIC GAMES V. APPLE

67 F.4th 946 (9th Cir. 2023).

M. SMITH, Circuit Judge:

[The district court rejected Epic's Sherman Act claim that Apple ties in-app payment processing to app distribution. It found the products not to be separate as a threshold matter, and thus did not reach which liability standard governed the question of antitrust lawfulness.]

ANALYSIS

* * *

III. Sherman Act Section 1: Tying

In addition to its general restraint-of-trade claim, Epic brought a Section 1 claim asserting that Apple unlawfully tied together app distribution (the App Store) and in-app payment processing (IAP). On appeal, Epic argues that (1) the district court clearly erred when it found that Epic did not identify separate products, and (2) we can enter judgment in its favor because the tie is unlawful, either *per se* or pursuant to the Rule of Reason. We agree with Epic that the district court clearly erred in its separate-products finding, but we find that error to be harmless. The Rule of Reason applies to the tie involved here, and, for the reasons already explained, Epic failed to establish that Apple's design of the iOS ecosystem—which ties the App Store and IAP together—is anticompetitive.

A. Existence of a Tie

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.' " To prove the existence of a tie, a party must make two showings.

First, the arrangement must, of course, involve two (or more) separate products. Pursuant to *Jefferson Parish* and *Kodak*, we apply a consumer-demand test when conducting this inquiry: To constitute two separate products, "[t]here must be sufficient consumer demand so that it is efficient for a firm to provide" the products separately. Importantly, the separate-products inquiry "turns not on the functional relation between them, but rather on the character of the demand for the two items." This consumer-demand test, in turn, has two parts: (1) that it is possible to separate the products, and (2) that it is efficient to do so, as inferred from circumstantial evidence.

The efficiency showing does not require a full-blown economic analysis. Because the showing is just a threshold step to reaching the merits of a tie (including, sometimes, the application of a *per se* rule), it would be incongruous to require a resource-intensive showing. . . . Accordingly, the existence of separate products is inferred from "more readily observed facts." These include consumer requests to offer the products separately, disentangling of the products by competitors, analogous practices in related markets, and the defendant's historical practice. . . .

Second, even where a transaction involves separate products, it is not necessarily a tie; the seller must also "*force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Were a buyer merely

to agree "to buy [a] second product on its own merits" absent any coercion, there would be no tie.

* * *

Here, the district court found that there was no tie because app distribution and IAP are not separate products. It based this finding on four rationales—each of which is either clearly erroneous or incorrect as a matter of law.

To begin, the district court erred as a matter of law when it concluded that IAP was not separate from app distribution because IAP is "integrated into . . . iOS devices." *Jefferson Parish* expressly rejects an approach to the separate-products inquiry based on the "functional relation" between two purported products.

Next, the district court clearly erred when it found that "Epic Games presented no evidence showing that demand exists for IAP as a standalone product." Here, the App Store and IAP clearly can be separated because Apple *already does* so in certain contexts, namely that IAP is not required for in-app purchases of physical goods. The efficiency showing is also met. Epic produced evidence that it, Facebook, Microsoft, Spotify, Match, and Netflix, have all tried to convince Apple to let them develop their own in-app payment solutions. The Epic Games Store—a direct competitor of Apple in the mobile-games submarket—delinks distribution from payment processing. And prior to IAP's development in 2009, Apple distributed apps through the App Store but permitted developers to use their own in-app payment systems.

Relatedly, the district court clearly erred when it reasoned that, even if Apple did not require IAP, Apple would still be entitled to collect a commission on payments made and, therefore, "no economically rational developer would choose to use the alternative [payment] processor." The district court itself found that "Epic Games raises legitimate concerns" about the non-price features of IAP, including that: "Apple does a poor job of mediating disputes between a developer and its customers"; that Apple's one-size-fits-all refund approach "leads to poor [customer] experiences"; and that IAP's exclusion of developers from transactions "can also increase fraud."

Finally, the district court erred as a matter of law when it concluded that a product in a two-sided market can *never* be broken into multiple products. Despite Apple's strained effort to portray this as a factual finding, the district court imposed a bright-line legal rule. But *Amex* simply does not stand for the proposition that any two-sided platform will necessarily relate only to one market. Instead, it emphasized that market definition must "reflect[ ] commercial realities." Indeed, if *Amex* truly required a one-platform, one-market rule, then the district court's market definition—mobile gaming transactions, instead of *all* app transactions—would be

erroneous, despite the court's extensive findings that game and non-game apps are characterized by significantly different demand.

B. Lawfulness of the Tie

A tie can be unlawful pursuant to either a modified *per se* rule or the Rule of Reason. A tie is *per se* unlawful if (1) the defendant has market power in the tying product market, and (2) the "tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." The first prong requires the market-power inquiry standard throughout antitrust law. The second prong requires only that the tie affect an amount of commerce in the tied product market that is not "*de minimis*." These requirements are met here: Apple has market power in the app-distribution market. And the tie affects a non "de minimis" amount of commerce in the in-app-payment-processing market: Apple requires IAP to be used for more than half of the transactions that comprise a $100 billion market.

Nonetheless, we join the D.C. Circuit in holding that *per se* condemnation is inappropriate for ties "involv[ing] software that serves as a platform for third-party applications." "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations." That is because *per se* condemnation embodies a judicial assessment that a category of restraints is "plainly anticompetitive" and "lack[ing] . . . [in] any redeeming virtue" such that it can be "conclusively presumed illegal." Given the costs of improperly condemning a practice across the board, extending a *per se* rule requires caution and judicial humility. . . . Based on the record, we do not have the level of confidence needed to universally condemn ties related to app-transaction platforms that combine multiple functionalities. . . .

The tie in this case differs markedly from those the Supreme Court considered in *Jefferson Parish* and prior tying cases. Particularly, "[i]n none of these cases was the tied good . . . technologically integrated with the tying good." Moreover, none of the ties presented any purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good, as Apple does here.

Moreover, while *Jefferson Parish*'s separate-products test filters out procompetitive bundles from *per se* scrutiny in traditional markets, we are skeptical that it does so in the market involved here. Software markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. In such a market, any first-mover product risks being labeled a tie pursuant to the separate-products test. If *per se* condemnation were to follow, we could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect. The Rule of Reason guards against that risk by "afford[ing] the first mover an opportunity to demonstrate that an

efficiency gain from its ‘tie’ adequately offsets any distortion of consumer choice.”

Applying the Rule of Reason to the tie involved here, it is clearly lawful. Epic’s tying claim (that app distribution and payment processing are tied together) is simply a repackaging of its generic Section 1 claim (that the conditions under which Apple offers its app-transactions product are unreasonable). For the reasons we explained above, Epic failed to carry its burden of proving that Apple’s structure of the iOS ecosystem is unreasonable.

CHAPTER 7

ANTITRUST AND INTELLECTUAL PROPERTY

■ ■ ■

C. ANTICOMPETITIVE AGREEMENTS INVOLVING IP RIGHTS

2. STANDARD-SETTING AND FRAND OBLIGATIONS; AVOIDING PATENT AMBUSH

Insert to page 750, before *Questions and Comments.*

FTC V. QUALCOMM, INC.

969 F.3d 974 (9th Cir. 2020)

CALLAHAN, Circuit Judge:

This case asks us to draw the line between *anti*competitive behavior, which is illegal under federal antitrust law, and *hyper*competitive behavior, which is not. The Federal Trade Commission ("FTC") contends that Qualcomm Incorporated ("Qualcomm") violated the Sherman Act, 15 U.S.C. §§ 1, 2, by unreasonably restraining trade in, and unlawfully monopolizing, the code division multiple access ("CDMA") and premium long-term evolution ("LTE") cellular modem chip markets. After a ten-day bench trial, the district court agreed and ordered a permanent, worldwide injunction prohibiting several of Qualcomm's core business practices. . . . We now hold that the district court went beyond the scope of the Sherman Act, and we reverse.

I

A

Founded in 1985, Qualcomm dubs itself "the world's leading cellular technology company." Over the past several decades, the company has made significant contributions to the technological innovations underlying modern cellular systems, including third-generation ("3G") CDMA and fourth-generation ("4G") LTE cellular standards—the standards practiced in most modern cellphones and "smartphones." Qualcomm protects and profits from its technological innovations through its patents, which it licenses to original equipment manufacturers ("OEMs") whose products

(usually cellphones, but also smart cars and other products with cellular applications) practice one or more of Qualcomm's patented technologies.

Qualcomm's patents include cellular standard essential patents ("SEPs"), non-cellular SEPs, and non-SEPs. Cellular SEPs are patents on technologies that international standard-setting organizations ("SSOs") choose to include in technical standards practiced by each new generation of cellular technology. SSOs—also referred to as standards development organizations ("SDOs")—are global collaborations of industry participants that "establish technical specifications to ensure that products from different manufacturers are compatible with each other." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 875 (9th Cir. 2012) ("*Microsoft II*"). . . .Cellular SEPs are necessary to practice a particular cellular standard. Because SEP holders could prevent industry participants from implementing a standard by selectively refusing to license, SSOs require patent holders to commit to license their SEPs on fair, reasonable, and nondiscriminatory ("FRAND") terms before their patents are incorporated into standards.

Rather than license its patents individually, Qualcomm generally offers its customers various "patent portfolio" options, whereby the customer/licensee pays for and receives the right to practice all three types of Qualcomm patents (SEPs, non-cellular SEPs, and non-SEPs).

Qualcomm's patent licensing business is very profitable, representing around two-thirds of the company's value. . . . The company also manufactures and sells cellular modem chips, the hardware that enables cellular devices to practice CDMA and premium LTE technologies and thereby communicate with each other across cellular networks. . . .

Like its licensing business, Qualcomm's modem chip business has been very successful. From 2006 to 2016, Qualcomm possessed monopoly power in the CDMA modem chip market, including over 90% of market share. . . . Around 2015, however, Qualcomm's dominant position in the modem chip markets began to recede, as competitors like Intel and MediaTek found ways to successfully compete. Based on projections from 2017 to 2018, Qualcomm maintains approximately a 79% share of the CDMA modem chip market and a 64% share of the premium LTE modem chip market.

B

Qualcomm licenses its patent portfolios exclusively at the OEM level, setting the royalty rates on its CDMA and LTE patent portfolios as a percentage of the end-product sales price. This practice is not unique to Qualcomm. As the district court found, "[f]ollowing Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly." . . .

Qualcomm reinforces these practices with its so-called "no license, no chips" policy, under which Qualcomm refuses to sell modem chips to OEMs

that do not take licenses to practice Qualcomm's SEPs. . . . Qualcomm's practices, taken together, are "chip supplier neutral"—that is, OEMs are required to pay a per-unit licensing royalty to Qualcomm for its patent portfolios regardless of which company they choose to source their chips from.

Although Qualcomm's licensing and modem chip businesses have made it a major player in the broader cellular technology market, the company is not an OEM. That is, Qualcomm does not manufacture and sell cellphones and other end-use products (like smart cars) that consumers purchase and use. Thus, it does not "compete"—in the antitrust sense—against OEMs like Apple and Samsung in these product markets. Instead, these OEMs are Qualcom's *customers*.

C

* * *

Qualcomm's competitors in the modem chip markets contend that Qualcomm's business practices, in particular its refusal to license them, have hampered or slowed their ability to develop and retain OEM customer bases, limited their growth, delayed or prevented their entry into the market, and in some cases forced them out of the market entirely. These competitors contend that this result is [] anticompetitive . . . .

In 2011 and 2013, Qualcomm signed agreements with Apple under which Qualcomm offered Apple billions of dollars in incentive payments contingent on Apple sourcing its iPhone modem chips exclusively from Qualcomm and committing to purchase certain quantities of chips each year. Again, rivals such as Intel—as well as Apple itself, which was interested in using Intel as an alternative chip supplier—complained that Qualcomm was engaging in anticompetitive business practices designed to maintain its monopolies in the CDMA and premium LTE modem chip markets while making it impossible for rivals to compete. In 2014, Apple decided to terminate these agreements and source its modem chips from Intel for its 2016 model iPhone.

D

In January 2017, the FTC sued Qualcomm for equitable relief, alleging that Qualcomm's interrelated policies and practices excluded competitors and harmed competition in the modem chip markets, in violation § 5(a) of the FTC Act and §§ 1 and 2 of the Sherman Act. [T]he district court concluded that "Qualcomm's licensing practices are an unreasonable restraint of trade under § 1 of the Sherman Act and exclusionary conduct under § 2 of the Sherman Act." The district court ordered a permanent, worldwide injunction prohibiting Qualcomm's core business practices.

The district court's decision consists of essentially five mixed findings of fact and law: (1) Qualcomm's "no license, no chips" policy amounts to "anticompetitive conduct against OEMs" and an "anticompetitive practice[]

in patent license negotiations"; (2) Qualcomm's refusal to license rival chipmakers violates both its FRAND commitments and an antitrust duty to deal under § 2 of the Sherman Act; (3) Qualcomm's "exclusive deals" with Apple "foreclosed a 'substantial share' of the modem chip market" in violation of both Sherman Act provisions; (4) Qualcomm's royalty rates are "unreasonably high" because they are improperly based on its market share and handset price instead of the value of its patents; and (5) Qualcomm's royalties, in conjunction with its "no license, no chips" policy, "impose an artificial and anticompetitive surcharge" on its rivals' sales, "increas[ing] the effective price of rivals' modem chips" and resulting in anticompetitive exclusivity. . . .

The district court concluded that "[b]y attacking all facets of rivals' businesses and preventing competition on the merits, [Qualcomm's] practices 'harm the competitive process and thereby harm consumers.' " Accordingly, the district court held that the FTC met its burden under the Sherman Act of proving "market power plus some evidence that the challenged restraint harms competition." Furthermore, the district court held that it could "infer" a causal connection between Qualcomm's conduct and anticompetitive harm because that conduct " 'reasonably appear[s] capable of making a significant contribution to ... maintaining monopoly power.'" Qualcomm timely appealed. . . . For the reasons that follow, we reverse the district court's Sherman Act ruling and its issuance of a worldwide injunction. . . .

II

A

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Supreme Court "has long recognized that, '[i]n view of the common law and the law in this country' when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.' " . . . Thus, "[t]o establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in *unreasonable* restraint of trade." "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.' " "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure ... to assess the [restraint]'s *actual* effect' on competition." . . . "The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " . . .

Whereas § 1 of the Sherman Act targets *concerted* anticompetitive conduct, § 2 targets *independent* anticompetitive conduct. The statute makes it illegal to "monopolize . . . any part of the trade or commerce among the several States." To establish liability under § 2, a plaintiff must show: " '(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust

injury.' " "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not [itself] unlawful; [instead,] it is an important element of the free-market system." "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."

"To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful [under § 2] unless it is accompanied by an element of anticompetitive *conduct*." Accordingly, plaintiffs are required to prove "anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market." "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect' "—that is, it "must harm the competitive *process* and thereby harm consumers." "In contrast, harm to one or more *competitors* will not suffice."

Allegations that conduct "has the effect of reducing consumers' choices or increasing prices to consumers do[ ] not sufficiently allege an injury to competition . . . [because] [b]oth effects are fully consistent with a free, competitive market." Instead, in order to prove a violation of the Sherman Act, the plaintiff must show that diminished consumer choices and increased prices are the result of a less competitive market due to either artificial restraints or predatory and exclusionary conduct. *See Am. Express*, 138 S. Ct. at 2288 ("This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.' "). Furthermore, novel business practices—*especially* in technology markets—should not be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." . . .

[The Court explains the three-part burden shifting test under the rule of reason.]

* * *

The similarity of the burden-shifting tests under §§ 1 and 2 means that courts often review claims under each section simultaneously. If, in reviewing an alleged Sherman Act violation, a court finds that the conduct in question is *not* anticompetitive under § 1, the court need not separately analyze the conduct under § 2. However, although the tests are largely similar, a plaintiff may not use *indirect* evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2. In this respect, proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation, although courts have also held that the third element of a § 2 claim, the causation element, may be inferred.

B

A threshold step in any antitrust case is to accurately define the relevant market, which refers to "the area of effective competition." Here, the district court correctly defined the relevant markets as "the market for CDMA modem chips and the market for premium LTE modem chips." Nevertheless, its analysis of Qualcomm's business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district court's ruling considered alleged economic harms to OEMs—who are Qualcomm's *customers*, not its competitors—resulting in higher prices to consumers. These harms, even if real, are not "anticompetitive" in the antitrust sense—at least not *directly*—because they do not involve restraints on trade or exclusionary conduct in "the area of effective competition."

* * *

Moreover, throughout its analysis, the district court failed to distinguish between Qualcomm's *licensing* practices (which primarily impacted OEMs) and its practices relating to *modem chip sales* (the relevant antitrust market). . . . But even if Qualcomm's practices are interrelated, actual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law.

III

Accordingly, we reframe the issues to focus on the impact, if any, of Qualcomm's practices in the area of effective competition: the markets for CDMA and premium LTE modem chips. . . .

* * *

A

"As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals[.]" Likewise, "the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' " . . . This is because the antitrust laws, including the Sherman Act, "were enacted for 'the protection of *competition,* not *competitors*.' "

The one, limited exception to this general rule that there is no antitrust duty to deal comes under the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). There, the Court held that a company engages in prohibited, anticompetitive conduct when (1) it "unilateral[ly] terminat[es] ... a voluntary and profitable course of dealing," (2) "the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition,'" and (3) the refusal to deal

involves products that the defendant already sells in the existing market to other similarly situated customers. The Supreme Court later characterized the *Aspen Skiing* exception as "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409.

The district court's conclusion that Qualcomm's refusal to provide exhaustive SEP licenses to rival chip suppliers meets the *Aspen Skiing* exception ignores critical differences between Qualcomm's business practices and the conduct at issue in *Aspen Skiing*, and it ignores the Supreme Court's subsequent warning in *Trinko* that the *Aspen Skiing* exception should be applied only in rare circumstances. . . .

First, the district court was incorrect that "Qualcomm terminated a 'voluntary and profitable course of dealing' " with respect to its previous practice of licensing at the chip-manufacturer level. According to Qualcomm, it ceased this practice in response to developments in patent law's exhaustion doctrine . . . which made it harder for Qualcomm to argue that it could provide "non-exhaustive" licenses in the form of royalty agreements. Nothing in the record or in the district court's factual findings rebuts these claims. . . .

Second, Qualcomm's rationale for "switching" to OEM-level licensing was not "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition," the second element of the *Aspen Skiing* exception. Instead, Qualcomm responded to the change in patent-exhaustion law by choosing the path that was "far more lucrative," both in the short term *and* the long term, regardless of any impacts on competition. . . . Because Qualcomm's purpose was greater profits in both the short and long terms, the second required element of the *Aspen Skiing* exception is not present in this case.

Finally, unlike in *Aspen Skiing*, the district court found no evidence that Qualcomm singles out any specific chip supplier for anticompetitive treatment in its SEP-licensing. In *Aspen Skiing*, the defendant refused to sell its lift tickets to a smaller, rival ski resort even as it sold the same lift tickets to any other willing buyer (including any *other* ski resort); moreover, this refusal was designed specifically to put the smaller, nearby rival out of business. Qualcomm applies its OEM-level licensing policy equally with respect to all competitors in the modem chip markets and declines to enforce its patents against these rivals even though they practice Qualcomm's patents (royalty-free). Instead, Qualcomm provides these rivals indemnifications through the use of "CDMA ASIC Agreements"—the *Aspen Skiing* equivalent of refusing to sell a skier a lift ticket but letting them ride the chairlift anyway. Thus, while Qualcomm's policy toward OEMs is "no license, no chips," its policy toward rival chipmakers could be characterized as "no license, no problem." Because Qualcomm applies the latter policy neutrally with respect to *all* competing modem chip manufacturers, the third *Aspen Skiing* requirement does not apply.

As none of the required elements for the *Aspen Skiing* exception are present, let alone all of them, the district court erred in holding that Qualcomm is under an antitrust duty to license rival chip manufacturers. We hold that Qualcomm's OEM-level licensing policy, however novel, is not an anticompetitive violation of the Sherman Act.

B

Conceding error in the district court's conclusion that Qualcomm is subject to an antitrust duty to deal under *Aspen Skiing*, the FTC contends that this court may nevertheless hold that Qualcomm engaged in anticompetitive conduct in violation of § 2. This is so, the FTC urges, because (1) "Qualcomm entered into a voluntary contractual commitment to deal with its rivals as part of the SSO process, which is itself a derogation from normal market competition," and (2) Qualcomm's breach of this contractual commitment "satisfies traditional Section 2 standards [in that] it 'tends to impair the opportunities of rivals and . . . does not further competition on the merits.' " We disagree.

Even if the district court is correct that Qualcomm is contractually obligated via its SSO commitments to license rival chip suppliers—a conclusion we need not and do not reach—the FTC still does not satisfactorily explain how Qualcomm's alleged breach of this contractual commitment *itself* impairs the opportunities of rivals. . . . [T]o make out a § 2 violation, the anticompetitive harm identified must be to *competition itself*, not merely to competitors. The FTC identifies no such harm to competition.

The FTC's conclusion that OEM-level licensing does not further competition on the merits is not only belied by MediaTek and Intel's entries into the modem chip markets in the 2015–2016 timeframe, it also gives inadequate weight to Qualcomm's reasonable, procompetitive justification that licensing at the OEM and chip-supplier levels simultaneously would require the company to engage in "multi-level licensing," leading to inefficiencies and less profit. . . . More critically, this part of the FTC's argument skips ahead to an examination of Qualcomm's procompetitive justifications, failing to recognize that the burden does not shift to Qualcomm to provide such justifications unless and until the FTC meets its initial burden of proving anticompetitive harm. Because the FTC has not met its initial burden under the rule of reason framework, we are less critical of Qualcomm's procompetitive justifications for its OEM-level licensing policy—which, in any case, appear to be reasonable and consistent with current industry practice.

* * *

We therefore decline to hold that Qualcomm's alleged breach of its SSO commitments to license its SEPs on FRAND terms, even assuming there was a breach, amounted to anticompetitive conduct in violation of § 2.

C

We next address the district court's primary theory of anticompetitive harm: Qualcomm's imposition of an "anticompetitive surcharge" on rival chip suppliers via its licensing royalty rates.

* * *

This central component of the district court's ruling is premised on the district court's findings that Qualcomm's royalty rates are (1) "unreasonably high" because they are improperly based on Qualcomm's monopoly chip market share and handset price instead of the "fair value of Qualcomm's patents," and (2) anticompetitive because they raise costs to OEMs, who pass the extra costs along to consumers and are forced to invest less in other handset features. . . .

We hold that the district court's "anticompetitive surcharge" theory fails to state a cogent theory of anticompetitive harm. . . .

1

A [] problem with the district court's "unreasonable royalty rate" conclusion is that it erroneously assumes that royalties are "anticompetitive"—in the antitrust sense—unless they precisely reflect a patent's current, intrinsic value and are in line with the rates other companies charge for their own patent portfolios. Neither the district court nor the FTC provides any case law to support this proposition, which sounds in patent law, not antitrust law. . . . We decline to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the "fair value" of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates.

Finally, even assuming that a deviation between licensing royalty rates and a patent portfolio's "fair value" could amount to "anticompetitive harm" in the antitrust sense, the primary harms the district court identified here were to the OEMs who agreed to pay Qualcomm's royalty rates—that is, Qualcomm's *customers*, not its *competitors*. These harms were thus located outside the "areas of effective competition"—the markets for CDMA and premium LTE modem chips—and had no direct impact on competition in those markets.

2

Regardless of the "reasonableness" of Qualcomm's royalty rates, the district court erred in finding that these royalties constitute an "artificial surcharge" on rivals' chip sales. In *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244 (D. Utah 1999), the primary case relied upon by the district court for its surcharging theory, Microsoft required OEMs "to pay [it] a royalty on every machine the OEM shipped regardless of whether the machine contained MS DOS or another operating system." This resulted in OEMs having to pay two royalties instead of one for a portion of their

product base unless they chose to exclusively install Microsoft's operating system in their products. Microsoft's policy thus had "the practical effect of exclusivity," as it imposed a naked tax on rivals' software even when the end-product—an individual computer installed with a non-Microsoft operating system—contained no added value from Microsoft. . . .

Qualcomm's licensing royalties are qualitatively different from the per-unit operating-system royalties at issue in *Caldera*. . . . In its complaint and in its briefing, the FTC suggests that Qualcomm's royalty rates impose an anticompetitive surcharge on its rivals' sales not for the reasons at play in *Caldera*, but rather because Qualcomm uses its licensing royalties to charge anticompetitive, ultralow prices on its own modem chips—pushing out rivals by squeezing their profit margins and preventing them from making necessary investments in research and development. But this type of "margin squeeze" was rejected as a basis for antitrust liability in *Linkline*. . . .

[T]he district court faulted Qualcomm for lowering its prices only when other companies introduced CDMA modem chips to the market to effectively compete. We agree with Qualcomm that this is exactly the type of "garden-variety price competition that the law encourages," and are aware of no authority holding that a monopolist may not lower its rates in response to a competitor's entry into the market with a lower-priced product.

D

As with its critique of Qualcomm's royalty rates, the district court's analysis of Qualcomm's "no license, no chips" policy focuses almost exclusively on alleged "anticompetitive harms" to OEMs—that is, impacts outside the relevant antitrust market. . . .

Furthermore, it appears that OEMs have been somewhat successful in "disciplining" Qualcomm's pricing through arbitration claims, negotiations, threatening to move to different chip suppliers, and threatened or actual antitrust litigation. These maneuvers generally resulted in settlements and renegotiated licensing and chip-supply agreements with Qualcomm, even as OEMs continued to look elsewhere for cheaper modem chip options. . . .

According to the FTC, the problem with "no license, no chips" is that, under the policy, "Qualcomm will not sell chips to a cellphone [OEM] like Apple or Samsung unless the OEM agrees to a license that requires it to pay a substantial per-phone surcharge *even on phones that use rivals' chips*." But this argument is self-defeating: if the condition imposed on gaining access to Qualcomm's chip supply applies regardless of whether the OEM chooses Qualcomm or a competitor (in fact, this appears to be the essence of Qualcomm's policy), then the condition by definition does not distort the "area of effective competition" or impact competitors. At worst, the policy raises the "all-in" price that an OEM must pay for modem chips

(chipset + licensing royalties) regardless of which chip supplier the OEM chooses to source its chips from. As we have already discussed, whether that all-in price is reasonable or unreasonable is an issue that sounds in patent law, not antitrust law. Additionally, it involves potential harms to Qualcomm's *customers*, not its competitors, and thus falls outside the relevant antitrust markets.

The district court stopped short of holding that the "no license, no chips" policy itself violates antitrust law. For good reason: neither the Sherman Act nor any other law prohibits companies like Qualcomm from (1) licensing their SEPs independently from their chip sales and collecting royalties, and/or (2) limiting their chip customer base to licensed OEMs. As we have noted, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." . . . Indeed, the FTC accepts that this is the state of the law when it concedes that "Qualcomm holds patents practiced by its rivals' chips, and ... is entitled to collect a royalty" on them.

In addition, the district court's criticism of "no license, no chips" treats that policy as if Qualcomm is making SEP licenses contingent upon chip purchases, instead of the other way around. . . . But unlike a hypothetical "no chips, no license" policy, "no license, no chips" is chip-neutral: it makes no difference whether an OEM buys Qualcomm's chip or a rival's chips. The policy only insists that, whatever chip source an OEM chooses, the OEM pay Qualcomm for the right to practice the patented technologies embodied in the chip, as well as in other parts of the phone or other cellular device.

This is not to say that Qualcomm's "no license, no chips" policy is not "unique in the industry" (it is), or that the policy is not designed to maximize Qualcomm's profits (Qualcomm has admitted as much). But profit-seeking behavior alone is insufficient to establish antitrust liability. . . . We decline to ascribe antitrust liability in these dynamic and rapidly changing technology markets without clearer proof of anticompetitive effect.

E

Having addressed the primary components of the district court's antitrust ruling with respect to Qualcomm's general business practices, we now address the district court's more specific finding that from 2011 to 2015, Qualcomm violated both sections of the Sherman Act by signing "exclusive deals" with Apple that "foreclosed a 'substantial share' of the [CDMA] modem chip market." "Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." Because "[t]here are 'well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition,' " an exclusive dealing arrangement is not per se illegal. Instead, such an arrangement violates the Sherman Act under the rule of reason only if "its effect is to 'foreclose competition in a substantial share of the line of commerce affected.' "

Qualcomm argues that its agreements with Apple were "volume discount contracts, not exclusive dealings contracts." Unlike exclusive dealing arrangements, "volume discount contracts are legal under antitrust law ... [b]ecause the contracts do not preclude consumers from using other ... services." *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999). Likewise, conditional agreements that provide "substantial discounts to customers that actually purchase[ ] a high percentage of their ... requirements from" a firm are not exclusive dealing arrangements, de facto or actual, unless they "prevent[ ] the buyer from purchasing a given good from any other vendor."

The district court concluded that the Apple agreements were not volume discount contracts, but rather "de facto exclusive deals" that "coerced '[Apple] into purchasing a substantial amount of [its] needs from [Qualcomm]' " and thereby " 'substantially foreclosed competition' in the [CDMA modem chip] market."

There is some merit in the district court's conclusion that the Apple agreements were structured more like exclusive dealing contracts than volume discount contracts. However, we do not agree that these agreements had the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market, or that injunctive relief is warranted.

During the relevant time period (2011–2015), the record suggests that the only serious competition Qualcomm faced with respect to the Apple contracts was from Intel, a company from whom Apple had considered purchasing modem chips prior to signing the 2013 agreement with Qualcomm. . . . [I]t is undisputed that Intel won Apple's business *the very next year*, in 2014, when Apple's engineering team unanimously recommended that the company select Intel as an alternative supplier of modem chips. . . . There is no indication in the record, however, that Intel was a viable competitor to Qualcomm prior to 2014–2015, or that the 2013 agreement delayed Apple's transition to Intel by any more than one year. . . . Given these undisputed facts, we conclude that the 2011 and 2013 agreements did not have the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market.

* * *

IV

Anticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behavior is not. Qualcomm has exercised market dominance in the 3G and 4G cellular modem chip markets for many years, and its business practices have played a powerful and disruptive role in those markets, as well as in the broader cellular services and technology markets. The company has asserted its economic muscle "with vigor, imagination, devotion, and ingenuity." It has also "acted with sharp elbows—as businesses often do." Our job is not to condone or punish

Qualcomm for its success, but rather to assess whether the FTC has met its burden under the rule of reason to show that Qualcomm's practices have crossed the line to "conduct which unfairly tends to destroy competition itself." We conclude that the FTC has not met its burden.

First, Qualcomm's practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of § 2, as Qualcomm is under no antitrust duty to license rival chip suppliers. *Second*, Qualcomm's patent-licensing royalties and "no license, no chips" policy do not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, these aspects of Qualcomm's business model are "chip-supplier neutral" and do not undermine competition in the relevant antitrust markets. *Third*, Qualcomm's 2011 and 2013 agreements with Apple have not had the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market. Furthermore, because these agreements were terminated years ago by Apple itself, there is nothing to be enjoined.

We therefore REVERSE the district court's judgment and VACATE its injunction as well as its partial grant of summary judgment.

QUESTIONS AND COMMENTS

1. Restate succinctly the FTC claim that Qualcomm's licensing practices "taxed" rival modem chip makers such as Intel and foreclosed them from effectively contesting the market, which might/would have increased chip competition and driven down the price of chips to device manufacturers (the OEMs). Note the argument that the OEMs (like Apple), doing some business with Qualcomm, would already have paid Qualcomm for royalties on the chips they needed, whether not they got the chips from Qualcomm; so why would they buy them from anyone else?

2. To what extent is *Aspen Skiing* as limited by *Trinko* the big problem that stands in the way of the FTC's success? In other words, but for *Aspen Skiing* and *Trinko*, would Qualcomm have had a duty to license its essential technology to Intel? Which is the better rule – duty or no duty?

3. Assume Qualcomm had a contractual duty with the SSO (Standards Setting Organization and its members) to charge no more than a FRAND license fee, given that Qualcomm probably got market power by the choice of the SSO to include its technology in the standard. (The court declined to say whether Qualcomm had a contractual duty.) What are the arguments for and against holding that the SSO duty should be transformed into an antitrust duty; that Qualcomm therefore had an antitrust duty to license at FRAND? Or that, when Qualcomm not only violated its FRAND obligation but also required its buyers to pay it royalties for all chips the buyer used, whether or not they were Qualcomm chips, the conduct was anticompetitive and illegal?

4. What does the court mean by its statement that, if Qualcomm's royalty rates were too high, this conduct directly impacted only customers (the OEMs),

not competitors, and was therefore outside the relevant market and not relevant to the case? (point D) Is this correct?

5. How important is perspective in this case? – that the courts should let the market play itself out and what might look anticompetitive might actually be hypercompetitive, especially when it comes to licensing intellectual property rights; versus a caution that powerful firms are likely to choke off competition, even by abuses of intellectual property rights?

3. SETTLEMENT OF INFRINGEMENT ACTIONS AGAINST FIRST-FILING GENERICS

Insert to page 764, end of note 5.

The Court of Appeals for the Fifth Circuit upheld the FTC's determination that the brand owner Endo and the generic producer Impax illegally entered into a pay-for-delay settlement of an infringement suit to block Impax from offering consumers a low-cost alternative to the Endo brand. Impax Laboratories v. FTC, 994 F.3d 484 (5th Cir. 2021).

CHAPTER 8

LOOKING FORWARD

▪ ▪ ▪

B. DEFANGING THE FAANG

IT'S TIME TO BREAK UP AMAZON, GOOGLE, AND FACEBOOK

Insert to page 797, before 'Restoring competition in the tech sector.'

The FTC adopted a policy statement in September 2022 stating its enforcement priorities on "gig work". The statement highlights issues of concentrated markets protected by high barriers of entry presenting a unique challenge to working conditions for gig workers. The FTC intends to police deceptive claims on wages and investigate wage-fixing. The FTC also stated its intent to apply Section 5 of the FTC Act to target unfair or misleading claims about earnings and to algorithm-based decision making that prejudices gig workers. *https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf.* In December 2021, the EU released a set of proposals interpreting EU competition law as recognizing gig workers as employees and mandating transparency in the use of digital monitoring. *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605*.

Insert to page 800, before C.

A Note on the Biden Administration

The Biden Administration has made clear its support for a dramatic change of course in antitrust policy and enforcement. President Biden appointed three leading Neo-Brandeisians to top antitrust positions: Lina Khan as Chair of the FTC, Jonathan Kanter as Assistant Attorney General for the Antitrust Division, and Tim Wu to head competition policy at the National Economic Council. On July 9, 2021, the Administration released an Executive Order ("EO") on Promoting Competition in the American Economy that outlines a broad and aggressive blueprint on competition policy. *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/*. The EO begins from the premise that "over the last several

decades . . . competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality." Without directly attacking the consumer welfare standard, it cites a pre-Chicago School understanding of antitrust's goals, asserting that the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

The EO outlines a detailed agenda for increasing competition in the American economy. Among other things, it calls for more vigorous enforcement of the antitrust laws, review of the horizontal and vertical merger guidelines, scrutiny of anticompetitive occupational licensing regulations, and increased attention to the extensions of market power beyond the lawful scope of patents. It calls on the FTC to consider rule-making to limit non-compete clauses limiting employee mobility, "unfair competition in major Internet marketplaces," "unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars," and "unfair tying practices or exclusionary practices in the brokerage or listing of real estate." It also directs particular federal agencies, such as the Departments of Agriculture and Transportation, to take action addressing certain obstacles to competition within their respective jurisdictions.

The EO potentially marks a sharp turn in U.S. competition policy, but the test will be implementation. The agencies have demonstrated a shift in enforcement priorities by increased scrutiny of labor markets by targeting anticompetitive agreements seeking to limit labor mobility, and arguing monopsony harms in challenging mergers. The agencies have also prioritized competition in digital markets by arguing theories of harm around data, privacy, and innovation. Some of its most ambitious action items involve the substantive FTC rulemaking under its "unfair methods of competition" authority, something the FTC has almost never done. Whether the courts will uphold such rules remains to be seen. At a minimum, however, the first two and a half years of the Biden Administration suggests that U.S. antitrust and competition policy will remain in play for the next several years.

Increased congressional scrutiny of antitrust issues comes on the heels of the EO. It also takes place amid other political involvement in antitrust. The Senate Judiciary committee conducted hearings on Ticketmaster's practices after its acquisition of LiveNation, and after the Kroger and Albertsons merger between two retail grocery chains. The House Committee on the Judiciary grilled the FTC Chair at recent oversight hearings.

APPENDIX A

THE FRAMEWORK FOR U.S. ANTITRUST LAW

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III. The Enforcement of the Federal Antitrust Laws

A. The Justice Department and the Federal Trade Commission

Insert to page 807, at end of Section A.

Today, the structure and powers of the FTC are threatened on several fronts.

In terms of remedies, Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek injunctive relief against violations of any provision of law enforced by the FTC. At times, the FTC has invoked §13(b) to support equitable monetary relief in the form of restitution or disgorgement. Although this practice has been more common in consumer protection cases than in antitrust cases, the Commission has received some significant monetary relief in antitrust cases as well. In May 2015, the Commission secured a $1.2 billion disgorgement remedy against the Israeli pharmaceutical company Teva Pharmaceuticals for anticompetitive behavior with respect to the sleep-disorder drug Provigil.

In *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court ended this line of recovery. In AMG, a consumer protection case, the Court held that §13(b) does not authorize the FTC to seek court-ordered monetary relief. Absent Congressional action, the Commission can no longer seek this relief.

Another embattled power of the FTC is the power to make rules under Section 6(g) of the FTC Act, 15 U.S.C. § 46(g). The FTC's power to make substantive rules is unsettled in both its availability and scope. The FTC has rarely invoked its rule making power in recent decades. Current FTC leadership is not so hesitant. In January of 2023, the FTC proposed a substantive rule that would prohibit the inclusion of noncompete clauses in employment contracts.

Challenges to the FTC's authority to promulgate substantive rules might start from the Supreme Court's recent opinion limiting the EPA's powers in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022), excerpted below. There, the Court held that, at least in extraordinary cases involving an agency's sudden discovery of substantial

rulemaking powers, an agency must be able to point to "clear congressional authorization" to exercise the powers that it claims to have.

Finally, the FTC is facing due process challenges relating to its adjudicative structure, in which the same commissioners who authorize the filing of complaints may come to adjudicate those complaints in later administrative proceedings. This adjudicate structure is not new, but the pre-appointment advocacy of some Biden-appointed commissioners is fueling renewed concerns among some FTC observers.

An appeal to the Fifth Circuit is promising to test some of these constitutional questions. In its challenge to the merger of Illumina and Grail, complaint counsel for the FTC lost before the FTC's ALJ but won on subsequent appeal to the Commission. Going beyond the substance of the Commission's decision, Illumina and Grail argue that the "potential for unconstitutional bias here is intolerable" and characterized the FTC as simultaneously "playing the roles of 'investigator, prosecutor, and judge.'" Illumina v. FTC, Docket No. 23-60167 (5th Cir. Apr 05, 2023). The appeal is still pending as of August 2023.

WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY

142 S.Ct. 2587 (2022).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. That standard . . . must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. . . . Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

* * *

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost,

health, and other factors—it finds "has been adequately demonstrated." . . . The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. . . .

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.* . . . we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the ... spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. . . . Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. . . .

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." . . . Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

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B

. . . In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).

* * *

The Government attempts to downplay the magnitude of this "unprecedented power over American industry." The amount of generation shifting ordered, it argues, must be "adequately demonstrated" and "best" in light of the statutory factors of "cost," "nonair quality health and environmental impact," and "energy requirements." . . . But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. . . .

* * *

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." . . .

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

In a powerful dissenting opinion, Justice Kagan, joined by Justices Breyer and Sotomayor, accused the majority of selective textualism and implausible uncertainty about the scope of the broad and flexible powers that Congress had intended to provide the EPA:

> Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time."
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> The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. . . . The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. . . .
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> "Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

Insert to page 818, at end of 2. Federal Exemptions.

The DOJ has filed an amicus brief before the Second Circuit in support of ending Major League Baseball's antitrust carve-out created in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs,* 259 U.S. 200 (1992). DOJ has argued that the application of antitrust law to professional sports has proven workable in the past.