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How to Restore Limiting Principles for "Unfair Methods of Competition" in Antitrust Law

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The FTC has granted itself the power to bring antitrust enforcement actions based on amorphous and politically motivated ideas of "fairness." There should instead be a uniform standard for what constitutes fairness in both consumer protection and competition policy.

KEY TAKEAWAYS

- In a partisan 3-to-1 vote, the FTC issued a policy statement in November 2022 dramatically expanding its powers to bring "standalone" antitrust enforcement actions with respect to "unfair methods of competition."
- Intended to broaden the FTC's interventionist approach to the market and underpin its aggressive antitrust enforcement efforts, the policy statement failed to present any meaningful guidelines or legal clarity for entrepreneurs and companies.
- The statement allows the FTC to deem "unfair" the "tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants." Disruptive innovation is thus inherently suspicious.
- The FTC also declared it would target "incipient threats to competitive conditions." Consumer harm is no longer required to be "likely"; mere hypothetical change to market structures becomes a ground for precautionary antitrust liability.
- The policy statement's "incipiency" and "other market participants" language reveals the FTC's intentions to expand its standalone powers under Section 5 without focusing on consumer welfare and conventional competition considerations.
- To challenge the FTC's zeal, litigators should focus on a definition of fairness grounded in consumer protection and IP law, with a balancing test that weighs factors such as market conditions, consumer choice, and pro-competition justifications.

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INTRODUCTION

The Federal Trade Commission (FTC) made a bid to radically reshape the contours of American antitrust law last November when it released a policy statement redefining its authority under Section 5 of the FTC Act by asserting discretion to bring so-called "standalone" actions unconnected to the traditional areas of antitrust law governed by the Sherman and Clayton Acts.[1] Through this new policy guidance, the FTC has granted itself the ability to bring enforcement actions based on amorphous and politically motivated ideas of "fairness."[2] The courts—which have favored legal interpretations of antitrust law that are grounded in traditional economic analyses—will likely be unwilling to go along with the FTC's precautionary approach to antitrust law in which preemptive prohibitions of innovative conduct take place before any consumer harm materializes.[3]

In contrast to the FTC's interpretation of the law, this report proposes an alternative approach to "fairness" regarding Section 5's "unfair methods of competition" (UMC) clause, based on the principle that the concept of "fairness" in antitrust law should be the same for both consumer protection and competition policy. This unitary approach to fairness stems directly from the relevant language of the FTC Act, which reads, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices ['UDAP'] in or affecting commerce, are hereby declared unlawful."[4] A single line of statutory text covers consumer protection and competition policy, and the term "unfair" is used twice—separated by only eight words—to refer to both areas of antitrust law, suggesting legislative intent to regulate both areas under the same standard of fairness.[5] A unified approach to antitrust law—in contrast to the FTC's current, amorphous take on UMC fairness—provides statutory consistency and an objective, nonpolitical standard through which market participants can self-regulate their behavior as to avoid FTC actions against them. This proposed standard would necessitate well-articulated rationales for regulatory oversight, instead of a reliance on circular reasoning by which a market participant is considered to be "unfair" because the FTC has labelled them as such through a slap-dash, "quick-look" evaluation process.

Eminent antitrust scholars Neil W. Averitt and Robert H. Lande have similarly championed this unified theory for antitrust law.[6] They argued that this approach gives effective warning to consumers, companies, attorneys, and economists about whether an action may trigger regulatory oversight, while also staying true to the legislative intent behind the FTC Act.[7]

They built this integrated theory on the principle of "consumer sovereignty," which exists when (1) cogent competition policy allows for a range of consumer options and (2) consumers are able to choose effectively between these options.[8] To ensure that these twin fundamental conditions are met, consumers must remain unimpaired by anticompetitive activities such as price fixing, monopolistic mergers, deception, or the withholding of pertinent information needed for comparison between varying goods or services.[9] Averitt and Lande noted that their holistic approach to antitrust law guards against market failures in both contexts.[10] Competition policy negates market failures that are external to consumers, while consumer protection measures guard against internal market failures that arise inside the minds of consumers.[11] Ultimately, however, the goal is the same: fairness in the face of those seeking to exploit breakdowns in "the state of affairs that prevails or should prevail in a modern free-market economy."[12]

Averitt and Lande based their cohesive dichotomy on the principle that trade regulation should "prevent restraints on competition or other factors that interfere with full and free competition from harming any aspect of consumer welfare."[13] Thus, they tied fairness to consumer welfare and a nuanced balancing of economic factors, rather than prima facie categorization or shortcut designations of commercial activities as "unfair" or "inherently suspect."[14] In its latest policy statement, the FTC has abandoned the former and opened the door for the latter.

Through this new policy guidance, the FTC has granted itself the ability to bring enforcement actions based on its amorphous and politically motivated ideas of "fairness."

A word must be spared from the outset to discuss whether the FTC is "empowered to promulgate substantive rules of business conduct."[15] In a 1973 case called *National Petroleum Refiners Association v. FTC*, the U.S. Court of Appeals for the District of Columbia Circuit examined this issue.[16] The case revolved around the FTC's rule declaring that failure to post octane rating numbers on gas pumps at service stations constituted an unfair method of competition and an unfair or deceptive act or practice.[17] The appellant argued that the FTC's powers did not extend to substantive rulemaking, and instead were "limited to specifying the details of the Commission's non-adjudicatory, investigative, and informative functions spelled out in the other provisions [of the FTC Act]."[18] The court rejected the appellant's arguments by employing a plain-language approach to the statute, liberally construing the term "rules and regulations," and rejecting the application of the legal maxim stating that an expressed inclusion of one approach in a statute equates to an exclusion of other approaches.[19]

Critics challenged the D.C. Circuit Court's *National Petroleum* methodology and argued that, unlike the court in that case, a post-Scalia Supreme Court would not have found that the FTC possesses the power to promulgate rules for carrying out the provisions of Section 5.[20] However, the FTC can look to legislation as well as judge-made law for its argument regarding the existence of its rulemaking authority. Specifically, the FTC can cite the Magnuson-Moss Warranty Act (the Magnuson-Moss Act).[21] Passed in 1975, this piece of legislation formally gave the FTC

the power to issue substantive rules under Section 18 of the FTC Act with respect to UDAP, while leaving unchanged its UMC powers.[22] The ambiguity associated with failing to explicitly codify the FTC's UMC rulemaking authority has opened the door to debate on the subject, but proponents of more muscular FTC powers view the Magnuson-Moss Act as supportive of their claims.[23]

This debate over the existence of the FTC's rulemaking authority is largely tangential to the matter at hand. The substance of the debate surrounding the FTC's recent change of tack on Section 5 is not whether the FTC has the power to promulgate Section 5 UMC rules under Section 6(g) of the FTC Act.[24] Rather, the issue at hand is how the FTC should wield that authority when it prosecutes cases under Section 5's UMC clause. In other words, it is the breadth of cases that the FTC can prosecute under Section 5 of the FTC Act that is the bone of contention.

The 2022 policy statement envisions an FTC with the overreaching ability to declare an act to be unlawfully unfair merely through a prima facie classification mechanism.[25] As dissenting Commissioner Christine S. Wilson noted, "[I]nstead 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."[26] In contrast to the policy statement, this report calls for a Section 5 UMC policy that is grounded in traditional economic rationales, premised on well-reasoned explanations of harm to consumers, guided by analytical principles of intellectual property law, and in line with the definition of fairness in a consumer protection context. It briefly presents the complicated history behind the phrase "unfair methods of competition" before taking a deep dive into the FTC's 2022 policy statement in light of several key cases demonstrating judicial interpretation of Section 5. The report predicts that the courts will not be willing to go along with the FTC's "I know it when I see it" approach.[27] It then details the previously mentioned alternative to the FTC's current direction by incorporating notions of fairness from intellectual property and consumer protection law.

The lack of a definition for the term "unfairness" has created over a century of confusion.

40 YEARS OF TEMPERATE COMPETITION POLICY

The language of the FTC Act is nebulous on the limits of the FTC's power to pursue standalone actions with respect to Section 5's UMC language. Section 5 empowers the FTC to prevent entities "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[28] However, the law does not define the phrase "unfair methods of competition." Similarly, a series of Supreme Court cases have affirmed the notion that the FTC's Section 5 authority extends beyond the bounds of the Sherman and Clayton Acts, but do not define the extent of the FTC's power to bring standalone cases or determine what constitutes "unfair methods of competition."[29] This lack of definition of the term "unfairness" has created over a century of confusion.

In 1964, the FTC created the Cigarette Rule Statement of Basis and Purpose, in which it laid out a three-factor test for determining whether an act or practice is unlawful under Section 5's UDAP restrictions:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
>
> (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and]
>
> (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it.[30] Although the FTC did not act on this doctrinal declaration in the years following its release, its three-part formulation nevertheless sprang forth from the mouth of the Supreme Court in 1972 in a case called *FTC v. Sperry & Hutchinson Co*.[31]

The FTC had brought a lawsuit against Sperry & Hutchinson—the largest and oldest company in the trading stamp industry at the time—for violating Section 5, under the theory that the defendant had unfairly regulated the rates of stamp dispensation to its retail licensees, combined with other parties to control stamp dispensation throughout the marketplace, and attempted to suppress the operation of "free and open" trading stamp exchanges and entities for the redemption of stamps.[32] The FTC entered three orders against the company, although the company only appealed the third. The Court of Appeals for the Fifth Circuit held in favor of Sperry & Hutchinson and reversed the FTC.[33]

The Supreme Court ruled against the FTC, finding that it had "not rendered an opinion which … links its findings and conclusions."[34] In the eyes of the court, the FTC's opinion was "barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed."[35] Nevertheless, the court sided with the FTC with respect to the scope of its power, writing that "legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[36]

The FTC's overly broad and unfocused approach to its rulemaking capacities under Section 5 sparked widespread anger among many media professionals, businesspeople, and lawmakers.

Emboldened by the court's declaration on fairness and its citation to the Cigarette Rule, the FTC began to test the constraints of its Section 5 power.[37] As J. Howard Beales, the former director of the FTC's Bureau of Consumer Protection, noted in a 2003 paper presented to the Marketing and Public Policy Conference, the FTC created "a series of rulemakings relying upon broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon the individual Commissioner's personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace. Predictably, there were many absurd and harmful results."[38]

The most problematic proposals offered by the FTC at this time "relied heavily on 'public policy' with little or no consideration of consumer injury."[39] The most notorious of these proposals related to the FTC's attempt—based on generalized public policies geared toward protecting the young—to use its Section 5 powers to ban all advertising directed to children because these ads were "immoral, unscrupulous, and unethical."[40] The FTC's overly broad and unfocused approach to its rulemaking capacities under Section 5 sparked widespread anger among many media professionals, businesspeople, and lawmakers.[41] This sharp backlash resulted in severe repercussions for the FTC, which was by that point despised by many for its overreach and branded the "National Nanny" by the *Washington Post*.[42] Congress shut down the FTC for a few days in 1980, and refused to reauthorize it for 14 years.[43]

Following this disastrous response to the FTC's expansive, ill-defined take on its own powers, the FTC "backed away from bringing standalone Section 5" actions during the 1980s.[44] A 1980 policy statement signed by all five commissioners presaged this policy shift by "attempting to delineate … a concrete framework for future application of the Commission's unfairness authority."[45] Although this statement relates to "unfair … acts or practices" and not "unfair methods of competition," its articulation of the commissioners' views on fairness is pivotal for a contemporary understanding of the term "unfair."[46] They identified "three factors that they considered when applying the prohibition against consumer unfairness. These were: (1) whether the practice injures consumers; (2) whether it violates established public policy; [and] (3) whether it is unethical or unscrupulous."[47]

The commissioners explained, "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[48] As the commissioners unanimously declared over 40 years ago, the FTC "is not concerned with trivial or merely speculative harms," and "[m]ost of the Commission's unfairness matters are brought … to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[49]

The 1980 policy statement started a decades-long move away from the free-wheeling approach to Section 5 enforcement. This restrained methodology culminated in 2015 with the publication of a Statement of Enforcement Principles.[50] The 2015 statement is, in other words, a concretized version of the FTC's practices following the 1980 policy statement. In the 2015 statement, the FTC affirmed that the promotion of consumer welfare would guide the FTC's Section 5 enforcement actions.[51] Moreover, the FTC stated that it would evaluate its cases "under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[52] The 2015 statement also noted that the FTC would be less likely to bring a Section 5 standalone challenge if it can address the alleged competitive harm through enforcement under the Sherman or Clayton Acts.[53]

Former FTC commissioner Maureen Ohlhausen was the sole dissenter against the 2015 statement.[54] In her view, the FTC's "unbounded" position was "seriously lacking" and "too abbreviated in substance and process."[55] Ohlhausen argued that the 2015 statement was "short

on details and constraints," and failed to provide citations to case law or examples of lawful behavior.[56] She instead presented six factors that should be present in Section 5 guidance:

> (1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws; (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice.[57]

UNPACKING THE 2022 POLICY STATEMENT IN LIGHT OF THE CASE LAW

In 2021, the FTC, headed by Chair Lina M. Khan, summarily discarded the FTC's prior approach to Section 5 when it withdrew the 2015 policy statement.[58] The withdrawal rejects the "framework similar to the rule of reason," claiming that its "likelihood requirement would abrogate the Commission's statutory mandate to combat incipient wrongdoing *before* it becomes likely to harm consumers or competition."[59] This precautionary approach to market regulation entails significant risks of deterring innovative products and services, as well as disruptive business methods that promote productivity and growth.[60]

This withdrawal illustrates the new FTC chair's efforts to remake American antitrust law.[61] Under the 2022 new policy statement, the FTC now considers two factors when evaluating the fairness of a method of competition.[62] The first factor is a list of malicious adjectives: "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power or a similar nature … [or] otherwise restrictive or exclusionary, depending on the circumstances."[63] As dissenting commissioner Christine Wilson noted, many of these terms have no antitrust or economic meaning, and the 2022 Statement "provides no methodology to explain which adjectives may apply in any given set of circumstances."[64] This lack of both terminological clarity and principles of application renders the statement especially problematic in that it fails to provide guidance for how market participants can tailor their behavior so as to avoid FTC actions against them.

In 2021, the FTC, headed by Khan, summarily discarded the FTC's prior approach to Section 5 when it withdrew the 2015 policy statement.

The second factor is equally ill defined. To be considered unfair, "the conduct must tend to negatively affect competitive conditions."[65] This factor "addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants."[66] In that respect, actions that risk disrupting market structures so as to gain market shares—which is to say actions that are characteristic of innovative companies offering popular products that consumers demand—thus fall under the ambit of the 2022 policy statement's new UMC definition. In other words, disruptors displacing incumbents via innovative and popular products may be prevented from innovating because their conduct negatively affects less efficient or less innovative market participants. The lack of efficiency considerations in the 2022 policy statement paves the way for successful claims by inefficient competitors to stop the successful innovations of disruptive companies. Thus, competition through innovation (i.e.,

dynamic competition) becomes subject to antitrust liability because of a misguided notion of "fair competition."

The expansive language of the 2022 policy statement opens the door for the FTC to bring enforcement actions whenever a company negatively impacts its rivals.[67] Such an action would violate the bedrock antitrust principle that the law protects competition, not competitors.[68] Moreover, these two factors are evaluated on 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."[69] In other words, even where there are relatively few "indicia of unfairness"—this term is left undefined in the statement—the FTC could still bring a Section 5 claim based on its perceptions of negative competitive conditions, a factor which is broad enough to include "conduct that tends to foreclose or impair the opportunities of market participants."[70] Similarly, instead of providing a clear definition for the term "a tendency to generate negative consequences," the statement rattles off a list of acts that have triggered Section 5 enforcement.[71] Indeed, according to the statement, the FTC can rely on "non-quantifiable harms" to make an unfairness case, and would not need to provide a standard net-efficiency or numerical cost/benefit analysis.[72]

Thus, the statement argues that the FTC does not need to quantify the harm caused by alleged violators of the law, and instead can make its case by simply branding actions as "non-quantifiably" harmful to competition, or even to other competitors.[73] This emphasis on labeling has landed the FTC in trouble before. In June 2021, the U.S. Court of Appeals for the Second Circuit found that the FTC improperly used a quick-look approach to brand the defendant in the case, 1-800 Contacts, as "inherently suspect" for using trademark settlement agreements to protect its trademarks against competitors.[74]

Under this "inherently suspect" framework, the "likely tendency to suppress competition" makes the challenged conduct "inherently suspect" and the FTC need not present direct evidence of harm or proof of market power to show the alleged anticompetitive effect of the challenged conduct.[75] Moreover, after the FTC labels a defendant as "suspect," the burden shifts to the defendant to show any procompetitive justifications for its conduct.[76] The FTC's 2022 Statement includes similar language about burden shifting, in essence arguing that it can merely label something as unfair without presenting significant evidence of harm and then shift the burden to the defendant to argue as to why the conduct is not harmful.[77]

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In *1-800 Contacts, Inc. v. FTC*, the Second Circuit noted that the "inherently suspect" framework is only appropriate when the conduct is obviously harmful (i.e., when someone with only a basic understanding of economics can recognize that the challenged conduct would have anticompetitive effects on consumers and the market as a whole.)[78] The court also noted that a plausible procompetitive justification "effectively foreclosed" the use of the quick-look, "inherently suspect" framework.[79] Thus, the court concluded that the FTC was wrong to jump to this framework instead of the standard rule of reason analysis used in Sherman Act cases, and

was likewise wrong to use "theoretical and anecdotal" proof rather than direct evidence of anticompetitive effects on competition.[80]

As the FTC correctly pointed out, there is limited case law regarding the FTC's competition policy powers under Section 5.[81] Nevertheless, there are other cases that align with *1-800 Contacts*. Take, for example, the *FTC v. Actavis, Inc.* case from 2013.[82] Like *1-800 Contacts*, *Actavis* related to intellectual property law.[83] However, while *1-800 Contacts* revolved around trademark infringement settlement agreements, Actavis centered on patent infringement settlement agreements, specifically "reverse payment" agreements in which the patentee agrees to pay the alleged infringer and the alleged infringer agrees not to produce the patented product until after the patent expires.[84]

In *Actavis*, the FTC brought a lawsuit against the company—along with the other parties that settled patent infringement disputes with patentholder Solvay—alleging that a certain reverse payment settlement agreement violated Section 5.[85] The FTC claimed that the settling parties unlawfully agreed "to share in Solvay's monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with [Solvay's pharmaceutical product] AndroGel for nine years."[86] The District Court dismissed the FTC's complaint, holding that the FTC's allegations did not amount to an antitrust violation because categorizing anticompetitive effects as falling under the scope of patent law immunized the anticompetitive behavior from antitrust law.[87] The Court of Appeals for the Eleventh Circuit affirmed the dismissal, and the FTC took the matter to the Supreme Court, which overturned the lower court's decision.[88] In so doing, the court noted that a balancing test, rather than a branding exercise, was necessary for determining fairness under antitrust law.[89] "It would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy," wrote Justice Stephen Breyer for the court, "rather than by measuring them against procompetitive antitrust policies as well."[90]

While the case was an overall win for the FTC, the Supreme Court pointedly rejected the FTC's efforts to brand reverse payment settlement agreements as presumptively unlawful and therefore subject to quick-look regulatory oversight rather than the rule of reason.[91] The court discussed the need to evaluate the commercial and business reasons for a settlement as well as other convincing justifications for allegedly unlawful behavior.[92] In short, it held that the FTC "must prove its case" in light of these complexities, rather than default to a designation-based approach to regulatory oversight.[93]

The 1999 Supreme Court case *California Dental Association v. FTC* is similarly edifying.[94] The petitioner (CDA) was a nonprofit association of local dental groups; approximately 75% of Californian dentists were members of these groups.[95] CDA maintained a code of ethics that prohibited false or misleading advertising, and issued advisory opinions and guidelines on the matter.[96] The FTC brought a complaint alleging that CDA violated Section 5 by restricting two forms of truthful, nondeceptive advertising based on price and quality of dental services.[97] An Administrative Law Judge (ALJ) used a truncated rule of reason, similar to the quick-look approach used in *1-800 Contacts*.[98] The ALJ ruled in favor of the FTC, and the Ninth Circuit Court of Appeals affirmed.[99] The Supreme Court disagreed.[100] It held that a truncated rule of reason was inappropriate under the circumstances because that analytical shortcut only applies

in cases in which any anticompetitive effects are "intuitively obvious," and in all other cases "the rule of reason demands a more thorough enquiry."[101]

"The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires," Justice David Souter wrote for the court in *California Dental*, "there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive… Where, as here, the circumstances of the restriction are somewhat complex," he continued, "assumption alone will not do."[102]

Nevertheless, the new FTC leadership has recently defaulted to "anecdotal and impressionistic stories" that amount to the sort of quick-look analyses the Supreme Court rejected.[103] For instance, the ongoing attempt to block Microsoft from purchasing video game company Activision Blizzard for $68.7 billion and the failed effort to stop Meta (Facebook's parent company) from buying Within, the developer of the virtual reality fitness app Supernatural, are illustrations of quick-look analyses and rejections of the rule of reason that rely on too many assumptions to generate convincing antitrust enforcement actions. Following a trial in which CEO Mark Zuckerberg testified, a judge ruled that Meta could move forward with the $400-million acquisition.[104] The tech giant finally closed the deal in February 2023.[105] When coupled with the *Actavis* and *California Dental Association* decisions and the rush to label 1-800 Contacts as "inherently suspect," these 2022 cases highlight the FTC's apparent tendency to anchor its claims in narrative rather than economics.

In summary, the FTC's new statement relies on a rush to brand challenged conduct as "unfair" and unquantifiably harmful to competition.[106] After employing a labeling exercise that lacks evidentiary substance, the FTC shifts the burden of proof to the defendant, which must then prove why the conduct does not meaningfully harm consumers or competition.[107] Regarding this reversed burden of proof, the statement fails to provide workable guidance or even a definition for its key criterion—namely, that the challenged conduct "tends to negatively affect competitive conditions."[108] The FTC has jettisoned the rule of reason for evaluating whether conduct will lead to anticompetitive outcomes in the market.[109] Instead, the statement enshrines a nebulous "incipiency" factor that appears to teeter on the verge of speculation.[110] All this in the name of punishing conduct that allegedly "violates the spirit" of antitrust law, even though the policy statement fails to define such "spirit" so as to provide some legal predictability to market actors.[111]

Dissenting Critiques of the FTC's Policy Statement

The rule of reason allows for the courts' case-by-case determination of what constitutes an "unfair method of competition."[112] The FTC has now eliminated that framework but failed to provide an alternative. In essence, the FTC has declared itself to be the arbiter of fairness on a subjective basis. To quote dissenting commissioner Wilson, the FTC has "embraced an unstructured 'I know it when I see it' approach."[113]

"The only crystal-clear aspect of the Policy Statement," Commissioner Wilson wrote, "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.'"[114]

The FTC will certainly see unfair competition as a function of size rather than efficiency, therefore making economies of scale an offense rather than a defense, as they are traditionally perceived. Commissioner Alvaro M. Bedoya, in a statement joined by Khan, cited one expert to make the argument that "the FTC is to be used to fight the harms to small business by the abuses of larger companies."[115] In his words, "Congress was distinctly aware of the importance of small business while passing Section 5. Today's Statement brings the Commission closer in line with that focus."[116] Instead of considering efficiency, consumer welfare, or the rule of reason, the FTC will now apparently focus on company size and the "incipiency" of supposed anticompetitive behavior.[117]

Like Commissioner Wilson, the U.S. Chamber of Commerce has railed against the FTC's latest move on Section 5.[118] In its view, the 2022 policy statement is likely to give the FTC carte blanche in its standalone actions, opening a Pandora's box of prohibitions against a wide range of pro-efficiency and pro-consumer practices under a vague "UMC" label.[119] The FTC is likely to use this new guidance to "intimidate companies into comporting with its view of 'fair' competition … [and] bully companies, particularly politically disfavored companies, into accepting settlements that purport to agree with the FTC's legal analysis."[120]

DEFINING "UNFAIRNESS" IN SECTION 5 UNDER COMPETITION AND CONSUMER PROTECTION POLICIES

As Commissioner Wilson noted in her dissenting statement, the term "unfair" appears twice in the language of Section 5: once with respect to competition and the other regarding consumer protection.[121] This dichotomy is crucial for a reasonable and appropriate understanding of the concept of fairness.

Following years of debate, the FTC published its unfairness policy statement in 1980.[122] This statement heralded a similar congressional move to codify the bounds of fairness in the context of consumer protection.[123] The law, enacted as the Federal Trade Commission Act Amendments of 1994, lays out a three-part analysis that centers on consumer welfare and limits the FTC's authority "to declare unlawful an act or practice on the grounds that such act or practice is unfair."[124] Under this law, the FTC can only declare an act or practice to be unfair, in the context of consumer protection, if it:

1. causes or is likely to cause substantial injury to consumers;
2. which is not reasonably avoidable by consumers themselves, and
3. not outweighed by countervailing benefits to consumers or to competition.[125]

In essence, a consumer protection fairness evaluation requires actual or likely substantial injury to consumers, rather than minor injury or inconvenience.[126] It also requires a balancing test that compares the alleged harm of a challenged act or practice with the benefit provided by that act or practice.[127] Crucially, the FTC must perform this balancing test to declare an act or practice unfair in terms of consumer protection, rather than shift the burden to a defendant to make a cost/benefit analysis as part of their justification argument.[128] The law also states that public

policy may be a factor in a fairness evaluation but cannot serve as the primary basis for classifying an act or practice as unfair.[129]

Those seeking to better understand the term "fairness" in a consumer protection context can also look to intellectual property law. Indeed, the January 2017 guidelines issued by the Department of Justice and FTC make plain the link between intellectual property and antitrust law, noting that both disciplines "share the common purpose of promoting innovation and enhancing consumer welfare."[130]

A Lesson From Trademark Law: The Notion of "Fair Use"

This is especially true with trademarks. The Lanham Act, which is the principal statute governing U.S. trademark law, reads:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[131]

As Justice Antonin Scalia wrote in a 2003 Supreme Court holding, the Lanham Act "was intended to make 'actionable the deceptive and misleading use of marks,' and 'to protect persons engaged in … commerce against unfair competition.'"[132] In his view, "[f]ederal trademark law 'has no necessary relation to invention or discovery'" but rather focuses on protecting consumers by preventing confusion in the marketplace.[133] This mission aligns with the FTC's role.

Additionally, trademark law explicitly connects back to notions of efficiency and fair play in commerce.[134] By outlawing the unfair copying of source-identifying marks, trademark law reduces the costs of shopping and ensures that a producer will "reap the financial, reputation-related rewards associated with a desirable product."[135] In short, trademark law fosters honest competition and consumer welfare, thereby complementing antitrust laws in their objectives.

Interestingly, trademark jurisprudence uses several factors and balancing considerations when evaluating whether a market actor's behavior is lawful.[136] For example, in the seminal Second Circuit case *Polaroid Corp. v. Polarad Electronics Corp.*, the Court of Appeals considered, among other factors, the defendant's good-faith, business reasons for using the allegedly trademark-infringing term, the defendant's role in separate market sectors, the plaintiff's sales figures, and the sophistication of buyers in the relevant marketplace (i.e., how much thought they put into

their purchases before buying either the defendant's or the plaintiff's products.)[137] In other words, the court performed a market study and balanced the competing economic rationales for the parties' actions. In the 60 years since that decision, market surveys and economic expertise have factored heavily in intellectual property disputes.[138] Even copyright law is explicit about considering the effect on the potential market when evaluating whether an act is fair.[139] The same should be true when it comes to the notion of "fairness" in the context of Section 5's UMC clause.

It is noteworthy that a so-called "fair use" defense exists in both trademark and copyright law.[140] This defense ties back to public policy and societal notions of fairness. In a trademark context, this can include using a trademarked term to describe a market actor's product (i.e., "nominative fair use.")[141] For example, saying "Coke tastes better than Pepsi" would not infringe on either trademark.[142] This is also the case for product identification, such as a repair shop saying, "We fix BMWs and Porsches."[143] Parody, criticism, and genericness are also examples of public policy reasons for allowing an allegedly infringing act in light of its marketplace benefits.[144] Another example is a recent trademark infringement case in the U.S. District Court for the Southern District of New York, which centered around the issue of artistic license as a fair-use defense.[145] In that case, *Hermes International v. Rothschild*, the plaintiff made designer handbags under the Birkin trademark.[146] The defendant created a collection of digital images that depicted Birkin bags covered in faux fur, marketed this collection of non-fungible tokens (NFTs) under the term "MetaBirkins," and sold them online.[147] He claimed that the First Amendment's protections for artistic works shielded him from the plaintiff's trademark infringement claims; however, a jury rejected this argument and sided with the plaintiff.[148]

This case represents the first major trademark infringement case related to NFTs, and adds to the ongoing conversation surrounding consumer protection and competition policy with respect to digital commodities and web commerce. However, for the purposes of UMC fairness, the takeaway idea is simply that trademark law balances competing public policy considerations such as, in this case, the societal benefit of artistic expression with the harm suffered by the trademark holder.[149] This same societal cost/benefit analysis should factor into any fairness evaluation under Section 5's UMC clause.

Unfairness from Consumer Protection Law: The Notion of "Fair Dealing"

Some scholars look to the historic, common-law concept of "fair dealing" in their efforts to define "fairness" under Section 5.[150] Fair dealing, as an idea, stems from English folk law, and British colonists imported the concept when developing a body of law for their newly constructed states in America.[151] However, societal norms and customs—such as "morality" and "virtue"—informed the meaning of the term "fair dealing," and there was no substantive, well-articulated definition of the term outside those amorphous standards.[152] Connecting Section 5 fairness to the ancient notion of "just price" (*justum pretium*)—which springs from ideas of morality and ethics rather than any concrete definition—suffers from the same problem of subjectivity.[153] That being said, the concepts of fair dealing and just price would soon lead to the term "unfair competition" in the late 19th and early 20th centuries.[154] Unfair competition, in this context, related to goodwill, honesty in business, and intellectual property rights such as trademarks and copyrights.[155] Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit explicitly referenced notions of virtue and fair dealing in the 1936 case *Federal Trade Commission v. Standard Education Society*.[156] He wrote, "The Commission has a wide latitude in such matters;

its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[157]

Collectively, these ideas of fair dealing, just price, and other ethical approaches to commerce tie back to consumer protection, especially when protecting the market from deceptive practices.[158] Nevertheless, they have their place in the conversation regarding the FTC Act because the FTC regulates both competition policy and consumer protection.[159] More to the point, Section 5 explicitly relates to both areas of the law, and the term "fairness" is used in both contexts.[160] The two uses of the term are only separated by eight words in the statute, and there is no indication in any other section—such as a definitions subsection—that the word "fairness" should be applied differently depending on the context.[161] Two canons of statutory interpretation invoked by Justice Antonin Scalia—the whole-text canon and the presumption of consistent usage—dictate interpreting the term "fairness" in the same manner for both competition policy and consumer protection.[162] Yet, as Commissioner Wilson has pointed out, the FTC's 2022 statement explicitly avoids this shared reading of the word "unfair."[163] Even though the term is used twice in the same statutory provision and separated by only a handful of words, the new guidance's ill-defined approach to "competition unfairness" is the polar opposite of the nuanced and clarified approach to "consumer protection unfairness" articulated by the law.[164] The latter presents clear factors: the substantial nature of the actual or likely injury and the balancing of harm to consumers or competition with any benefit that they may accrue.[165] The former, in contrast, represents a hollow exercise in semantics by defining "unfairness" as "a tendency to negatively affect competitive conditions," but leaving that term undefined.[166]

Thus, under the inherent logic of Scalia's canons of statutory interpretation and the plain language of the statute, the term "fairness" should be applied the same in both contexts.[167] This would involve applying the consumer protection fairness factors discussed in Section 45(n) of the statute to competition policy.[168] That section reads:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.[169]

Applying this section to competition policy would involve a return to the rule of reason, a harm/benefit balancing evaluation, market studies, an abandonment of prima facie labeling, and the inclusion of public policy considerations, as modelled by intellectual property law. A unified standard for fairness would also provide limiting principles absent in the FTC's current approach.[170] Courts have been reluctant to endorse a free-wheeling approach to Section 5, and have looked more favorably on standards that bear strong resemblances to the frameworks used in Sherman Act and Clayton Act cases.[171] Building an approach to competition policy fairness based on the approaches to fairness already articulated and adjudicated under consumer

protection and intellectual property would likewise go a long way toward alleviating judicial concerns about appropriate limits for the FTC.[172]

As antitrust expert Robert Lande noted back in 2014, an "expansive" FTC approach to fairness "risks attack as being unduly indefinite and for giving the Commission too much discretion" and can face criticism for "not providing sufficient notice to businesses as to what specific conduct is likely to be illegal."[173] This exact outcome has occurred following the issuance of the 2022 policy statement.[174] Regulatory guidance is meant to lead the public away from unlawful behavior while providing sufficient legal clarity and encouraging pro-consumer conduct. Unfortunately, the FTC's 2022 policy statement fails to accomplish this basic task.

In contrast, a unified definition of fairness applicable to both competition policy and consumer protection would create a workable blueprint for market actors to tailor their behavior, as they have been doing since the codification and enactment of the consumer protection fairness standard in 1994. As noted, such an approach would be in line with canons of statutory interpretation that call for reading the text as a whole and presuming that a word will bear the same meaning throughout the statute.[175] Thus, the merits of a unified approach to Section 5 fairness include textual consistency as well as predictable applicability.

CONCLUSION

To paraphrase Lande, bad guidelines are worse than no guidelines at all.[176] A bad guideline magnifies and multiplies confusion across the marketplace; a good guideline creates regularity and reliability for those seeking to stay on the right side of the law. Every antitrust violation harms consumers, but not every harm to consumers is an antitrust violation.[177] Weeding out the lawful from the illegal requires a clear, impartial standard that simply is not present in the FTC's 2022 policy statement.

A bad guideline magnifies and multiplies confusion across the marketplace; a good guideline creates regularity and reliability for those seeking to stay on the right side of the law.

As Justice Byron White observed more than 40 years ago, "[E]asy labels do not always provide ready answers."[178] The FTC will likely fail in court if it presents arguments that lack substance and instead hinge on the FTC's choice of terminology. Nevertheless, the FTC has relied in the recent past on anecdotal evidence and the semantics of classification.[179] As part of their trial preparations in competition cases, market actors should rely on seminal antitrust jurisprudence, the rule of reason, classic economic arguments of harm and benefit, innovation-driven arguments about consumer welfare, and a definition of fairness drawn from consumer protection and intellectual property law. These arguments will have echoes in courts that, fortunately, will remain highly skeptical of the FTC's unbound approach to Section 5's UMC clause.

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