ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS (8th edition)

2020 Supplement

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Chapter 3. Special Problems of Antitrust Enforcement

[A] Tripartite Approach

[e] The Direct Purchaser Requirement and the Problem of Passing On

Insert at page 113 just before [f] "Business or Property"

Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019)

Justice KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in Illinois Brick Co. v. Illinois, 431 U.S. 720, 745–746, 97 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under Illinois Brick. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the Illinois Brick direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $ 99 annual membership fee. Apple requires that the retail sales price end in $ 0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30% fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market."

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In Illinois Brick, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, Illinois Brick means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See In re Apple iPhone Antitrust Litig., 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices.

II

A

The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. Illinois Brick. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under Illinois Brick, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 26 Stat. 209, 15 U.S.C. § 2. Section 4 of the Clayton Act in turn provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... the defendant ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U.S.C. § 15(a) (emphasis added). The broad text of § 4 "any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: Applying § 4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207, (1990); see also *Illinois Brick*, 431 U.S. at 745–746. At the same time, incorporating principles of proximate cause into § 4, we have ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick.

The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp*, 497 U.S. at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 481–482 (C.A.7 2002) (Wood, J.)

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under Illinois Brick, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that Illinois Brick allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of § 4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in Illinois Brick established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. Illinois Brick, as we read the opinion, was not based on an economic theory about who set the price. Rather, Illinois Brick sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of Illinois Brick and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $ 6 to the manufacturer and then sell the product for $ 10, keeping $ 4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $ 10 and keep 40 percent of the sales price; and then sell the product for $ 10, send $ 6 back to the manufacturer, and keep $ 4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." 846 F. 3d at 324. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The Illinois Brick Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. 497 U.S. at 216. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions."

But even if we engage with this argument, we conclude that the three Illinois Brick rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. Illinois Brick is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Illinois Brick surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U.S. at 737. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain; Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 483–484(1968). If the iPhone owners prevail, they will be entitled to the full amount of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in Illinois Brick, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." 431 U.S. at 741.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But Illinois Brick did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in Illinois Brick. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. Illinois Brick does not bar either category of suit.

In short, the three Illinois Brick rationales do not persuade us to remake Illinois Brick and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

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Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in Illinois Brick does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Justice GORSUCH, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

More than 40 years ago, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), this Court held that an antitrust plaintiff can't sue a defendant for overcharging someone else who might (or might not) have passed on all (or some) of the overcharge to him. Illinois Brick held that these convoluted "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting Illinois Brick as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how antitrust law is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

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II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the developers are the parties who are directly injured by it. Plaintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer ... we're going to take this 30 percent commission ... what's the developer going to do? The developer is going to increase its price to cover Apple's ... demanded profit."

Because this is exactly the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with " 'complicated theories' " about "how the relevant market variables would have behaved had there been no overcharge." *Illinois Brick*, 431 U.S. at 741. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further by Apple's requirement that all app prices end in $ 0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $ 0.99. And a developer charging $ 0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $ 1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's

99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission.

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. *Illinois Brick*, 431 U.S. at 737. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, Hanover Shoe would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that Illinois Brick doesn't govern this situation surely must mean Hanover Shoe doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); Illinois Brick, 431 U.S. at 739(explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder").

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently,and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 763, 772–774 (1984) (rejecting an " 'artificial distinction' " that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

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Notes and Questions

1. Does the Court in *Apple* clarify and simplify the "direct purchaser" rule of *Illinois Brick*? Compare Justice Kavanaugh's and the dissent's discussion and analysis on the test "who sets the price" versus "who are the immediate buyers from the antitrust violators". Is the dissent correct that the holding and reasoning in *Apple* is a formalistic rule of contract law privity over a proximate causation test? Is the dissent's preference for an "economic reality" standard subject to subjective interpretation rather than empirical evidence on the dynamics of the marketplace exchange?
2. The *Illinois Brick* decision itself and much of the case law and commentary since then has focused on the problem of passing on overcharge damages. Is the Court's approach in *Apple* radically different? In any event, is the overcharge even theoretically the correct measure of damages for a business that has absorbed part of the overcharge but passed on a part as well. In fact, many retailers use standard markup formulas that would end up passing on the entire higher price. Their real injury comes from loss of sales. See Herbert Hovenkamp, Apple vs. Pepper: Rationalizing Antitrust's Indirect Purchaser Rule, 120 Col. L. Rev. Forum 14 (2020).
3. Many amicus briefs were filed in support of the plaintiffs that asked the Court to overturn *Illinois Brick*. Would that have made future predications of *Illinois Brick*'s application easier?
4. After reading both *Illinois Brick* and now *Apple*, do you think they may not apply to injunctive relief claims, meaning that a claim for injunctive relief is an exception to *Illinois Brick*'s direct purchaser limitations?

Chapter 4. Cartels and Other Joint Conduct by Competitors

[B] Price Fixing

[4] The Meaning and Scope of the Rule of Reason

Add at p. 264 before NCAA case.

6. The Tenth Circuit has cited *Arizona v. Maricopa County* for the proposition that "[t]he

> per se rule is not a different cause of action than the rule of reason, but rather only an evidentiary shortcut through the rule of reason morass." *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1272 (10th Cir. 2018). The per se rule and the rule of reason are simply two different ways for a plaintiff to prove that the defendants' agreement constitutes an unreasonable restraint of trade. Even so, it is not uncommon for antitrust

> plaintiffs to plead a per se violation and a rule of reason violation based on the same underlying conspiracy. This is essentially a form of pleading in the alternative. A court would not allow a plaintiff to recover antitrust damages on both claims if they are based on the same underlying conspiracy.

Add at p. 277 before *O'Bannon* case:

13. In *In re Processed Egg Products Antitrust Litigation*, __ F.3d __, 2020 WL 3407761 (3d Cir. 2020), the plaintiffs claimed that egg producers violated Section One of the Sherman Act by conspiring to increase egg prices through three strategies: "(1) early slaughtering of hens and similar supply-reducing steps; (2) creation of an animal-welfare program that was actually designed to reduce the egg supply; and (3) coordinated exports of eggs." The plaintiffs argued that because the conspiracy entailed a horizontal agreement to reduce supply in order to increase price, the per se rule should apply. The district court disaggregated the three components of the conspiracy and held that because the animal-welfare program should be judged under the rule of reason, then so should the entire Section One claim. At trial, the jury found that the defendants participated in "a single overarching conspiracy" to reduce supply, but that the conspiracy did not impose "an unreasonable restraint on supply." On appeal, the plaintiffs argued that because "the defendants had engaged in a single, overarching conspiracy, all of the defendants' conduct must be evaluated under a single standard," which should be the per se rule because the defendants conspired to reduce supply and increase price. The Third Circuit rejected this argument, concluding that "[w]hen different stratagems are alleged to have furthered an antitrust conspiracy, the court is free to determine which analytical standard should apply to each." The appellate court reasoned that a contrary rule would impermissibly allow a plaintiff with rule of reason claims to "add[] a single allegation of behavior that is anticompetitive *per se*, [and] demand *per se* analysis of the whole." Do you agree?

Add at p. 284, after O'Bannon:

5. See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2020). In the wake of *O'Bannon* several current and former NCAA athletes sued to have a determination that the NCAA "amateurism" rules were too restrictive in that they denied students compensation for certain education-related benefits. After a ten-day bench trial, the district court entered judgment for Student-Athletes and the Ninth Circuit affirmed, stating:

> …. The court enumerated specific education-related benefits that the NCAA would be unable to prohibit or limit…: "computers, science equipment, musical instruments and other items not currently included in the [COA] but nonetheless related to the pursuit of various academic studies"; post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school; tutoring; study-abroad expenses; and paid post-eligibility internships….
>
> ….[T]he court reiterated its summary judgment finding of "significant anticompetitive effects in the relevant market." It relied on Student-Athletes' economic analyses

reflecting that schools, as buyers of athletic services, exercise monopsony power to artificially cap compensation at a level that is not commensurate with student-athletes' value.

After cataloguing the long list of above-COA ["cost-of-attendance"] payments that the NCAA permits, the court then reached two conclusions: (i) the challenged rules "do not follow any coherent definition of amateurism ... or even 'pay,' " and (ii) these payments (many of which post-date O'Bannon) have not diminished demand for college sports, which "remain[ ] exceedingly popular and revenue-producing." ….

Despite finding the NCAA's procompetitive theory largely unpersuasive, the district court "credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports." The court then found that some NCAA rules—the COA limit on the grant-in-aid, limits on compensation unrelated to education, and limits on cash awards for graduating or other academic achievements—serve that purpose by precluding "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." … But the court concluded that limits on "non-cash education-related benefits," such as post-eligibility graduate scholarships or tutoring, do not have that effect; it reasoned that such benefits "could not be confused with a professional athlete's salary" and would only "emphasize that the recipients are students."

Although both *Board of Regents* and *O'Bannon* II define amateurism to exclude payment for athletic performance, neither purports to immortalize that definition as a matter of law. In fact, O'Bannon II recognizes that Board of Regents' discussion of amateurism is "dicta." 802 F.3d at 1063. And to the extent the O'Bannon II majority accepted the NCAA's conception of amateurism, it did so based on the record, which demonstrated a "concrete procompetitive effect," of limiting above-COA "NIL cash payments untethered to [students'] education expenses," ...

In defense of its expansive conception of amateurism, the NCAA relies on its survey of 1,100 college sports fans, reflecting that 31.7 percent watch college sports because, inter alia, they "like the fact that college players are amateurs and/or are not paid." The NCAA claims that the district court rejected this survey on "baseless grounds." But it disregards the court's primary and most compelling reason for dismissing this evidence: The survey results reflect, at most, a consumer preference for "amateurism," but do not capture the effects (if any) that the tested compensation scenarios would have on consumer behavior….

In short, the district court fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.….

Moreover, no evidence in the record substantiates the NCAA's concerns that certain benefits permissible under the LRA, if uncapped, will become vehicles for payments that are virtually indistinguishable from a professional's salary….

> The record indicates that the Power Five schools[1] have exercised their autonomy in recent years to expand benefits unrelated to education and that conferences and schools have provided largely discretionary SAF and AEF payments for a wide range of expenses unrelated to education—both without harming consumer demand…..
>
> *Circuit Judge M. Smith concurring,*
>
> The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion.
>
> The Sherman Act and related antitrust laws were designed to preserve our economic freedom. Under those laws, the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector for the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. The Sherman Act thus "protect[s] the economic freedom of participants in the relevant market." Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999) (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)). Those protections extend to sellers of goods and services—such as Student-Athletes—to the same extent they do buyers, consumers, or competitors. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Id. (emphasis added).

[C] Proof of Agreement

[4] Surviving a Motion for Summary Judgment

Add at p. 380 before Williamson case:

2. The Seventh Circuit in *In re High Fructose Corn Syrup Antitrust Litigation* assigned probative value to the plaintiffs' evidence that the defendants sold HFCS to each other. Writing for the court, Judge Richard Posner reasoned that "[a] seller who experiences a surge in demand, but meets the surge by buying what it needs from another seller rather than by expanding its own production, protects the other firm's market share and so preserves peace among the cartelists." In contrast, the Third Circuit in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.,* 873 F.3d 185 (3d Cir. 2017), implied that no precedent existed for treating inter-competitor sales as a plus factor. In *Valspar*, the plaintiff argued that titanium dioxide manufacturers' sales to each other –

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[1] [Referring to the Schools in the five NCAA conferences that generate large amounts of revenue – namely, the Atlantic coast Conference, the Big Ten, Big Twelve, Pac-Twelve, and Southeastern Conferences. – ed]

sometimes at below-market prices – were evidence that the defendants' 31 parallel price increases occurred pursuant to an underlying price-fixing conspiracy. The Third Circuit, however, deprived the inter-competitor sales of probative value. Which circuit's approach is more persuasive? Should inter-competitor sales be considered a plus factor? Why or why not? See Christopher R. Leslie, *Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U.L. REV. 1 (2018).

Chapter 5. Vertical Restrictions

II. Interbrand Vertical Foreclosure -- Mainly, Exclusive Dealing and Tying

[A] Exclusive Dealing and Related practices Under the Rule of Reason.

Insert this note at page 569:

5. In *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), the district court found that the defendant's discount practices, many of which involved standard-essential patents, were unlawful under the antitrust laws. For example, in 2013 Qualcomm gave Apple rebates "in exchange for Apple's effective commitment to purchase modem chips exclusively from Qualcomm." It was particularly important for Qualcomm to secure Apple's exclusive business because of Apple's scale and prestige. This, the court concluded, foreclosed competitor Intel and other rivals from working with Apple for approximately three years. That practice, it should be noted, appears to fall within Clayton Act § 3's prohibition of anticompetitive tying and exclusive dealing, even though the case at hand was brought under § 5 of the FTC Act.[2] The court also cited evidence that Qualcomm had used its exclusivity arrangements with Apple to forestall the marketing of a superior "thin modem" with significant cost advantages.[3] In particular, Apple wanted two suppliers because the competition between them would reduce Apple's royalty burden. Under a related provision, if Apple were to launch a device with a chip made by a Qualcomm competitor it would have to pay back a significant amount. Qualcomm resisted Apple's strenuous efforts to have at least two modem suppliers.

The Ninth Circuit reversed the district court,[4] concluding that while the agreements in question were a type of exclusive dealing, they were in fact *de minimis* because Apple, the intended target, was the only customer in play, and the only rival chip maker was Intel. But foreclosure must be measured as a proportion of the market that is excluded by the deal. The fact that the market has only two competitors exacerbates rather than diminishes the effects of foreclosure. In any event, in a footnote the Ninth Circuit conceded:

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[2] See *id.* at 669. Section 3 of the Clayton Act provides that "it shall be unlawful … to lease or make a sale of goods …, or fix a price charged therefor, or discount from … such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods … of a competitors." 15 U.S.C. § 14.

[3] *Id.* at 728, quoting a letter among Qualcomm officials to the effect that "if Qualcomm secured Apple exclusivity in the TA, Qualcomm could prevent those thin modem competitors from becoming threats: '[T]here are significant strategic benefits as it is unlikely that there will be enough standalone modem volume to sustain a viable competitor without that slot.'"

[4] *FTC v. Qualcomm, Inc.*, ___ F.3d __, 2020 WL 4591476 (9th Cir. Aug. 11, 2020).

> Of note, the agreements did not just provide substantial discounts to Apple in exchange for Apple "purchas[ing] a high percentage of [its] ... requirements from" Qualcomm. Allied Orthopedic, 592 F.3d at 996. Instead, they sought to "prevent[ ] the buyer [Apple] from purchasing a given good [CDMA modem chips] from any other vendor," id., by making volume discounts (or "incentive funds") contingent on exclusivity. Nor were these agreements "easily terminable," even though Apple did, in fact, terminate them. See id. at 997 (noting that "[t]he 'easy terminability' of an exclusive dealing arrangement 'negate[s] substantially [its] potential to foreclose competition' " (quoting Omega Envtl., 127 F.3d at 1163–64)). Clearly, the requirement that Apple forfeit or reimburse Qualcomm millions of dollars in incentive funds was a strong deterrent to termination.

Id., n. 24.

The footnote appears to contradict the statements that the court made in the text of its opinion Section 3 of the Clayton Act applies its prohibition against exclusive dealing even when the defendant offers "a discount from, or rebate upon" a price in exchange for an exclusive dealing or tying agreement.[5] That is, the fact that a firm may subsequently be shown to be capable of buying itself out of an exclusivity provision does not negate its anticompetitive effect. The standard under FTC Act §5 should be at least as aggressive.

The court also concluded because the conduct in question had occurred in the past and had been terminated, injunctive relief was no longer necessary.[6] Of course, the reason for refusing an injunction with respect to past conduct is that the circumstances are such that the conduct is unlikely to recur. In fact, *all* conduct deserving of an injunction is past conduct, in the sense that it is established in the record. But if the circumstances make recurrence a serious possibility then injunctive relief may be appropriate.

Finally, in what seems to be an extraordinary repudiation of antitrust's consumer welfare principle, the court said:

> …[T]he 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." *Am. Express*, 138 S. Ct. at 2285.

The quotation is from the Supreme Court's decision in Ohio v. American Express Co., 138 S.Ct. 2274, 2285 (2018), where the Supreme Court said only that a relevant market is the area of effective competition.

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[5] 15 U.S.C. §14.
[6] *Id*. at __.

The very reason we condemn restraints under the antitrust laws is because they result in higher prices, harming consumers. While the Court quoted liberally from the Supreme Court's *AmEx* decision, it did not both with the Supreme Court's statement a year later that "protecting consumers from monopoly prices" has been "the central concern of antitrust…." Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019). The Ninth Circuit panel seems to believe that the fact that Qualcomm's practices cause higher prices for OEMs – that is, the manufacturer customers who purchase chips for inclusion in their devices – is not the kind of injury that concerns the antitrust laws. To be sure, exclusive dealing in the first instance might deny selling opportunities to a rival, but the reason we condemn it is that it facilitates a price increase. Indeed, the reason we have market power requirements in antitrust cases is in order to distinguish harms to rivals that are likely to result in price increases from those that are not. That is the all-important difference between business torts and antitrust law.

Chapter 6. Monopoly Structure, Power, and Conduct

[D] Vertical Integration, Refusals to Deal and Exclusionary Contracting

[1] The Monopolist's Refusal to Deal and the Essential Facility Doctrine

Add at page 869:

9. See *FTC v. Qualcomm Inc*., __ F.3d __, 2020 WL 4591476 (9th Cir. Aug. 11, 2020). The FTC sued Qualcomm – the dominant maker of modem chips used in making cellphones and smartphones – for violating the Sherman Act by, among other things, refusing to license its standard-essential patents (SEPs) to rival chipmakers. After a ten-day trial, the district court concluded that, as in *Aspen Skiing*, Qualcomm had terminated a voluntary and profitable course of dealing (because it had previously licensed its rivals), that Qualcomm's refusal to license its rivals was motivated by anticompetitive malice, and that a retail market for licensing modem chip SEPs had existed. From these factors, the district court found that Qualcomm had an antitrust duty to license its SEPs to rival modem chip suppliers. After holding that Qualcomm's refusal to deal violated Section 2, the district court issued a worldwide permanent injunction against Qualcomm.

On appeal, the Ninth Circuit reversed. The court recognized that *Aspen Skiing* created a "limited exception to [the] general rule" that antitrust law does not impose a duty to deal. The appellate panel followed the structure of the district court's approach and converted the language of *Aspen Skiing* into a three-element test, whereby

> 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. (citations omitted).

The appellate panel interpreted the facts differently than the trial judge and found that none of these elements was satisfied. Consequently, the panel vacated the district court's injunction against Qualcomm.

Chapter 7. Mergers and Acquisitions

I. Vertical Integration Through Merger

Insert at p. 956:

NOTE: THE 2020 VERTICAL MERGER GUIDELINES

On June 30, 2020, the U.S. Department of Justice and Federal Trade Commission released new Vertical Merger Guidelines for the first time since 1984. They are available at **https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf**.

As compared to the essentially dormant 1984 Guidelines, the new version marked a step—even if smaller than some advocates wanted—toward more vigorous vertical merger enforcement in the U.S. In that regard, we note that the two Democratic FTC Commissioners, Rohit Chopra and Rebecca Kelly Slaughter, dissented from the new Guidelines. Commissioner Chopra argued that the new Guidelines relied too heavily on economic theory and did not adequately address effects of vertical mergers on entry. Commissioner Slaughter found the Guidelines insufficiently demanding with respect to evidence of benefits from vertical mergers, despite stronger on that point than the 1984 Guidelines were.

The principal changes of the 2020 Vertical Merger Guidelines are the following:

Increased Demands Regarding Procompetitive Effects: The 2020 Guidelines make clear that elimination of double marginalization ("EDM") is the most likely procompetitive effect of vertical mergers. The draft Guidelines noted that the agencies rely on parties to show how EDM occurs. The new Guidelines make it clear that while "it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from [EDM]," the agencies may independently evaluate EDM-related evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs. The Guidelines note that the agencies may consider whether EDM-related cost savings are "merger-specific," or could have been achieved independent of the merger through contracting between independent firms.

Flexibility but no "Safe Harbor" for Low Market Shares: When the 2020 Guidelines initially appeared in draft form, they stated that the DOJ and FTC were unlikely to challenge a vertical merger in which the merging parties have less than a 20% share of the upstream and downstream markets. The final Guidelines eliminate this language, although the final Guidelines suggest that in practice the agencies may exercise greater flexibility in enforcement than they otherwise would.

Comparison of Vertical and Horizontal Mergers: The 2020 Guidelines eliminate the 1984 Guidelines' explicit statement that vertical mergers are less likely than horizontal mergers to raise competition concerns. Instead, the revised Guidelines state: "the agencies more often encounter problematic horizontal mergers than problematic vertical mergers," in the context of noting that "vertical mergers are not invariably innocuous." This language, while less strong than that of the 1984 Guidelines, nonetheless signals that the agencies continue to expect horizontal mergers to receive more scrutiny than vertical mergers going forward.

Theories of Anticompetitive Harm: The 2020 Guidelines expand upon the theories of anticompetitive harm covered in the previous version, recognizing such unilateral effects on competition as foreclosure, raising rivals' costs, and increased access to competitively sensitive information. The new Guidelines explain that in considering foreclosure effects, the agencies will look to whether a merged firm has the ability to cause a rival to lose sales or compete less aggressively for business, and whether the merged firm would have an incentive to do so. The 2020 Guidelines go into detail on the types of costs that can be imposed on rivals, including raising costs of distribution, raising input costs, and forcing potential rivals to enter both upstream and downstream segments of a market (known as two-level entry). The 2020 Guidelines also recognize unilateral effects where firms producing two non-competing upstream inputs to a single downstream product merge (known as a merger of complements), and diagonal mergers, where a merger across different levels in different product chains prevents two products from competing with each other. The Guidelines also recognize that vertical mergers can enable tacit coordination among competitors.

The 2020 Vertical Merger Guidelines ultimately bring a potentially more enforcement-minded approach to reviewing vertical transactions, with an updated understanding of the applicable theories of harms and, while still focusing on EDM efficiencies, taking a less reflexively benign view of the effects of such deals. Nonetheless, the new Guidelines remain flexible enough to afford the agencies considerable enforcement discretion—perhaps more so than in the Horizontal Merger Guidelines—and it remains to be seen to what extent the FTC and DOJ will heed Commissioner Slaughter's call in her dissent for the agencies to "aggressively investigate and apply" the Guidelines' theories of harm.

II. Mergers of Competitors

Insert at p. 961, after Note 5

NOTE ON THE MERGER OF T-MOBILE AND SPRINT

In July of 2019, the U.S. Department of Justice ("DOJ") conditionally approved the merger of T-Mobile and Sprint, allowing the market for nationwide wireless carriers in the United States to consolidate from four firms to three. After completing its investigation of the transaction, the DOJ filed a complaint alleging that, because T-Mobile and Sprint competed to sell nationwide mobile coverage to consumers, and because the carriers were close competitors in the sale of prepaid wireless services, the merger would eliminate head-to-head competition between the companies to offer lower prices and better service. Instead of going to court to block the transaction, the DOJ eventually settled the case. The parties and the DOJ entered into a consent decree requiring T-Mobile and Sprint to divest Sprint's prepaid business (Boost Mobile, Virgin Mobile, and Sprint prepaid) to Dish Network Corp., a satellite television provider and for the parties to divest certain spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also allow Dish seven years of access to T-Mobile's network facilities to enable Dish to build out its own 5G network.

While five states joined in the DOJ's settlement, a group of fourteen states led by New York declined to accept the divestitures to Dish as sufficient and challenged the merger in federal court. After a bench trial in December 2019, the U.S. District Court for the Southern District of New York ruled against the states and dismissed their complaint, allowing the merger to be completed. United States v. Deutsche Telekom AG, 2020 WL 2481785 (D.D.C. Ar. 1, 2020). The court determined that the states has made a reasonable *prima facie* case against the merger, but that the states' case crumbled upon further inspection for three main reasons. First, the court found that T-Mobile was a maverick that was putting strong competitive pressure on market leaders Verizon and AT&T, and that the competition among those three were the primary drivers of the marketplace as Sprint had fallen behind and was losing competitive relevance. Second, the court credited the parties' arguments that the combination would increase efficiency—in ways that could not occur without the merger—by increasing network capacity, reducing marginal costs, and accelerating the pace and scope of 5G network build-out. Third, the court concluded based on the DOJ's investigation and trial testimony by Dish that the consent decree's required divestitures to Dish would remedy any competitive harms that might result from the deal.

It is unclear from the district court's opinion what role the remedial divestitures to Dish actually played in the judge's decision. The court appeared persuaded both that Sprint was a fading competitive force and that the merger would lead to significant efficiencies. If the court came to those conclusions, then it is unclear why any remedy was necessary. Indeed, the DOJ in its complaint argued that the merger would be anticompetitive and that the efficiencies were inadequate to offset any likely harms—that is why the DOJ required the divestitures to Dish. One possibility is that the district court, which appeared readily to accept efficiency arguments toward which courts have typically been more skeptical (and which the DOJ rejected in this case), implicitly considered the deal with the remedy in place. One might speculate whether the court might have more rigorously considered the competitive effects and efficiencies had DOJ granted the deal unconditional approval and Dish not been in the picture.

Insert at p. 1043, end of the page:

NOTE: MARKET DEFINITION AND MERGERS IN TWO-SIDED MARKETS

In an important dictum in its *AmEx* decision (printed at p. 571 of your casebook) the Supreme Court stated as a matter of law that "Only other two-sided platforms can compete with a two-sided platform for transactions." Ohio v. American Express Co., 138 S. Ct. 2274, 2287 (2018), The statement was pure dicta, unnecessary to the decision at hand, which involved only two-sided platforms competing with one another. Further, market definition is always intensely factual, so why this conclusion as a matter of law? Finally, the Court was incorrect. As a matter of fact, two sided platforms compete with each other all the time. Credit card networks compete with cash or checks. Uber competes with traditional taxicabs.[7] Amazon online grocery sales through its Whole Foods division compete with traditional grocers.

For purposes of antitrust market definition, we say that two firms compete if one is able to force the other's prices down to a level close to its cost. For example, a traditional taxicab company would be regarded as a competitor with Uber if competition from the cab company was sufficiently robust to prevent Uber from charging a price significantly higher than its costs. That is, in the process of setting its price Uber must consider not only demand as between its own drivers and riders, it must also consider competition with Lyft, another two-sided platform, as well as conventional taxicab companies. Further, customers can switch among Uber, Lyft, and taxicabs, taking whichever is most favorable at the moment. Some drivers do the same thing. This makes the competition question intensely factual, and with the likelihood of different outcomes for different situations.

Finally, it is no answer that in a long run equilibrium only the platform will dominate. It may or may not be the case that eventually Uber and Lyft will drive traditional taxis out of the market. More likely, taxicab companies will adopt technologies that make them more competitive with multi-homing customers. But antitrust policy necessarily looks at shorter or middle runs, so what counts is the substitution now and in the near term. In all cases, however, the question whether a particular two-sided platform competes with a more traditional market is one of fact, not of law.

The *AmEx* dicta has already caused mischief in the lower courts, and in a merger case. See United States v. Sabre Corp., ___ F.Supp.3d __, 2020 WL 1855433 (D.Del. Apr. 7, 2020), which relied on this statement to conclude that a merger between two computerized airline reservation systems could not be a merger of competitors because one of the systems was a two-sided digital platform, while the other was a more traditional reservation service. See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. (2021) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3639142.

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[7] *See, e.g.*, Phila. Taxi Ass'n, Inc. v. Uber Tech., Inc., 886 F.3d 332 (3rd Cir. 2018), cert. denied, 139 S. Ct. 211 (2018), reprinted in the casebook at p. 904.

Insert at p. 1073, before part III:

NOTE: NOVELIS/ALERIS: A NOVEL PROCEDURE FOR ACHIEVING FASTER REMEDIES AND DEAL CLOSURE

In September 2019, the DOJ filed suit in federal court in Ohio to block Novelis, Inc. from acquiring Aleris Corp, a rival producer of rolled aluminum products. The DOJ's complaint specifically alleged that the combination would reduce competition in the market for "rolled aluminum sheet for automotive applications." Novelis disagreed with the DOJ's definition of the relevant market. Before the DOJ filed its complaint, however, the parties agreed to a novel approach to resolve their dispute: they would conduct civil discovery under the jurisdiction of the court and try to resolve their dispute. If they could not, the court would then refer the case to binding arbitration. If the merging parties won, the DOJ would move to dismiss its complaint; if the DOJ won, the parties could close their transaction subject to an obligation to divest certain overlapping assets (notably Aleris' Lewisport, Kentucky plant) within a specified time. The DOJ won the arbitration and ultimately filed a Proposed Final Judgement setting out the assets to be divested and the relevant time for compliance. As of this writing, Novelis is in the midst of the bidding process for potential buyers of the Lewisport plant.

The arbitration process used for the Novelis/Aleris deal was novel, and it remains to be seen whether it was a one-time experiment or may become a more commonly used procedure to expedite merger disputes. As a policy matter, it is worth considering carefully the costs and benefits that the process might have both for parties and for the development of U.S. antitrust law.