# FROM RANCID TO REASONABLE: UNFAIR METHODS OF COMPETITION UNDER STATE LITTLE FTC ACTS

SAMUEL EVAN MILNER*

*When Congress gave the Federal Trade Commission the power to identify and enjoin unfair methods of competition, it did not create a parallel private right of action as it had for other antitrust laws. Yet approximately two dozen states have since enacted their own "Little FTC Acts," under which private plaintiffs may sue for damages and other remedies. These poorly understood state laws are actively shaping American competition policy on a national scale. The Ninth Circuit recently affirmed the nationwide injunction that Epic Games obtained against Apple under California's law despite concluding that Apple violated no federal or state antitrust law. Uber has faced liability under these laws from taxi companies seeking to enforce local regulatory monopolies. And employees have used these laws to challenge their employers' violations of labor laws.*

*This Article provides the first scholarly overview of state laws against unfair methods of competition on a national scale. Although these laws generally require some degree of deference to federal precedent, most states have failed to acknowledge the FTC's evolving guidance on this subject. Nevertheless, application of these state laws broadly tracks the same categories of conduct that the FTC Act covers, including violations of the letter and spirit of antitrust law, statutory and common law, and vaguely defined public policy. These various applications share a common focus in equating unfairness with harm to competition, as understood under either economic theory or legislative policy, and not simply injury to competitors. Appreciation for this core concern can ensure these state laws minimize the risk of overdeterrence without having to eliminate their signature private right of action for damages or narrowing the*

* Term Judicial Law Clerk, United States Court of Appeals for the Sixth Circuit. J.D., with Highest Honors, *University of Chicago Law School*, 2022; Ph.D., *Yale University*, 2018; A.B., summa cum laude, *Harvard University*, 2013. My thanks to the editors of the *American University Law Review* for their insightful comments and meticulous scrutiny.

*range of potential plaintiffs to competitors or customers. Increased awareness of these state laws by the FTC itself will allow it to work more closely with state officials to align the objectives of competition policy on a national scale.*

TABLE OF CONTENTS

## INTRODUCTION

More than a century after the Federal Trade Commission Act[1] (FTC Act) declared unfair methods of competition illegal, the line between fair and unfair remains heavily contested.[2] What is undisputed is that Congress intentionally selected a flexible standard, anticipating that a list of specifically prohibited practices would only invite business ingenuity in circumventing the law's strict letter.[3] Congress created the Federal Trade Commission (FTC or "the Commission") to identify and plug these gaps in American competition policy as they emerge, ensuring that businesses channel their dynamism in ways that work for the benefit of society.[4] Defending competition under this authority has also required the Commission to close a second type of gap: the enforcement gap between business practice and agency action. Resource limitations, administration priorities, and jurisdictional concerns limit the Commission's ability to reach all possible offenders. But unlike federal antitrust laws, which permit private enforcement to

1. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

2. *See* 15 U.S.C. § 45(a). *Compare* Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 110, 140, 162–66 (2023) (linking unfair methods of competition to statutory violations and intentional torts), *and* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 944–50 (2010) (equating unfairness to antitrust law), *with* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 654–63 (2017) (endorsing an expansive view of FTC unfairness powers), *and* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251, 271–75 (1980) (arguing unfairness extends to FTC's construal of public policy).

3. *See* Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSPECTIVES 94, 95, 104 (2019) (explaining that Congress created the FTC to define and police the line between companies that became large through anticompetitive practices and companies that became large through innovation and economies of scale); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 67–68, 74–80 (2003) (describing how the FTC was created as a flexible organization that could address the Sherman Act's shortcomings).

4. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 302h (2022) (describing the FTC's broad power to restrict business practices running counter to public policy).

supplement agency action, the FTC Act allows only the Commission to challenge a method of competition as unfair.[5]

Enter the Little (or Baby) FTC Acts, state laws modeled after their federal counterpart, which have the potential to fill this enforcement gap by providing private causes of action for damages and other remedies.[6] Scholarly and judicial treatment of Little FTC Laws have overlooked that many of these laws expressly prohibit unfair methods of competition in addition to their more commonly discussed prohibitions on harming consumers through unfair or deceptive acts or practices.[7] At most, several authors have investigated the application of a single state's laws against unfair methods of competition, which has obscured national policy and relegated states with less developed case laws to an afterthought.[8]

---

5. *See* Lauren Henry Scholz, *Private Rights of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639, 1646–51, 1655–63 (2022) (explaining that while antitrust law allows for private rights of action, some enforcement of privacy violations may only be carried out by the FTC or the states); Amy Widman, *Protecting Consumer Protection: Filling the Federal Enforcement Gap*, 69 BUFF. L. REV. 1157, 1164–71 (2021) (describing how both the Consumer Financial Protection Act and the FTC Act do not allow for private rights of action); Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1910–12 (2013) (arguing that to correct chronic underenforcement of unfair acts laws, cities and counties should be granted standing to enforce these laws).

6. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912–13 (2017); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 15–16 (2005).

7. *Cf.* John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1957, 1960 (2002) (criticizing courts for not identifying or distinguishing between unfairness standards); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 732–33 (1972) (acknowledging distinctions but focusing on state unfair or deceptive acts or practices laws). A few articles examine limited applications of state unfair methods laws without addressing their wider context. *See* Sean A. Pager & Jenna C. Foos, *Laboratories of Extraterritoriality*, 29 GEO. MASON L. REV. 161, 172 (2021) (supply-chain human rights litigation); Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 154 (2006) (treatment of licensed professionals). Unfair or deceptive acts or practices as defined by section 5 of the FTC Act are referred to as UDAP cases. 15 U.S.C. §§ 45, 57(a)–(b).

8. For example, one set discusses California Business and Professional Code Section 17200, the Unfair Competition Law: Kevin A. Adams, *What is "Unfair" Conduct in a Franchise Case Under California's Unfair Competition Law?*, 40 FRANCHISE L.J. 385, 385 (2021) (discussing the broad application of California's Unfair Competition law to resolve "any 'business act that is either fraudulent, unlawful, or unfair'"); Alexander

Nevertheless, state laws targeting unfair methods of competition have exerted influence on a national scale. Consider how the Ninth Circuit recently affirmed a national injunction against Apple, the world's most valuable company, for violating California's Unfair Competition Law despite concluding that it had not violated federal or state antitrust law.[9] Or how taxi companies have mounted successful challenges to Uber's violations of local rules protecting against a regulatory monopoly.[10] Such headline litigation only scratches the surface of unfairness claims, which have become routine in business lawsuits.[11]

The division of responsibility between federal, state, and private enforcement is not unique to unfair methods of competition. Federal antitrust law has long anticipated that state laws and officials, who possess knowledge of local markets and close ties with the state residents who transact in them, will supplement national enforcement efforts.[12] But as critics have also charged, state antitrust law can diverge

---

N. Cross, Comment, *Federalizing Unfair Business Practice Claims under California's Unfair Competition Law*, 2013 U. CHI. LEGAL F. 489, 489 (2013) (weighing the benefit of "Little FTC Acts" for consumer welfare against the cost of an uncertain state-specific regulatory environment for businesses); Thomas A. Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 WHITTIER L. REV. 561, 561–63 (1982) (calling the California unfair competition law a "Sleeping Giant" for California consumer protection and antitrust law). Others discuss North Carolina General Statutes § 75-1.1. Matthew W. Sawchak, *Refining Per Se Unfair Trade Practices*, 92 N.C. L. REV. 1881, 1883 (2014) (stating that North Carolina's unfair competition law is a "prominent feature" and constitutes a "boilerplate claim" for almost all commercial or consumer transaction litigation); Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in Unfair Trade Practices*, 90 N.C. L. REV. 2033, 2034 (2012); Graybeal, *supra* note 7 (stating that the statutes are evoked so frequently because of the powerful remedies that they provide). On states ignored by most authors, see, for example, LOUIS ALTMAN & MARIA POLLACK, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 3.50 (4th ed. 2022) ("Scarcity of case law prevents full construction of the [South Dakota Deceptive Trade Practices and Consumer Protection Act].").

9. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 999, 1001 (9th Cir. 2023).

10. *See infra* notes 204–13 and accompanying text (discussing multiple cases where taxi cabs holding medallions have brought claims against Uber for disrupting a regulatory monopoly).

11. *See* Sawchak & Nelson, *supra* note 8, at 2035 ("North Carolina lawyers include a 75-1.1 claim in almost every lawsuit that involves business conduct.").

12. *See* Daniel E. Rauch, *Sherman's Missing "Supplement": Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism*, 68 CLEV. ST. L. REV. 172, 179–81 (2020) (describing how proponents of early federal antitrust laws assumed that state enforcement would be required); Alan J. Meese, *Antitrust Regulation and the Federal-State*

from and even hinder the objectives of federal enforcers, as can private plaintiffs acting under these laws.[13] A similar difficulty arises when the FTC finds state-law support for its institutional mission against unfair or deceptive acts or practices.[14] When the FTC and other federal enforcers of consumer protection law appear too timid, state laws, as enforced by both private and public plaintiffs, have assumed leading roles.[15] These private rights of action have nevertheless attracted much

---

*Balance: Restoring the Original Design*, 70 AM. U. L. REV. 75, 84–85 (2020) (discussing the authority of the federal government in creating antitrust laws and how narrowing of the Commerce Power might impact the state and federal relationship in antitrust enforcement); Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679–84 (2003) (arguing that state advantages in antitrust enforcement include familiarity with local markets and institutions and the ability to provide damages to injured individuals); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1005–13 (2001) (describing case law where state attorneys general enforced antitrust violations).

13. *See* Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 BYU L. REV. 421, 431–33, 436–46, 456–58 (2020) (describing interactions between private and public plaintiffs in suits against corporate defendants); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 724–27 (2011) (critiquing generalist state attorneys general); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 678–702 (2010) (arguing that private litigation does not promote deterrence or properly compensate victims); Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 47–50 (2008) (describing state frustration of federal efforts). *But see* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GEO. L. REV. 1, 37–38 (2013) (summarizing empirical results supporting importance of private antitrust enforcement).

14. *See* Elise M. Nelson & Joshua D. Wright, *Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 997, 1002–04 (2017) (discussing the early development of "little FTC Acts" at the state level, and noting that these state FTC analogues have been amended and interpreted by the courts to expand consumer rights beyond the intent of the FTC); James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L.J. 947, 954–55 (2017) (offering examples to demonstrate that "early state laws were generally intended to provide more consumer protection than either common law claims or the original FTC Act could provide"); Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 176–78 (2011) (discussing amendments to state consumer protection laws that have expanded the rights of consumers, provided incentives for consumers to act as private enforcers, reduced burdens of proof, and allowed class actions, leading to "harmful consequences for consumers by taxing socially desirable business conduct"); Lovett, *supra* note 7, at 730 (noting that, in some ways, state consumer protection laws are much more powerful than the FTC Act).

15. Pridgen, *supra* note 6, at 924–26; Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 481 (2021); *see also* Myriam E. Gilles, *The Private Attorney General in*

criticism for overshooting the enforcement gap and encouraging costly litigation over acts and practices that the FTC would be unlikely to challenge.[16]

State laws against unfair methods of competition presumably suffer from similar mixes of over- and under-enforcement; however, not only has this body of law been overlooked, the very meaning of unfairness under these laws remains unclear.[17] Decades of litigation under state Little FTC Acts have developed jurisdictional case laws with their own distinct tests of unfairness, ranging from bans on rancid behavior to the balancing of antitrust law's rule of reason.[18] A definition of unfairness focused on competition, as in antitrust law, will tend to promote overall consumer welfare at the expense of individual competitors, whereas unfairness based on consumer harm and deception may very well conclude that too much competition is harmful for consumer wellbeing.[19] The FTC recently released two policy statements on unfair methods of competition, each taking a radically different interpretation of what makes methods of competition unfair.[20] Whatever definition the Commission adopts, its

---

*a Time of Hyper-Polarized Politics*, 65 ARIZ. L. REV. 337, 371 (2023) (defending private attorneys general); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 56, 84–85 (2018) (classifying state enforcement strategies); *cf.* Mark Totten, *The Enforcers & The Great Recession*, 36 CARDOZO L. REV. 1611, 1621–23 (2015) (illustrating how state enforcers combatted problematic mortgage lending practices when their federal counterparts did not).

16. Nelson & Wright, *supra* note 14, at 1016 (estimating that the majority of state UDAP cases fail FTC definitions); Butler & Wright, *supra* note 14, at 187–88 (concluding that the FTC would not condemn forty percent of successful state claims); Cooper & Shepherd, *supra* note 14, at 969–75 (declaring trial attorneys the ultimate winner in UDAP cases); Schwartz & Silverman, *supra* note 6, at 39–41 (critiquing consumer actions that do not require reliance or causation).

17. *See supra* note 2.

18. *See* Sawchak & Nelson, *supra* note 8, at 206 & n.197 (explaining that the North Carolina Supreme Court "developed a body of its own decisions" and ceased citing section 5 authorities as shown by numerous collected decisions).

19. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2240–41, 2244–46 (2012); *see also* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:21 (5th ed. 2023) (distinguishing antitrust from unfair competition); 1 ALTMAN & POLLACK, *supra* note 8, § 3:8 (distinguishing unfair or deceptive acts or practices laws from antitrust and other statutes).

20. *Compare* Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57,056 (Sept. 21, 2015) [hereinafter Statement of Enforcement Principles] (endorsing

guidance could provide a standard model for applying state laws, but it could also allow costly actions for damages to follow on the Commission's purely injunctive relief.[21]

By providing the first examination of state laws against unfair methods of competition on a national scale, this Article argues that successful application of Little FTC Acts requires state law to overlook harms to competitors in favor of harms to competition, as understood both under antitrust and economic doctrine and legislative or common law policy. Part I provides a summary of the Federal Trade Commission and Little FTC Acts, showing that the latter's adoption coincided with a concern about supplementing the federal government's ability to combat antitrust-style harms. This Part concludes with a new taxonomy of state Little FTC Acts that describes their approaches to unfair methods of competition. Part II analyzes how states have defined unfairness in four areas that the FTC Act plausibly reaches: violations of antitrust law; violations of other statutory laws; violations of the spirit of antitrust law; and violations of non-statutory public policy. Part III addresses the costs and benefits of Little FTC Acts for competition. By identifying the best practices devised by state judiciaries and legislatures and showing how states can better appreciate current FTC guidance, this Article argues that states

---

rule-of-reason approach), *with* FED. TRADE COMM'N, MATTER NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022) [hereinafter POLICY STATEMENT REGARDING THE SCOPE], https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission [https://perma.cc/W9MS-ZHCT] (adopting multifactor approach).

21. *See* Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENF'T 1, 12 n.54 (2014) (presenting the debate among FTC commissioners as to the significance of follow-on litigation after section 5 actions); Amy Marshak, Note, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. REV. 1121, 1145, 1157–58 (2011) (describing FTC commissioners' concerns that section 5 decisions will provide precedent for state court actions seeking money damages); Justin Whitesides, Comment, *The FTC's Competition Policy After the Intel Settlement*, 9 DEPAUL BUS. & COMM. L.J. 555, 586 (2011) (arguing that treble money damages available in private suits are inappropriate for addressing monopoly pricing because those damages are inconsistent with standards that encourage legitimate monopoly innovation); Justin J. Hakala, *Follow-On State Actions Based on the FTC's Enforcement of Section 5*, 2 (2008), https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00002/537633-00002.pdf [https://per ma.cc/PL9E-PE5H] (voicing concern that section 5 actions being used as precedent for follow-on private cases for damages might have a chilling effect on competition).

should be able to reduce the risks of overdeterrence and underenforcement without having to eliminate the signature private right of action for damages. Part IV concludes with reflections on how states that currently do not possess unfair methods of competition authority can play a greater role in national competition policy.

## I. THE STATUTORY LAW OF UNFAIR METHODS OF COMPETITION

Laws against unfair methods of competition appear at both the federal and state level.[22] Progressive Era lawmakers embedded this concept in the Federal Trade Commission Act as a complement to both federal antitrust law as well as state tort law.[23] The contours of that standard and its consumer-facing counterpart prohibiting unfair and deceptive acts or practices ("UDAP") have since fluctuated, and federal guidance documents defining these terms have targeted different core concerns.[24] This seemingly protean meaning deterred some states from following the federal model, but when others looked to the FTC Act as a model for consumer protection law, they adopted its ban on unfair methods of competition to promote antitrust enforcement.[25] Today, these state laws come in many varieties and display important distinctions with one another and with federal standards.[26]

### *A. Federal Law Against Unfair Methods of Competition*

Congress designed the Federal Trade Commission as an expert body able to decide when evolving business conduct crossed the line from permissible to unfair.[27] But while the Commission has provided guidance on what makes acts or practices unfair to consumers, it has never settled on a definitive standard for when methods of competition are unfair.[28]

---

22. *See infra* Section I.B.1 (discussing the evolution of state competition law).

23. *See infra* Section I.A.1 (discussing the formation of the FTC and the state and national concerns that the Commission was intended to address).

24. *See infra* Section I.A.2 (reviewing the history of the FTC's approach to determining what constitutes an "unfair" business practice).

25. *See infra* Section I.B.2 (discussing state reactions to federal requests to adopt this authority).

26. *See infra* Section I.C (discussing the modern landscape of state unfairness law).

27. *See infra* Section I.A.1 (discussing the passage of the FTC Act).

28. *See infra* Section I.A.2 (contrasting different FTC guidance on unfairness).

*1. The origins of the Federal Trade Commission Act*

The Federal Trade Commission and its ban on unfair methods of competition emerged from concerns about the limits of existing laws to deal with the changing business landscape of Progressive Era America.[29] Traditional American common law recognized competition as a positive force for society and so provided few remedies to competitors driven out by cartels and trusts.[30] Federal law initially filled this gap with the Sherman Antitrust Act of 1890,[31] which provides civil and criminal sanctions for agreements made in restraint of trade and monopolization in interstate commerce.[32] But this law did not fully resolve its sponsors' concerns about safeguarding competition.[33] The reach of federal authority over interstate commerce was more limited than it is now, and neither private plaintiffs nor resource-strung state attorneys general filled the enforcement gap.[34] Private plaintiffs could claim damages only after being harmed, and not even treble damages always sufficed to incentivize litigation.[35] Where lawsuits did commence, businesses soon learned that they could avoid liability under the Sherman Act by replacing cartelization and price-fixing with mergers into single corporations or consciously parallel behavior.[36] Perhaps most concerningly, responsibility for interpreting and applying the Sherman Act ultimately rested with the courts.[37] In 1911, when the Supreme Court declared that the Sherman Act reached only those restraints that failed the "Rule of Reason" test or would constitute a restraint of trade at common law, both reformers and the stock market interpreted this policy as biased towards business.[38]

---

29. *See* Milner, *supra* note 2, at 117–18 (arguing that Standard Oil's conduct in growing its business went beyond what had been considered acceptable forms of competition); Winerman, *supra* note 3, at 6–7 (explaining that Congress passed the Sherman Antitrust Act in response to the wave of business consolidations into trusts).

30. *See* Milner, *supra* note 2, at 117–20 (describing how the common law usually treated restraint of trade as a defense to breaches of contract and rarely as a basis for damages).

31. Sherman Antitrust Act of 1890, Pub. L. 51-675, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

32. 15 U.S.C. §§ 1–2.

33. *See* Milner, *supra* note 2, at 118–21 (collecting legislative comments).

34. Rauch, *supra* note 12, at 181, 184; Meese, *supra* note 12, at 86.

35. Milner, *supra* note 2, at 139.

36. NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, 164 (1985).

37. Averitt, *supra* note 2, at 230.

38. *Id.* at 230–31; Winerman, *supra* note 3, at 13.

Congress established the Federal Trade Commission as one solution to these challenges in 1914, the same year in which it restated antitrust law's private right of action and outlawed certain mergers and other anticompetitive conduct in the Clayton Antitrust Act.[39] Section 5 of the Federal Trade Commission Act empowers the Commission to determine and proscribe "unfair methods of competition."[40] The Act does not define what makes methods of competition unfair, but its senatorial backers argued that it would track existing law that had developed around competition.[41] They likely had in mind the rule adopted in a majority of American jurisdictions that a competitor could receive damages when a rival used a method of competition that was independently wrongful, such as a violation of statutory or tort law, or the method of competition was "malicious," meaning that it lacked any economic or social justification except to gain from another's loss.[42] In any event, this term was broader than common-law "unfair competition," such as trademark infringement and passing-off.[43]

The FTC Act allows only the Commission to challenge unfair methods of competition, not private litigants.[44] To guide the agency's inquiry, Congress established the Commission as an expert agency of five commissioners selected by the President to terms of seven years and who are removable only for good cause.[45] That Commission structure allows experts on business and economics to make fact-heavy determinations about what is fair, replacing generalist courts.[46] Congress further required the FTC to find that issuing a complaint would be in the "interest of the public."[47] The public interest requirement restricts the FTC from intervening on behalf of an

39. Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730, 730–32, 734 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

40. 15 U.S.C. § 45(a)(1), (b).

41. Milner, *supra* note 2, at 141–43.

42. *See id.* at 123–25, 133–35 (examining the legal basis for early unfair competition laws and application of that law to Standard Oil); *see also* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 708–09 (2012) (observing that lawsuits that would be brought today under antitrust law were often treated as business torts in the late nineteenth and early twentieth centuries).

43. Milner, *supra* note 2, at 145; Averitt, *supra* note 2, at 235.

44. 15 U.S.C. § 45(a).

45. *Id.* § 41.

46. Averitt, *supra* note 2, at 236; AREEDA & HOVENKAMP, *supra* note 4, ¶ 302h5.

47. 15 U.S.C. § 45(b).

individual competitor in a private dispute, although it extends beyond the competitive harms that antitrust law targets.[48]

If the Commission determines after a hearing that a method is unfair, it may grant only one type of relief: an order "to cease and desist from using such method of competition."[49] These orders can go beyond a negative injunction to include divestitures, pre-approval requirements, and other affirmative remedies.[50] However, the Commission has no ability to levy money damages for the use of an unfair method, only for a violation of a previous Commission order.[51] Restricting the Commission to equitable relief reduces the costs of misidentifying beneficial conduct as unfair and so encourages the agency to err on the side of stopping incipient or potentially unfair methods of competition before it is too late.[52]

As originally written, section 5 of the FTC Act allowed the agency to target only an unfair method of competition, which the Supreme Court held in *FTC v. Raladam Co.*[53] requires harm to business competitors, not consumers.[54] In 1938, Congress addressed this limitation with the Wheeler-Lea Act, which amended section 5 to include both "[u]nfair methods of competition in . . . commerce, and unfair or deceptive acts or practices in . . . commerce."[55] Under that second standard, the FTC does not have to prove injury to an actual or potential competitor, although it must still determine that enforcement promotes the public interest.[56]

---

48. *See* FTC v. Royal Milling Co., 288 U.S. 212, 216–17 (1933) (concluding public interest existed in protecting the public from purchasing unwanted products); FTC v. Klesner, 280 U.S. 19, 28 (1929) (suggesting public interest includes combatting widespread losses insufficient to justify a private suit or "flagrant oppression of the weak by the strong").

49. 15 U.S.C. § 45(b).

50. AREEDA & HOVENKAMP, *supra* note 4, ¶ 302e.

51. *Id.*

52. *Id.* ¶ 302h3.

53. 283 U.S. 643 (1931).

54. *Id.* at 649.

55. Act of Mar. 21, 1938, Pub. L. No. 75-49, 52 Stat. 111, 111 § 3 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)).

56. R.E. Freer, Comm'r, FTC, Address Before the Annual Convention of the Proprietary Association 1 (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf [https://perma.cc/4HW5-RB23]; *see supra* note 47 and accompanying text (explaining the public interest requirement in a consumer protection case).

*2. The FTC's standards of unfairness*

The FTC initially applied a haphazard approach to determining what was unfair without an explanation of its policy.[57] That approach changed in 1964 when the FTC issued its "Cigarette Rule" declaring that cigarette packaging that failed to disclose the danger of smoking committed an unfair or deceptive act or practice.[58] As part of this rule, the FTC noted several characteristics of unfair acts or practices. First, 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."[59] Second, the practice is "immoral, unethical, oppressive, or unscrupulous."[60] Third, "it causes substantial injury to consumers (or competitors or other businessmen)."[61] Where all three were present, the act or practice was "surely" illegal.[62]

Although not intended as a broader statement of FTC policy, the Supreme Court subsequently cited the Cigarette Rule's factors when explaining what constituted unfairness, even though the case in which it did so concerned unfair methods of competition and not the UDAP authority of the Cigarette Rule.[63] This endorsement of the Cigarette Rule nevertheless encouraged the FTC to take an expansive approach to combatting both unfair acts and practices and unfair methods of

57. *See* Herrine, *supra* note 15, at 472–74; J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED.TRADE COMM'N (May 30, 2023), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection [https://perma.cc/TAB8-L7KM].

58. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (July 2, 1964) (codified at 16 CFR §§ 408–460); Milner, *supra* note 2, at 152–53.

59. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. at 8355.

60. *Id.*

61. *Id.*

62. *Id.*

63. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 & n.5 (1972); *see* Milner, *supra* note 2, at 152–53 (explaining that the holding of *FTC v. Sperry & Hutchinson* ignored the distinction between unfair methods of competition and unfair or deceptive acts or practices); Averitt, *supra* note 2, at 286 (indicating that the holding in *Sperry & Hutchinson* appeared to allow the FTC to define unfair competition beyond competitive effects but observing that the holding actually addresses unfair or deceptive acts or practices).

competition.[64] Facing criticism of regulatory overreach, in 1980, the FTC issued a new "Unfairness Policy" that more narrowly defined what was an unfair act or practice (but not a method of competition).[65] The Unfairness Policy expands upon prong three of the Cigarette Rule, consumer injury.[66] To be unfair, the act or practice would now have to cause an injury that was substantial, that outweighed any countervailing benefits to consumers or competition, and that consumers could not have reasonably avoided.[67] The first prong of the Cigarette Rule, a public policy violation, no longer had independent force but primarily served as a means of determining whether that requisite injury existed.[68] The FTC disclaimed any reliance on the Cigarette Rule's second prong, observing that "[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."[69] Congress has subsequently mandated that the Commission satisfy the Unfairness Policy before declaring an act or practice unfair, and public policy cannot "serve as a primary basis" for that decision.[70]

It would take another four decades, and more than a century since the Act's adoption, for the FTC to provide specific guidance on what made a method of competition unfair. In a 2015 policy statement, the Commission stressed that it would prefer to rely on the Sherman and Clayton Acts to combat unfair methods of competition.[71] When a method fell outside of the letter of those antitrust statutes, the Commission's application of section 5 would still "be guided by the public policy underlying the antitrust laws, namely, the promotion of

64. *See* Herrine, *supra* note 15, at 439 (finding the FTC intensified its scrutiny of unfair or deceptive practices after the creation of the Cigarette Rule); Nelson & Wright, *supra* note 14, at 1005–07 (finding that the Supreme Court's citation of the Cigarette Rule marked the turning point for the FTC's enforcement); Milner, *supra* note 2, at 154–55 (asserting that as a result of the Supreme Court's endorsement of the Cigarette Rule, the FTC began scrutinizing practices that resulted in supra-competitive parallel prices as unfair methods of competition).

65. Fed. Trade Comm'n, *FTC Policy Statement on Unfairness* (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/K2NF-RQ6P].

66. *See* Herrine, *supra* note 15, at 441 (finding the FTC elevated the consumer injury prong as it sought a more objective, neutral, and focused test).

67. Fed. Trade Comm'n, *supra* note 65.

68. *Id.*

69. *Id.*

70. 15 U.S.C. § 45(n).

71. Statement of Enforcement Principles, *supra* note 20, at 57056.

consumer welfare."[72] It would likewise evaluate the method under the rule of reason—the same standard from which the FTC Act's authors had recoiled—meaning that it "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[73]

This policy stood for only a few years before a more progressive FTC rescinded it in 2021.[74] The replacement policy statement issued in November 2022 identified two factors for evaluating unfair methods.[75] First, the challenged conduct must constitute a "method of competition," meaning some affirmative act that implicates competition either directly or indirectly but not "violations of generally applicable laws . . . such as environmental or tax laws, that merely give an actor a cost advantage."[76] Second, the method must be unfair or "beyond competition on the merits."[77] That evaluation in turn depends on the nature of the conduct, including whether it is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature."[78] The size and power of an entity could influence that evaluation.[79] The methods must also "tend to negatively affect competitive conditions," such as by raising prices, reducing output, limiting innovation, or impeding market entry, including in labor markets.[80] The FTC finally cautioned that it would be unlikely to consider potential justifications as under the rule of reason.[81]

### *B. State Law Against Unfair Methods of Competition*

States that looked to the federal government as a model for antitrust and consumer protection law in the mid-twentieth century understood that they could also adopt their own laws against unfair methods of

72. *Id.*
73. *Id.*
74. FED. TRADE COMM'N, STATEMENT OF THE COMMISSION ON THE WITHDRAWAL OF THE STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT 1 (2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf [https://perma.cc/6MAW-L47X].
75. POLICY STATEMENT REGARDING THE SCOPE, *supra* note 20, at 8.
76. *Id.*
77. *Id.*
78. *Id.* at 9.
79. *Id.*
80. *Id.*
81. *Id.* at 10–12.

competition.[82] But when the FTC itself seemed unable to define what section 5 meant, only some states were willing to heed the Commission's calls to support its efforts.[83]

*1. Antitrust reforms and early adopters*

By the early 1960s, state attorneys general, the Department of Justice, and the private antitrust bar all agreed that states should play a larger role in competition policy.[84] But state antitrust enforcement was lackluster.[85] According to one count, thirty-eight states had over 150 antitrust laws on their books, many of which predated the Sherman Act and used such obsolete terms as trusts and pools.[86] States also lacked the economic knowhow, manpower, and financial resources of the federal government, hindering their ability to undertake complicated antitrust investigations and lawsuits.[87]

When the National Conference of Commissioners on Uniform State Laws proposed the first draft of a Uniform State Antitrust Act in 1963,[88] it accordingly sought to channel states' enforcement energies to "per se" violations, such as price fixing and market allocation, as well as monopolies created for the purpose of controlling prices or excluding competitors.[89] Although some state attorneys general desired coverage equal to that available under federal antitrust law, the limited scope of this proposed act had the benefit of preventing overzealous state enforcers from targeting pro-competitive conduct and firms that had

82. *See infra* Section I.B.1 (discussing state interest in antitrust reform).

83. *See infra* Section I.B.2 (discussing state response to the FTC's calls to adopt Little FTC Acts).

84. *See* PROCEEDINGS IN COMMITTEE OF THE WHOLE, UNIFORM STATE ANTITRUST ACT 2, 8 (Aug. 8, 1963) [hereinafter PROCEEDINGS IN COMMITTEE OF THE WHOLE (1963)] (discussing the need for state enforcement in some areas of antitrust law due to the increased burden on federal enforcement); Julian O. von Kalinowski, *A Symposium Presented by Committee on State Antitrust Laws*, 29 AM. BAR ASS'N SEC. ANTITRUST L. 255, 255 (1965) (contrasting the recognized efforts of the federal government and private antitrust bar with the "[u]nnoticed" but "increasing" antitrust activity of states).

85. PROCEEDINGS IN COMMITTEE OF THE WHOLE (1963), *supra* note 84, at 4–5.

86. *Id.* at 4; James A. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 760 (1961).

87. PROCEEDINGS IN COMMITTEE OF THE WHOLE (1963), *supra* note 84, at 9, 24–25.

88. *Id.* at 1.

89. *Id.* at 9–10, 24–28; PROCEEDINGS IN COMMITTEE OF THE WHOLE, UNIFORM STATE ANTITRUST ACT 12–13 (July 28, 1973) [hereinafter PROCEEDINGS IN COMMITTEE OF THE WHOLE (1973)].

become dominant through their own skill and efficiency.[90] These limitations further reserved responsibility for complex decisions or those with national impact, such as those involving mergers and consolidations under the Clayton Act, to the federal government.[91]

Nevertheless, a few states concluded that successful antitrust reforms at the state level required the broad scope of liability that section 5 afforded the federal government. The first state to adopt such a measure was Washington in 1961.[92] In addition to containing analogs to the Sherman Act and Clayton Act, including merger enforcement, section 2 of Washington's new Consumer Protection Act declared unfair methods of competition and unfair or deceptive acts or practices in any trade or commerce that directly or indirectly affected the state population to be unlawful.[93] Washington included this section 5 analog to address "a persistent epidemic of practices which, under the guise of legitimate commerce, take an unfair advantage of competitors and consumers alike."[94] The Washington law instructed courts to interpret unfairness by considering the federal laws and judicial interpretations "governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition."[95] In doing so, state law was not to be construed "to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest."[96] To further promote harmonization with the FTC, only the

90. PROCEEDINGS IN COMMITTEE OF THE WHOLE (1963), *supra* note 84, at 15; PROCEEDINGS IN COMMITTEE OF THE WHOLE (1973), *supra* note 89, at 12–15.

91. PROCEEDINGS IN COMMITTEE OF THE WHOLE (1963), *supra* note 84, at 9–10, 27–28.

92. Washington Consumer Protection Act, Wash. Sess. Laws 1956–57 (1961); *see* John J. O'Connell, *Washington Consumer Protection Act-Enforcement Provisions and Policies*, 36 WASH. L. REV. & ST. BAR J. 279, 279 (1961) (discussing the unprecedented nature of the Washington Consumer Protection Act in Washington law). Although California's Unfair Competition Law took on its modern form in 1933, its antitrust dimensions only emerged in the 1980s following recodification. California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (1977); Papageorge, *supra* note 8, at 563–76 (discussing the application and evolution of the California Unfair Competition Law from its inception through modern times).

93. Washington Consumer Protection Act, 1961 Wash. Sess. Laws 1956–57 (codified as amended at WASH. REV. CODE §§ 19.86.020–19.86.060).

94. O'Connell, *supra* note 92, at 280, 282.

95. 1961 Wash. Sess. Laws 1963–64 (codified as amended at WASH. REV. CODE § 19.86.920).

96. *Id.*

state Attorney General had the authority to initiate lawsuits for violations of section 2, and then solely to seek injunctive relief.[97]

Following its transition from territory to statehood, Hawaii also adopted an unfair competition standard as part of its codification of antitrust law.[98] Initially, the law contained only analogs to the Sherman Act and Clayton Act and provided a private right of action for damages to those injured by violations.[99] In 1965, as part of a push to grant Hawaii's state attorney general the power to enjoin unfair and deceptive practices, the Hawaii legislature also adopted a full section 5 analog, including unfair methods of competition authority.[100] In adopting this law, the Hawaii legislature looked to the success of the FTC in selecting a broad standard by which it could target novel harms as well as Washington state's own track record.[101] Like Washington, Hawaii expressed its intent that courts would follow the FTC's interpretations in applying this rule.[102] But Hawaii did not provide a separate limitation on remedies and causes of action, relying instead on the broad private right already provided under its analog to section 4 of the Clayton Act.[103]

*2. Little FTC Acts and other alternatives*

The FTC, under Chairman Paul Rand Dixon, shared the objective of encouraging states to shoulder more responsibility in competition policy, including that which section 5 covered.[104] Dixon recognized that more than just the Commission's available resources limited its ability to target unfair practices.[105] Section 5 of the FTC Act restricted the Commission to competition and practices in interstate commerce,

---

97. *Id.* at 1958 (codified as amended at WASH. REV. CODE §§ 19.98.080, 19.86.090).

98. A Bill for an Act Relating to the Regulation of the Conduct of Trade and Commerce, 1961 Haw. Sess. Laws 313–16 (codified at HAW. REV. STAT. §§ 480-4–480-9).

99. *Id.* at 317–18 (codified at HAW. REV. STAT. §§ 480-13, 480-15).

100. 1965 Haw. Sess. Laws 176–77 (codified at HAW. REV. STAT. § 480-2).

101. Cieri v. Leticia Query Realty, Inc., 905 P.2d 29, 36 (Haw. 1995) (quoting H. J. STAND. COMM. REP. 3-55, Gen. Sess., at 538 (Haw. 1965)).

102. 1965 Haw. Sess. Laws 176–77 (codified at HAW. REV. STAT. § 480-2(b)).

103. *See id.*; HAW. REV. STAT. § 480-13; *see also Cieri*, 905 P.2d at 35–37.

104. Rand Paul Dixon, *Federal-State Cooperation to Combat Unfair Trade Practices*, STATE GOV'T (1966) [hereinafter Dixon], *reprinted in Consumer Interests of the Elderly: Hearings Before the Subcomm. on Consumer Ints. of the Elderly of the Special Comm. on Aging*, 90th Cong. 219 (1967) [hereinafter *Consumer Interests*].

105. *Id.* at 220; *see also* Rahl, *supra* note 86, at 759–60 (estimating federal agencies' inadequacy in actual enforcement).

not those within the scope of a single state.[106] When the Commission received a report of an unfair or deceptive practice primarily within state lines, it had to refer these cases to the states for resolution.[107] Even then, the Commission passed along these concerns only when doing so would satisfy the Commission's own statutory requirement limiting proceedings to the "public interest."[108]

In 1966, Dixon's FTC accordingly called on states to enact laws "to prevent consumer deception and unfair competitive practices" and channel the agency's national expertise and case law to combat localized concerns.[109] Although the Commission phrased this call largely in the language of consumer protection, it urged states to adopt section 5 in full as had Washington and Hawaii: "unfair methods of competition and unfair or deceptive acts or practices."[110] The FTC explained that this language would allow states to combat both those practices that were unfair and deceptive toward consumers, such as misleading branding, and those "unfair to competitors," including price-fixing conspiracies, boycotts, and discriminatory pricing.[111] The Commission further recommended that states copy the language already included in Hawaii's unfair competition law that instructed state courts to construe the law as consistent with the FTC's and federal judiciary's interpretations of section 5, so that states could fully draw on agency experience and guidance.[112] But, critically, Chairman Dixon advocated that state laws authorize not just injunctions but also the "assessment of civil penalty," at least for unfair or deceptive practices.[113]

---

106. Dixon, *supra* note 104, at 220.

107. *Id.*

108. *Id.*

109. Press Release Issued by FTC on July 7, 1966 [hereinafter Press Release], *reprinted in Consumer Interests*, *supra* note 104, at 223.

110. *Id.*; *see also* Memorandum from Robert J. Hughes to John H. Carley (July 7, 1982) [hereinafter Memorandum from Robert J. Hughes], *reprinted in FTC's Authority over Deceptive Advertising: Hearing Before the Subcomm. for Consumers of the Comm. on Com., Sci., & Transp.*, 97th Cong. 32–33 (1982) ("An initial objective was to encourage as many states as possible to adopt the broad language of § 5(a)(1) [of the FTC Act].").

111. Press Release, *reprinted in Consumer Interests*, *supra* note 109, at 223; Dixon, *reprinted in Consumer Interests*, *supra* note 104, at 222.

112. Memorandum from Robert J. Hughes, *supra* note 110, at 33.

113. Dixon, *reprinted in Consumer Interests*, *supra* note 104, at 221; *cf.* Memorandum from Robert J. Hughes, *supra* note 110, at 32–33 (discussing the evolution of the FTC's proposal for states to enact uniform laws for unfair or deceptive practices); Press Release, *supra* note 109, at 223 (explaining how Dixon recommended states to adopt laws "similar to the Commission's own authority" to police unfair or deceptive practices).

Following this call, some states recognized that a Little FTC Act modeled upon section 5 would allow them to target both consumer harms and threats to competition.[114] Even when states identified the primary purpose of their new laws as consumer protection, they also appreciated that they now possessed, as Massachusetts's consumer protection division chief explained in 1969, "an antitrust law coextensive with that of the Federal Trade Commission Act."[115] These states further acknowledged that decades of FTC enforcement provided a basis to apply what otherwise would be vague terms.[116] Indeed, the FTC followed through on its promise of support to those states interested in adopting this legislation.[117] But, just as Hawaii had, many of these states did not track the FTC Act's remedies and instead permitted private actions for damages. Some states may have done so as an unintentional consequence of locating their Little FTC Acts as part of their statutory chapters on antitrust law.[118] More significantly,

---

114. *See* Nelson v. Lusterstone Surfacing Co., 605 N.W.2d 136, 142 (Neb. 2000) (noting that Nebraska adopted its Consumer Protection Act as "an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies").

115. Robert L. Meade, *The Consumer Protection Act of Massachusetts*, 4 NEW ENG. L. REV. 121, 131 (1969); *see also* Stephen Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 736 (1974) (describing Florida's Little FTC Act as "the most recent, and potentially the most important, antitrust legislation yet enacted in Florida"); Stephen Mason Thomas, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C. L. REV. 896, 898 (1970) (explaining North Carolina's law resulted partly from restrictive judicial reading of antitrust law).

116. *See* Wayne V. Meuleman, *Idaho Consumer Protection Act: Enforcement Procedures,* 8 IDAHO L. REV. 322, 322–23 & n.8 (1972) (noting FTC guidance when Idaho adopted language parallel to section 5); Robert Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1, 19–20 (1969); *see also* John H. Kazanjian, Note, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME L. REV. 410, 413–14 (1973).

117. *See* Faith Prior, Extension Family Economist, Univ. Vt., Limbs and How to Go out on Them, Talk at the 45th Annual Agric. Outlook Conf. 4 (Nov. 15, 1967), https://ageconsearch.umn.edu/record/325488/files/1968-26.pdf [https://perma.cc/3GX4-57HP] (acknowledging support from the FTC's Assistant General Counsel for Federal-State Cooperation in drafting Vermont's Little FTC Act).

118. *Cf.* Thomas, *supra* note 115, at 898–99 (discussing how the North Carolina legislature incorporated its FTC Act into the State's general antitrust chapter); Papageorge, *supra* note 8, at 570 (noting the recodification of the California Unfair Competition Law immediately after the state antitrust analog in 1977); Richard A. Schulman, *Little F.T.C. Act: The Neglected Alternative*, 9 J. MARSHALL J. PRAC. & PROC. 351, 352 n.11 (1975) (suggesting Illinois did not adopt a treble damage provision in the

as suggested by Washington's subsequent addition of this private right of action at the request of its attorney general, states without a dedicated agency, such as the FTC, to enforce this law also understood that a private right of action for those harmed by unfair conduct was needed to give "teeth" to these laws.[119]

Yet only ten states had adopted a full section 5 analog by 1969, and only eighteen total by 1990.[120] This slow adoption was not for lack of interest in antitrust law reform, as at least thirty-one states enacted new antitrust laws during the 1970s alone.[121] Instead, given that state antitrust reforms focused on replacing unclear and outmoded language with clear rules, unfairness simply appeared too unclear a standard.[122] While the drafters of the proposed uniform state antitrust act eventually recognized the benefits of allowing states flexibility to go beyond per-se violations when the states could apply the well-established rule of reason, they apparently did not seriously consider that states were capable of reasoning what was unfair.[123] Grafting traditional antitrust remedies onto these laws also raised significant enforcement concerns; at the 1965 meeting of the American Bar Association's Section of Antitrust Law, the Section's chairman, leading antitrust attorney and treatise writer, Julian O. von Kalinowksi, cited the "teeth" available under Hawaii's section 5 analog as "a striking

---

Little FTC Act because of preexisting antitrust law); Boeing Co. v. Sierracin Corp., 738 P.2d 665, 676–77 (Wash. 1987) (observing same legislative chapter includes both laws subject to same damages provision).

119. D. Roger Reed, *Consumer Protection in Washington: An Overview*, 10 GONZ. L. REV. 391, 393 (1975); *see* Pridgen, *supra* note 6, at 916 (explaining how limited public resources in Massachusetts encouraged adoption of private right of action); Cieri v. Leticia Query Realty, Inc., 905 P.2d 29, 36–37 (Haw. 1995) (discussing legislative allowance of private right in 1987 "in part to ease the burden on the state attorney general's limited resources").

120. Memorandum from Robert J. Hughes, *supra* note 110, at 33; Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 956 (1991).

121. John J. Miles, *Current Trends in State Antitrust Enforcement*, 47 ANTITRUST L.J. 1343, 1345 (1979).

122. For example, the Oregon state legislature initially recommended a section 5 analog before switching to an enumerated list to reduce vagueness. Richard A. Acarregui, Note, *Trade Regulation—Deceptive Trade Practices—The Federal Trade Commission Act and Recent Oregon Legislation*, 45 OR. L. REV. 132, 135–36 (1966).

123. *Cf.* Arthur D. Wolfe, *A Review of the Uniform State Antitrust Act*, 2 NOTRE DAME J. LEGIS. 30, 34 (1975) (noting the "obvious omission" of "unfair trade practices" in the Uniform Act).

example of the business-man's nightmare engendered by recent antitrust developments."[124]

Most states eschewed section 5's broad focus on competitive harms for the narrower objective of protecting consumers from unfair or deceptive acts and practices.[125] New Mexico even amended its Little FTC Act in 1971 to remove "unfair methods of competition" and retain only the consumer-protection authority.[126] The FTC sanctioned this more limited approach when it approved three alternate state-law schemes in the Model Unfair Trade Practices and Consumer Protection Law of 1970.[127] The first option condemned unfair methods of competition and unfair or deceptive acts and practices.[128] Commentary to this option explained that it protected consumers from deceptive practices as well as "unfair methods that injure competition," including "trade restraints which tend to create monopoly and enhance prices."[129] The two remaining options had a narrower scope.[130] The second mirrored existing state consumer fraud laws that banned false, misleading, or deceptive acts or practices, without any mention of "unfair" practices.[131] The third enumerated specific unfair acts, along with a catchall category for unfair or deceptive acts or practices.[132] All three alternatives continued to link state enforcement with the FTC's body of experience and case law by providing that section 5 would be given "due consideration and great weight" in applying the state law.[133] But unlike section 5, every option

124. Kalinowski, *supra* note 84, at 256.

125. Paul Rand Dixon, Comm'r, Fed. Trade Comm'n, *Remarks at the Public Seminar of the Fla. Dep't of Agric. & Consumer Servs.*, (Mar. 8, 1974), https://www.ftc.gov/system/files/documents/public_statements/692471/19740308_dixon_federal-state_cooperation_to_combat_unfair_trade_practices_-_a_review.pdf [https://perma.cc/L7BP-77DN] (situating comprehensive Little FTC Acts within the wider unfair trade practices concern).

126. *See* Gandydancer, LLC v. Rock House CGM, L.L.C., 453 P.3d 434, 440–41 (N.M. 2019) (discussing the Legislature's removal of "unfair methods of competition" from the statute).

127. *See* Butler & Wright, *supra* note 14, at 170–71.

128. *Id.* at 171.

129. *See* Lovett, *supra* note 7, at 732 (quoting COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED STATE LEGISLATION 142 (1972)).

130. Richard E. Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea*, 33 S.C. L. REV. 479, 480 n.7 (1982) (recognizing that only the first alternative extended beyond consumer protection).

131. Lovett, *supra* note 7, at 732.

132. *Id.* at 732–33 n.24.

133. *Id.* at 733–34.

recommended that anyone injured by a proscribed act could bring a private action, with the possibility of single and even treble damages along with attorney's fees and other awards.[134]

### *C. State Unfair Competition Law Today*

Currently, nineteen states have true Little FTC Acts that expressly declare unfair methods of competition to be unlawful, alongside unfair or deceptive acts or practices.[135] Another two have modified Little FTC Acts that ban unfair methods of competition alongside other practices not included in section 5, and California's Unfair Competition Law also covers "any unlawful, unfair or fraudulent business act or practice."[136] Some of these states give non-exhaustive examples of conduct that is an unfair method of competition, which can range from antitrust-style harms, such as monopolistic refusals to deal, to consumer-facing misrepresentations, as well as violations of cross-referenced statutes.[137] In contrast, seventeen jurisdictions ban unfair, or unfair and deceptive, acts or practices, either in general or as part of a non-exhaustive enumerated list, without mention of unfair

---

134. *Id.* at 730, 743–49.

135. ALASKA STAT. § 45.50.471(a) (2023); CONN. GEN. STAT. § 42-110b(a) (2023); HAW. REV. STAT. § 480-2(a) (2023); IDAHO CODE § 48-603 (2023); 815 ILL. COMP. STAT. 505/2 (2023); LA. STAT. ANN. § 51:1405(a) (2023); ME. STAT. tit. 5, § 207 (2023); MASS. GEN. LAWS ch. 93A, § 2(a) (2023); MISS. CODE ANN. § 75-24-5 (2023); MONT. CODE ANN. § 30-14-103 (2023); NEB. REV. STAT. § 59-1602 (2023); N.H. REV. STAT. ANN. § 358-A:2 (2023); N.C. GEN. STAT. § 75-1.1(a) (2023); 73 PA. CONS. STAT. §§ 201-2(4), 201-3(a) (2023); 6 R.I. GEN. LAWS § 6-13.1-2 (2023); S.C. CODE ANN. § 39-5-20(a) (2023); VT. STAT. ANN. tit. 9, § 2453(a) (2023); WASH. REV. CODE § 19.86.020 (2023); W. VA. CODE § 46A-6-104 (2023).

136. CAL. BUS. & PROF. CODE § 17200 (West 2023); *see also* FLA. STAT. § 501.204(1) (2023) (adding "unconscionable acts or practices"); WIS. STAT. § 100.20(1) (2023) (adding "unfair trade practices").

137. *See* N.H. REV. STAT. ANN. § 358-A:2(XIV) (discussing pricing that creates a monopoly or harms competition); WIS. STAT. § 100.20(1t) (withholding any service that promotes an unfair method of competition); *see also* IDAHO CODE § 48-603(17)-(18) (banning specified unfair methods of competition and unfair or deceptive acts or practices, with a catchall only for actions that are misleading, false, or deceptive to consumers, or unconscionable); 815 ILL. COMP. STAT. 505/2 (listing deception, fraud, misrepresentation, and other similar unfair practices); MISS. CODE ANN. § 75-24-5(2) (listing passing off, misrepresentation, disparagement, and other practices); 73 PA. CONS. STAT. §§ 201-2(4), 201-3 (enumerating unfair methods of competition and unfair or deceptive acts focused on fraud or deception).

methods of competition.[138] Even then, three of these states consider deceptive trade practices "prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."[139] Finally, twelve states have consumer protection statutes that focus on unconscionability, fraud, deception, or terms other than "unfairness," although they still could reach disparagement of competitors and other similar harms.[140]

Regardless of coverage, most statutes possess a harmonization provision requiring the state to give some level of authority to the FTC's own decisions.[141] States that have adopted Little FTC Act bans on unfair methods of competition typically either require that their courts be "guided by" the decisions of the FTC or give "due

138. ARIZ. REV. STAT. ANN. § 44-1522(A) (2023); COLO. REV. STAT. § 6-1-105(1)(rrr) (2023); D.C. CODE. § 28-3904 (2023); GA. CODE. ANN. § 10-1-391(a) (2023); IND. CODE § 24-5-0.5-3(a) (2023); IOWA CODE § 714.16(2)(a) (2023); KY. REV. STAT. ANN. § 367.170(1) (West 2023); MD. CODE ANN. COM. LAW. § 13-301 (West 2023); MICH. COMP. LAWS § 445.903(1) (2023); MO. REV. STAT. § 407.020 (2023); NEV. REV. STAT. § 598.0915 (2023); N.M. STAT. ANN. § 57-12-3 (2023); OHIO REV. CODE ANN. § 1345.02(A) (West 2023); OKLA. STAT. tit. 15, §§ 752(13)-(14), 753(20) (2023); ORE. REV. STAT. § 646.608(1)(u) (2023); TENN. CODE ANN. § 47-18-104(a) (2023); WYO. STAT. ANN. § 40-12-105(a)(xv) (2023).

139. COLO. REV. STAT. § 6-1-105(2); NEV. REV. STAT. § 598.0953(1); OKLA. STAT. tit. 78, § 53(B).

140. *See* ALA. CODE § 8-19-5(27) (2023) (banning any "unconscionable, false, misleading, or deceptive act or practice"); ARK. CODE ANN. § 4-88-107(a) (2023) (banning "[d]eceptive and unconscionable trade practices"); DEL. CODE ANN. tit. 6, § 2532(a) (2023) (banning deceptive practices); KAN. STAT. ANN. § 50-626 (2023) (banning only "deceptive act[s] and practice[s]"); MINN. STAT. § 325D.44 (2023) (defining "a deceptive trade practice"); MINN. STAT. § 325F.69 (banning fraud and misrepresentation); N.D. CENT. CODE § 51-15-02 (2023) (banning "any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation"); N.J. STAT. ANN. § 56:8-2 (2023) (banning unconscionable, deceptive, fraudulent, and misrepresenting practices); N.Y. GEN. BUS. LAW § 349(a) (2023) (banning "[d]eceptive acts or practices"); S.D. CODIFIED LAWS § 37-24-6 (2023) (banning a "deceptive act or practice"); TEX. BUS. & COM. CODE ANN. § 17.46(a)–(b) (West 2023) (banning "[f]alse, misleading, or deceptive acts or practices"); UTAH CODE ANN. § 13-11-4(1) (West 2023) (banning a "deceptive act or practice"); UTAH CODE ANN. § 13-11-5(1) (banning an "unconscionable act or practice"); VA. CODE ANN. §§ 59.1-200, 59.1-200.1 (2023) (banning "fraudulent acts or practices").

141. *See generally* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 388–429 (1990) (reviewing different degrees of deference to the FTC in state laws).

consideration and great weight" to its interpretation of section 5.[142] Those that do not contain harmonization provisions have still tended to impute some deference judicially.[143] But states have interpreted identical statutory language to mean different things; some, for instance, have treated the requirement to be "guided by" FTC decisions as mandatory, while others treat it as optional.[144] Moreover, as states have developed their own bodies of precedent over the past decades, they have had less need to look to the FTC for guidance.[145]

Like the FTC Act, every state allows for some form of investigation and enforcement by public authorities.[146] But the powers of state enforcers exceed those of the FTC in several ways. For one, a majority of states grant their attorney general express authority to issue regulations or rules governing standards of unfairness.[147] For another, while most investigations will end in a voluntary assurance of compliance as opposed to litigation, state attorneys general are not limited to the injunctive relief of the FTC.[148] They can instead seek

---

142. ALASKA STAT. § 45.50.545 (2023) ("due consideration and great weight"); CONN. GEN. STAT. § 42-110b(b) (2023) ("guided by interpretations"); FLA. STAT. § 501.204(2) (2023) ("due consideration and great weight"); HAW. REV. STAT. § 480-2(b) (2023) ("due consideration"); IDAHO CODE § 48-604(1) ("due consideration and great weight"); 815 ILL. COMP. STAT. 505/2 ("consideration shall be given"); ME. STAT. tit. 5, § 207(1) (2023) ("guided by"); MASS. GEN. LAWS ch. 93A, § 2(b) (2023) ("guided by"); MISS. CODE ANN. § 75-24-3(c) ("guided by"); MONT. CODE ANN. § 30-14-104(1) (2023) ("due consideration and weight"); N.H. REV. STAT. ANN. § 358-A:13 (2023) ("guided by"); 6 R.I. GEN. LAWS § 6-13.1-3 (2023) ("due consideration and great weight"); S.C. CODE ANN. § 39-5-20(b) (2023) ("guided by"); VT. STAT. ANN. tit. 9, § 2453(b) (2023) ("guided by"); WASH. REV. CODE § 19.86.920 (2023) ("guided by"); W. VA. CODE § 46A-6-101(1) (2023) ("guided by").

143. *See* Johnson v. Phx. Mut. Life Ins. Co., 266 S.E.2d 610, 620–21 (N.C. 1980) (showing court's interpretation of state statute, without harmonization clause, based on resemblance to FTC Act), *abrogated on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 374 S.E.2d 385 (N.C. 1988); Guste v. Demars, 330 So. 2d 123, 125 (La. Ct. App. 1976) (discussing the court's considerations of Federal case law and FTC interpretations in adjudicating the application of the state statute); People *ex rel.* Mosk v. Nat'l Rsch. Co. of Cal., 20 Cal. Rptr. 516, 522 (Ct. App. 1962) (containing the court's reasoning process surrounding the interpretation of the state law).

144. *See* Karns, *supra* note 141, at 399–420.

145. *See* Sawchak & Nelson, *supra* note 8, at 2068 & n.197 (noting the courts waning dependence on section 5 in favor of the state's Little FTC Act).

146. *Cf.* Cox, Widman & Totten, *supra* note 15, at 45–46 (acknowledging various public enforcement methods).

147. Pridgen, *supra* note 6, at 921.

148. *See id.* at 920–21 (describing other solutions that attorneys general may be able to deploy, including civil and criminal penalties).

compensation in the form of restitution to consumers, civil penalties for each violation, reimbursement for fees and costs, cy pres awards, or some combination, as well as potentially criminal sanctions.[149]

Beyond this public enforcement, every state law grants some private right of action to sue for violations of the act alongside state officials.[150] Various rationales have been offered for this departure from the FTC's exclusively public right, including that the government would underenforce these standards, elected state attorneys general may be reluctant to combat politically powerful businesses, and that victims should have access to a direct remedy for the harms that they have actually suffered.[151] Whatever the rationale, many states afford this private right of action to "any person" injured by certain methods, mirroring the private right of action for antitrust harms under section 4 of the Clayton Act.[152]

Further expanding the scope of enforcement compared with the FTC Act are the remedies available under this private right of action. If state laws were truly Little FTC Acts that copied the federal law, they would limit their remedies to equitable relief.[153] Instead, these laws typically permit any person injured by an unfair method of competition or other forbidden conduct to recover at least the actual damages caused by their injury.[154] Some states allow a successful

---

149. *Id.*; Cox, Widman & Totten, *supra* note 15, at 46–47.

150. Butler & Wright, *supra* note 14, at 173.

151. *Id.*; Pridgen, *supra* note 6, at 915–17, 940.

152. 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ."); *see, e.g.*, ALASKA STAT. § 45.50.535(a) (2023); CONN. GEN. STAT. § 42-110g(a) (2023); HAW. REV. STAT. § 480-13(a) (2023); IDAHO CODE § 48-608(1) (2023); 815 ILL. COM. STAT. § 505/10a(a) (2023); LA. STAT. ANN. § 51:1409(a) (2023); ME. STAT. tit. 5, § 213(1) (2023); MASS. GEN. LAWS ch. 93A, § 11 (2023); MISS. CODE ANN. § 75-24-15(1) (2023); NEB. REV. STAT. § 59-1609 (2023); N.C. GEN. STAT. § 75-16 (2023); 73 PA. CONS. STAT. § 201-9.2 (2023); 6 R.I. GEN. LAWS § 6-13.1-5.2(a) (2023); S.C. CODE ANN. § 39-5-140(a) (2023); VT. STAT. ANN. tit. 9, § 2465(a) (2023); WASH. REV. CODE § 19.86.090 (2023); W. VA. CODE § 46A-6-106(a) (2023); WIS. STAT. § 100.20(5) (2023); *see also* CAL. BUS. & PROF. CODE § 17204 (West 2023) ("a person"); FLA. STAT. § 501.211(1) (2023) ("anyone"); Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 877 (Haw. 1999) (noting that Hawaii copied its remedy provision from the Clayton Act). *But see* MONT. CODE ANN. § 30-14-133(1)(a) (2023) ("a consumer").

153. *Cf.* 15 U.S.C. § 45(b) (outlining process by which the FTC achieves equitable relief).

154. *See, e.g.*, CAL. BUS. & PROF. CODE § 17203; CONN. GEN. STAT. § 42-110g; FLA. STAT. § 501.211(2); HAW. REV. STAT. §§ 480-2(e), 480-13(a); 815 ILL. COMP.

plaintiff to recover the greater of a multiple of the original damages or a minimum penalty for each violation.[155] Attorney's fees and punitive damages may also be available.[156] And many jurisdictions permit a private party to represent an entire class of persons aggrieved by the unfair method or practice.[157]

If private plaintiffs served primarily to combat underenforcement by public authorities, these laws could have incorporated public interest requirements similar to that contained in the FTC Act.[158] Some state laws do impose this requirement for public enforcement.[159] Two state codes emphasize that actions that are not injurious to the public interest are not unfair.[160] Another six have imposed a public interest requirement by judicial interpretation.[161] And injunctive relief will require a showing that such an action is in the public interest as well.[162]

---

STAT. 505/10a(a); LA. STAT. ANN. § 51:1409(a); ME. STAT. tit. 5, § 213(1); MASS. GEN. LAWS ch. 93A, § 11; MONT. CODE ANN. § 30-14-133(1); NEB. REV. STAT. § 59-1609; N.C. GEN. STAT. § 75-16; § 6-13.1-5.2(a); S.C. CODE ANN. § 39-5-140(a); VT. STAT. ANN. tit. 9, § 2465(a); WASH. REV. CODE § 19.86.090; W. VA. CODE § 46A-6-106(a).

155. *See, e.g.*, ALASKA STAT. § 45.50.531(a) (treble damages or $500); MONT. CODE ANN. § 30-14-133(1)(a) (single damages or $500); 6 R.I. GEN. LAWS § 6-13.1-5.2(a) (single damages or $500, with treble damages available in the court's discretion); WASH. REV. CODE § 19.86.090 (treble damages in court's discretion up to $25,000); W. VA. CODE § 46A-6-106(a) (single damages or $200); *see also* VT. STAT. ANN. tit. 9, § 2465(a) (maximum treble actual damages including attorney's fees and exemplary damages); WIS. STAT. § 100.20(5) (double damages).

156. *See, e.g.*, CONN. GEN. STAT. § 42-110g (permitting the awarding of punitive damages); FLA. STAT. § 501.211(2) (permitting the awarding of attorney's fees); VT. STAT. ANN. tit. 9, § 2465(a) (permitting awarding of attorney's fees and punitive damages); WASH. REV. CODE § 19.86.090 (same); WIS. STAT. § 100.20(5) (same).

157. *See, e.g.*, CAL. BUS. & PROF. CODE § 17203; MASS. GEN. LAWS ch. 93A, § 11; 6 R.I. GEN. LAWS § 6-13.1-5.2(b). *But see* MONT. CODE ANN. § 30-14-133(1)(a) (disallowing class actions).

158. 15 U.S.C. § 45(b) (noting that "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint").

159. *See, e.g.*, MASS. GEN. LAWS ch. 93A, § 4; 73 PA. CONS. STAT. § 201-4 (2023).

160. WASH. REV. CODE § 19.86.920; W. VA. CODE § 46A-6-101(2).

161. Pridgen, *supra* note 6, at 943–44 (listing Colorado, Georgia, Nebraska, New York, South Carolina, and Washington).

162. Pridgen, *supra* note 6, at 920 n.44; Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

But most have no such requirement, with Hawaii and Connecticut even declaring that the public interest is not an element at all.[163]

## II. WHAT MAKES A METHOD OF COMPETITION UNFAIR UNDER STATE LAW?

Although state Little FTC Acts can trace their origins to the FTC Act, they have transformed what was once a single federal standard into a patchwork of legal reasoning. States have applied their laws against unfairness in ways that are simultaneously narrow and broad.[164] At one end of the spectrum, an unfair method of competition is a violation of some other law, antitrust or otherwise, but which can carry more substantial liabilities to a larger group of potential plaintiffs.[165] At the other end, an unfair method of competition is a wrong not otherwise condemned in law, whether one based upon the letter or spirit of an existing law or a more nebulous concept of unfairness.[166]

Despite this range of enforcement targets and myriad formulations of describing unfairness, the common theme among these applications of Little FTC Acts is that a method of competition must harm competition to be unfair, not merely individual competitors. Drawing on this emphasis on competition itself, this section sorts state law enforcement into a four-part taxonomy that parallels the classic categorization of the FTC's own bailiwick: violations of the letter of antitrust law, violations of other laws, violations of the spirit of antitrust law, and violation of public policy.[167] State practice sometimes diverges from contemporary FTC policy, especially where legislative declarations of policy and not economic modeling establish that some method harms competition. Application of these common legal standards can also result in very different practical outcomes given the expanded

---

163. CONN. GEN. STAT. § 42-110g(a) (2023) ("Proof of public interest or public injury shall not be required in any action brought under this section."); HAW. REV. STAT. § 480-2(c) (2023) ("No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.").

164. See *supra* notes 142–59 and accompanying text for a comparison of state laws.

165. *See infra* note 188 (discussing how state antitrust laws can diverge from the content of federal antitrust laws).

166. *See infra* text accompanying note 178 (discussing the encouragement to bring state unfairness claims along with antitrust claims).

167. *See* Averitt, *supra* note 2, at 228–29 (defining six categories). This Article subsumes Averitt's category of incipient antitrust violations under the spirit of the antitrust laws and discusses his category of UDAP applications *infra* Section III.B.4.

remedies and rights of action under state law.[168] These differences should not detract from the increasing emphasis under both state and federal law on identifying objective injuries to competition itself rather resting upon subjective and unbounded notions of fair play to determine unfair methods of competition.

### *A. Violations of Antitrust Law*

Conduct that violates the strict letter of antitrust law constitutes an unfair method of competition under section 5.[169] As the Supreme Court has explained, the FTC's role is to target "every trade practice" that can harm competition, so it may bring a section 5 charge against a defendant "even though the selfsame conduct may also violate the Sherman Act."[170] Violations of the Clayton Act similarly constitute unfair methods of competition.[171] Although the Supreme Court has explained that it is the underlying conduct that is unfair, not the mere fact of the statutory violation itself, conduct that violates statutes on the fringes of antitrust law is also unfair under FTC precedent.[172] For instance, defendants who violate the price discrimination provisions of the Robinson-Patman Act,[173] which amend the Clayton Act's rules on anticompetitive pricing, commit an unfair method of competition, albeit one which the FTC may be reluctant to enforce today given longstanding concerns that this law protects competitors and not competition.[174] A similar conclusion may apply to the Clayton Act's per

168. *See infra* note 179 (observing $1,000 per violation minimum under New Hampshire Consumer Protection Act claim would exceed single recovery under state antitrust law).

169. FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 454–55 (1986); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 609 (1953) (collecting cases).

170. FTC v. Cement Inst., 333 U.S. 683, 693 (1948).

171. *See* Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 464 (1941) (noting that a monopoly that lessened competition violated the Clayton Act and was also an unfair method of competition); *see also* Averitt, *supra* note 2, at 240–42 (using the Court's reasoning in *Fashion Originators' Guild* to show how the Clayton Act can used to give rise to a section 5 violation).

172. *Cement Inst.*, 333 U.S. at 694 ("[A]lthough all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true.").

173. 15 U.S.C. § 13 (2018).

174. *Compare* FTC v. Fred Meyer, Inc., 390 U.S. 341, 345–46 & n.6 (1968) (acknowledging a section 5 charge alongside a Robinson-Patman violation), *and* Averitt, *supra* note 2, at 238 (accepting Robinson-Patman violations as unfair methods

se prohibition on interlocking directorships where a hypothetical agreement between the corporations would eliminate competition, even if no actual anticompetitive agreement exists.[175]

Conduct that would violate antitrust law, such as a method of competition that actively seeks to monopolize or restrain trade, also falls outside the bounds of fair competition under Little FTC Acts.[176] Because actions that violate state antitrust law give rise to a separate set of remedies under a Little FTC Act, bringing a claim for an unfair method of competition can be advantageous for a plaintiff.[177] The enhanced civil penalties available to public enforcers and statutory floors on the damages that private attorneys general can receive encourage plaintiffs to bring unfairness claims alongside antitrust claims.[178] Since some states provide for only single damages under their antitrust laws, this statutory minimum can greatly enhance recoveries for unfairness.[179]

---

of competition), *with* FTC, Policy Statement Regarding the Scope, *supra* note 20, at 12 (omitting Robinson-Patman from statutes that trigger section 5 violation). On Robinson-Patman, see generally Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J.L. & ECON. 201, 202–03 (2014) (providing background information on Robinson-Patman).

175. 15 U.S.C. § 19(a)(1). For a rare example of this claim under a state Little FTC Act, see Complaint at 16–17, Craigslist, Inc. v. eBay Inc., Case No. CGC-08-475276 (Cal. Sup. Ct. Oct. 10, 2008) ("eBay's acts and conduct as alleged in this Complaint . . . amount to incipient violations and/or violate the policy and spirit of the antitrust laws, including . . . [s]ection 8 of the Clayton Act . . . and they have effects comparable to or the same as a violation of the antitrust laws . . . .").

176. *See, e.g.*, Everett Clinic, PLLC v. Premera, No. 82687-5-I, 2023 WL 21563, at *1, *9–11 (Wash. Ct. App. Jan. 3, 2023) (per se tie); *In re* New Motor Vehicles Can. Exp. Antitrust Litig., 350 F. Supp. 2d 160, 186–87 (D. Me. 2004) (group boycott); Roncari Dev. Co. v. GMG Enters., Inc. 718 A.2d 1025, 1037 (Conn Super. Ct. 1997) (combination or conspiracy in restraint of trade).

177. *See Cement Inst.*, 333 U.S. at 694 (noting different remedies available under Sherman Act and FTC Act).

178. *See* Papageorge, *supra* note 8, at 580–81 (discussing the power of civil penalties as deterrents); People v. Nat'l Ass'n of Realtors, 174 Cal. Rptr. 728, 736 (Ct. App. 1981) (noting civil penalties apply when individual damages are too small); *cf.* Liu v. Amerco, 677 F.3d 489, 493 (1st Cir. 2012) (finding jurisdiction over putative class action in part because the $25 minimum statutory damages available under Massachusetts unfair competition law for each violation would, when aggregated across the class, exceed the $5 million statutory requirement of 28 U.S.C. § 1332(d)(2) even before accounting for the possibility of recovering statutory treble damages of $75 per violation).

179. *See In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., No. 17-MD-2785-TJJ, 2022 WL 226130, at *12–13 (D. Kan. Jan. 26, 2022) (observing $1,000 per violation minimum under New Hampshire Consumer Protection Act claim would exceed single recovery under state antitrust law).

Similarly, a greater number of potential plaintiffs can use an unfairness cause of action to seek redress for anticompetitive conduct than under a private antitrust action. The Supreme Court has interpreted the private right of action contained in section 4 of the Clayton Act to permit only direct purchasers from the antitrust violator to sue, not indirect purchasers.[180] This limitation to direct purchasers is known as the *Illinois Brick*[181] doctrine after the landmark case in which the Court explained its rationales.[182] In addition to reflecting traditional conceptions of proximate cause, the *Illinois Brick* doctrine simplifies the parties necessary for litigation and reduces the difficulties in determining how much individual purchasers are owed, albeit at the expense of denying these victims redress for what are clearly antitrust injuries.[183] State antitrust laws typically possess language similar to section 4 about who can bring suit for an antitrust violation, but rather than follow federal interpretations of that language, a majority of states have passed *Illinois Brick* "repealer" statutes, which expressly allow indirect purchasers to recover.[184]

State Little FTC Acts provide an alternative means for indirect purchasers to recover damages for overcharges.[185] This cause of action is especially prominent in litigation involving plaintiffs suing under the laws of multiple states, such as an insurance company who sues a pharmaceutical manufacturer for artificially inflating the price of a drug for which the insurer reimbursed policyholders.[186] It also frequently arises in those states that have not formally repealed *Illinois Brick*. A minority of those jurisdictions have concluded that the need

---

180. Ill. Brick Co. v. Illinois, 431 U.S. 720, 745–47 (1977); *see also* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520–21 (2019) (applying the *Illinois Brick* rule in the case of iPhone users purchasing apps from Apple's App Store); Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207 (1990) (applying the *Illinois Brick* rule in the case of gas consumers).

181. 431 U.S. 720 (1977).

182. *See Pepper*, 139 S. Ct. at 1520 (discussing that the Court's decision in *Illinois Brick* "established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers").

183. *Pepper*, 139 S. Ct. at 1520; *Ill. Brick*, 431 U.S. at 742, 744–46.

184. Joshua P. Davis & Anupama K. Reddy, *Unintended Consequences of Repealing the Direct Purchaser Rule*, 84 ANTITRUST L.J. 341, 343 & n.5 (2022).

185. *See* Elkins v. Microsoft Corp., 817 A.2d 9, 19–20 (Vt. 2002) (categorizing antitrust and consumer protection responses to *Illinois Brick*).

186. *See, e.g.*, *In re* HIV Antitrust Litig., No. 19-cv-02573-EMC 2023 WL 3006572, at *1–6 (N.D. Cal. Apr. 18, 2023); *In re* Namenda Indirect Purchaser Antitrust Litig., 338 F.R.D. 527, 537, 552–55, 572–75 (S.D.N.Y. 2021); Picone v. Shire PLC, No. 16-cv-12396 ADB, 2017 WL 4873506, at *15–19 (D. Mass. Oct. 20, 2017).

for harmony between state and federal law and concern about circumventing antitrust law require them to deny recovery to indirect purchasers under their unfairness laws.[187]

But simply because federal, or even state, antitrust law imposes a directness requirement does not change the conclusion that conduct which violates the antitrust laws remains unfair.[188] After all, if the FTC could determine that an act that violates antitrust law also constitutes an unfair method of competition, so too should the standard of unfairness contained in Little FTC Acts extend to the same anticompetitive conduct. Hence, most states without *Illinois Brick* repealers have correctly reasoned that Little FTC Acts affording a remedy to "any person injured" provide indirect purchasers harmed by price fixing or similar conduct with a cause of action.[189] Rather than considering these unfair methods claims as circumventing antitrust law, application of *Illinois Brick* to unfairness laws would stymie their objectives of providing recovery for those harmed by clearly

187. *See* Abbott Lab'ies, Inc. (Ross Lab'ies Div.) v. Segura, 907 S.W.2d 503, 506–07 (Tex. 1995) (holding that the claims of consumers, as indirect purchasers, were not actionable under the Texas Deceptive Trade Practices-Consumer Protection Act because recovery would have been barred if the claim was brought under the Texas Free Enterprise and Antitrust Act); Blewett v. Abbott Lab'ies, 938 P.2d 842, 846–47 (Wash. Ct. App. 1997) (ruling that the indirect consumers of pharmaceutical drugs were not injured by antitrust activity and did not have standing to sue under the Consumer Protection Act); *see also* Johnson v. Microsoft Corp., 834 N.E.2d 791, 800–01 (Ohio 2005) (dismissing claims filed under Ohio's Consumer Protection Act and common law because Ohio antitrust statute "provides the exclusive remedy for" claims of "monopolistic pricing practices"); Sickles v. Cabot Corp., 877 A.2d 267, 277 (N.J. Super. Ct. App. Div. 2005) (rejecting indirect purchasers' claims of antitrust violations under the New Jersey Antitrust Act); Gaebler v. N.M. Potash Corp., 676 N.E.2d 228, 229–30 (Ill. App. Ct. 1996) (dismissing an indirect purchaser class action because such claim was precluded by the Illinois Antitrust Act).

188. *Cf.* California v. ARC Am. Corp., 490 U.S. 93, 101–03 (1989) (observing that federal antitrust law "supplement[s]" state antitrust law and does not preclude *Illinois Brick* repealers).

189. LaChance v. U.S. Smokeless Tobacco Co., 931 A.2d 571, 576–77 (N.H. 2007); Ciardi v. F. Hoffman-La Roche, Ltd., 762 N.E.2d 303, 307–12, 311 n.17 (Mass. 2002); Arthur v. Microsoft Corp., 676 N.W.2d 29, 35 (Neb. 2004); Elkins v. Microsoft Corp., 817 A.2d 9, 20 (Vt. 2002); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 104, 110 (Fla. Dist. Ct. App. 1996); *see also* Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 148 P.3d 1179, 1215 (Haw. 2006) (holding that "any person may bring a claim of unfair methods of competition based upon conduct that could also support a claim of unfair or deceptive acts or practices").

anticompetitive practices.[190] But there are still limits. Permission to bring this cause of action does not excuse the need to satisfy traditional concepts of standing and remoteness.[191] And other defenses and limitations to antitrust statutes that derive from constitutional or prudential concerns rather than textual interpretation may still apply with equal force to state Little FTC Acts.[192]

### *B. Violations of Other Laws*

Unfair methods of competition can constitute tortious conduct under common law, and legislatures can also pass laws against certain

190. *Arthur*, 676 N.W.2d at 35 ("The clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce."); *LaChance*, 931 A.2d at 579 (noting purpose "to provide broad protection for consumers"); *Mack*, 673 So. 2d at 110 (reasoning harmonization with *Illinois Brick* would deprive indirect purchasers of any remedy contrary to purpose of the unfairness law).

191. *See* Kanne v. Visa U.S.A. Inc., 723 N.W.2d 293, 300–01 (Neb. 2006); Vacco v. Microsoft Corp., 793 A.2d 1048, 1064–67 (Conn. 2002); *see also Ciardi*, 762 N.E.2d at 313 (distinguishing proof of elements from ability to assert claim as indirect purchaser).

192. For instance, Little FTC Acts may incorporate state-action immunity, which shields certain anticompetitive conduct on the part of state government or authorized private parties from antitrust scrutiny. Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200, 212 (N.C. 1989) (importing state-action immunity from Sherman Act to North Carolina unfair competition law); *see* Parker v. Brown, 317 U.S. 341, 351 (1943) (creating this doctrine to respect state sovereignty). Courts also commonly apply the *Noerr-Pennington* doctrine, which protects companies that petition the government for anticompetitive legislation or administrative action; many courts have reasoned this defense derives from the First Amendment and so transcends a mere gloss on the Sherman Act. E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961) (holding that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws"); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (holding that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition"); *see also* Suburban Restoration Co. v. AMCAT Corp., 700 F.2d 98, 100–02 (2d Cir. 1983) (debating and ultimately applying the *Noerr-Pennington* doctrine to Connecticut law after concluding that it is rooted in the First Amendment more so than the Sherman Act); Salem Grain Co. v. Consol. Grain & Barge Co., 900 N.W.2d 909, 916–24 (Neb. 2017) (adopting *Noerr-Pennington* under Nebraska law); Green Mountain Realty Corp. v. Fifth Est. Tower, LLC, 13 A.3d 123, 128–31 (N.H. 2010) (applying *Noerr-Pennington* to New Hampshire law). *But see Noerr*, 365 U.S. at 132 n.6 (resting this defense on the Sherman Act without reaching separate First Amendment theory); Geomatrix, LLC v. NSF Int'l, 82 F.4th 466, 490–92 (6th Cir. 2023) (Murphy, J., concurring in part) (explaining that state adoption of *Noerr-Pennington* as a constitutional rule stretches the First Amendment too far).

practices on the ground that they are unfair.[193] The FTC has likewise targeted numerous practices that would be condemned under common law as unfair competition, such as coercion and misrepresentations.[194] Under the Cigarette Rule approach to unfairness, a violation of public policy "as it has been established by statutes, the common law, or otherwise" could serve as a basis for unfairness.[195] But the FTC backed away from this approach in the 1980 Unfairness Policy, reasoning that violations of laws or public policies indicated a substantial consumer injury but were of less importance by themselves.[196] And in its most recent guidance on unfair methods of competition, the Commission took the position that "violations of generally applicable laws . . . such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition."[197]

Under Little FTC Acts, however, not only are statutory violations routinely deemed unfair methods of competition, but they may constitute a "per se" violation without showing any independent harm to the competitive process.[198] At the narrowest, the legislature can declare certain conduct to be unfair, either by enumerating it in the unfairness law itself or by cross-referencing its remedy in other statutes.[199] At the broadest, it could declare that a violation of any other

193. Restatement (Third) of Unfair Competition § 1(b) cmt. F, Statutory Note (Am. Law Inst. 1995); see also id. at cmt. H. ("A competitor may also be subject to liability to other participants in the market if its methods of competition violate generally applicable principles of tort and contract law.").

194. *Compare* FTC v. Eastman Kodak Co., 274 U.S. 619, 627–28 (1927) (Stone, J., dissenting) (listing actions blocked by FTC), *with* Restatement (Third) of Unfair Competition § 1 (providing modern common law rule of liability for deceptive marketing, trademark infringement, or appropriation of trade value).

195. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

196. *Policy Statement on Unfairness, supra* note 65.

197. FTC, Policy Statement Regarding the Scope, *supra* note 20, at 8.

198. Klem v. Wash. Mut. Bank, 295 P.3d 1179, 1187 (Wash. 2013) (en banc); Davis v. Four Seasons Hotel Ltd., 228 P.3d 303, 321 (Haw. 2010); *see* Sawchak, *supra* note 8, at 1890 (distinguishing "per se violations" from "unfair methods of competition").

199. *See* Sawchak, *supra* note 8, at 1893–96; Albuquerque Cab Co. v. Lyft, Inc., 460 F. Supp. 3d 1215, 1222 (D.N.M. 2020) (discussing N.M. Stat. Ann. § 65-2A-33(J), which allows anyone injured by unauthorized transportation service to sue under the New Mexico Unfair Practices Act); *see also* Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 719 P.2d 531, 538–39 (Was. 1986) (en banc) (explaining that legislature can declare per se violation of public interest, unfairness, or both).

law—state or federal—is by definition unfair.[200] Under this approach, exemplified by California's ban on "unlawful" methods as a category distinct from "unfair" violations, a Little FTC Act becomes a universal cause of action against "anything that can properly be called a business practice and that at the same time is forbidden by law."[201] Because the unfair method is the action that independently violated that other law, not the bare violation itself, plaintiffs should be able to recover under a Little FTC Act even when that other law contains no private right of action, although criminal laws under which no private party could ever be able to recover likely do not provide this basis of unfairness.[202]

Such a broad scope can muddy the already unclear meaning of "unfairness" when enforcement of these laws does little to promote competition, at least as understood in antitrust law as enhancing consumer welfare or expanding output.[203] Consider the challenges brought by taxicab companies against Uber and other rideshare companies. Allowing competitors to enforce laws designed to protect incumbents from new entrants or technologies, such as taxi medallions and limits on where drivers can collect or deposit passengers, strengthens a regulatory monopoly and prevents new entrants from offering better prices or service.[204] For those reasons, antitrust claims against Uber and other rideshare companies are unlikely to succeed.[205]

---

200. *Cf.* 940 Mass. Code Regs. 3.16 (3)–(4) (2023) (declaring unfair violations of state laws protecting public health, safety, or welfare, the FTC Act, or federal consumer protection law).

201. Farmers Ins. Exch. v. Superior Ct., 826 P.2d 730, 734 (Cal. 1992) (quoting Barquis v. Merch. Collection Ass'n. 496 P.2d 817, 830 (Cal. 1972)).

202. *Compare* Schiff v. Liberty Mut. Fire Ins., 520 P.3d 1085, 1098–99 (Wash. Ct. App. 2022) (reasoning that unfair competition law provides private consumer remedy lacking in insurance code), *and* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003) (describing "borrowing" of statutory violations), *with* Action Ambulance Serv., Inc. v. Atlanticare Health Servs., Inc., 815 F. Supp. 33, 40 (D. Mass. 1993) (referencing State Med. Oxygen & Supply, Inc. v. Am. Med. Oxygen Co., 750 P.2d 1085, 1087 (Mont. 1988)) (concluding that legislature did not intend state Consumer Protection Act to enforce criminal anti-kickback statutes).

203. *See* Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l, LLC, 165 F. Supp. 3d 937, 952–53 (S.D. Cal. 2016) (observing that Lanham Act violation satisfied unlawful claim under California's Unfair Competition Law even when no anticompetitive practices satisfied unfairness prong).

204. *See* Milner, *supra* note 2, at 167; Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 86 (2020).

205. *See, e.g.*, Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 340–41 (3d Cir. 2018) (holding that the appellants failed to allege truly anticompetitive conduct

Many courts have similarly concluded that violations of local taxi regulations do not constitute an unfair method of competition.[206] Echoing the older concepts of the Cigarette Rule geared toward unfair acts and practices, they reason that violation of these rules or laws are not so unscrupulous to render them unfair, especially when municipal authorities themselves appear disinclined to enforce them.[207] But what is scrupulous in one jurisdiction may not appear so to another, leading others to apply the same Cigarette Rule standards to conclude that taxi drivers may bring suit for the unfair method of violating these regulations.[208]

The sounder basis for these suits rests on whether plaintiffs can demonstrate causation between Uber's regulatory violations and the loss of business to this rival—in other words, harm generated by a means of competition that the legislature has expressly declared to be unlawful.[209] A successful claim should show that the actual injury suffered—lost fares that would otherwise have been obtained—resulted from the competitive advantage not so much in costs but in pricing or service that Uber gained by violation of these rules.[210] For

---

because inundating the market with Ubers was not anticompetitive, but rather furthered competition; Uber's ability to operate at a lower cost is not anticompetitive; and finally, Uber's hiring of former taxicab drivers in this case was not anticompetitive).

206. 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:16 n.6 (5th ed. 2023 update) (summarizing case law).

207. Malden Transp., Inc. v. Uber Techs., Inc., 404 F. Supp. 3d 404, 419–20 (D. Mass. 2019), *aff'd*, *sub nom.* Anoush Cab, Inc. v. Uber Techs., Inc., 8 F.4th 1, 21 (1st Cir. 2021) (noting among other reasons that Boston issued fewer than 500 citations out of over 29 million trips); Greenwich Taxi, Inc. v. Uber Techs., Inc., 123 F. Supp. 3d 327, 341–42 (D. Conn. 2015) (concluding plaintiffs failed to establish violation of public policy or immoral or unethical conduct under the Cigarette Rule); *see also* Checker Cab Phila., Inc. v. Uber Techs., Inc., 689 F. App'x. 707, 709–10 (3d Cir. 2017) (concluding that violations of state law do not constitute common law unfair competition).

208. *See* Green v. Garcia-Victor, 248 So. 3d 449, 454–56 (La. Ct. App. 2018); *see also infra* Section II.D (discussing the extension of unfair methods of competition to violations of public policy).

209. *Malden*, 404 F. Supp. 3d at 418 (requiring causal connection between loss suffered and the unfair practice); *see also* Diva Limousine, Ltd. v. Uber Tech., Inc., 392 F. Supp. 3d 1074, 1091–92 (N.D. Cal. 2019) (considering causal connection between the injury and Uber's conduct to establish Article III standing).

210. Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *6–7 (D. Mass. Mar. 27, 2014) (allowing claim law that Uber unfairly competes by "operating" without incurring the costs of regulation); *Malden*, 404 F.

instance, a taxi company could quantify the link between Uber's violations and the prices it charges or demonstrate that Uber could not have set prices so low if not for cost savings engendered through these violations.[211] Or it could argue that Uber's entry into a market did not change the overall demand for rides, and so Uber's violations allowed it to capture business that otherwise would have gone to regulated taxis if not for the cost-price distinction.[212] In contrast, if plaintiffs cannot show that this violation caused Uber's market advantage, including if they themselves are guilty of the same unlawful conduct, then the bare violation is not a method of competition at all, let alone an unfair one, and is actionable only under the predicate law or regulation by the appropriate parties.[213]

### *C. Violations of the Spirit of the Antitrust Laws*

Beyond the strict letter of law, unfair methods of competition under section 5 of the FTC Act encompass violations of the spirit of the antitrust laws, that is, "trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."[214] The leading treatise on antitrust law posits that the spirit of the antitrust laws is no different than the letter of antitrust law, or at least such core principles as the rule of reason, except that it extends beyond the literal confines of antitrust

---

Supp. 3d at 416–18 (considering causation between Uber, declining taxi ridership, and lost value of taxi services while critiquing missing variables in expert reports); *see also* Albuquerque Cab Co. v. Lyft, Inc., 460 F. Supp. 3d 1215, 1224 n.3 (D.N.M. 2020) (declining to address whether causation was required because plaintiff alleged sufficient connection between violations and injuries regardless).

211. *Diva Limousine*, 392 F. Supp. 3d at 1093 ("Diva's allegations support the inference that Uber could not have undercut market prices to the same degree without misclassifying its drivers to skirt significant costs.").

212. *Albuquerque Cab*, 460 F. Supp. 3d at 1225.

213. *Compare* Overton v. Uber Techs., Inc., 333 F. Supp. 3d 927, 946–47 (N.D. Cal. 2018) ("We do not know what Uber's increased costs would be if it registered, . . . how much, if at all, Uber's pricing of rides will be affected, and whether any change in Uber's pricing will affect Plaintiffs' business."), *with Diva Limousine*, 392 F. Supp. 3d at 1093–94 (distinguishing *Overton* as failing to show detailed cost-savings).

214. FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); *see also* FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE, *supra* note 20, at 13–16 (illustrating that conduct found to violate section 5 includes "conduct that tends to cause potential harm similar to an antitrust violation" even if it is not expressly covered by the "literal language of the antitrust laws"). *See generally* Averitt, *supra* note 2, at 251–71 (arguing that the original legislative purpose of section 5 was not limited to only overt antitrust violations but also to fill any "gaps in antitrust laws").

statutes to prevent their circumvention.[215] Canonical examples of section 5 enforcement based on the spirit of the antitrust laws thus include mergers that would be unlawful under section 7 of the Clayton Act were they to occur between corporations, the sole type of business organization that the law formerly addressed.[216] The spirit of the antitrust laws extends liability under the Robinson-Patman Act to buyers who knowingly receive unlawful advertising allowances, not just sellers as stated in the statutory text.[217] And it allows the FTC to penalize those who offer an invitation to collude but are rebuffed, despite the Sherman Act saying nothing about attempted collusion.[218] At the same time, the spirit of the antitrust laws is not so broad as to allow section 5 to target behavior that is entirely unproblematic under the antitrust laws, such as unintentional monopoly or conscious parallelism.[219]

Section 5's coverage of the spirit of the antitrust laws has routinely suggested that Little FTC Acts also reach conduct that would otherwise escape the clutches of antitrust law.[220] Methods that do not technically satisfy a standard category of analysis under antitrust law may still be unfair if they unreasonably restrain competition.[221] At the same time, antitrust law requires a harm to competition, not a competitor, so it stands to reason that methods of competition that are unfair to the spirit of antitrust law must also harm competition.[222] A claim of

---

215. *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 302h1.

216. *In re* Beatrice Foods, 67 F.T.C. 697, 725–26 (1965).

217. Grand Union Co. v. FTC, 300 F.2d 92, 96–99 (2d Cir. 1962).

218. *In re* Alifraghis, 158 F.T.C. 213, 235 & n.1 (2014).

219. *See* E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 130, 137 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573, 574–76 (9th Cir. 1980); Off. Airline Guides, Inc. v. FTC, 630 F.2d 920, 927–28 (2d Cir. 1980); FTC v. Abbott Lab'ies, 853 F. Supp. 526, 533, 535–37 (D.D.C. 1994).

220. *See* Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 878–79 (Haw. 1999), *superseded by statute on other grounds*, HAW. REV. STAT. § 205A-22 (2023), *as recognized in* Davis v. Four Seasons Hotel Ltd., 228 P.3d 303, 309 (Haw. 2010) (noting 2002 Haw. Sess. Laws Act 229, § 2, page 916–17 amended § 205A-22); State v. Black, 676 P.2d 963, 968 (Wash. 1984) (en banc); Matanuska Maid, Inc. v. State, 620 P.2d 182, 185 (Alaska 1980).

221. *Cf.* Honorable Allen R. Carter, 1977 S.C. Op. Atty. Gen. 161, No. 77-209, 1977 WL 24551 (July 6, 1977) (reasoning that even if bank lending agreement was not technically a tie, it was still unfair for restraining trade).

222. *See* Batson v. Live Nation Ent., Inc., 746 F.3d 827, 831 (7th Cir. 2014) (declining to ban ties when procompetitive); Omnitech Int'l, Inc. v. Clorox Co., 11 F.3d 1316, 1331–33 (5th Cir. 1994) (concluding no injury to ability to compete); Elgen Mfg. Co.

unfairness based on the spirit of the antitrust laws hence should begin by defining the markets in which these harms occur, just as it is often the first step in evaluating potential antitrust violations.[223] Next, the court must determine whether a harm to competition occurred within that market. Some conduct that violates the spirit of the antitrust laws causes no competitive injury, such as most rebuffed invitations to collude, and so cannot provide the basis of a private damages claim under a state law even if the FTC or state attorney general could enjoin future attempts.[224] Even if that conduct does cause some private injury, it could still be justified for enhancing competition overall.[225] Under the rule of reason, conduct that would be deemed pro-competitive under the antitrust laws cannot violate their spirit in a Little FTC analysis.[226] Conduct that lays entirely outside of the scope of the antitrust laws—and section 5 of the FTC Act—also remains immune to claims based on antitrust's spirit under Little FTC Acts, such as consciously parallel conduct among competitors that occurs without

---

v. Mac Arthur Co., No. 21-cv-10034-JST, 2022 WL 1859353, at *3 (N.D. Cal. July 29, 2022) (noting that claim of interference with distributor's contracts focused on distributor and not competition or spirit of antitrust); Van Hoose v. Gravois, 70 So. 3d 1017, 1023 (La. Ct. App. 2011) (reasoning that failure to allege injury to competition precluded success under Louisiana law).

223. *See* Kaiser Found. Health Plan, Inc. v. Haw. Life Flight Corp., No. 16-00073 ACK-KSC, 2017 WL 1534193, at *11 (D. Haw. Apr. 27, 2017) ("Such allegations about the market are critical for concluding that injury to [competitor] converges with injury to the market."); MGA Ent., Inc. v. Mattel, Inc., No. CV 05-2727 NM (RNBx), 2005 WL 5894689, at *1, *6 (C.D. Cal. Aug. 26, 2005) (sustaining unfairness claim based on spirit of antitrust laws in part after detailed allegation of "fashion doll market"); People's Choice Wireless, Inc. v. Verizon Wireless, 31 Cal. Rptr. 3d 819, 823–26 (Ct. App. 2005) (dismissing unfairness claim focused on intrabrand competition).

224. *See* Liu v. Amerco, 677 F.3d 489, 491 (1st Cir. 2012) (noting that failed price fixing agreements normally do not harm consumers but could have here when competitor raised prices as part of failed overture).

225. *See* State v. Black, 676 P.2d 963, 969 (Wash. 1984) (en banc) (weighing legitimate business needs against anticompetitive conduct); Evanston Motor Co. v. Mid-S. Toyota Distribs., Inc., 436 F. Supp. 1370, 1374 n.6 (N.D. Ill. 1977) (evaluating unfairness claim against group boycott under rule of reason); *see also* Mont. Interventional & Diagnostic Radiology Specialists, PLLC v. St. Peter's Hosp., 355 P.3d 777, 779–80 (Mont. 2015) (alleging that termination of exclusive dealing agreement constituted "unreasonable restraint of trade in violation of the Montana Unfair Trade Practices Act").

226. The classic statement of this rule is Chavez v. Whirlpool Corp., 113 Cal. Rptr. 2d 175, 184 (Ct. App. 2001).

collusion or agreement[227] or licensing claims that sound in contract, patent, or tort law.[228]

The landmark California case of *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*[229] shows how the spirit of the antitrust laws must be tethered to their letter. The Los Angeles cellular telephone service market was a federally licensed duopoly, including L.A. Cellular.[230] To increase demand for cellular services, L.A. Cellular sold cellphones below-cost, leading Cel-Tech and other phone retailers to sue under California's Unfair Competition Law.[231] The California Supreme Court disapproved of the Cigarette Rule as "too amorphous" in the Rule's references to public policy and other phrases that "provide too little guidance to courts and businesses."[232]

The California Supreme Court instead established a two-part framework to determine how a competitor could show that a rival's method of competition was unfair. First, although actions that the state legislature expressly permits cannot be unfair, the "mere failure to prohibit an activity does not prevent a court from finding it unfair."[233] Second, drawing on federal section 5 jurisprudence, the court held that an unfair practice must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."[234] In other words, an "unfair" practice under California

---

227. *Black*, 676 P.2d at 969 (concluding independent actions not unfair); Cameron v. New Hanover Mem'l Hosp., Inc., 293 S.E.2d 901, 916, 918–20 (N.C. Ct. App. 1982) (requiring group behavior beyond "individual expressions of like personal opinion"); *see also* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("'[C]onscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."). *But see* L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477, 488 n.10 (M.D.N.C. 1985) (suggesting unfairness fills Sherman Act's "gap" when a single company acts in multiple capacities).

228. *See In re* Qualcomm Antitrust Litig., No. 17-md-02773-JSC, 2023 WL 121983, at *14, *21 (N.D. Cal. Jan. 6, 2023) (concluding after *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020), that conduct which was pro-competitive could not be unfair); Intel Corp. v. Fortress Inv. Grp., LLC, 511 F. Supp. 3d 1006, 1029 (N.D. Cal. 2021) (reasoning violation of essential patent licensing agreement, which is not an antitrust violation, could not violate spirit of antitrust law); AIDS Healthcare Found., Inc. v. Gilead Scis., Inc., No. C 16-00443 WHA, 2016 WL 3648623, at *9 (N.D. Cal. Jul. 6, 2016) (allowing exercise of patent monopoly).

229. 973 P.2d 527 (Cal. 1999).

230. *Id.* at 552.

231. *Id.* at 552–53.

232. *Id.* at 543.

233. *Id.* at 542.

234. *Id.* at 542–44.

law is one "that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[235] Applying the framework to L.A. Cellular's conduct, the California Supreme Court reasoned that L.A. Cellular might leverage its protected status in the cellular service market to harm competition in the cellular phone market and remanded the case for additional factfinding by the plaintiffs, noting that L.A. Cellular "may also, of course, present a defense."[236]

This "tethering approach" to evaluating unfairness suggests that courts should evaluate conduct for whether it would generate the same economic harms as conduct prohibited under antitrust law.[237] Where a plaintiff has alleged harm only to itself, not to competition, the spirit of the antitrust laws cannot justify deeming that conduct unfair, even if a claim for tortious interference may yet succeed.[238] In practice, many courts have reasoned that this analysis requires them to consider "unusual" aspects of market structure, such as Cel-Tech's government-licensed duopoly, in which the costs of ignoring a potentially harmful

---

235. *Id.* at 544.

236. *Id.* at 546–47. As a dissent noted, it was doubtful that this harm existed. Regulators required L.A. Cellular to sell airtime to retailers under cost, likely allowing them to match these prices on bundled sales, and there was no indication that L.A. Cellular would recoup its losses. *Id.* at 554–56 (Kennard, J., concurring in part).

237. *Compare* Aspex Eyewear, Inc. v. Vision Serv. Plan, 389 F. App'x 664, 666 (9th Cir. 2010) (observing that driving out one of 450 frame companies would not diminish competition), *and* Johnstech Int'l Corp. v. JM Microtechnology SDN BHD, No. 14-cv-02864-JD, 2016 WL 4182402, at *5 (N.D. Cal. Aug. 8, 2016) (observing plaintiff offered no proof that defendant had market power to exclude competitor or restrain trade), *with* hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1117 (N.D. Cal. 2017), *aff'd*, 938 F.3d 985 (9th Cir. 2019) (concluding LinkedIn's efforts to block data-scraper unfairly leveraged dominant position in professional networking market to monopolize data analytics market), *and* Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp., No. 15-cv-1576-AJB-RBB, 2016 WL 4087302, at *12–13 (S.D. Cal. Aug. 1, 2016) (sustaining unfairness claim based on monopolistic conduct in electrical transmission services).

238. *See* Elgen Mfg. Co. v. Mac Arthur Co., No. 21-cv-10034-JST, 2022 WL 18539353, at *3–4 (N.D. Cal. July 29, 2022) (allowing tortious interference but not unfairness claim as scattered references to competition established harm only to competitor); City of San Jose v. Off. of Comm'r of Baseball, No. C-13-02787 RMW, 2013 WL 5609346, at *13–14 (N.D. Cal. Oct. 11, 2013) (dismissing unfairness claim under baseball exception but sustaining tortious interference claims); *see also* hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1191, 1194 n.10 (9th Cir. 2022) (noting tortious interference and unfairness claims overlapped).

practice may outweigh those of misidentifying competitive conduct as unfair.[239]

### *D. Violations of Public Policy*

Beyond violations of the letter and spirit of antitrust law, unfair methods of competition under section 5 of the FTC Act may extend to violations of "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[240] Following the Supreme Court's observation that the drafters of section 5 intended that the agency would be able to apply this definition to novel forms of competition, many states have agreed that their own Little FTC Acts must similarly extend to violations of public policy even when the legislature has not passed a law expressly condemning that conduct.[241] But at the same time, the meaning of unfairness under state laws must have some fixed or objective meaning, no matter its level of deference to federal law, or else applying this standard would constitute nothing more than judges and juries "impos[ing] their own notions of the day as to what is fair or unfair."[242]

The FTC's recent 2015 and 2022 policy statements on unfair methods of competition, although perhaps not the most historically

---

239. Creative Mobile Techs., LLC v. Flywheel Software, Inc., No. 16-cv-02560-SI, 2017 WL 679496, at *6 (N.D. Cal. Feb. 21, 2017) (quoting Synopsys, Inc. v. ATopTech, Inc., No. C 13-2965 MMC, 2015 WL 4719048, at *10 (N.D. Cal. Aug. 7, 2015)); *cf.* Process Specialties, Inc. v. Sematech, Inc., No. CIV. S-00-414 FCD PAN, 2002 WL 35646610, at *17–18 (E.D. Cal. Jan. 18, 2002) (allowing unfairness claim against federally-authorized consortium that abused privileged position); Tel. Servs., Inc. v. Gen. Tel. Co. of the S., 373 S.E.2d 440, 442 (N.C. Ct. App. 1988) (considering regulated utility might not be permitted to refuse to deal).

240. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

241. *See* Robert's Haw., Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 884 n.34 (Haw. 1999) (noting that even though Hawaii's unfair competition law does not define unfair competition, it was construed to be a flexible tool to stop and prevent unfair, fraudulent, or deceptive business practices); *see also* Exxon Mobil Corp. v. Att'y Gen., 94 N.E.3d 786, 791–92 (Mass. 2018) (observing that evaluations of unfairness under the Massachusetts Little FTC Act are "neither dependent on traditional concepts nor limited by preexisting rights or remedies").

242. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 541 (Cal. 1999); *see* Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 719 P.2d 531, 535–38 (Wash. 1986) (reasoning that statutory designation of per se unfair practices is preferable to judicial determination); *see also* Dep't of Legal Affs. v. Rogers, 329 So. 2d 257, 262–63 (Fla. 1976) (citing State v. Reader's Digest Ass'n, 501 P.2d 290, 301 (Wash. 1972)) (holding "unfairness" usage in a Florida Little FTC statute not so vague as to violate due process).

accurate or clear-cut guidance that the agency could have issued, provide the most consistent nationwide standards for evaluating when behavior is unfair based on public policy.[243] Yet despite the prevalence of harmonization provisions in Little FTC Acts, this contemporary federal guidance has been roundly ignored under state law. Only one judicial opinion has ever cited the 2015 Policy Statement that defined unfair methods of competition based on the rule of reason.[244] That case involved Apple's claim that the transfer of standard essential patents to an investment group's "patent assertion entities" violated California's Unfair Competition Law because the new owners were not subject to the fair, reasonable, and non-discriminatory licensing terms of the original patent holders.[245] The district court first noted that the Ninth Circuit had already determined, in a case the FTC lost, that violations of a standard-setting commitment are not antitrust violations and hence this transfer of standard essential patents was not unlawful or unfair under California's law.[246] It then cited the 2015 Policy Statement almost as an afterthought for the proposition that section 5 extends to violations of the spirit of the antitrust laws and incipient antitrust violations—without any application of that statement's substantive test.[247]

Given this ignorance of the FTC's former stance on unfair methods of competition, it should not come as a surprise that courts have not yet engaged with the revised policy statement on unfair methods of competition from late 2022. As of 2023, only one court order has acknowledged this document, confusing it with FTC guidance on unfair or deceptive acts or practices and declining to follow it after reasoning that California had not extended *Cel-Tech*'s tethering approach to unfairness claims brought by consumers.[248]

---

243. *See* Milner, *supra* note 2, at 157–68 (critiquing the 2015 and 2022 Policy Statements in light of section 5's original meaning and goals of modern competition policy).

244. *See supra* notes 71–73 and accompanying text (describing the FTC's former policy that determination of unfair methods of competition should track the statutory and policy concerns of antitrust law).

245. Intel Corp. v. Fortress Inv. Grp. LLC, 511 F. Supp. 3d 1006, 1017–18 (N.D. Cal. 2021).

246. *Id.* at 1029–30 (citing FTC v. Qualcomm, Inc., 969 F.3d 974, 996–97 (9th Cir. 2020)).

247. *See id.*

248. Early v. CSAA Ins. Exch., No. 22CV014132, 2023 WL 3995137, at *4 (Cal. Super. Ct. June 12, 2023).

The 1980 Unfairness Policy that replaced the Cigarette Rule in evaluating UDAP harms provides a second-best model when evaluating public policy violations under Little FTC Acts. The Unfairness Policy's emphasis on consumer harms does not perfectly map on to combatting competitive harms. The requirement that the harm not be reasonably avoidable by consumers has less immediate applicability to competitors who are not purchasing products.[249] And its downgrading of statutory and common law violations as an independent factor ignores not only the legislative role in declaring certain forms of competition to be unfair but also well-established forms of unfair competition that are arguably hypercompetitive from an antitrust standpoint, such as trademark infringement.[250] But its balancing test between the injury to consumers and the benefits to competition at least somewhat mirrors the objective rule of reason approach that ensures conduct that yields overall social benefits may continue.[251] And its rejection of morality certainly reduces the ability of courts to apply their own subjective notions of fairness and penalize nonconforming businesses.[252]

Yet few jurisdictions acknowledge the Unfairness Policy, even for UDAP cases.[253] When Congress mandated that the FTC use the Unfairness Policy to determine UDAP violations in 1994, it went to great lengths to assure state attorneys general that they would remain

---

249. *See supra* notes 71–73 and accompanying text (noting the emphasis on the promotion of consumer welfare as a guiding principle when there is not a direct statutory violation).

250. *See supra* Section II.B; AREEDA & HOVENKAMP, *supra* note 4, ¶ 780.

251. Such balancing could be especially important in technologically dynamic sectors, where fast-changing technologies challenge conventional commercial standards. *Cf.* Bristol Tech. Inc. v. Microsoft Corp., 42 F. Supp. 2d 153, 158–59, 174–75 (D. Conn. 1998) (describing how Microsoft's decision to not renew a contract with a particular programmer, specifically for software to run Windows programs on UNIX, was not an immoral or unethical choice and could actually strengthen Windows's competitiveness).

252. Even the Cigarette Rule acknowledged that the FTC cannot issue "regulation which has no purpose other than . . . censoring the morals of business men." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (codified at 16 CFR §§ 408–60) (quoting FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 313 (1934)).

253. *See* Pager & Foos, *supra* note 7, at 186 (counting six states: Iowa, Florida, Maine, Maryland, Mississippi, and Tennessee); *see also* Michael M. Greenfield, *Unfairness under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1874, 1895–1929 (2000) (examining three states using the Unfairness Policy: Maine, Ohio, and Maryland; and five using the Cigarette Rule: Washington, Illinois, Connecticut, Louisiana, and Massachusetts).

free to select their own approaches under state law.[254] On those occasions where parties ask courts to apply this new standard, several reasons for judicial hesitance have emerged. Some legislatures have expressly codified a different test.[255] In states that enacted their Little FTC Acts while the Cigarette Rule was in effect, courts have suggested that their legislators implicitly adopted the Cigarette Rule as well.[256] Still more courts have concluded that responsibility for adopting a new standard belongs to the legislature, not the judiciary.[257] And some courts are simply reluctant to jettison their own precedent, notwithstanding the harmonization clauses and evolving FTC precedent.[258]

The Cigarette Rule thus remains the most common approach to determining when conduct outside of the letter of the law is unfair.[259] The application of that approach proves difficult because it requires courts to determine when business conduct has violated public policy and morality. States that define such conduct as "rancid" or rising to a "level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce" attempt to draw a line based on the marketplace's own standards of conduct, but mere adjectives give little clarity to this divide.[260] And conduct that arguably

---

254. S. Rep. No. 103-130, at 13 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1776, 1788.

255. *Compare* OKLA. STAT. ANN. tit. 15 § 752(14) (West 2023) (Cigarette Rule), *with* N.D. CENT. CODE ANN. § 51-15-02 (West 2023) (Unfairness Policy).

256. *See* Dep't of Legal Affs. v. Rogers, 329 So. 2d 257, 267 (Fla. 1976) (concluding that Florida intended to incorporate only FTC decisions that preceded passage of its state law). *But see* State v. Reader's Digest Ass'n, 501 P.2d 290, 301 (Wash. 1972) ("Since federal judicial interpretations are Guiding but not Binding, we may consider all relevant federal precedent, including that decided after the enactment of [Washington's Little FTC Act].").

257. Kent Liter. Club of Wesleyan Univ. at Middletown v. Wesleyan Univ., 257 A.3d 874, 900–01 (Conn. 2021).

258. *See* Pager & Foos, *supra* note 7, at 186–87 (articulating some states' reluctance to overturn "decades of state precedent").

259. *Id.* (identifying thirteen states using this approach: Alaska, Hawaii, Illinois, Louisiana, Massachusetts, Missouri, North Carolina, Nebraska, New Hampshire, Oklahoma, Rhode Island, South Carolina, and Vermont).

260. Mass. Emps. Ins. Exch. v. Propac-Mass, Inc., 648 N.E.2d 435, 438 (Mass. 1995); Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979). *Compare Mass. Emps. Ins.*, 648 N.E.2d at 438 (deeming terms such as "rancid" to be "uninstructive" for purposes of judicial interpretation), *with* Fat Bullies Farm, LLC v. Devenport, 164 A.3d 990, 995–96 (N.H. 2017) (employing the "rascality" test), *and* Barrows v. Boles, 687 A.2d 979, 986–87 (N.H. 1996) (adopting the rascality test from Massachusetts and First Circuit caselaw).

possesses procompetitive justification and so would survive the objective balancing tests contained in other FTC guidance documents could conceivably still be deemed immoral or outside the bounds of acceptable competition.[261]

Nevertheless, while frequently encountered references to "fair dealing" or the "morality of the marketplace" suggest an expansive judicial power under Little FTC Acts, in practice, courts have recognized objective limits on when violations of public policy rise to the level of an unfair method of competition.[262] Conduct that is not anticompetitive in an economic sense is unlikely to violate any public policy, rely on immoral means, or injure consumers or businesses to an appreciable degree, especially when compared to conduct that violates antitrust law.[263] Likewise, mere breaches of contract to a single purchaser lay at the "rough edges" of business and are not so unfair as to justify exposing the breacher to the remedies of a Little FTC Act.[264] But a breach accompanied by some independently wrongful act, such as coercion or a course of bad faith dealing, might support an unfairness claim if it demonstrates an intention to harm a specific competitor.[265] This recognition implicitly tracks the prevailing view of

---

261. *Cf.* Molina Healthcare, Inc. v. Celgene Corp., No. 21-cv-05483, 2022 WL 161894, at *11 (N.D. Cal. Jan. 18, 2022) (suggesting whether manipulation of pharmacy samples and patent litigation constituted monopolization would not matter to whether it was immoral or oppressive).

262. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. G (1995); *see* Thomas P. Brown & Dae Ho Lee, *Unfair Practices in the Financial Services Industry: The New Boss Is the Same as the Old Boss*, 81 ANTITRUST L.J. 981, 992 (2017) (recognizing negligence is rarely deemed unfair).

263. *See* Batson v. Live Nation Ent., Inc., 746 F.3d 827, 830–34 (7th Cir. 2014) (concluding a seller's tying of a mandatory parking fee to all concert tickets did not violate any prong of the Cigarette Test); PMP Assocs. v. Globe Newspaper Co., 321 N.E.2d 915, 917–19 (Mass. 1975) (deeming refusal to deal, in the absence of otherwise clear monopolistic or anticompetitive intent, fair under the Cigarette Test).

264. Barrows v. Boles, 687 A.2d 979, 986 (N.H. 1996); *cf.* Triple 7, Inc. v. Intervet, Inc., 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004) (citing Raad v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998)); Bank of Am., N.A. v. Prestige Imps., Inc., 917 N.E.2d 207, 229–30 (Mass. App. Ct. 2009).

265. Reingold v. Swiftships, Inc., 126 F.3d 645, 653–54 (5th Cir. 1997) (deeming a breach of contract by fraud leading to conversion of trade secrets "far more reprehensible than a mere breach of contract" and hence a violation of the Louisiana Unfair Trade Practice Act); Klem v. Wash. Mut. Bank, 295 P.3d 1179, 1189–91 (Wash. 2013) (finding breaches of fiduciary duty by a trustee and notary unfair for purposes of Washington's Consumer Protection Act); Mass. Emps. Ins. Exch. v. Propac-Mass, Inc., 648 N.E.2d 435, 438 (Mass. 1995) (concluding coercive conduct supported unfairness determination).

modern tort law that interference with a specific party's economic expectancies is wrongful only when employing independently wrongful means, shielding sharp dealing or novel methods of competition from liability.[266]

## III. RESTORING THE STATE-FEDERAL BALANCE IN UNFAIR METHODS OF COMPETITION

The key factor that differentiates an unfair method of competition from an unfair act or practice is that it must somehow harm competition. Under one line of analysis, that harm arises from the type of conduct that would violate antitrust law, namely that which unreasonably restrains competition and harms consumers.[267] Under another, actions that are wrongful or illegal under statute or common law constitute unfair methods when they have a clear effect on competitive forces.[268] And actions not formally declared wrongful by standalone law could still be unfair if they result in competitive harms or deploy some independently wrongful technique against rivals.[269]

If a state's law against unfair methods of competition had no consequences beyond its own borders, that state would be free to experiment with adopting varying definitions of unfairness or allowing more lucrative private remedies.[270] But while Little FTC Acts intentionally drew on federal law with the goal of crafting a national approach to combating harms of competition, the laws of each individual state can still impose great costs across jurisdictional lines.[271] Modern antitrust policy strives to avoid over-enforcement, albeit at the

---

266. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 18 cmt. B (AM. L. INST. 2020).

267. *See supra* Section II.A (evaluating unfairness for violating statutory antitrust law).

268. *See supra* Section II.B (evaluating unfairness for violating of non-antitrust statutory or common law).

269. *See supra* Sections II.C–D (evaluating unfairness for violating the spirit of antitrust law or public policy).

270. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

271. *See supra* Sections I.B.1–2 (detailing the mid-century push to expand options for state enforcement and the then-growing state recognition that FTC precedent reduced the application-uncertainty of similarly written laws).

cost of sometimes overlooking truly anticompetitive behavior.[272] It has leaned in this direction both as a matter of law, such as by favoring the rule of reason over per-se rules, and as a matter of agency or prosecutorial discretion in deciding what claims to bring.[273] The FTC Act further limits enforcement to an injunction sought by public authorities, reducing the costs of overenforcement and encouraging the agency to err on the side of curtailing potentially problematic or incipient harms.[274]

When states grant a private right of action for damages, to say nothing of differing rules on who can bring this action, these costs are much higher.[275] Not only can one state's determination on unfairness reverberate outside its borders, but the objective of harmonization may mean that the FTC's own decisions encourage costly follow-on actions under state law.[276] Without clear guidance on when they can be held liable and by whom, businesses may curtail unobjectionable or even

---

272. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–7 (1984) (arguing the old "inhospitality tradition of antitrust" facilitated "erroneous condemnations" of competitive practices, and that a more lenient, nuanced standard is socially preferable). While that evaluation has received criticism for overestimating the costs of false positives and underestimating those of true positives, it remains the dominant paradigm. *See* Herbert J. Hovenkamp, *Antitrust Error Costs*, 24 U. PENN. J. BUS. L. 293, 295–97, 300–03 (2022) (first citing Matsushita Elec. Industrial Co. v Zenith Radio, 475 U.S. 574, 601 (1986) (White, J., dissenting) (discussing the increased likelihood of summary judgments favoring antitrust defendants); then citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414–15 (2004) (discussing the increased likelihood of motions to dismiss favoring antitrust defendants)) (discussing the origins and impact of the "error-cost anti-enforcement bias" advocated for by Judge Easterbrook).

273. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–87, 899, 907 (2007) (explaining reluctance to resort to per se rules and overturning century-old precedent deeming vertical price restraints per se illegal); Roscoe B. Starek II., *Prosecutorial Discretion: A View from the Federal Trade Commission*, 20 REGULATION 24, 25–27 (1997) (explaining the FTC's move from binding rules to case-by-case evaluations of where to intervene as informed by economic and resource considerations).

274. FTC Act, 15 U.S.C. § 45(a)–(b); AREEDA & HOVENKAMP, *supra* note 4, ¶ 302h.

275. *See* Easterbrook, *supra* note 272, at 35 ("[The antitrust injury doctrine] responds to the fact that often the lure of damages (or the ability to raise rivals' costs) induces plaintiffs to challenge conduct that is procompetitive.").

276. *See infra* Section III.C.

procompetitive behaviors rather than risk liability when acting within antitrust law's "gray areas."[277]

This Part discusses ways that state unfairness laws can minimize those error costs and fulfill their role as part of a national competition policy. This solution does not require eliminating the private right of action that is the key to preventing underenforcement of unfairness law by the FTC and overburdened state officials.[278] Instead, states can look to the best practices that have developed under this decentralized system to ensure that enforcement will safeguard both competition and the public interest, the twin requirements of section 5. The FTC itself, moreover, can also act with greater awareness of its impact on local practices.

### *A.* Epic Games *and the National Trouble with State Little FTC Acts*

Epic Games' recent lawsuit against Apple over the alleged monopolization of App Store payments exemplifies how a single state's law against unfair methods of competition can impose error costs on a national scale.[279] Apple maintains a "walled garden" approach to its iOS operating system, using its App Store to control iOS users' access to any app or software.[280] As a condition of access, Apple requires app developers to distribute iOS apps only through the App Store, use Apple's in-app payment system, and not steer or encourage app users to employ alternatives.[281] When Epic, the developer of *Fortnite*, introduced a direct payment option, Apple removed it from the App Store, prompting Epic to sue under federal and state antitrust law as well as California's Unfair Competition Law.[282]

After a sixteen-day bench trial, the district court agreed with Apple that no antitrust violations had occurred, a conclusion that the Ninth

---

277. *In re* Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 58–60 (E.D. Pa. 2007) (quoting the deposition of William Howes, CEO of linerboard manufacturer Temple-Inland, discussing a phone conversation with another party to the lawsuit).

278. *Compare* Cooper & Shepherd, *supra* note 14, at 969–77 (criticizing the overenforcement of unfair trade practice claims incentivized by state damages remedies and suggesting that plaintiffs be required to demonstrate actual harm), *and* Graybeal, *supra* note 7, at 1975–77 (noting private remedies can lead to overenforcement), *with* Pridgen, *supra* note 6, at 915–19 (articulating the rationale for private remedies).

279. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 922–23 (N.D. Cal. 2021), *aff'd in part, rev'd in part and remanded*, 67 F.4th 946, 968 (9th Cir. 2023).

280. *Id.* at 922–23.

281. *Epic Games*, 67 F.4th at 968.

282. *Id.* at 968–69.

Circuit ultimately affirmed.[283] As the Ninth Circuit explained, viewing the relevant market for Epic's antitrust claims as mobile-game transactions, Apple's requirements did "impose substantial anticompetitive effects" by foreclosing alternatives to app distribution and payment processing while extracting commissions from developers that were above the rates expected in a competitive market.[284] But these practices passed the rule of reason, as improving device security and user privacy enhanced the competitiveness of iOS and the App Store against Android and other alternatives.[285] That same analysis also defeated Epic's claims of an unlawful tie between app distribution and payment processing and of Apple's monopolization of the market.[286]

The district court recognized that Epic had not demonstrated that Apple's conduct violated the "unlawful" prong of California's Unfair Competition Law, which would have required showing that Apple had transgressed some other statute.[287] And viewing Epic as a potential competitor to Apple for app distribution and payments, the court concluded that Apple's restrictions on in-app payment systems, which were reasonable under the letter of the antitrust laws, also did not violate their spirit under the *Cel-Tech* tethering test.[288]

But the court separately concluded that Apple's anti-steering provisions—which it noted Epic had litigated with a "less fulsome" record than its other antitrust challenges—failed the tethering test because they prevented substitution among transaction platforms.[289] The court reasoned that Apple's anti-steering provisions could raise the costs of obtaining "information about the lifetime costs of" using its iOS system and thereby "create the potential for anticompetitive exploitation of consumers."[290] While Epic had not proven the existence of an "actual lock-in" effect, Apple's anti-steering provisions still risked "an incipient violation of antitrust law" by preventing consumers from

283. *Id.* at 970–72, 998–99 (reviewing the conclusions of the district court).

284. *Id.* at 981, 984.

285. *Id.* at 985–89, 993–94.

286. *Id.* at 994–99. The Ninth Circuit declined to view this tie as per-se unlawful as it occurred in a dynamic software market combining frequent innovation and bundling with first-mover effects. *See id.* at 997–98 (borrowing from United States v. Microsoft Corp., 253 F.3d 34, 89 (D.C. Cir. 2001) (per curiam)).

287. *Epic Games*, 559 F. Supp. 3d at 1052.

288. *Id.* at 1053–54 (citing Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 184 (1999)).

289. *Id.* at 1054–56.

290. *Id.* at 1055 (citing Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 473 (1992)).

making informed choices about iOS and preventing them from switching to transaction platforms other than the App Store.[291]

In the alternative, viewing Epic as a consumer of Apple's services, the district court concluded that the anti-steering provisions failed the balancing test that some California courts continue to apply when someone other than a competitor brings an unfairness claim.[292] This approach essentially tracks the Cigarette Rule except that it weighs the harm caused to individual victims—not to competition or consumers generally—against the utility of the conduct.[293] Under this test, the district court reasoned that unlike "retail brick-and-mortar stores," in which consumers understood the alternatives even in the presence of anti-steering provisions, "Apple had created a new and innovative platform which was also a black box" and prevented consumers from learning about alternatives.[294]

On appeal, Apple did not challenge the application of the tethering and balancing tests directly.[295] Instead, it argued first that where no violation of antitrust law had occurred, its conduct could not be unfair. The Ninth Circuit disagreed, reasoning that conduct could still be unfair "when a federal antitrust claim suffers from a *proof deficiency*, rather than a *categorical legal bar*."[296] Apple next argued that the Supreme Court's approval of anti-steering provisions in *Ohio v. American Express Co.*[297] foreclosed liability, but the Ninth Circuit distinguished that decision as one in which there was insufficient evidence of anticompetitive effects, whereas here evidence showed supracompetitive pricing and excessive profit margins.[298] Apple finally argued that the balancing test required Epic to define a relevant market and evaluate its conduct "similar to the Rule of Reason," but

---

291. *Id.* at 1055–56 (quoting *Cel-Tech*, 20 Cal. 4th at 187).

292. *Id.* at 1055–56.

293. *See* Adams, *supra* note 8, at 392–93 (defining California's balancing test through *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Ct. App. 1984) and *State Farm Fire & Casualty Co. v. Superior Ct.*, 53 Cal. Rptr. 2d 220, 235 (Ct. App. 1996); Cross, *supra* note 8, at 505–09 (2013) (describing the balancing test as a "pre-*Cel-Tech*" and victim-oriented standard "resemble[ing]" the Cigarette Rule).

294. *Epic Games*, 559 F. Supp. 3d at 1056.

295. *Epic Games*, 67 F.4th at 1001.

296. *Id.*

297. 138 S. Ct. 2274 (2018).

298. *Epic Games*, 67 F.4th at 1002. The district court elsewhere noted that *American Express* applied the rule of reason to vertical restraints imposed by a payment operator on merchants in a two-sided market. *Epic Games*, 559 F. Supp. 3d at 1036 (citing *Am. Express Co.*, 138 S. Ct. at 2284).

the Ninth Circuit—citing pre-*Cel-Tech* case law—concluded that California imposed no such requirements.[299]

Perhaps with additional proof Epic could have made a valid antitrust claim stating that the anti-steering provision resulted in an unreasonable aftermarket tie in a pertinent market.[300] Nor should Epic be required to litigate an antitrust claim before turning to its Unfair Competition Law claim when they are separate causes of action.[301] But the way in which the court reached this conclusion raises concerns about a costly bias towards condemning pro-competitive conduct under state law. First, in analyzing what was unfair, the district court made extensive use of California case law but ignored relevant FTC case law and guidance, despite California having held that federal decisions are "more than ordinarily persuasive" when it comes to interpreting what is unfair.[302] In fact, the district court declined to apply the FTC's 1980 Unfairness Policy as an alternative to the tethering and balancing tests, in keeping with the Ninth Circuit's interpretation of California law, and it never referenced the 2015 or 2022 unfair methods policy statements.[303]

Without this guidance, the court may have imposed serious costs on a dynamic technical market without fully considering the circumstances of Apple's conduct. The district court focused on Apple's supracompetitive profits and potential lock-in effects without

---

299. *Epic Games*, 67 F.4th at 1002.

300. *See* Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 464–84 (1992) (holding that evidence of a high up-front product price coupled with necessary, brand-specific service plausibly creates information and switching costs sufficient to contribute to unlawful market power). In Epic's parallel litigation against Google, the jury concluded that Google monopolized the worldwide market (excluding China) for Android app distribution and in-app billing services and engaged in unreasonable restraints of trade in its dealings with app developers and equipment manufacturers, violating state and federal antitrust law; the jury did not separately evaluate Epic's California Unfair Competition Law claim against Google. Verdict Form, *In re* Google Play Store Antitrust Litig., Case 3:20-cv-05671-JD (N.D. Cal. Dec. 11, 2023), ECF No. 606. The district court had not yet decided on Epic's request for injunctive relief against Google when this Article went to print.

301. *But see* Complaint for Injunctive Relief, at 53–55, 58–61, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff'd in part, rev'd in part and remanded*, 67 F.4th 946 (9th Cir. 2023) (No. 20-cv-05640), 2020 WL 12623035 (alleging tying between app distribution and in-app purchases as violation of Sherman Act, California Cartwright Act, and implicitly California Unfair Competition Law).

302. Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543 (Cal. 1999).

303. *Epic Games*, 559 F. Supp. 3d at 1053 n.630.

discussing the potential benefits for competition and consumer privacy as it had earlier in the opinion under the rule of reason.[304] The court also paid heavy attention to the unusual features of this market, similar to *Cel-Tech*'s emphasis on duopoly, even though it had already acknowledged that courts should be extremely hesitant to find ties in dynamic technological markets.[305] Even if courts disregard allegations of pro-competitive benefits at the pleading stage, plaintiffs who cannot establish an unreasonably harmful balance from the record should fail at summary judgment.[306] But after a bench trial, the court failed to acknowledge the evidence that the anti-steering provision could also promote security and privacy for users and distinguish the Apple brand.[307]

Second, the remedy that the district court applied and the Ninth Circuit upheld for this violation of antitrust law's spirit also carried high costs for Apple: a nationwide injunction against imposing anti-

304. *See id.* at 1036–41, 1055–56 (applying the rule of reason to the antitrust claim and separately concluding Apple violated tethering test); *id.* at 1013 (acknowledging that the "competitive effects and justifications for the anti-steering provision are coextensive" with Apple's other restrictions).

305. *Compare Cel-Tech*, 973 P.2d 567 (emphasizing duopoly market), *and Epic Games*, 559 F. Supp. 3d at 1056 (stressing uniqueness of technological platforms), *with Epic Games*, 67 F.4th at 997–98 (expressing caution in technological platforms); *see also* Creative Mobile Techs., LLC v. Flywheel Software, Inc., No. 16-cv-02560-SI, 2017 WL 679496, at *6 (N.D. Cal. Feb. 21, 2017) (suggesting that exclusivity contract that monopolized derivative aftermarket could constitute unfairness if defendant possessed unique market position).

306. *See* Watson Lab'ies, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1116–19 (C.D. Cal. 2001) (granting summary judgment when plaintiff could not prove alleged unfair conduct restricted supplies or raised prices); *cf. In re* Qualcomm Antitrust Litig., No. 17-md-02773-JSC, 2023 WL 121983, at *21 (N.D. Cal. Jan. 6, 2023) (accepting at pleading Apple's claims that there were no countervailing benefits from exclusive dealing in chip licensing under balancing test); *In re* Google Assistant Privacy Litig., 546 F. Supp. 3d 945, 975 (N.D. Cal. 2021) (considering claim that improved products that consumers continued to use outweighed privacy abuses but declining to dismiss complaint at pleading).

307. *Epic Games*, 559 F. Supp. 3d at 1056–57; *see also id.* at 1002–07 (considering security and privacy justifications for Apple's distribution restrictions). For justifications of Apple's restrictions, see Brief of Amicus Curiae the Center for Cybersecurity Policy and Law, at 6–22, *Epic Games*, 67 F.4th 946 (No. 21-16506), https://cdn.ca9.uscourts.gov/datastore/general/2022/10/20/21-16506-Amicus-brief-by-The-Center-for-Cybersecurity-Policy-and-Law.pdf [https://perma.cc/7RZC-MLM6]; Brief of Law and Business Professors as Amici Curiae in Support of Appellee/Cross-Appellant Apple Inc., at 13–26, *Epic Games*, 67 F.4th 946 (No. 21-16506), https://cdn.ca9.uscourts.gov/datastore/general/2022/10/20/21-16506-Amicus-brief-by-Law-and-Business-Professors.pdf [https://perma.cc/ZC67-QQT5].

steering provisions on developers.[308] This injunction likely cost Apple more than if Epic had obtained damages because it would reduce Apple's high margins on all AppStore sales.[309] Of course, as Apple is headquartered in California, it makes sense that it must comply with California law.[310] And while Epic was the sole plaintiff, an injunction does not become a "'de facto' class action" when an injured competitor sues to prevent conduct that incidentally harms consumers and competition more broadly.[311]

But by issuing an injunction against the world's most valuable corporation in a case with a nationwide concern, California had allowed a private plaintiff to displace the FTC's expert authority, to say nothing of the Little FTC Acts of other states where app developers operate.[312] That interstate effect runs contrary to the original intention that Little FTC Acts would fill the enforcement gap where federal action falls short. Given how many other technology companies call Silicon Valley home, the power of the California Unfair Competition Law—not the FTC—to govern how companies compete outside of California appears immense. And other states could potentially impose their own injunctions or penalties on foreign behavior as well if deemed necessary to protect competition within their own borders.[313] In contrast, were injunctions under Little FTC Acts limited to conduct within that jurisdiction's borders, thereby reserving national policy to

---

308. *Epic Games*, 559 F. Supp. 3d at 1058, *aff'd*, 67 F.4th at 1003–04.

309. *Compare id.* at 1068 (Epic's revenues), *with id.* at 1036–37 (thirty percent margin).

310. *See* Brief for California as Amicus Curiae, at 23–24, *Epic Games*, 67 F.4th 946 (No. 21-16506), https://cdn.ca9.uscourts.gov/datastore/general/2022/10/20/21-16506-Amicus-brief-by-State-of-California.pdf [https://perma.cc/7RTF-YW3N] (describing California Unfair Competition Law in regard to interactions with out-of-state consumers).

311. *Epic Games, Inc. v. Apple, Inc.*, 73 F.4th 785, 788 (9th Cir. 2023) (order) (Smith, J., concurring) (explaining that in antitrust, injunctions will almost by definition have incidental benefits to non-parties). *But see* Arizona v. Biden, 40 F.4th 375, 395–98 (6th Cir. 2022) (Sutton, C.J., concurring) (providing general criticism of nationwide injunctions).

312. *See* Brief of Washington Legal Foundation as Amicus Curiae, at 21–29, *Epic Games*, 67 F.4th 946 (No. 21-16506), https://cdn.ca9.uscourts.gov/datastore/general/2022/10/20/21-16506-Amicus-brief-by-Washingto-Legal-Foundation.pdf [https://perma.cc/Y4R9-YBV5].

313. *Cf.* Exxon Mobil Corp. v. Att'y Gen., 94 N.E.3d 786, 792–98 (Mass. 2018) (allowing national investigation on ground that extra-state climate change impacts Massachusetts consumers); Pager & Foos, *supra* note 7, at 203–05 (arguing supply chain suits should focus on end-market sales and not foreign human rights violations).

the FTC, the costs of condemning potentially competitive behavior (or, conversely, ignoring potentially anticompetitive behavior) under one state's law would entail little costs to the system as a whole.[314]

### *B. Reducing the Error Costs of Little FTC Acts*

*Epic Games* provides a warning about how disagreements between state and federal unfair methods laws can lead to national repercussions, especially when Little FTC Acts err on the side of overenforcement. Even if Apple had engaged in an unfair method of competition as under the FTC's current definitions, the private right of action and remedies available to Epic under California law show that Little FTC Acts can still impose heavy costs and encourage additional litigation compared with the FTC's exclusively public remedies.[315] How can state laws avoid those consequences without surrendering the private right of action that is these laws' key innovation?

Fortunately, states have already experimented with means to limit the costs of excessive litigation. These best—and occasionally worst—practices demonstrate that state judiciaries and legislatures can fulfill the objectives of these laws on a national scale.[316] Greater awareness of the FTC's current policies can ensure that one state does not impose its own vision of competition on the nation.[317] At the same time, states can enhance their standing and causation theories to customize each plaintiff's remedy based on the harm to competition; in turn, this may decrease the prevalence of monetary damages in favor of more economical injunctions.[318] And states can also exercise greater care to distinguish true harms against competition with fraud and other harms against consumers.[319] Taken together, these refinements to state Little FTC Acts can improve their ability to redress competitive injuries while minimizing the risks that enforcement will sweep up procompetitive conduct in its rush to condemn anticompetitive harms.

---

314. *Cf.* State v. Reader's Digest Ass'n, 501 P.2d 290, 299 (Wash. 1972) (reasoning FTC allowance of sweepstakes did not preclude intrastate injunction on related lottery conduct).

315. *Supra* text accompanying note 283 (discussing the holding of *Epic Games* where the Court found no antitrust violation).

316. *See* Schwartz & Silverman, *supra* note 6, at 49–68 (describing best practices in judicial interpretation and noting where legislative intervention is necessary).

317. *Supra* text accompanying notes 141–45.

318. *Supra* text accompanying notes 52, 191, 209.

319. *Supra* text accompanying notes 125–40.

*1. Harmonizing the meaning of unfairness*

Identical language and legislative history both show that unfairness under state law should track federal law.[320] Many states have recognized these parallels, either by the statutory command of harmonization clauses or their own judicial observations, but none have adopted the FTC's current guidance on unfair methods of competition.[321] True, FTC policy statements reflect the decision-making of an expert commission aided by teams of legal, economic, and business specialists—resources lacking to the attorneys general and other state officials who enforce Little FTC Acts.[322] And while juries may be capable of applying notions about what is unfair or injurious to consumers under the Cigarette Test, they may be significantly able to evaluate expert testimony on market definitions and justified conduct.[323]

Still, given that state courts are already capable of applying the rule of reason and distinguishing tortious interference from legitimate competition, they could also be trusted to apply the FTC's most recent guidance with some degree of uniformity.[324] Following the FTC's current guidance documents on unfair methods of competition would provide states with a "more precise test" for articulating why actions that do not violate an express policy are unfair, encouraging uniformity and predictability across jurisdictions.[325] They would also provide businesses with clearer standards to which they can conform their conduct—assuming that the FTC's own standards are themselves clear.[326]

---

320. *See* Ciardi v. F. Hoffman-La Roche, Ltd., 762 N.E.2d 303, 311 (Mass. 2002) (finding that the state statute directs courts to be guided by definitions of unfair methods of competition under federal statutes).

321. *Supra* notes 243–47 and accompanying text.

322. *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 553 (Cal. 1999) (Kennard, J., concurring in part) (explaining that the FTC is better equipped to handle such questions than a court).

323. *See* Kent Literary Club of Wesleyan Univ. at Middletown v. Wesleyan Univ., 257 A.3d 874, 901 (Conn. 2021) (describing how juries are more capable of applying the Cigarette Test than "[t]he substantial unjustified injury test").

324. *Cf.* RESTATEMENT (THIRD) OF TORTS, LIAB. FOR ECON. HARM § 18 Rep.'s Notes cmt. b (AM. L. INST. 2020) (noting trend in state law towards modern view of tortious interference).

325. *Cel-Tech Commc'ns*, 973 P.2d at 543.

326. The 2022 policy statement in particular faced criticism for being less clear than the 2015 statement's rule of reason approach. *See* Christine S. Wilson, Dissenting

At the same time, adoption of current FTC guidance would not preclude states from imposing additional liability and creating safe harbors based on their own statutes and regulations, at least where not preempted by FTC authority.[327] The question of what is unfair under state law is ultimately one for each jurisdiction to decide, and a state should not feel compelled to find conduct unfair simply because another state has banned it.[328] Nor should states have to treat violations of federal law as unfair unless they independently harmed competition or otherwise violate the framework of FTC policy.[329] Most notably, states that have not enacted an analog to the federal Robinson-Patman Act have declined to declare non-predatory price discrimination unfair even when such conduct violates section 5.[330]

Despite ongoing hesitance to bring state law into harmony with federal law, this outcome is far from infeasible.[331] Some state courts have already concluded that their harmonization clause requires application of the FTC's 1980 Unfairness Policy, suggesting judicial action may suffice to adopt the modern policy statements.[332] In other

---

Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" 1–3 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilson Dissent Stmt.pdf [https://perma.cc/3VBN-6QVU] (rejecting proposed policy for a lack of clarity).

327. *Cf.* Comment from State Attorneys General, FTC-2023-0007-21043, at 14–15 & n.91 (April 19, 2023), https://www.regulations.gov/comment/FTC-2023-0007-21043 [https://perma.cc/PYH3-ZBBQ] (asking that a proposed FTC rule against non-compete agreements not preempt the California Unfair Competition Law and other state laws "that provide substantially similar or greater protections").

328. On whether violations of foreign laws can establish unfairness, see Molina Healthcare, Inc. v. Celgene Corp., No. 21-cv-05483-JCS, 2022 WL 161894, at *11 (N.D. Cal. Jan. 18, 2022) (collecting cases).

329. *See* PeopleBrowsr, Inc. v. Twitter, Inc., No. C-12-6120 EMC, 2013 WL 843032, at *4 n.2 (N.D. Cal. Mar. 6, 2013) (observing that state law determines whether some act is an "incipient violation" or violates the spirit of a law, even if the law in question is federal).

330. *See* Whitehall Co. v. Merrimack Valley Distrib. Co., 780 N.E.2d 479, 486 & n.15 (Mass. App. Ct. 2002); Laughlin v. Evanston Hosp., 550 N.E.2d 986, 992 (Ill. 1990); Fitzgerald v. Chi. Title & Trust Co., 380 N.E.2d 790, 792–95 (Ill. 1978). *But see* Graybeal, *supra* note 7, at 1990 (arguing harmonization includes violations of Robinson-Patman).

331. *See* Schwartz & Silverman, *supra* note 6, at 66–68 (noting that state legislatures can correct Little FTC Acts if courts cannot).

332. *See* Tungate v. MacLean-Stevens Studios, Inc. 714 A.2d 792, 797 (Me. 1998) (applying Unfairness Policy to UDAP claim); *In re* Effexor Antitrust Litig., 357 F. Supp. 3d 363, 392 (D.N.J. 2018) (collecting cases).

states, the legislature has periodically updated harmonization clauses to incorporate any FTC guidance as of a more recent date, and state attorneys general can also push for updated standards.[333] But perhaps the best motivation for states to update their legal standards would be for the FTC to increase awareness of its current guidance. Outreach to state attorneys general and other enforcement officials may prove useful in this regard, as would amicus briefings in cases with national impact such as *Epic Games*.[334]

*2. Defining the public interest*

Clarifying the meaning of unfairness under state laws would be helpful in reducing the costs of uncertainty, but when state laws broadly allow "any person" to bring these actions and receive damages, the bare application of that policy statement could still be overbroad.[335] Such would be the case if a competitor preferred to challenge a method of competition as unfair and so receive the damages permitted by a Little FTC Act instead of suing under a business tort or another statutory cause of action geared to private disputes.[336] Rather than eliminating private rights of action entirely and risking underenforcement, states could mirror the FTC Act in requiring that suits brought under the unfair methods authority satisfy the public interest, in essence assuring that the private plaintiff acts in the place of the attorney

333. *See* Fla. Stat. Ann. § 501.203(3); H.B. 1066, 83rd Sess. Legis. Assemb. (S.D. 2008) (proposing amendment to S.D. Cod. L. § 37-24-6 "at the request of the Office of the Attorney General").

334. *See* Dep't of Legal Affs. v. Rogers, 329 So. 2d 257, 267 (Fla. 1976) (noting that the FTC filed an amicus brief explaining that a previous agency order did not approve the conduct facing challenge under the state Little FTC Act). Although it filed no brief in *Epic Games*, the FTC routinely files amicus briefs in private litigation involving federal antitrust or consumer protection law. Fed. Trade Comm'n, Legal Library: Amicus Briefs, https://www.ftc.gov/legal-library/browse/amicus-briefs [https://perma.cc/V9ZP-4ZVL]; *see also infra* Section III.C (predicting that states will follow the FTC's lead in unfair competition as they have in other matters).

335. *See supra* note 152 and accompanying text (explaining that many states provide a private right of action modeled on section 4 of the Clayton Act for unfair methods of competition).

336. *Cf.* FTC v. Klesner, 280 U.S. 19, 28–29 (1929) (concluding that the public interest did not support the FTC's involvement in a private dispute); LaMotte v. Punch Line of Columbia, Inc., 370 S.E.2d 711, 713 (S.C. 1988) (affirming that South Carolina's "Unfair Trade Practices Act is unavailable to redress private wrongs if the public interest is unaffected").

general on behalf of the state's residents.[337] Despite this important feature of the FTC Act, only a few states have ever codified an express public interest requirement in tandem with a private right of action.[338] Several others have interpreted statutory language limiting the scope of these laws to commerce "directly or indirectly affecting the people" of the state as requiring that the unfairness affects the public interest, not just a private interest.[339] But this statutory limitation is far from universal, and it is doubtful that other jurisdictions would conclude that laws that intentionally omitted this phrase implicitly contain a public interest requirement.[340]

Still, when a law forbids unfair methods of competition, it presumably serves to protect competition—not a competitor.[341] An unfair method of competition is one that injures marketplace competition, such as by restricting output or raising prices.[342] Methods of competition that are reasonable or promote competition are not deemed unfair even if they take business from a competitor, although unlike a straightforward application of antitrust law, the legislature retains the ability to declare certain express conduct as unfair regardless of its competitive impact.[343]

Enforcement against unfair methods should thus necessarily serve the public interest in promoting competition, as either economically

---

337. *See* Pridgen, *supra* note 6, at 943–44 (identifying states that add a public interest requirement to private actions).

338. *Id.* (identifying seven states); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 719 P.2d 531, 536 (Was. 1986) (noting that only six of forty-two states with private rights of action in 1980 had ever imposed a public interest requirement).

339. Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 351 S.E.2d 347, 349–50 (S.C. Ct. App. 1986)*; see, e.g.*, Ciardi v. F. Hoffman-La Roche, Ltd., 762 N.E.2d 303, 308–09 (Mass. 2002) (discussing Mass. Gen. Law. C. 93A § 9(1)); Nelson v. Lusterstone Surfacing Co., 605 N.W.2d 136, 141–42 (Neb. 2000) (discussing Neb. Rev. St. § 59-1601).

340. *Cf.* Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 876 (Haw. 1999) (explaining why Hawaii removed the public interest requirement).

341. *Cf.* Terry v. Tyson Farms, Inc. 604 F.3d 272, 276–77 (6th Cir. 2010) (collecting cases holding that the Packers and Stockyards Act's ban on "any unfair, unjustly discriminatory, or deceptive practice or device" requires an injury to competition).

342. Kaiser Found. Health Plan, Inc. v. Haw. Life Flight Corp., No. 16-00073 ACK-KSC, 2017 WL 1534193, at *30–31 & n.16 (D. Haw. Apr. 27, 2017).

343. *Cf.* Davis v. Four Seasons Hotel Ltd., 228 P.3d 303, 324 n.35 (Haw. 2010) (reasoning that legislatively deeming an action anti-competitive shows injury stems from anti-competitive action).

or legislatively determined, even where that element is not express.[344] Consider the Hawaii Supreme Court's recent decision in *Field v. National Collegiate Athletic Association*.[345] Aloha Sports, a sponsoring agency and promoter of college football bowl games, had encountered difficulties in putting on its bowl games, and it planned to sell itself contingent on the NCAA's recertification of a bowl game as an authorized event.[346] The NCAA ignored Aloha's request for a probationary approval and instead decertified the bowl, preventing the sale.[347] After a lengthy judicial process spanning over a decade of appeals, the NCAA moved for summary judgment on Aloha's unfair method of competition claim, noting that a jury had already ruled against its theory of tortious interference.[348]

The Hawaii Supreme Court disagreed that Aloha had to prove tortious interference for this conduct to be unfair, emphasizing instead that the unfairness of commercial conduct was measured by its offense to public policy, immorality or oppression, and injury to consumers.[349] Because there was evidence that the NCAA knew of Aloha's agreement to sell the rights and intentionally violated its internal policies to prevent that transaction, a jury could decide that the NCAA's actions were "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[350] Had Hawaii stopped with the Cigarette Rule, it might have suggested that methods of competition which violate the "spirit" of tortious interference could be unfair.[351] Such an approach would allow enterprising plaintiffs to escape the recent trend in curtailing liability for tortious interference where no contractual interference occurs.[352]

Hawaii instead evaluated a second factor: whether this allegedly unfair conduct could have injured Aloha because it "negatively affects

---

344. *Id.* at 318–20 (examining injury to competition despite no longer maintaining public interest requirement); Graybeal, *supra* note 7, at 1981–83 (considering the relation between pro-competitive torts and anti-competitive unfair competition).

345. 431 P.3d 735 (Haw. 2018).

346. *Id.* at 739–40.

347. *Id.* at 740.

348. *Id.* at 742–44.

349. *Id.* at 746–47.

350. *Id.* at 745–46.

351. *See supra* text accompanying notes 242, 259 (explaining the challenges of defining unfairness in reference to acts that do not violate established public policies or laws).

352. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 17 Rep.'s note cmts. A–B (AM. L. INST. 2020).

competition or harms fair competition."[353] Hawaii has derived that element from the widely-used clause in Little FTC Acts stating that "any person may bring an action based on unfair methods of competition declared unlawful," noting that an unfair method of competition presupposes "the existence of the competition."[354] Demonstrating this effect first required Aloha to define the market in which the competition occurred; it had done so by detailing "the NCAA's certification process and the underlying competition among bowl sponsoring agencies vying for NCAA certification of bowl games, the member institutions that participate in the bowls, and the consumers that attend the bowls."[355] It then had to show that the NCAA's actions had the potential to harm competition in the market for bowl game rights, beyond its own injury.[356] The Hawaii Supreme Court notably concluded that the "allegedly arbitrary certification" would restrict the transfer of bowl rights, artificially depressing the sales price (or profitability) of sponsoring agencies and in turn reducing the output of bowl games, harming "schools and consumers" who would otherwise have participated.[357] Without acknowledging modern FTC guidance, the Hawaii Supreme Court had thus linked a potentially amorphous policy against immoral conduct, distinct from the legally recognized tort of tortious interference, to the central concern of modern antitrust law: the restriction of output leading to consumer harm.[358]

*3. Establishing proximate cause and determining who can sue*

Simply because a law allows "any person" to sue does not mean that it has eliminated the traditional requirements of proximate cause that guards against awarding damages for speculative harms to remote

353. *Field*, 431 P.3d at 747.

354. *See* Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 148 P.3d 1179, 1208, 1213–14 (Haw. 2006) (citing Haw. Rev. Stat. § 480-2(e)).

355. *Field*, 431 P.2d. at 749.

356. *Id.*

357. *Id.* at 748. Of course, if a jury ultimately found that the NCAA had not acted arbitrarily or monopolistically, actions strengthening the quality of NCAA-branded bowl games would presumably be fair.

358. *Id.* at 749 (explaining that a plaintiff can survive summary judgement by providing "proof of the general market" and showing harm to the plaintiff from the allegedly unfair method of competition); *see* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) (noting the importance of defining the market); *cf.* Kaiser Found. Health Plan, Inc. v. Haw. Life Flight Corp., No. CV 16-00073 ACK-KSC, 2017 WL 1534193, at *11–12 (D. Haw. Apr. 27, 2017) (noting importance of market and pricing power).

parties.[359] When Little FTC Acts establish that a method of competition is unfair based on a violation of some other law, ignoring these traditional requirements in favor of an expansive broad right of action could also displace legislatively intended forms of relief available to specific classes of plaintiffs.[360] Are Uber drivers employees or independent contractors protected by labor law, consumers of its ridesharing services deceived by unfair acts or practices, suppliers of driving services with contract or tort claims, or potential competitors in the provision of taxi substitutes?[361] Is Epic a competitor of Apple in the provision of payment services or a consumer of its App Store functions?[362] And what about franchisees who challenge their franchisor's allegedly unfair actions?[363]

Rather than restricting the private right of action to just competitors, or applying different tests to different classes of plaintiff as California has, Little FTC Acts should be construed as permitting private plaintiffs to challenge a method of competition as unfair as long as they can show that the harm to competition itself caused their specific injury.[364] As with the competition requirement, this standard derives from the existing and common statutory language that enables any person injured "by" the unfair method of competition to sue.[365] This broad permission to sue provides a potent tool to defend competition when

---

359. *See* Associated Gen. Contractors of Cal., Inc v. Cal. State Council of Carpenters, 459 U.S. 519, 529–35 (1983) (interpreting section 4 of the Clayton Act in light of common law limitations).

360. *See* E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 498–500 (1st Cir. 1994) (emphasizing "any person" expands beyond consumers); Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 148 P.3d 1179, 1221 (Haw. 2006) (Acoba, J., concurring in part) (noting that "any person" expands beyond direct competitors or customers); *cf. Associated Gen. Contractors*, 459 U.S. at 538–40 (denying union antitrust claim when labor law was the better remedy).

361. *See generally* Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 627–46 (2023) (exploring the gig economy and the classification of Uber drivers within it).

362. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1052–53 (N.D. Cal. 2021), *aff'd in part, rev'd in part*, 67 F.4th 946 (9th Cir. 2023).

363. Adams, *supra* note 8, at 394–400.

364. *Cf. Associated Gen. Contractors*, 459 U.S. at 541–44 (finding the plaintiff Union's claims to be indirect and highly speculative).

365. Arthur v. Microsoft Corp., 676 N.W.2d 29, 33 (Neb. 2004) (discussing Neb. Rev. Stat. § 59-1609); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 719 P.2d 531, 539 (Wash. 1986); Roncari Dev. Co. v. GMG Enters., Inc., 718 A.2d 1025, 1036 (Conn. Super. Ct. 1997) (discussing Conn. Gen. Stat. § 42-110g).

the competitors who might otherwise step forward as plaintiffs have all adopted an unfair practice or are at least unwilling to sue their fellows.[366] In those situations, state attorneys general could still seek injunctive relief and other penalties.[367] But private plaintiffs other than competitors may also be positioned to defend competition and thereby promote the public interest by challenging the unfair methods that have injured them.[368] For instance, if state law requires hotels to pass on service charges to workers as tip income, those workers could argue that retention of these funds "allowed [hotels] to charge lower base prices than law-compliant competitors" and "create[d] incentives for customers to purchase banquet services from the defendant instead of competitors who did not engage in the unlawful conduct."[369] Employees who make this showing would directly promote the public interest in competition, even as they also pursue private motives that would be better served by labor law.[370]

---

366. *See* FTC v. R.F. Keppel & Bro., 291 U.S. 304, 313 (1934) (reasoning method remained unfair when companies were compelled to adopt it to stem lost business). Reluctance on the part of competitors to sue may be especially prominent when violations of labor law are in each company's individual self-interest. *See* Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1091 (N.D. Cal. 2019) (describing statutory objective of labor law as protecting compliant employers from "competitive advantage" of those who violate standards). *See generally* SAMUEL EVAN MILNER, ROBBING PETER TO PAY PAUL: POWER, PROFITS, AND PRODUCTIVITY IN MODERN AMERICA 116–28, 164–65 (2021) (providing historical examples of inter- and intra-industry collusion on labor law).

367. *See* People *ex rel.* Harris v. PAC Anchor Transp., Inc., 329 P.3d 180, 183, 187–90 (Cal. 2014) (concluding that California could bring an action seeking injunctive relief, civil penalties, and restitution from trucking company for engaging in acts of unfair competition by violating state labor and insurance laws).

368. Gurrobat v. HTH Corp., 323 P.3d 792, 813 (Haw. 2014) (allowing workers to show that violation of tipping law "negatively affects fair competition").

369. *Id.* This theory contrasts with a claim that employers used unfair or deceptive acts or practices to induce employees to work. *See* Kirkpatrick v. Ironwood Commc'ns, Inc., No. C05-1428JLR, 2006 WL 2381797, at *12 (W.D. Wash. Aug. 16, 2006) (concluding plaintiffs presented sufficient evidence that a jury could conclude that defendant employer engaged in unfair or deceptive acts in trade or commerce under the Washington Consumer Protection Act by deceiving the public that its employees would be paid in conformity with Washington law); Peterson & Steinbaum, *supra* note 361, at 642–57 (discussing how ride-share drivers, as independent contractors, can sue under state laws prohibiting unfair or deceptive acts or practices).

370. Davis v. Four Seasons Hotel Ltd., 228 P.3d 303, 317–18, 318 n.27 (Haw. 2010) (requiring employees to allege how employer conduct will harm competition and how an "injury directly resulted" from the unfair method).

True, there may be other parties more directly harmed by the lessening of competition that are better positioned to serve as private attorneys general, especially where statutory damages are sought above actual damages.[371] The employees' recovery under an unfairness law should correspond to damages caused *by* the injury to competition—in this case, the legally compliant hotels' lost business and not the wrongly retained tips.[372] That calculation is necessary to reduce the risk of multiple recovery under the unfairness law, such as if banquet consumers likewise brought suit challenging price overcharges under this statutory violation.[373] But this calculation is neither intuitive nor straightforward, given the numerous variables and unclear causal link between the statutory violation and the resulting prices or shifts in business.[374]

Still, most states already permit recovery for indirect purchasers under unfairness laws—suggesting that calculating damages from the harm to competition is not always insurmountable, either from an accounting perspective or as a policy goal of making sure damages flow to those most deserving of the remedy.[375] As long as a party can prove injuries from this harm, the anti-circumvention nature of unfairness laws supports allowing any potential private attorney general to recover some form of relief.[376] California infamously once allowed plaintiffs to obtain equitable relief and attorneys' fees without requiring any showing of actual harm, raising costs to businesses and consumers alike.[377] Voters responded in 2004 by passing Proposition 64, which

---

371. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 541–42 (1983).

372. Establishing this connection would be easier when employees can allege an unfair method of competition in the labor market, such as express collusion on wage rates or unreasonable non-compete agreements, as then their resultant injury would be the lost wages. *Compare Gurrobat*, 323 P.3d at 809–10 (awarding double lost wages under relevant labor law), *with* Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 982 P.2d 853, 883 n.32 (Haw. 1999), *superseded by statute*, 2002 Haw. Sess. Laws 229, § 2 at 916–17, *as recognized in* Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 148 P.3d 1179, 1208–09 (Haw. 2006) (distinguishing fact of damages from amount of damages).

373. *See* Kawakami v. Kahala Hotel Invs., LLC, 421 P.3d 1277, 1281–82 (Haw. 2018).

374. *Cf.* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458–59 (2006) (illustrating how directness and causation concerns make awarding damages difficult when there is an attenuated link between injury and wrongdoing).

375. *See supra* notes 180–91 (referencing case law regarding recovery for indirect purchasers under unfairness laws). *But cf. Anza*, 547 U.S. at 457–61 (explaining that these difficulties can preclude recovery under the federal RICO statute).

376. Schwartz & Silverman, *supra* note 6, at 21.

377. Cooper & Shepherd, *supra* note 14, at 976.

imposed a new injury-in-fact requirement for private plaintiffs and singlehandedly reduced lawsuits—presumably the most baseless—by as much as seventeen percent.[378]

The anti-circumvention objectives of Little FTC Acts further support allowing plaintiffs who cannot calculate their damages from an actual injury to seek an injunction against continuing the unfair method of competition in the future. Remote parties seeking damages can drain the defendant's resources needed to compensate more direct victims of this unfairness; courts need not be so picky about which party first attempts to vindicate this social interest via injunctive relief.[379] Indeed, parties with ongoing dealings in that market, such as the hotel employees, may likely deem an injunction against continuing the unfair method of competition an adequate incentive to bring suit, at least when attorneys' fees and court costs are also available.[380]

*4. Distinguishing unfair methods of competition from other authorities*

Just as the FTC used its unfair methods authority to target fraud and other consumer-facing harms prior to the Wheeler-Lea Act, some states that lack an unfair methods prong have used other statutes to allow consumers to recover for anticompetitive harms. For instance, indirect purchasers who have overpaid due to some underlying antitrust violation will commonly claim that the defendants engaged in an unfair or deceptive act or practice by misrepresenting the true market price of the goods or services or hiding their anticompetitive conduct.[381] Other jurisdictions may allow this claim under provisions banning "unconscionable" acts and practices if these plaintiffs paid "artificially inflated, supracompetitive prices."[382]

---

378. *Id.* at 976–77. Other Little FTC Acts incorporate an injury in fact requirement. *See* Schwartz & Silverman, *supra* note 6, at 50–52 (discussing how state consumer protection acts still include an "injury in fact" requirement, despite the broad language of many state statutes).

379. *Cf.* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 657–58 (2008) (noting proximate cause was not a barrier when no other victim was better positioned to sue for a specific remedy).

380. *See* Gurrobat v. HTH Corp., 346 P.3d 197, 202–03 (Haw. 2015) (awarding attorneys' fees).

381. *See* Picone v. Shire PLC, No. 16-cv-12396-ADB, 2017 WL 4873506, at *19 (D. Mass. Oct. 20, 2017) (applying New York law).

382. *In re* HIV Antitrust Litig., No. 19-cv-02573-EMC, 2023 WL 3006572, at *6 (N.D. Cal. Apr. 18, 2023) (applying Utah law); *see also In re* Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 906–07 (E.D. Pa. 2012) (collecting New Mexico cases).

This approach eliminates any distinction between unfairness, unconscionability, deception, and other terms, even if it aligns state authority more closely with section 5.[383] Unfair or deceptive practices mislead consumers, and unconscionable practices manipulate a consumer's understanding of a transaction or take advantage of some gross disparity in information, whereas an unfair method of competition directly impedes competition in the marketplace.[384] Anticompetitive practices may make it easier to carry out unfair, deceptive, or unconscionable acts, but the real harm in those situations occurs from coercion or a lack of accurate information, not the market injury itself.[385] Stretching a UDAP authority in this fashion also increases the uncertainty and costs associated with Little FTC Acts for businesses that must conform their conduct to the rules of these jurisdictions, especially where damages are awarded.[386]

But UDAP claims can still target ancillary harms that arise under anticompetitive conditions.[387] Consider a recent Pennsylvania case where oil companies agreed to establish exclusive territories to purchase mineral rights.[388] By becoming local monopsonists, each company purchased mineral rights at a lower price than had they competed.[389] Pennsylvania lacked an antitrust statute covering market

383. *See In re* Namenda Indirect Purchaser Antitrust Litig., 338 F.R.D. 527, 574 (S.D.N.Y. 2021) (observing that differently worded statutes might not be applied differently in practice); *see also In re* Interior Molded Doors Indirect Purchaser Antitrust Litig., No. 18-cv-00850-JAG, 2020 WL 2110931, at *2–3 (E.D. Va. May 4, 2020) (noting that Utah law lacks full harmonization with the FTC Act).

384. *See* Johnson v. Microsoft Corp., 834 N.E.2d 791, 800–01 (Ohio 2005); Abbott Lab'ies, Inc. (Ross Lab'ies Div.) v. Segura, 907 S.W.2d 503, 507–11 (Tex. 1995) (Cornyn, J., concurring).

385. *See In re* Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1157–58 (N.D. Cal. 2009) (denying unconscionability claim under D.C. law based on pleading of artificially inflated prices); Kieffer v. Mylan Lab'ies, Inc., 1999-2 Trade Cas. (CCH) ¶ 72,673, at *6 (N.J. Super. Law Div. Sept. 9, 1999) ("[T]here is nothing inherently misleading or fraudulent in the defendants' acts of controlling the supply and overcharging . . . ."); Gaebler v. N.M. Potash Corp., 676 N.E.2d 228, 229–30 (Ill. App. Ct. 1996) (contrasting antitrust and consumer protection claims).

386. *See generally* Wright, *supra* note 19, at 2226–38 (distinguishing the goals of consumer protection and antitrust law).

387. *Cf.* Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 148 P.3d 1179, 1215 (Haw. 2006) (holding that conduct supporting UDAP claim can support unfair methods claim when competition sufficiently alleged).

388. Anadarko Petroleum Corp. v. Commonwealth, 206 A.3d 51, 53 (Pa. Commw. Ct. 2019), *aff'd in part, rev'd in part sub nom.* Commonwealth v. Chesapeake Energy Corp., 247 A.3d 934 (Pa. 2021).

389. *Id.*

allocation agreements, so its Attorney General invoked its Little FTC Act, which, despite featuring the term "unfair methods of competition," defined it only in terms of fraud or misunderstanding.[390] In this situation, the unfair method of competition was the horizontal agreement that artificially depressed prices—which involved no fraud or deception toward consumers.[391] But the companies also engaged in a separate deceptive act cognizable under the UDAP prong when they affirmatively misrepresented actual market conditions during the terms negotiation, harm that the agreement had enabled but did not directly generate.[392]

For a second example, consider the recently filed complaint from Cleveland, Ohio, against insulin manufacturers and CVS Caremark for unfairly and deceptively raising insulin prices to supracompetitive levels.[393] Ohio's Deceptive Trade Practices Act prohibits only specific practices, including falsely claiming to be offering a price reduction and not unfair methods of competition.[394] To the extent that Cleveland argues that the manufacturers constituted an oligopoly and so prices would not necessarily reflect costs as in a perfectly competitive market, or that CVS Caremark unilaterally raised prices, this claim of deception would be nothing more than an end-run around conventional antitrust principles.[395] But if CVS Caremark misled Cleveland into thinking it would promote the city's interest in discounted drugs but instead demanded higher manufacturer rebates, in turn driving up list prices, then Cleveland could potentially establish a deceptive act separate from any competitive harm.[396]

---

390. *Id.* at 59.

391. Of course, in another jurisdiction, the landowners could have challenged the market allocation agreement directly as an unfair method of competition and received damages based on the difference between the sales price and competitive market price, just as under the Sherman Act and (presumably) its local state analog. *See supra* Sections III.B.2–3.

392. *Anadarko*, 206 A.3d at 60–61. Because the Pennsylvania law protects only buyers, not sellers, this claim ultimately failed as a matter of law. *Chesapeake Energy*, 247 A.3d at 948–49.

393. Complaint at 141, City of Cleveland v. Eli Lilly & Co., No. 23-cv-01417 (N.D. Ohio July 24, 2023), ECF No. 1.

394. Ohio Rev. Code Ann. § 4165.02(A)(12) (West 2023).

395. Complaint at 95–96, 136–37, *City of Cleveland*, No. 23-cv-01417 (N.D. Ohio July 24, 2023), ECF No. 1; *see also supra* note 227 (citing cases explaining that consciously parallel conduct among competitors that occurs without collusion or agreement is not unfair).

396. Complaint at 136–41, *City of Cleveland*, No. 23-cv-01417 (N.D. Ohio July 24, 2023), ECF No. 1.

### *C. How the FTC Can Benefit from Little FTC Acts*

States can clearly learn much from the FTC when playing their part in a national competition strategy. The FTC encouraged the adoption of Little FTC Acts, including their unfair methods authority, to relieve the administrative burden on its resources and target intrastate conduct outside of its jurisdiction.[397] As part of that program, it encouraged states to harmonize their own jurisprudence with the agency's policies and case law.[398] The FTC continues to count on state laws to supplement its own enforcement capacity.[399] But it has not permitted state interpretations of unfairness to influence its own understanding of section 5.[400]

Like it or not, when the FTC acts, states and private plaintiffs listen. The FTC may adopt a broad approach in a standalone section 5 action where proving a violation of antitrust law, and hence the possibility of the agency securing treble damages, is difficult.[401] If only the FTC Act were implicated, the nature of its exclusively public injunctive relief would reduce the potential costs of wrongly targeting procompetitive behavior and so permit the agency to err on the side of condemning borderline cases.[402] Once the FTC has declared some behavior as an unfair method of competition, private plaintiffs could follow this precedent with their own suits under state Little FTC Acts, leading to a massive expansion of liability and damages.[403] In practice, harmonization clauses have not resulted in the automatic imitation of

---

397. *See supra* Section I.B.2 (explaining that the FTC encouraged states to pass legislation modeled on section 5 of the FTC Act to address consumer deception and unfair competition that were outside of the FTC's jurisdiction).

398. *Id.*

399. *See, e.g.*, Mortgage Acts and Practices—Advertising, 76 Fed. Reg. 43826, 43833 (July 22, 2011) (noting that entities not covered under FTC rule could be covered by "[L]ittle FTC Acts").

400. *See* Brown & Lee, *supra* note 262, at 994–95 (discussing FTC v. Neovi, Inc., 604 F.3d 1150, 1156 (9th Cir. 2010)); Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1363 (11th Cir. 1988).

401. *See* Hakala, *supra* note 21, at 4 (discussing Negotiated Data Solutions, 73 Fed. Reg. 5846, 5849 n.9 (Jan. 31, 2008)).

402. *See* 15 U.S.C. §§ 45(b), 53(b).

403. Negotiated Data Solutions, 73 Fed. Reg. at 5854 (Kovacic, Comm'r, dissenting); Robert H. Lande, *FTC v. Intel: Applying the "Consumer Choice" Framework to "Pure" Section 5 Allegations*, 2 CPI ANTITRUST J. 2, 3 (2010) (suggesting that FTC first declare conduct illegal under section 5 to put businesses on notice that they may face private suits for damages).

FTC actions.[404] Still, given the historical experience of the Cigarette Rule and the expansive and often vaguely defined standards of the FTC's 2022 policy statement, the FTC should at least consider the possibility of follow-on actions when acting in novel ways.[405]

Ongoing collaboration with state officials on topics of shared concern provides another productive way to consider these potential costs. The FTC has long partnered with state antitrust enforcers, especially in areas of local concern such as healthcare, to educate state officials and assist their challenges to potentially anticompetitive activity.[406] When it comes to deception and fraud, moreover, the FTC has racked up a number of victories in partnerships with state enforcers.[407] And the FTC has turned to state laws to seek monetary relief for consumer fraud following the Supreme Court's holding in

---

404. J. Thomas Rosch, *The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?*, FTC (Jan. 27, 2011), at 11–13, 11 n.27, https://www.ftc.gov/sites/default/files/documents/public_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf [https://perma.cc/R55D-K27U]; *see also supra* notes 141–42 (noting the development of state-exclusive precedent).

405. *See supra* notes 63–65, 326 (noting the unexpected endorsement of the overaggressive Cigarette Rule and the criticisms of the 2022 policy statement as overbroad). Of course, the FTC could also reduce these costs by returning to the more cabined view of unfairness contained in the 2015 policy statement or writing a new policy statement altogether, but there is little to no chance that it will do so in the near term. Even if it did, the FTC could still inspire costly follow-on actions under conventional interpretations of the spirit of the antitrust laws. For instance, in Liu v. Amerco, 677 F.3d 489 (1st Cir. 2012), the FTC had reached a consent decree with U-Haul over rebuffed invitations to collude. 677 F.3d at 492. A consumer who had rented from U-Haul learned of this scheme as a consequence of the FTC's own investigation and consent decree; because U-Haul had raised prices as part of its invitation, the consumer could claim injury and represent a class seeking damages under the Massachusetts Little FTC Act, notwithstanding the imperfect alignment of the "FTC's aim to achieve injunctive relief" in the agency record and the consumer's need for "proving price effects" in court. *Id.* at 496.

406. *See* Roundtable Conference with Enforcement Officials, *in* 73 ANTITRUST L.J. 269, 296 (2005).

407. *See* Lina M. Khan, Rebecca Kelly Slaughter & Alvaro M. Bedoya, *Statement . . . Regarding the FTC State Collaboration Act Request for Information*, FTC (June 6, 2023), at 1–2, https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_ftc_state_collaboration_act_rfi.pdf [https://perma.cc/LVF9-AJJY] (providing examples).

2021 that the FTC Act limited the federal agency to seeking injunctive relief.[408]

Expanding this collaboration to unfair methods of competition would not be difficult. State attorneys general have communicated to the FTC where they believe they can use their Little FTC Acts in tandem with the FTC to combat common objectives, such as software piracy.[409] State attorneys general have also signaled where they believe that the FTC can push the boundaries of section 5 and the FTC Act itself to enhance their own capacity to combat unfair methods of competition, most recently in the field of labor non-compete agreements.[410] And state attorneys general have already facilitated multistate actions under these laws without the FTC's guidance.[411] The FTC can take advantage of these existing efforts by educating states on its current unfair methods guidance and priorities, similar to how the FTC Collaboration Act of 2021 requires the FTC to study how it can facilitate and improve its existing coordination with state attorneys general to combat consumer fraud.[412] Expanded contacts would allow the FTC to consider the concerns of state enforcers closer to the scene about whether these rules have become too expansive or impose too much liability on businesses.[413] They could also provide support or guidance to the FTC when multiple state partners are working with each other to bring unfairness claims, especially where an injunction would have national impact.[414] At the very least, expanded ties could

---

408. FTC Collaboration Act of 2021 Study, 88 Fed. Reg. 38510, 38511 (June 13, 2023) (soliciting state input on how AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021), "impacted effective collaboration between the Commission and State Attorneys General").

409. Thomas L. Boeder, Elvira Castillo & Susan Foster, *39 State Attorneys General Pledge to Combat Piracy, an Unfair Method of Competition*, PERKINS COIE (Nov. 16, 2011), https://www.perkinscoie.com/en/news-insights/39-state-attorneys-general-pledge-to-combat-piracy-an-unfair.html [https://perma.cc/Z7PY-MA9N].

410. Comment from State Attorneys General, *supra* note 327.

411. Pridgen, *supra* note 6, at 922–23.

412. FTC Collaboration Act of 2021, Pub. L. 117-187, § 2, 136 Stat. 2201, 2201 (2022); *see also* FTC Collaboration Act of 2021 Study, 88 Fed. Reg. at 38510–12.

413. *Cf.* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 20–21 (2010) (observing that even the California Attorney General labeled pre-Proposition 64 litigation burden as "extortionate").

414. *Cf.* Brief of Utah and 34 Other States as *Amici Curiae* in Support of Plaintiff-Counter-Defendant-Appellant and Reversal at 1, Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (No. 21-16506) (noting in passing Epic's Unfair Competition Law claim before focusing only on federal antitrust claims).

encourage the FTC to express its own views on whether injunctive relief in state-level litigation would serve the public interest.[415]

## CONCLUSION

At first glance, Little FTC acts and their bans on unfair methods of competition may appear redundant with antitrust law or costly derivatives of federal competition policy. In practice, however, they provide a powerful tool to a substantial number of potential plaintiffs. Despite state law precedent expressly evaluating unfairness in terms of rancid immorality, the case law fundamentally understands unfairness as signifying harm to competition. That definition largely revolves around the antitrust standard of consumer welfare, but it also extends to legislative and established common-law understandings of what constitutes fair competition. Little FTC Acts encourage the enforcement of these laws by allowing private plaintiffs to sue for damages and injunctive relief alongside public authorities. This private right of action and its remedies are not unlimited. An express public interest requirement may be ideal, but private plaintiffs, at a minimum, must demonstrate some causal link between the unfair method, the injury suffered, and the wider harm to competition. In doing so, Little FTC Acts, in essence, provide the private right of action that the FTC Act itself lacks.

At present, the most important limit on unfair methods laws is that most states still have not enacted a Little FTC Act covering this type of conduct. Wider adoption of these laws would prove beneficial by creating increased avenues for state and private enforcers to collaborate across jurisdictional lines. Broader coverage could allow each state to better define the responsibilities of foreign corporations in each jurisdiction instead of allowing one state to dictate policy to the rest. And most importantly, these laws would provide a remedy for anticompetitive conduct that goes unnoticed and unremedied by the FTC but does not fit all the elements of antitrust law. The need to target these sorts of conduct inspired not only Dixon's FTC but also Washington, Hawaii, and other states to adopt Little FTC Acts to protect their citizens. With more than half a century of state-law precedent upon which to draw, to say nothing of the FTC's long-awaited guidance on what constitutes unfair methods of competition

415. *See supra* note 324 and accompanying text (discussing how state courts' ability to distinguish tortious interference from legitimate competition demonstrates that state courts can apply FTC guidance uniformly).

under section 5, the indefiniteness of this standard has decreased greatly compared to the concerns expressed in the 1960s. As long as state laws recognize that an unfair method of competition necessarily must involve some overall harm to competition and satisfy traditional concepts of proximate cause, the spread of Little FTC Acts can only further the goal of an American competition policy that combines public and private enforcement across a federalist division of labor.