

Federal Trade Commission Seminar (Fall 2020)

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Welcome to FTC Seminar

We will study the Federal Trade Commission as an institution, as an enforcement agency, and as an advocacy and research agency.

Learning Outcomes: By the end of the course students should be able to:

- Understand the Federal Trade Commission, its legal authority, its role as an independent agency, and its research and advocacy functions

Grades will be based upon a research paper, which will be due the last class period, Tuesday, November 23rd. You can choose to write your paper on any topic covered in the syllabus, or we can agree on another topic. You can meet with me to discuss potential topic ideas any time. The goal of the paper is to produce publishable quality research.

An outline, of at least 4-5 double spaced pages, will be due on September 21st via email to Professor Wright.

Class: We will meet **Tuesday at 6:05 pm.**

Office Hours: All office hours will be via appointment and through Zoom meetings. I will always be available **Tuesday 2-3 pm.** I am also generally available via appointment and email. Please copy my assistant, Daniel Tonsing, dtonsing@gmu.edu, on appointment emails.

Classroom Rules:

- Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me.

Class Materials:

There is no casebook. We will read enforcement agency guidelines, scholarly

commentary, and other supplementary materials. **All reading material will be available online or on TWEN.**

Grading: Your paper will account for 100% of your grade, subject to a discretionary class participation adjustment of 1/3rd of a grade in **either** direction. **You should come to class having read and thought about the material, and ready to participate in a discussion.**

Tentative Syllabus: We may deviate from the tentative syllabus with assignments taken from current events, new cases, to accommodate guest speakers, scheduling reasons, etc. Please make sure you are signed up to receive updates via TWEN.

CLASS SCHEDULE

August 24

Overview, Institution, and History

William E. Kovacic & Marc Winerman, *The Federal Trade Commission As an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).

Marc Winerman & William E. Kovacic, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527 (2012).

Seila Law LLC v. CFPB, available at:

https://www.supremecourt.gov/opinions/19pdf/19-7_n6io.pdf

August 31

Who Decides? Part III Administrative Litigation, Specialized Courts, and Generalist Judges

Axon Enterprise, Inc. v. FTC, available at:

https://axon-2.cdn.prismic.io/axon-2/1438309c-d103-472e-85a5-929e79642aa5_1-3-20+Axon+FTC+Complaint+-+File-stamped+version.pdf

Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENF'T 82 (2013)

Wright, *Judging Antitrust*, available at:

https://www.ftc.gov/system/files/documents/public_statements/626231/150221judgingantitrust-1.pdf

Ginsburg & Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 *FORDHAM INT'L L. J.* 788 (2013), available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289488

September 7

The Role of Economics at the FTC

Luke M. Froeb, Paul A. Pautler, & Lars-Hendrik Roller, *The Economics of Organizing Economists*, 76 *ANTITRUST L.J.* 569 (2009).

Douglas H. Ginsburg & Eric M. Fraser, *The Role of Economic Analysis in Competition Law*, in *GETTING THE BALANCE RIGHT: INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA* (2011).

Statement of Commissioner Joshua D. Wright on the FTC's Bureau of Economics, Independence, and Agency Performance, (Aug. 6, 2015),

https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

Michael Baye and Joshua D. Wright, *Economizing Consumer Protection*, *Antitrust Source* (2018)

COMPETITION

September 14

Advanced Topics in Horizontal Merger Analysis: Potential Competition, Nascent Competition, and Consummated Mergers

United States v. Microsoft, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam).

Douglas H. Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703

Scott Hemphill & Tim Wu, *Nascent Competitors*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3624058#:

[~:text=A%20nascent%20competitor%20is%20a,future%20threat%20to%20an%20incumbent.&text=Acquisitions%20by%20a%20dominant%20firm,approach%20that%20has%20several%20advantages.](#)

Prepared Statement of John Yun, Senate Judiciary Committee Antitrust Subcommittee (Sept. 24, 2019), available at: <https://www.judiciary.senate.gov/imo/media/doc/Yun%20Testimony.pdf>

September 21

Vertical Mergers

2020 Vertical Merger Guidelines

Global Antitrust Institute, Comment on VMGs, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534352

Baker et al, [*Five Principles for Vertical Merger Enforcement Policy*](#) (2019)

September 28

Section 5 Unfair Methods of Competition: Adjudication & Rulemaking I

Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 Univ. Chi. L. Rev. 357 (2020).

Thomas W. Merrill & Kathryn. T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 46 (2002)

Global Antitrust Institute, Comment on Noncompete Clauses Used in Employment Contracts, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374.

Bruce H. Kobayashi & Evan Starr on Noncompetes, Global Antitrust Institute Discussion Series, available at: <https://www.youtube.com/watch?v=I3LFBH1k9y0&t=1871s>

William MacLeod, Elizabeth Brunins, & Anna Kertesz, *Three Rules & a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 72 Antitrust L.J. 943 (2005).

FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), available at: <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

October 05 Section 5 Unfair Methods of Competition: Adjudication & Rulemaking II

No additional reading

CONSUMER PROTECTION

October 19 Deception, Unfairness & Privacy

James C. Cooper & Joshua D. Wright, *The Missing Role of Economics in FTC Privacy Policy*, in CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY, (Jules Polonetsky et al. eds. 2017).

Complaint, In the Matter of Facebook, Inc., FTC File No. 092-3184 (Aug. 10, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookcmpt.pdf>.

Decision and Order, In the Matter of Facebook, Inc., FTC File No. 092-3184 (Aug. 10, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>.

Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple Inc., FTC File No. 112-3018 (Jan. 15, 2014), <https://www.ftc.gov/sites/default/files/documents/public-statements/dissenting-statement-commissioner-joshua-d.wright/140115applestatementwright.pdf>.

Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251 (April 23, 2015), available at:

https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

Dissenting Statement of Commissioner Rohit Chopra, In re Facebook, Inc., FTC File No. 1823109 (July 24, 2019), available at:

https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

Statement of Chairman Joe Simmons and Commissioners Noah Joshua Phillips and Christine S. Wilson, In re Facebook, Inc., FTC File No. 1823109 (July 24, 2019), available at:

https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf.

FED. TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), available at: <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (1983), available at: <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

October 26

FTC and Equitable Monetary Relief

Guest Lecturer: Professor James C. Cooper, (Scalia Law School)

James C. Cooper & Bruce H. Kobayashi, *Equitable Monetary Relief Under the FTC Act: An Opportunity for a Marginal Improvement* (Geo. Mason Univ. L. & Econ. Research Paper No. 20-06),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549899

J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1 (2013).

Section 13(b) of the FTC ACT, 15 U.S.C. 53(b) (2018).

FTC v. Credit Bureau Center, 937 F.3d 764 (7th Cir. 2019).

FTC v. AMG Capital Management, LLC, 910 F.3d 417 (9th Cir. 2018).

FTC v. Shire ViroPharma, Inc., 917 F.3d 147 (3d Cir. 2019).

SEC v. Liu, 754 Fed.Appx. 505 (9th Cir. 2018).

November 02	NO CLASS
November 09	Guest Lecturer: TBD
November 16	Guest Lecturer: FTC Commissioner Noah J. Phillips
November 23	NO CLASS