MERGER ANTITRUST LAW

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Class 21 (November 7): Potential and Nascent Competition Mergers (Unit 14)

Our remaining case studies will deal with nonhorizontal mergers, that is, mergers between firms that are not incumbent competitors of one another. Two types of nonhorizontal mergers attract attention in modern U.S. enforcement: potential competition mergers and vertical mergers.

This unit examines potential competition mergers. Theories of anticompetitive harm premised on the elimination of potential rivalry through acquisition come in three related but distinct variants.

The first theory, known as the *actual potential competition doctrine*, looks directly at the elimination of possible near-term future rivals through their acquisition before they can enter the market as independent competitors. The idea here is that, in the absence of the acquisition, the potential entrant would have entered the market and its entry would have improved the competitive performance of the marketplace. Under this theory, the acquisition is anticompetitive because, on a forward-looking basis, it eliminates future rivalry and makes the market less competitive than it would have been without the transaction. The elimination of actual potential competition is the most commonly invoked theory of potential competitive harm.

The second theory, known as the *perceived potential competition doctrine*, looks at actions incumbent firms in the market currently may be taking to discourage firms they perceive as potential future entrants from entering the market. Under this theory, incumbent firms (unilaterally) take actions that increase the level of competitive activity—such as keeping prices low—which reduces the returns from operating in the market and hence decreases the attractiveness of entry. The harm arises when the perceived potential entrant is acquired, negating the incentive for incumbent firms to keep prices low or take other actions to discourage entry, and, as a result, prices in the market increase. Although accepted by the Supreme Court as a theory of anticompetitive harm in Section 7 cases,[1] this theory has all but been eliminated from the antitrust enforcement toolkit for lack of situations where it may apply.[2]

A third variant of potential competition theory emerged in the last years of the Trump administration and is continuing to be pressed by the Biden administration. Under the *nascent competition theory*, an actionable harm to competition arises when a dominant firm acquires a firm whose innovation—either in the target firm's hands or the hands of a third-party acquirer or licensee—presents the potential of a serious threat to the acquirer's dominant position sometime in the indefinite future. The theory is a major extension of the actual potential competition theory

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[1] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973); United States v. Marine Bancorporation, 418 U.S. 602, 624-25 (1974).

[2] *But see* FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023) (denying FTC's Section 13(b) petition on actual and perceived potential competition theories).

because it does not require the target to be a near-term entrant or even a likely entrant into the incumbent's market in the absence of the acquisition. The Biden administration enforcement agencies are actively looking for cases to apply the theory, especially against dominant high-tech firms.

As noted above, the Supreme Court has expressly recognized the elimination of perceived potential competition as an anticompetitive harm cognizable under Section 7. The Court, however, has reserved judgment on the elimination of actual potential competition.[3] Lower courts, the FTC, the 1984 DOJ Merger Guidelines, and the 2023 DOJ/FTC Merger Guidelines have recognized (or at least assumed arguendo) the elimination of actual potential competition as an anticompetitive harm under Section 7[4]—no court when presented with the theory has refused to consider it. From the 1980s until 2020, the federal enforcement agencies did not try a potential competition case since the 1980s. However, in a number of cases, the agencies have alleged the elimination of actual potential competition in complaints predicating consent settlements. Since 2020, however, the agencies have litigated two potential competition cases—FTC v. Steris Corp. (Steris/Synergy Health)[5] and FTC v. Meta Platforms, Inc. (Meta/Within)[6]—and lost both of them for failure of evidence. Although the agencies have filed two complaints in recent years alleging that the elimination of nascent competition violates Section 7 (if not Section 2 of the Sherman Act), no court has adjudicated the theory on the merits, so it remains judicially untested.[7]

Eliminating actual potential competition

An actual potential competitor is a firm that does not currently compete in the relevant market but would enter in the near future, either de novo or through a "toehold" acquisition of a small, competitively insignificant incumbent firm. If, however, the actual potential entrant merges with a significant incumbent firm, its incentives to enter the market independently disappear, and the market will lose that measure of additional competition that the near-term future new entry would have entailed.

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[3] *See* Marine Bancorp, 418 U.S. at 625; Falstaff, 410 U.S. at 537-38.

[4] *See, e.g.*, Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980); FTC v. Atl. Richfield Co., 549 F.2d 289 (4th Cir. 1977); FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *21 (N.D. Cal. Feb. 3, 2023); United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd sub nom.* Tidewater Oil Co. v. United States, 418 U.S. 906 (1974), *and aff'd*, 418 U.S. 906 (1974); Altria Group, Inc., No. 9393, 2022 WL 622476 (F.T.C. Feb. 23, 2022) (initial decision); B.A.T. Indus., No. 9135, 1984 WL 565384 (Dec. 17, 1984) *see also* FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) ("[T]he FTC has clearly endorsed this theory by filing this case, and the administrative law judge will be employing it during the proceeding. . . . Accordingly, in deciding the likelihood of success on the merits, the Court will assume the validity of this doctrine.").

[5] 133 F. Supp. 3d 962 (N.D. Ohio 2015) (rejecting FTC's theory that Steris' proposed $1.9 billion acquisition of Synergy Health would eliminate future competition in radiation sterilization services).

[6] 654 F. Supp. 3d 892 (N.D. Cal. Feb. 3, 2023) (rejecting FTC's theory that alleges that Meta's proposed $69 billion acquisition of Within would eliminate actual and perceived potential competition from Meta in virtual reality (VR) dedicated fitness applications).

[7] *See* First Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. filed Aug. 19, 2021) (alleging in part that Facebook's acquisition of Instagram and WhatsApp eliminated nascent competition from the acquired companies in social networking) (in litigation); Complaint, United States v. Visa Inc., No. 3:20-cv-07810 (N.D. Ca. Nov. 5, 2020) (alleging that Visa's $5.3 billion acquisition of Plaid would eliminate a nascent competitive threat to Visa's online debit business) (deal abandoned before trial).

Although the target company is usually the putative actual potential entrant, the theory equally applies when the acquirer is the putative entrant. The latter situation occurs when the acquirer has a "make or buy" decision and chooses to buy rather than make.

Given this concept, several conditions are required for anticompetitive harm to result from the elimination of an actual potential entrant:

1. *Noncompetitiveness*. The relevant market in which the anticompetitive effect may occur must be operating noncompetitively prior to the acquisition. If the market is operating competitively, new entry cannot improve the competitive performance of the market. Some courts have held a plaintiff may make out a prima facie case of this element through evidence of sufficiently high market concentration.[8]

2. *Uniqueness*. The putative potential entrant must be largely unique in its incentives and ability to enter the relevant market. If there are numerous other similarly situated potential entrants, eliminating one through acquisition is unlikely to affect the long-run level of competition in the market. The conventional wisdom is that the agencies are unlikely to challenge a transaction under the actual potential competition doctrine if three or more other firms share the entry advantages ascribed to the putative potential entrant.

3. *"Available, feasible means" of procompetitive entry*. The putative potential entrant must have the means of entering the market in the near future in a way that would likely improve the competitive performance of the target market. Courts recognize two procompetitive entry alternatives: de novo entry and "toehold" entry. For de novo entry to qualify as an "available, feasible means" of procompetitive entry, any barriers to entry into the market must not be so high to make entry difficult and hence unlikely. For a toehold acquisition to qualify as an "available, feasible means" of procompetitive entry: (a) toehold firms must exist in the target market that, if acquired, would provide a viable avenue to developing a significant market presence; and (b) such firms must be available for acquisition, presumably on objectively reasonable terms.

4. *Incentive*. But for the acquisition, the putative potential entrant must have a sufficient incentive in addition to the ability to enter the market using one of the above means to make entry in the near future likely. Objective evidence of intent to enter (including in contemporaneous regular course of business documents) is usually the most compelling.[9] Courts are more mixed on the probative value of subjective testimony from the alleged actual potential entrant of its intent to enter or not enter the relevant market.[10]

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[8] *See Meta Platforms Inc.*, 654 F. Supp. 3d at 922.

[9] *See id.* at 932 ("The Court first notes that it will accord little weight to subjective evidence and statements provided by Meta employees during the course of this litigation. Although they are relevant, entitled to some weight, and no doubt offered by persons of character, the bias affiliated with such ex post facto testimony is widely recognized and unavoidable.").

[10] *Compare* Mercantile Texas Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 638 F.2d 1255, 1270 (5th Cir. 1981) ("Not only is objective evidence undeniably probative, but subjective evidence is not required to establish a violation of the Clayton Act standard. On remand, the Board may rely exclusively on objective evidence if that evidence is sufficient to support the findings we require.") (internal citation omitted), *with* Meta Platforms, 654 F. Supp. 3d at 927 ("Here, the Court will first consider whether the objective evidence presented by the FTC supports the findings and conclusions necessary to satisfy the actual potential competition doctrine. If the objective evidence is weak, inconclusive, or conflicting, the Court will consult subjective evidence to illuminate the ambiguities left by the objective evidence, with the understanding that the subjective evidence cannot overcome any

5. *Procompetitive effect*. Assuming the potential entered the market in the absence of the acquisition, its entry must materially improve the competitive performance of the market.

The actual potential competition theory has not fared well in the courts. The usual problem is that the courts find that the preponderance of the evidence fails to show that the putative potential entrant would enter the market in the near future in the absence of the acquisition. Although testimony by the potential entrant's executives that they have not decided to enter the market is somewhat suspect by itself (given their support of the acquisition), the evidence usually also shows a lack of the planning or the commitment of resources necessary to enter the market in the near term. The evidence also frequently shows a business case that entry would be unprofitable, or at least too risky to prudently attempt, and that the putative potential entrant has other opportunities to pursue that promise greater and less risky financial returns.

The "near future" is not well-defined in the case law.[11] The conventional wisdom is that entry should be likely within two years but for the acquisition. In some situations, however, courts may apply the actual potential entry doctrine where the potential entrant is committing the necessary resources and on a well-defined path to enter the market, but regulatory approvals are likely to delay entry beyond two years. The prime example is the entry of pharmaceutical firms into new drugs requiring lengthy clinical trials for FDA approval.[12]

Fashioning an adequate remedy in an actual potential case can be difficult. In many cases, there may be no remedy short of divesting the incumbent operating business or blocking the acquisition in its entirety. In other cases, however, it may be possible to create actual entry by a viable competitor by divesting the assets of the potential entrant. For example, when Actavis sought to acquire Warner Chilcott, the FTC alleged that the transaction would eliminate actual potential competition against three Warner Chilcott-branded pharmaceutical products since Actavis would be the first in the absence of the transaction to manufacture and sell a generic version of these drugs.[13] As a remedy, the Commission accepted a consent order that required Actavis to divest all of its rights and assets relating to its generic versions of the drugs to Amneal Pharmaceuticals, a New Jersey-based generic pharmaceutical company.[14] At the time, Amneal marketed 65 products and maintained an active product development pipeline. The idea was that Amneal had the ability and incentive to "step into the shoes" of Actavis in developing the generic versions and entering the market with these products once it obtained FDA approval.

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directly conflicting objective evidence."), *and with B.A.T. Industries*, 1984 WL 565384, at *26 (noting that "the inherent limitations of economic evidence mean that, standing alone," purely objective evidence could not "establish liability under the actual potential entrant theory") (Bailey, Comm'r, concurring). Many courts have also consulted both objective and subjective evidence in reaching their conclusions. *See, e.g.*, *Yamaha Motor*, 657 F.2d at 979; *Siemens Corp*., 621 F.2d at 507; *Phillips Petroleum*, 367 F. Supp. at 1239 (recognizing that subjective evidence is "relevant and entitled to consideration, [but] cannot be determinative").

[11] For cases requiring that the actual potential entrant be likely to enter in the "near future" absent the acquisiton, see Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982); United States v. Siemens Corp., 621 F.2d 499, 505 (2d Cir. 1980); BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).

[12] The FTC has issued numerous complaints, all settled by a divestiture consent decree, that a combination between one pharmaceutical manufactuer with an incumbent drug with few if any competitors and another pharmaceutical manufacturer with a competing drug in the development pipeline although not yet FDA-approved violates Section 7.

[13] Complaint ¶¶ 8-10, 12(b)-(c), *In re* Actavis, Inc., No. C-4414 (F.T.C. issued Sept. 27, 2013) (settled by consent order).

[14] Decision & Order, In re Actavis, Inc., No. C-4414 (F.T.C. issued Sept. 27, 2013); *see* Analysis of Agreement Containing Consent Orders To Aid Public Comment, *id*.

Actavis was also required to supply generic versions of two of the products to Amneal for two years, which Amneal could extend at its option for up to two additional one-year terms.[15]

Eliminating perceived potential competition

A perceived potential competitor is a firm not currently selling in the market that incumbent firms regard as "on the wings" of the market, that is, ready, willing, and able to enter the market as a new independent participant but waiting because the financial returns on entry are not sufficiently attractive. The idea behind the perceived potential entrant doctrine is that incumbent firms recognize this threat of entry and the likely harm to them individually if entry occurs. With this recognition, the incumbent firms then act "more competitively" than they would in the absence of this threat to keep the financial returns on entry low and continue to discourage the potential entrant from actually entering. If, however, the perceived potential entrant merges with a significant incumbent firm in the market, the perceived potential entrant essentially becomes a "member of the club" and stops being a competitive threat, allowing incumbent firms to cease their endeavors to discourage the firm's independent entry by keeping the market more competitive. In this sense, eliminating a perceived potential entry through acquisition is anticompetitive because the acquisition removes the premerger procompetitive force exerted by the threat of independent entry.

Many of the necessary conditions for an anticompetitive effect to arise from eliminating perceived potential rivalry are closely related to the conditions of the actual potential competition doctrine. These conditions reflect the fact that firms are unlikely to be perceived as potential entrants unless they are actually likely potential entrants.

1. *Non-competitiveness*. For the elimination of perceived potential competition to have any anticompetitive effect, the market must be susceptible to coordinated interaction. An oligopolistic market structure is sufficient to satisfy this condition. Again, some courts have held a plaintiff may make out a prima facie case of this element through evidence of sufficiently high market concentration.[16]
2. *Perception as a likely potential entrant*. Incumbent firms must perceive the firm as a likely potential entrant. Courts are mixed on whether they are willing to credit subjective testimony from representatives of incumbent firms that they perceive the putative entrant as a perceived potential entrant or demand more objective evidence (such as contemporaneous regular course of business documents).
3. *Uniqueness*. Incumbent firms must regard the perceived potential entrant as largely unique in its incentives and ability to enter the relevant market. If there are numerous other similarly situated potential entrants in the minds of incumbent firms, the elimination of one through acquisition is unlikely to affect the long-run level of competition in the market. The conventional wisdom is that the agencies are unlikely to challenge a transaction under the actual potential competition doctrine if the entry

[15] For a related remedy, see Complaint ¶¶ 10, 12(b), *In re* Novartis AG, No. C-4364 (F.T.C. issued July 16, 2012) (alleging the elimination of actual potential generic competition against Solaraze, a branded drug sold by Fougera that is used to treat actinic keratosis), and Decision & Order, No. C-4364 (F.T.C. issued July 16, 2012) (consent decree requiring Novartis to withdraw from a marketing arrangement with Tolmar for a forthcoming generic version of Solaraze, return all rights in the generic version to Tolmar, and precluding Fougera from pursuing patent infringement litigation against Tolmar with respect to its generic product).

[16] *See Meta Platforms Inc.*, 654 F. Supp. 3d at 922.

advantages ascribed to the putative potential entrant are shared by three or more other firms.

4. *Incumbent reaction to the threat of entry*. Incumbent firms must be shown to be responding to the perceived threat of entry by lowering their prices, improving their product quality, or engaging in some other procompetitive activities to discourage the entry of the perceived potential entrant. Courts are mixed on whether they are willing to credit subjective testimony from representatives of incumbent firms that they are acting to deter entry because of the perceived threat of entry or demand more objective evidence (such as contemporaneous regular course of business documents).

5. *Anticompetitive effect*. It must be in the profit-maximizing interest of incumbent firms to cease some or all of their procompetitive entry-deterring conduct in the wake of the acquisition to the detriment of competition in the market.

Ironically, although the Supreme Court has recognized the elimination of perceived potential competition as a valid theory of anticompetitive harm, the agencies have rarely invoked the theory since 1980.[17] There is no remedy for the elimination of perceived potential competition short of enjoining the transaction.

Read the class notes for more background on the theories of perceived and actual potential competition (slides 3-22). I will give you an overview in class of some of the cases in which consent decrees have been entered on the actual potential competition theory. To keep the reading materials contained, I have given you only the *Steris* case, the only litigated potential competition case since the 1980s (pp. 4-48).

Eliminating nascent competition

In recent years, reformers have been agitating for the antitrust laws to do something about well-entrenched monopolies, especially in high-tech industries. This has resulted in a focus on so-called "nascent competitors." A "nascent competitor" is a firm that can potentially threaten a dominant firm's position at some time in the future. The threat usually resides in the nascent competitor's development of a new technology or product that could possibly shift share away from the dominant firm.

The actual potential competition doctrine requires, among other things, that (1) but for the acquisition, the putative potential entrant would have sufficient incentive and ability to make entry in the market reasonably probable in the near future, and (2) assuming entry occurred, the entry must have a reasonable probability of materially improving the competitive performance of the market.

By their nature, "nascent competitors" almost always fail to satisfy these requirements. At the time of the acquisition, the nascent competitor may not be actively considering entering the market with a product competitive with the acquiring dominant firm. Even if the nascent competitor is considering entering the market—or selling itself or licensing its technology to a third party that would enter the market—entry may be more distant than in "the near future."

[17] The only litigated case brought by the Justiece Department or FTC since the 1980s is *Meta Platforms Inc.*, 654 F. Supp. 3d at 939-41 (finding the FTC sufficient pleaded the potential competition theory in its complaint but finding on the record that the objective evidence did not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant and tempered their affected competitive activity as a result).

And even if entry is contemplated in the near future, the technological and commercial success of entry—and the competitive impact of entry—may be highly speculative.

Even so, proponents of challenging acquisitions by dominant firms of nascent competitors argue that even a small chance of disrupting the acquirer's market dominance at some point in the future should be preserved for the benefit of society. The argument is most compelling in the case of a so-called "killer acquisition," where a dominant firm acquires a new, potentially competitive technology specifically to suppress it. The idea, of course, is that suppressing a new technology yields no societal benefits and could cause substantial harm by stifling innovation. However, identifying "killer acquisitions" is challenging in practice. Sophisticated acquiring firms typically defend the acquisition by claiming that they intend to accelerate the development of the acquired technology and integrate it into new, improved products. As a result, discerning whether an acquisition is genuinely intended to suppress competition or foster innovation can be difficult.

In any event, to deal with the failure of the actual potential competition doctrine as currently interpreted by the courts to deal with nascent competitors, some commentators have suggested that the government enforcement agencies and other challengers allege a Section 2 monopolization or attempted monopolization violation in addition to a Section 7 claim. They argue that an acquisition by a firm with monopoly power of a nascent competitor that could threaten its monopoly is an actionable exclusionary act to maintain the incumbent's monopoly. No court to date, however, has ruled on the application of Section 7 or Section 2 on this theory.

Read the slides on nascent competitors (slides 23-37) to get some more background. That is probably enough. But if you are interested, read the materials on the DOJ's challenge to Visa's proposed acquisition of Plaid (pp. 50-81). The case is not a pure nascent competitor case since, at least according to the DOJ's complaint, Plaid had indicated that it would enter with a product that could undermine Visa's market position in credit cards.[18] But what makes the case interesting are the concerns expressed by Visa management about the nascent competitive threat Plaid posed if Visa did not acquire it, either on its own or, perhaps more concerning, in the hands of another acquirer. The case squarely raises the issue of what the enforcement agencies and the courts should do when there is substantial evidence that the acquisition was partly, if not principally, motivated by the acquiring company's desire to keep the target out of the hands of another acquirer to suppress possible future competition.[19]

A postscript: Meta/Within

On July 27, 2022, the FTC, after a nine-month HSR second request investigation and a 3-2 vote, filed a complaint in the Northern District of California under FTC Act § 13(b) seeking a preliminary injunction blocking the proposed acquisition by Meta Platforms, Inc. of Within Unlimited, Inc. until the conclusion of an administrative trial on the merits.[20]

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[18] The DOJ's complaint is surprisingly light on the allegations that Plaid was contemplating entry. This suggests that something else was going on here. What do you think it might be?

[19] In past years, I required students to read the Visa/Plaid. But now that the court has decided the Meta/Within Limited potential competition case (see the next section), requiring you to read the Visa/Plaid materials would be too much.

[20] Amended Complaint for a Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, FTC v. Meta Platforms, Inc., No. 3:22-cv-04325 (N.D. Cal. filed Oct. 7, 2022; original complaint filed July 27, 2022). The staff reportedly recommended against challenging the transaction but were overruled by a majority of the commissioners. *See FTC's Khan Overruled Staff to Sue Meta Over VR App Deal*, BloombergLaw.com (July 29, 2022). For the major papers in the case, see here.

Meta, formerly known as Facebook, is the leading developer of virtual reality ("VR") devices and apps, including the Oculus Quest 2 VR headset, through its Reality Labs division. Under CEO Mark Zuckerburg, Meta spent $36 billion on Reality Labs (for an operating loss of $30.7 billion) from January 1, 2019, to September 30, 2022.[21]

Within, a privately owned company founded in 2014, creates products, original content, formats, proprietary software, and tools for virtual and augmented reality entertainment, fitness, and learning. Its flagship product, *Supernatural*, is a complete fitness subscription service exclusively for the Oculus Quest 2 VR headset. Supernatural offers over 800 fully immersive VR workouts, each set to music and located in a virtual setting such as the Galapagos Islands and the Great Wall of China. It is the leading VR dedicated fitness app. The complaint alleged that the VR dedicated fitness app market is highly concentrated, although it did not allege (at least in the public version) that the market was operatively noncompetitively.

The FTC's amended complaint alleged that the acquisition, if consummated, would substantially lessen competition in the national market for VR dedicated fitness apps in violation of Section 7.[22] The complaint's principal theory of anticompetitive harm was that the acquisition eliminated the possibility that Meta would enter into VR dedicated fitness apps through other means, which the complaint alleged was reasonably probable but for the acquisition. The harm then was the elimination of Meta's actual potential competition into VR dedicated fitness apps.

This theory of anticompetitive harm is a major extension beyond what current law recognizes under the actual potential competition theory since it fails to allege facts making a plausible claim that that (1) the VR dedicated app fitness market was operating noncompetitively, (2) Meta was one of the few firms positioned to enter the VR dedicated fitness app market in the near future, (3) Meta was developing or had plans to develop a competing dedicated fitness app absent the acquisition, or (4) Meta's entry, if it occurred, would make the VR dedicated fitness app market more competitive.

The Meta/Within complaint was the first of only a few efforts to date by the Biden administration to extend antitrust law significantly beyond its current boundaries. It is worth careful attention.

Read the FTC's press release announcing the enforcement action (pp. 83-85) and Meta's response to it (pp. 86-88). You can skim or skip the amended complaint (pp. 89-115). Finally, read the district court's opinion finding the FTC's evidence insufficient on both the Commission's actual and perceived potential competition theories and denying the Commission's Section 13(b) petition for a preliminary injunction (pp. 115-79). This is an important opinion doctrinally and worth careful study. The case notes provide a summary (slides 38-48).

As always, email me if you have any questions.

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[21] Grace Dean, *Meta Has Pumped $36 Billion into Its Metaverse and VR Businesses since 2019*, BusinessInsider.com (Oct. 29, 2022). As of the close of the market on November 4, 2022, Meta stock has lost 73% of its value compared to its closing price on December 31, 2021.

[22] The complaint also alleges that the acquisition, if consummated, would violate Section 5 of the FTC Act. But there is no indication that the Section 5 extends beyond Section 7 and incorporates a Section 2 violation. *See* Am. Compl. ¶ 14 ("On August 11, 2022, the Commission found reason to believe that the Acquisition would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.").