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Press Release

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NEW PHOENIX CENTER LEGAL ANALYSIS QUESTIONS LEGAL BASIS FOR FTC'S NEW UNFAIR METHODS OF COMPETITION POLICY STATEMENT

FTC's decision to abandon the consumer welfare standard and "rule of reason" analysis is unlikely to survive judicial scrutiny

WASHINGTON, D.C. — American antitrust law protects consumers against anticompetitive conduct primarily through Sections 1 and 2 of the Sherman Act, both of which are concurrently enforced by the Department of Justice and the Federal Trade Commission ("FTC"). In addition to enforcing the Sherman Act, the FTC is also exclusively charged with, among other responsibilities, protecting consumers from "unfair methods of competition" ("UMC") under Section 5 of the eponymous Federal Trade Commission Act. The FTC Act does not define "unfair methods of competition," leaving the analytical bounds of this standard to be determined by the Commission in the first instance. An important question to ask, therefore, is how much deference a reviewing court must accord the FTC when it seeks to interpret and enforce the UMC standard of Section 5? Last November, the FTC issued a new *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*. Current FTC leadership appears to believe that this judicial deference is so great that the agency is now free to reject the consumer welfare standard and rule of reason analysis altogether when enforcing Section 5.

In a new legal analysis released today entitled *Pushing the Bounds of Judicial Deference: Some Thoughts on The FTC's New Unfair Methods of Competition Policy Statement*, Phoenix Center President Lawrence J. Spiwak explains why the FTC's new position on UMC is likely an overreach. A review of the caselaw reveals that while the FTC is entitled to judicial deference when interpreting and enforcing Section 5, this deference is not unfettered. The FTC, as the independent agency charged with enforcing the nation's antitrust laws, must still respect antitrust terms of art and economic fundamentals when invoking Section 5 and, therefore, many applications of its new (and indeed) vague interpretation of unfair methods of competition are unlikely to survive judicial scrutiny.

"By any reasonable standard, the FTC's 2022 UMC *Policy Statement* is not an analytically serious document," says study author Phoenix Center President Lawrence J. Spiwak. "Not only does the UMC *Policy Statement* reject years of antitrust precedent, abandon adherence to economic first principles, and raise significant due process concerns, but it also exudes a remarkable regulatory hubris by the Commission in its belief that the FTC can act with judicial impunity when enforcing Section 5."

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A full copy of PHOENIX CENTER POLICY BULLETIN NO. 63, *Pushing the Bounds of Judicial Deference: Some Thoughts on The FTC's New Unfair Methods of Competition Policy Statement*, may be downloaded free from the Phoenix Center's web page at: <https://www.phoenix-center.org/PolicyBulletin/PCPB63Final.pdf>.

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