
Unit 4. Merger Antitrust Litigation

CLASS SLIDES

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A Few Things to Remember

Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court
Seeks permanent injunctive relief in administrative trial

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

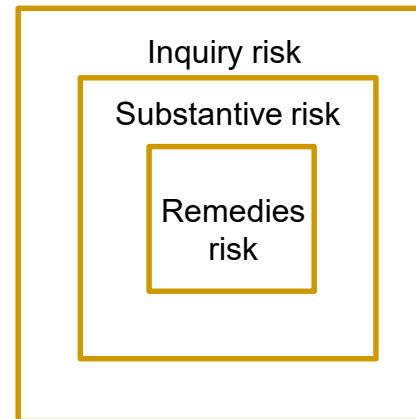
- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
 - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

Plaintiffs and Forums: Assessing Inquiry Risk

Three types of antitrust risks

- Inquiry risk
 - The risk that legality of the transaction will be put in issue
- Substantive risk
 - The risk that the transaction is anticompetitive and hence unlawful
- Remedies risk
 - The risk that the transaction will be blocked or restructured

Risks are nested



Inquiry risk

- Inquiry risk
 - The risk that legality of the transaction will be put in issue
- Inquiry risk does not arise in the abstract
- Some entity has to raise the issue in a forum that requires the merging parties to respond
- Questions
 - Who has the ability to raise the issue?
 - In what forum can they raise the issue?
 - What is their incentive to raise the issue?

Plaintiffs and forums

Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC		
–Preliminary inj.	Federal district court	Court of appeals
–Permanent inj.	FTC administrative trial	Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal district court	Court of appeals

* May bring state claims in state court or join state claims in federal court

Assessing incentives

- The DOJ/FTC are by far the most likely challengers
 - Both charged with enforcing Section 7 of the Clayton Act
 - Are large and well-funded
 - Have the benefit of the HSR Act
 - Premerger reporting
 - Waiting period
 - Precomplaint investigation tools
 - Have successful litigation experience

Assessing incentives

■ Other parties

- As we have seen, other parties may have standing to challenge a transaction under the private rights of actions contained in the antitrust laws:
 - State attorneys general
 - Customers
 - Competitors

■ Forum

- These challengers must seek relief from a federal district court
- Technically, the process is the same as for a DOJ injunctive relief action
 - NB: Injured parties may also have standing to seek treble damages relief
 - Damages usually can only be found postclosing where the merged firm has increases prices or foreclosed competitors as a result of the merger

■ State court forums

- Parties may also seek relief in state court for violations of state antitrust law
- This is very rare in practice and we will not consider merger antitrust actions in state court in this course

Assessing incentives

■ States

- State AGs often join with the DOJ or FTC in challenging a deal that they believe has a significant anticompetitive effect in their state
- State AGS rarely bring their own merger antitrust actions
 - Why?

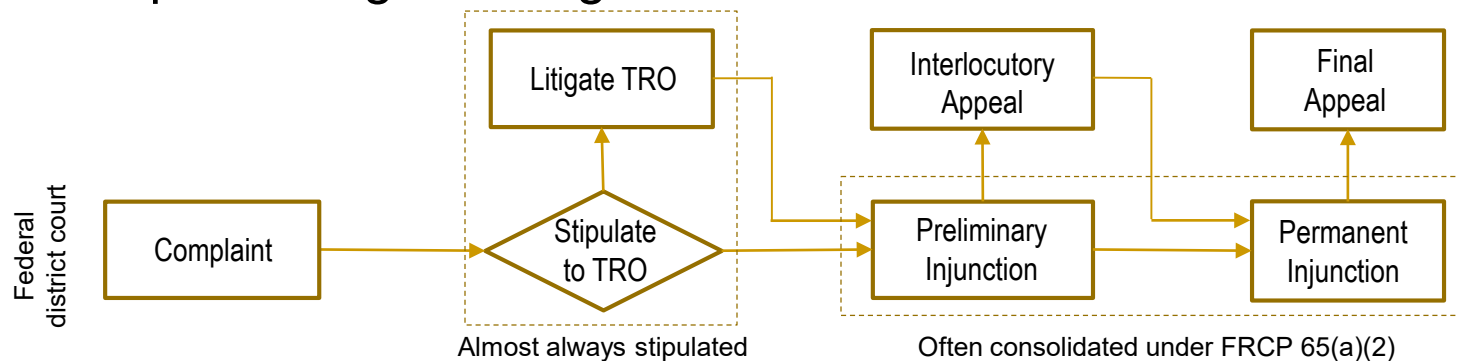
■ Customers and competitors

- Very infrequently bring challenges
- But there are some examples

Typical Litigation Paradigms

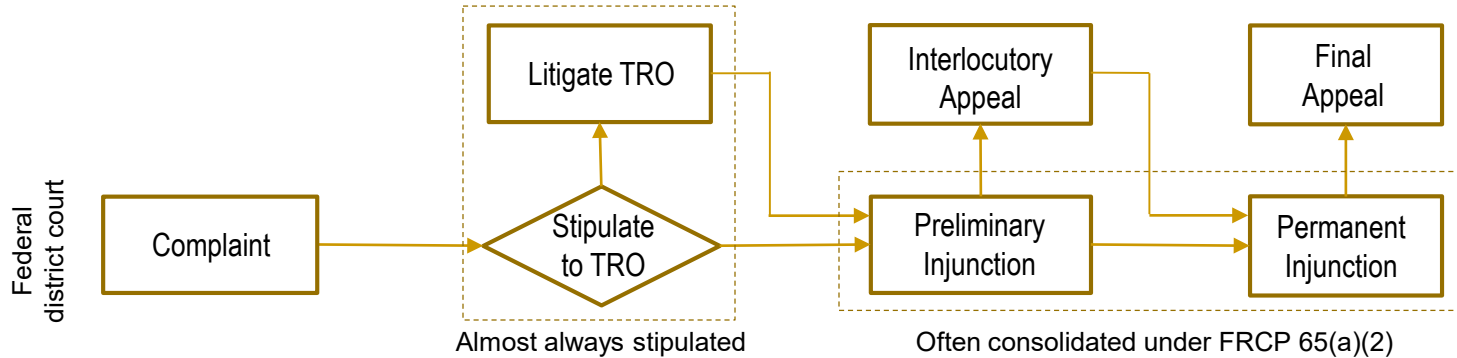
Typical litigation paradigms

DOJ preclosing challenge

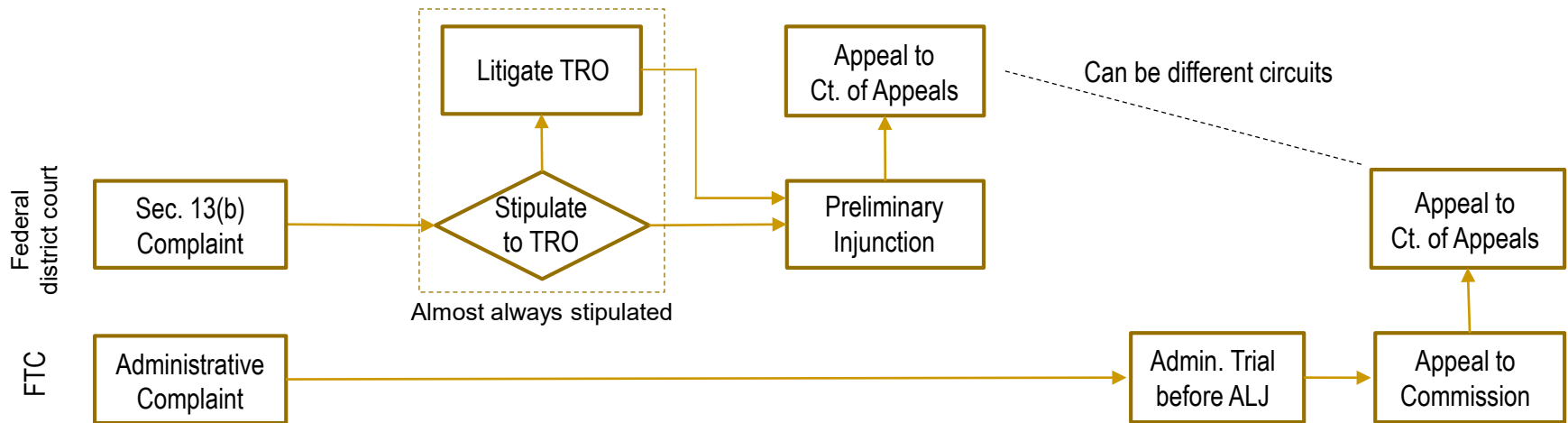


Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



Typical litigation paradigms

DOJ postclosing challenge



FTC postclosing challenge



Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Formum	Likely timing
Preliminary injunction	DOJ or FTC	Federal district court	6.5 months from filing of the complaint
Appeal from the grant or denial of a PI	DOJ or FTC	Federal court of appeals	Likely to be granted expedited treatment, in which case 6 months
Full trial on the merits	DOJ	Federal district court	Typically consolidated with PI hearing under Rule 65(a)(2)
Decision of ALF on the merits	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint
Appeal from the administrative trial	FTC	Full FTC	
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

Litigation timing—Preclosing challenges

	DOJ			FTC		
	Energy Solutions	Anthem	Aetna	Advocate Health Care	Penn State Hershey	Staples
Complaint	11/16/2016	7/21/2016	7/21/2016	12/22/2015	12/9/2015	12/8/2015
PI hearing	Consolidated	Consolidated	Consolidated	4/11/2016 (6 days)	4/11/2016 (4 days)	3/21/2016 (10 days)
PI				6/14/2016 ¹	5/9/2016 ²	3/21/2016 ³
PI appeal				10/31/2016	9/27/2016	None
Merits hearing (trial days)	4/24/2017 (10 days)	11/21/2016 (20 days)	12/5/2016 (13 days)	Transaction abandoned after PI entered and administrative complaint dismissed on 3/20/2017	Transaction abandoned after PI entered and administrative complaint dismissed on 10/23/2016	Transaction abandoned after PI entered
Live witnesses	6-8 fact 3 experts	29 fact 5 experts	>30 fact 7 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	6/21/2017	2/8/2017	1/23/2017			
Merits appeal	None	4/28/2017	None			
Total time to conclusion	7 months	6.5 months (tr) 2.5 months (a)	6 months	6 months (PI) 4.5 months (A)	5 months 4 months	3.5 months

¹ PI: Witness count not reported

² PI: 14 fact witnesses; 2 experts.

³ PI: 10 fact witnesses; 5 experts

Note: The slides continue to address injunctive relief and appeals. We did not cover those slides in class because they are completely covered in the class notes and I wanted to spend the time on the T-Mobile/Sprint case study. I have left the slides in this deck for whatever worth you may find them to have.

Injunctive Relief

Types of injunctions in merger cases

Injunction type	Relief ordered
TRO	Maintain status quo pending decision on a preliminary injunction
Preliminary injunction	Premerger: Blocking injunctions ¹ Postmerger: Hold separate/preserve assets for divestiture Rescission in appropriate cases ²
Permanent injunction	Premerger: Blocking injunction Postmerger: Divestiture (rescission in one case)

NB: Since actions for injunctive relief sound in equity, they are tried to the court, not to a jury

Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15

“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute **proceedings in equity** to prevent and restrain such violations.”

FTC: FTC Act § 13(b)

“Upon a proper showing that,
[1] **weighing the equities** and
[2] **considering the Commission’s likelihood of ultimate success**,
[3] such action would be in the **public interest**,
and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond”

Preliminary injunctions

- DOJ

Clayton Act § 15	Judicial standard (modified <i>Winter</i> ¹)
<p>“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.”</p>	<p>“A [private] plaintiff seeking a preliminary injunction must establish</p> <p>[1] that he is likely to succeed on the merits,</p> <p>[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,</p> <p>[3] that the balance of equities tips in his favor, and</p> <p>[4] that an injunction is in the public interest.”</p>

¹ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Preliminary injunctions

■ FTC

FTC: FTC Act § 13(b)	Judicial standard
<p>“Upon a proper showing that, [1] weighing the equities and [2] considering the Commission’s likelihood of ultimate success, [3] such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond.”</p>	<p>“[1] The issue is whether the Commission has demonstrated a likelihood of ultimate success. The Commission meets its burden if it ‘raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.”</p> <p style="text-align: center;">+</p> <p>[2] Balance of the equities</p> <p style="text-align: center;">+</p> <p>[3] Public interest</p>

Temporary restraining orders (TROs)

- Emergency interim relief a court may enter to maintain the status quo pending a fuller hearing on a motion for a preliminary injunction
- Can be entered ex parte
- Duration
 - Not to exceed 14 calendar days
 - May be extended for good cause by the court for an additional 14 calendar days
 - The parties may agree on a longer extension (stipulated TRO)
 - Short duration is the safeguard to the lack of higher standards
 - Absent consent, if of a longer duration TRO will be treated as a preliminary injunction and must conform to the more rigorous preliminary injunction standards
- Standard
 - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction
 - But the respective harms to the parties and the public interest will be assessed in light of very limited duration of the TRO (as opposed through the end of the trial on the merits for a preliminary injunction)

Temporary restraining orders (TROs)

- Rarely employed in modern merger antitrust practice
 - Judges strongly dislike the timing pressures of a TRO and believe that the litigating parties should be able to agree on a scheduling order that will—
 - Since same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement

Interim injunctions—Appeals

■ Appeal

- The grant or denial of a motion for a preliminary injunction is immediately appealable as a matter of right under 28 U.S.C. § 1292(a)(1):

[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

- The standard of review is abuse of discretion
 - Review legal conclusions de novo
 - Review factual findings for clear error

Permanent injunctions

- Identical to usual federal court preliminary injunction standard
 - EXCEPT that a permanent injunction requires *actual* success on the merits¹
 - Success on the merits requires proof by the preponderance of the evidence
 - Also, the record for a decision on a permanent injunction may be more developed if additional discovery and briefing have occurred since the preliminary injunction hearing
- Factual findings in the preliminary injunction hearing
 - Not binding in the permanent injunction trial
 - BUT unlikely to be overturned in the absence of new evidence

¹ Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

Appeals

Appeals: Jurisdiction

- Statutorily prescribed
 - Courts of appeal must be assigned jurisdiction by statute in order to hear an appeal
- Jurisdiction in three types of appeal
 - Appeals of final judgments (28 U.S.C. § 1291)
 - Appeals of the grant or denial of injunctive relief (28 U.S.C. § 1291(a))
 - Interlocutory appeals (28 U.S.C. § 1291(b))

Appeals: Jurisdiction

- Appeals of final judgments—28 U.S.C. § 1291
 - Courts of appeal have appellate jurisdiction over all “final decisions” of the district courts
 - Appeal may be taken as a matter of right

Appeals: Jurisdiction

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
 - Appeals of interlocutory orders are not as of right
 - Certification: Two-tiered screening procedure—
 - District court certification:
 1. the order involves a controlling question of law
 2. as to which there is substantial ground for difference of opinion, and
 3. that an immediate appeal from the order may materially advance the ultimate termination of the litigation¹
 - Court of appeals acceptance: Discretionary with appellate court
 - Rarely successfully invoked

Appeals: Standards of review

- Interpretation of the law—De novo
 - Query: Is the FTC accorded *Chevron* deference?
- Finding of facts
 - In a bench trial—Clearly erroneous rule
 - By a jury—Substantial evidence rule
 - By the FTC—Substantial evidence rule
- Others matters
 - In federal court—Abuse of discretion
 - FTC—[No articulated rule? But in any event very deferential]