Unit 4. Merger Antitrust Litigation

Merger Antitrust Law

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Topics

- A few things to remember
- Plaintiffs and forums
- Typical litigation paradigms
- Contrasts in litigating with the DOJ and FTC
- Interim injunctive relief
  - Winter v. Natural Res. Def. Council, Inc.
  - Temporary restraining orders (TROs)
  - Preliminary injunctions
  - Differences in the PI standards for the DOJ and FTC
- Permanent injunctions
- Recent litigated cases

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

Some key points explored in this unit

- Means and incentives to raise challenges
  - The DOJ and FTC have means and incentives
    - HSR Act review process: For reportable transactions
    - Civil investigative demands (CIDs) (precomplaint subpoenas) for all transactions
      - Can be issued to the parties in non-HSR reportable transactions
      - Can be issued to third parties in all transactions
    - Charged by congress to investigate transactions and challenge those they believe are anticompetitive
      - Have budget to challenge mergers
    - Can only seek injunctive relief—cannot seek fines
  - State AGs usually have the means but often lack the incentive
    - Can join with the DOJ/FTC in merger investigations
    - Usually can investigate on their own (with precomplaint investigative discovery authority)
    - BUT have limited enforcement budgets
    - Merger antitrust challenges are resource-intensive, costly, and time-consuming
      - State AGs often conclude that their limited resources can be better used elsewhere
    - Can only seek injunctive relief—cannot seek fines
      - But can recover costs of investigations in settlements and often in litigated proceedings

A key points explored in this unit

- Means and incentives to raise challenges
  - Private parties lack the means outside of litigation and almost always lack the incentive
    - No means of precomplaint discovery
    - Merger antitrust litigation is very costly and time-consuming and outcomes are uncertain
    - No damages when mergers are challenged preclosing
      - But damages can be awarded in litigation
    - Courts are very reluctant to order injunctive relief in private cases
      - Especially when the transaction has been reviewed by the DOJ or FTC

Plaintiffs and Forums

Plaintiffs and forums

Summary

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

The DOJ/FTC as plaintiffs

- By far the most likely challenger
  - Both charged with enforcing Section 7 of the Clayton Act
    - DOJ: Section15 of the Clayton Act provides in that "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" of the antitrust laws (15 U.S.C. § 25)
    - FTC:
      - Section 11(a) of the Clayton Act authorizes the FTC to enforce the Clayton Act (15 U.S.C. § 21(a))[1]
      - Section 11(b) of the Clayton Act authorizes the FTC to adjudicate the merits of a Section 7 in an administrative trial (15 U.S.C. § 21(a))
      - Section 13(b) of the FTC Act provides the FTC with a caused of action to seek preliminary injunctions in federal district court pending a resolution of the merits in an administrative trial (15 U.S.C. § 53(b))
      - Section 13(b) of the FTC Act also provides the FTC with a cause of action to seek permanent injunctive relief "in proper cases"

[1] Mergers also may be challenged by the FTC under Section 5(a) of the FTC Act (15 U.S.C. § 45(a)).
[2] The analogous providing for enforcing Section 5 of the FTC Act is found in Section 5(b) (15 U.S.C. § 45(b)).

The DOJ/FTC as plaintiffs

- By far the most likely challenger
  - Are large and well-funded
    - DOJ
      - The Antitrust Division's 2020 budget request asks for $165 million and 656 FTEs (including 335 attorneys)[1]
      - The Antitrust Division does not break down its budget for merger enforcement.
      - However, criminal price-fixing and mergers constitute the vast bulk of the Division's work
    - FTC
      - The bulk of its competition resources are developed to the investigation of and litigation against anticompetitive mergers.
      - In its 2020 budget request, asked for $120 million and 453 FTEs for merger antitrust enforcement[2]
  - Have the benefit of the HSR Act
    - Premerger notification of pending transaction
    - Waiting period to delay closing to allow for investigation
    - Discovery tools
      - Most notably, the "second request"
  - Have successful litigation experience

[1] U.S. Dep't of Justice, Antitrust Division (ATR): FY 2020 Budget Request at a Glance (undated).
[2] Fed. Trade Comm'n, Fiscal Year 2020: Congressional Budget Justification 44 (transmitted Mar. 11, 2019).

Non-DOJ/FTC challenges

- 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[1]
  - 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

[1] 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.

Non-DOJ/FTC challenges

- Frequency
  - 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
      - Federal agency typically carries the load in the investigation and litigation
      - Although states may be some effect on the relief sought when it has a particularized effect in their jurisdiction
    - State AGS rarely bring their own merger antitrust actions
      - Although some states are saying that they will step up their own merger enforcement actions if the DOJ and FTC in the Trump administration become too lenient

Non-DOJ/FTC challenges

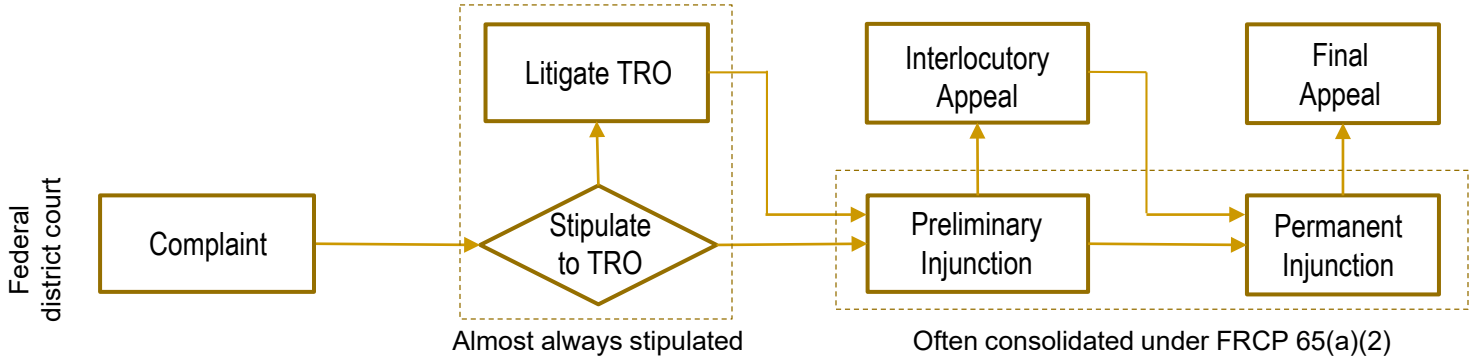
- Frequency
  - Customers and competitors
    - Very infrequently bring challenges
      - Merger challenges are extremely expensive to prosecute given the requirement of showing a reasonably probable anticompetitive effect in a relevant market
      - There are no damages if the challenge is to a transaction that has not yet closed[1]
      - Empirically, courts rarely grant injunctive or damages relief to nongovernment plaintiffs (especially when the transaction has been reviewed by the DOJ/FTC under the HSR Act and either "cleared" without enforcement action or restructured to eliminate the alleged anticompetitive problem through a consent decree)[2]

[1] A significant example occurred in 2018. *See* Steves & Sons, Inc. v. Jeld-Wen, Inc., No. 3:16-CV-545, 2019 WL 1186847 (E.D. Va. Mar. 13, 2019) (denying defendants' jmol motion in the wake of a jury verdict awarding Steves $12,151,873 for past damages under both the Clayton Act and breach of contract claims and $46,480,581 in future lost profits under the Clayton Act claim) (Clayton Act amounts to be trebled).
There are exceptions. *See, e.g.*, Steves & Sons, Inc. v. Jeld-Wen, Inc., 345 F. Supp. 3d 614 (E.D. Va. Oct. 5, 2018) (finding divestiture relief appropriate); Boardman v. Pac. Seafood Grp., No. 1:15-108-CL, 2015 WL 13357739 (D. Or. Mar. 6, 2015) (entering preliminary injunction), *aff'd*, 822 F.3d 1011 (9th Cir. 2016)

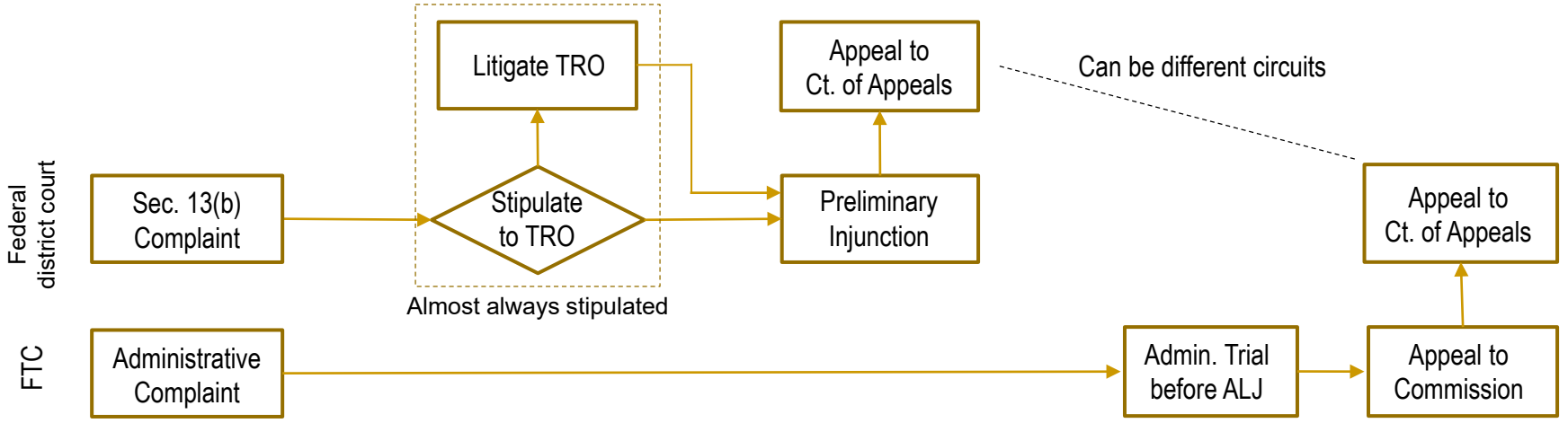
Typical Litigation Paradigms

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



Typical litigation paradigms

DOJ postclosing challenge

FTC postclosing challenge

Litigation timing—Preclosing challenges

	DOJ			FTC		
			AT&T/ Time-Warner	Sanford Health	Wilhelmsen	Tronox
Complaint			11/20/2017	6/22/2017	2/23/2018	7/10/2018[1]
PI hearing			Consolidated	10/30/2017 (4 days)	5/29/2018 (10 days)	8/7/2018 (3 days)
PI				12/15/2017	7/21/2018[2]	9/7/2018
PI appeal				6/13/2019	None	None
Merits hearing (trial days)			3/22/2018 (23 days)	Transaction abandoned after the PI was affirmed on appeal and the administrative complaint dismissed on 7/8/2019	Transaction abandoned after the PI was affirmed on appeal and the administrative complaint dismissed on 7/31/2018	Following the entry of the PI, the parties settled with a curative divestiture consent order on 4/18/2019
Live witnesses			23 fact 5 experts			
Initial merits decision (FTC)			--			
Final decision			6/12/2018			
Merits appeal			2/26/2019			
Total time to conclusion			7 months (Tr) 8.5 months (A)	6 months (PI) 18 months (A)	5 months (PI)	2 months

[1] The FTC filed its administrative complaint on Dec. 5, 2017. When the PI was filed eight months later, the trial was over and an ALJ decision was pending.
[2] PI: 15 fact witnesses; 3 experts. The opinion was issued on Oct. 1, 2018

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

Litigation timing—Preclosing challenges

	DOJ			FTC		
	H&R Block	Oracle	Sunguard	Steris	Sysco	CCC
Complaint	5/23/2011	2/24/2004	10/23/2001	5/29/2015	2/20/2015	11/25/2008
PI hearing	Consolidated	Consolidated	Consolidated	8/17/2015 (3 days)	5/5/2015 (8 days)	1/8/2009 (9 days)
PI				9/24/2015	6/23/2015	3/18/09
PI appeal						
Merits hearing	9/6/11 (9 days)	6/6/04	11/8/01 (10 hours)	Transaction closed; administrative proceeding dismissed	Transaction abandoned after PI	Transaction abandoned after PI
Live witnesses	8 fact 3 experts		3 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	10/31/11	9/9/04	11/14/01			
Merits appeal	None	None	None			
Total time to conclusion	5 months	6.5 months	3 weeks	4 months	4 months	4 months

Litigation timing

- Some initial observations
  - Litigation timing can be critical in deals that have yet to be consummated
    - The acquisition agreement will specify a “drop-dead date”—that is, the date on which either party can terminate the agreement unilaterally and without cause
    - If the deal is not closed by the drop-dead date, there is a risk that one of the parties may walk away or seek to renegotiate the terms of the transaction (especially the purchase price) as an inducement to stay in the deal
    - For this reason, the business people need a good sense of the timing in order to understand what they should be seeking (and what they might be giving up) in negotiating for a specific drop-dead date in the acquisition agreement
  - The DOJ/FTC typically will not continue litigation on the merits if they are denied a preliminary injunction (although the agency might appeal an adverse PI decision)
    - DOJ has not continued on the merits after losing a PI since 1980
    - FTC, which had consistently continued litigation until 1995, when it discontinued the practice for the most part
  - Unaware of any case in the last 40 years where the merging parties have proceeded to a full trial when a preliminary injunction has been granted blocking the closing pending a final adjudication of the merits

Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Forum	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[1]
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

[1] By FTC rule, the administrative trial must begin no less than 5 months after the filing of the administrative complaint if the FTC has sought preliminary injunctive relief under Section 13(b). 16 C.F.R. § 3.11(b)(4). The evidentiary hearing may last no more than 30 trial days (about 1.5 calendar months). *Id*. § 3.41(b). The parties must file their proposed findings of fact, conclusions of law, and order within 21 days of the close of the evidentiary hearing. *Id*. § 3.46(a). The ALJ must issue a decision with 70 days of the filing of the proposed findings of fact and conclusions of law. *Id*. § 3.51(a).

Contrasts in Litigating with the DOJ and FTC

Contrasts between the DOJ and FTC

- Authority
  - DOJ
    - Purely a prosecutorial agency
  - FTC
    - Both prosecutes and adjudicates

Contrasts between the DOJ and FTC

- Adjudicators
  - DOJ actions
    - Same district court judge decides preliminary injunction and merits/permanent injunction
    - Appeal to the federal court of appeals in the circuit containing the district court
    - Appellate standard: Abuse of discretion
  - FTC actions: Typical case with an administrative trial
    - District court judge only decides preliminary injunction—has no further involvement in the merger challenge
    - ALJ (an FTC employee) decides permanent injunction
    - Initial appeal lies to the full Commission—usually most if not all of the same five people who voted out the complaint
    - Appeal to any federal court of appeals with venue
    - Appellate standard:[2]
      - Legal conclusions: De novo
      - Factual findings: Substantial evidence rule—regarded as very deferential
        - Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."[3]
        - 15 U.S.C. § 45(c) provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

[2] ProMedica Health Sys., Inc. v. FTC, No. 12-3583, at 7 (6th Cir. Apr. 22, 2014).
[3] *Id*. (quoting Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011)

Contrasts between the DOJ and FTC

- Consolidation under FRCP 65(a)(2)
  - DOJ: Will consent to consolidating preliminary injunction hearing with trial on the merits
  - FTC: Never consents to consolidation—always insists on separate administrative trial and appeal to the full Commission
- Rules of procedure and evidence
  - DOJ
    - Must follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence applicable to all federal court proceedings
  - FTC
    - Follows the FTC Rules of Practice
    - Do not incorporate FRCP or FRE
      - E.g., do not adopt limitations on the number of interrogatories or the length of depositions
- Preliminary injunction standard
  - Arguably lower threshold in FTC Section 13(b) proceedings than in DOJ Section15 proceedings (discussed below)

Interim 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 (recission in one case)

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

[1] Blocking injunctions are injunction that prevent the parties from closing their transaction. By contrast, a "hold separate injunction" is an injunction that permits the parties to close their transaction but requires the combined firm to operate the businesses separately and in a way that allows for an effective separation in the event that the transaction is ultimately found to violate Section 7 on the merits. Hold separate injunctions are highly disfavored and have not been entered by modern courts.

[2] Rescission is an injunction that "unwinds" the deal to the premerger status quo. An appropriate case for recission is in a non-HSR reportable transaction that the government learns about prior to closing and asks the parties to delay the closing until the government has an opportunity to investigate the transaction, and the parties respond by accelerating the closing.

Winter v. Natural Res. Def. Council, Inc.[1]

- Seminal Supreme Court case on preliminary injunctions
- "A preliminary injunction is an extraordinary remedy never awarded as of right."[2]
- *Winter* test

> A [private] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.[3]

- Sliding scale
  - Prior to *Winter*, many courts held that the four factors could be balanced on a sliding scale, so that, for example, a weak showing of likelihood of success could be offset by a strong showing of irreparable harm
  - Post-*Winter*, some courts have rejected the sliding scale, holding that *Winter* requires a likelihood of success on the merits as an independent, free-standing requirement for a preliminary injunction

[1] 555 U.S. 7 (2008).
[2] *Id*. at 24.
[3] *Id* at 20.

Winter v. Natural Res. Def. Council, Inc.

- DOJ/FTC challenges
  - Irreparable harm is presumed to result if the law is violated
    - Other cases hold that the element of irreparable harm is simply not part of the test when the government is the plaintiff and is seeking to prevent a violation of law
  - Balance of the equities
    - The public equities when there is a likelihood of success on the merits
      - The public interest in effectively enforcing the antitrust laws
      - *In addition for a preliminary injunction*: The public interest in ensuring that effective relief may be ordered if the government succeeds at the trial on the merits
    - The public equities almost always outweigh any private equity
  - Therefore, the critical factor when the government seeks a preliminary injunction is the requisite likelihood of success on the merits

Preliminary injunctions

- Purpose
  - To maintain the status quo ex ante until a final decision on the merits
  - In merger antitrust law, this usually means a blocking preliminary injunction if the transaction has not yet closed
    - Modern courts have held that “hold separate” injunctions, which allow the deal to close but require merged parties to be operated separately and not integrated, are usually regarded as inadequate relief

Preliminary injunctions

- Deal realities
  - Moreover, a transaction is unlikely to survive as a business matter the time it would take for both a preliminary injunction and a subsequent trial on the merits
    - Most deals start to flounder if they have not closed within a year of signing
    - A HSR merger review is likely to take 6-8 months
    - Little time left practically for a trial and an appeal
  - Federal judges in the District of Columbia recognize the time sensitivity of deals and usually give the parties the opportunity on a very expedited basis to present a compete case in the preliminary injunction proceeding
    - Usually includes 3-6 days of evidentiary hearings for live witnesses
    - *Trade-off*: Due to court schedules, the more trial days the parties want the more delayed the hearing
- Other observations
  - The DOJ/FTC need only show a likelihood of success on the merits for a preliminary injunction
  - This is a lower standard than the actual access on the merits required for a permanent injunction

Preliminary injunctions

- Implications—DOJ actions
  - Merging parties often seek to avoid separate a stand-alone preliminary injunction proceeding (and the technically lower standard of proof) by stipulating to a PI
  - Advantages for merging parties
    - Results in the use of the "actual success on the merits" standard
    - Shortens the time to get a trial on the merits
    - May sacrifice some trial days to get earlier calendar date
    - Typically seek to consolidate preliminary injunction hearing with trial on the merits under FRCP 65(a)(2)
  - DOJ practice is to consent (provided it obtains enough trial days to present case)
    - Recognizes that discovery will be complete before the PI hearing
    - Recognizes that judges (in D.D.C.) expect a full merits case to be presented even in a preliminary injunction proceeding, that they do not want two evidentiary proceedings, and that they are unlikely to reach a different conclusion in a full merits proceeding[1]

[1] *See, e.g.*, United States v. Gillette Co., 828 F. Supp. 78, 86 n.12 (D.D.C. 1993) ("Despite the limited time involved, both parties have provided the court with a remarkably complete and detailed record; in fact, the record is more complete than many cases are after trial. Thus, the court feels confident in reaching its conclusion that plaintiff is not likely to succeed on the merits after a full trial, should a full trial ever occur in this case.")

Preliminary injunctions

- Implications—FTC actions
  - Merging party incentives
    - Merging parties have the same incentives to avoid separate a stand-alone preliminary injunction proceeding and to proceed on an "actual success" standard
  - BUT FTC will not cooperate
    - Will not consent to consolidation of preliminary injunction hearing and trial on the merits under FRCP 65(a)(2)
      - Insists that statutory scheme indicates a strong congressional intent that the FTC to try the case on the merits in its own administrative proceeding
      - Federal courts have exhibited no willingness to consolidate over FTC opposition
    - Likes to litigate under the Section 13(b) standard (see below)
    - Cannot be pressured by federal court
      - The federal judge's only role is to conduct the Section 13(b) proceeding
      - The federal judge will have no involvement in the trial on the merits

Preliminary injunctions

- Implications—FTC actions (con't)
  - Consequences
    - FTC has incentive to seek a very quick preliminary injunction hearing date to minimize ability of merging parties to take adequate discovery, prepare expert testimony, and make a complete case in the Section 13(b) proceeding
      - FTC believes that a strong win in the Section 13(b) proceeding will dissuade the parties from pursuing litigation on the merits in a post-PI administrative proceeding given the long length of time to litigate to conclusion on the merits (including an appeal) and the nature of the forum (the same commissioners that voted out the complaint will hear any appeal from the initial decision by the administrative law judge)
      - Also, by the end of an HSR merger review the FTC staff should have completed discovery for its affirmative case, while the merging parties have no opportunity for third-party discovery until a complaint has been filed.
    - Merging parties has incentive to litigate the Section 13(b) PI if they believe they can make a strong evidentiary showing and obtain a denial of the PI by a (neutral) federal judge, so as to incentivize the FTC to dismiss the administrative complaint as futile
      - But may stipulate to a PI and avoid a Section 13(b) decision if the time available to prepare is too short to take adequate discovery and prepare experts or if there are other reasons that make it likely that the merging parties will lose (e.g., a judge who is apparently unsympathetic or unsophisticated in complex antitrust litigation)

Preliminary injunction standard

- DOJ
  - *Clayton Act § 15*: Authorizes the district courts in antitrust cases brought by the Attorney General to "make such temporary restraining order or prohibition as shall be deemed just in the premises."[1]
  - *Test*: Traditional four-factor test in private actions:
    - Likelihood of the plaintiff's success on the merits
    - Threat of irreparable injury to the plaintiff in the absence of the injunction
    - Possibility of substantial harm to other interested parties from a grant of injunctive relief
    - Interest of the public
  - DOJ does not have to show irreparable harm
  - Likelihood of success is key
    - Usually requires a showing that there is a "reasonable probability of success at trial"
      - Some older decisions require only that the case "raise questions going to the merits which are so substantial and complex as to warrant ... maintaining the status quo until they have been resolved."
    - Courts give lip service to other factors, but rarely if ever important in DOJ cases
  - Type of relief
    - Blocking preliminary injunction
    - "Hold separate" injunctions that allow the deal to close are regarded as insufficient to preserve competition[2]

[1] 15 U.S.C. § 25.

[2] FTC v. PPG Indus., Inc., 798 F.2d 1500, 1506-09 (D.C. Cir. 1986)

Preliminary injunction standard

- FTC
  - *FTC Act § 13(b)*: Authorizes the district court to enjoin the consummation of a merger pending completion of an FTC administrative adjudication "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[1]
    - No requirement to show irreparable harm
  - *Test*: "Serious questions"

> 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."[2]

[1] 15 U.S.C. § 53(b).

[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); *id*. at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 44 (D.D.C. 2018); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); FTC v. Sanford Health, No. 1:17-CV-133, 2017 WL 10810016, at *24 (D.N.D. Dec. 15, 2017), *aff'd*, 926 F.3d 959 (8th Cir. 2019); FTC v. Advocate Health Care, No. 15 C 11473, 2016 WL 3387163, at *2 (N.D. Ill. June 20, 2016), *rev'd and remanded*, 841 F.3d 460 (7th Cir. 2016); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 115 (D.D.C. 2016); FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 22 (D.D.C. 2015); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *53 (N.D. Ohio Mar. 29, 2011); FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG MLGX, 2011 WL 3100372, at *16 (C.D. Cal. Feb. 22, 2011); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

Preliminary injunction standard

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  - *FTC Act § 13(b)*: Authorizes the district court to enjoin the consummation of a merger pending completion of an FTC administrative adjudication "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[1]
    - No requirement to show irreparable harm
  - *Test*: "Serious questions"

    > 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."[2]

  - Application
    - While the law recognizes FTC as an "expert agency" that (in principle) is entitled to some deference, most courts in practice appear to hold the FTC to the same standard as the DOJ (a "likelihood of success on the merits") even if they do not explicitly say so
    - *Query*: Is a question "serious" only if the evidence shows a likelihood of success on the merits?

[1] 15 U.S.C. § 53(b).

[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); *id*. at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 44 (D.D.C. 2018); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); FTC v. Staples, Inc., No. CV 15-2115 (EGS), 2016 WL 2899222, at *6 (D.D.C. May 17, 2016); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

Preliminary injunction standard

- Private parties
  - Clayton Act § 16
    - Provides private persons (including states) with a right of action to "sue for and have injunctive relief ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[1]
      - Interpreted to include TROs and preliminary injunctions as well as permanent injunctions
  - Test: Same as DOJ + immediate threat of irreparable harm
    - Irreparable harm is harm no remediable by damages
      - Courts typically find that harm is not irreparable → Damages are sufficient
      - But some cases hold that a harm resulting from a lessening of competition is a irreparable harm[2]
      - *Query*: Which is the proper reading in a private case?
    - Threat of irreparable harm must be immediate
      - Means that the plaintiff "is likely to suffer irreparable harm before a decision on the merits can be rendered."[3]
    - Also requires actual or threatened antitrust injury and prudential standing
    - The equities and the public interest count in the analysis (although still secondary to likelihood of success on the merits)

[1] 15 U.S.C. § 26.
[2] *See, e.g.*, Boardman v. Pacific Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016).
[3] *Winter*, 555 U.S. at 22.

Preliminary injunction standard

- Private parties (con't)
  - Type of relief
    - While private parties can obtain preliminary injunctive relief, courts are reluctant to grant it
      - Especially true when deal has been challenged and settled by the DOJ or FTC
      - There are exceptions[1]
    - Courts typically find that harm is not irreparable → Damages are sufficient

[1] *See, e.g.*, Boardman v. Pacific Seafood Grp., 822 F.3d 1011 (9th Cir. 2016).

Preliminary injunction—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

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
  - May be used to block the imminent closing of a challenged merger where there has not been time to conduct a PI proceeding
  - Initiated by motion (usually filed simultaneously with the complaint) accompanied by a request to see the judge immediately
- Ex parte entry[1]
  - May be entered ex parte (without notice or participation by the adverse party) if—
    - immediate and irreparable injury will result before the adverse party can be heard in opposition, and
    - the movant sought to give notice to the adverse party or there are good reasons why notice could not be given
  - In merger antitrust cases—
    - Immediate and irreparable injury will be threatened if the transaction will close and will be difficult to unwind postclosing (almost a presumption)
    - BUT as a practical matter the merging parties and their counsel are always available to appear to oppose the TRO
    - So TROs are never entered ex parte in government merger antitrust cases

[1] Fed. R. Civ. P. 65(b)(1).

Temporary restraining orders (TROs)

- Duration[1]
  - Standard
    - 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[2]
- Standard
  - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction[3]
    - If issued ex parte, efforts to give notice also may be taken into account
  - 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)

[1] Fed. R. Civ. P. 65(b)(2).

[2] Sampson v. Murray 415 U.S. 61, 86 & n.58 (1974); *accord* United Airlines, Inc. v. U.S. Bank, N.A., 406 F.3d 918, 923 (7th Cir. 2005).

[3] United States v. Tribune Publ'g Co., No. CV1601822AB (PJWX), 2016 WL 2989488, at *1 (C.D. Cal. Mar. 18, 2016) (entering TRO in newspaper merger case).

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—
    - Permit the merging parties to take all necessary discovery on an expedited basis prior to the preliminary injunction hearing
      - HSR-reportable transaction: If the investigating agency has done its job properly, it should not need additional discovery (BTW the agency almost always disagrees)
      - Non-HSR reportable transaction: Likely that both sides will require discovery
    - Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement

Permanent Injunctions

Permanent injunctions

- Identical to usual federal court preliminary injunction standard
  - EXCEPT that a permanent injunction requires *actual* success on the merits[1]
  - 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
  - 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).

Recent Litigated Cases

Recent litigated cases

- Recent DOJ actions litigated to conclusion (not settled)

Case	Deal Status	Litigation Result
United States v. AT&T Inc., No. CV 17-2511 (RJL), 2018 WL 2930849 (D.D.C. June 12, 2018)	Preclosing challenge	Case dismissed on the merits; appeal pending Note: This was a vertical transaction and the only nonhorizontal challenge in the list
United States v. Energy Solutions, Inc., 265 F. Supp. 3d 415 (D. Del. July 13, 2017)	Preclosing challenge	Blocking permanent injunction entered.
United States v. Anthem Inc., 2017 WL 685563 (D.D.C. Feb. 9, 2017)	Preclosing challenge	Blocking permanent injunction entered.
United States v. Aetna Inc., 2017 WL 325189 (D.D.C. Jan. 23, 2017)	Preclosing challenge	Blocking permanent injunction entered. Parties abandoned merger.
United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. 2014)	Consummated transaction	No PI sought. Tried on the merits. Permanent injunction entered.
United States v. H & R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction entered.
United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation.
United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation.

Recent litigated cases

- Recent DOJ actions litigated to a preliminary or final conclusion[1]

Case	Deal Status	Litigation Result
United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (W.D. Wis. 2000)	Preclosing challenge	Stipulated PI. Tried on the merits. Blocking permanent injunction entered.
United States v. Engelhard Corp., 970 F. Supp. 1463 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation.
United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation.
United States v. Mercy Health Servs., 902 F. Supp. 968 (N.D. Iowa 1995), *vacated*, 107 F.3d 632 (8th Cir. 1997)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation. Judgment vacated when parties later terminated the transaction.
United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993)	Preclosing challenge	Preliminary injunction denied. DOJ dismissed case and did not pursue a full merits decision.
United States v. Baker Hughes Inc., 731 F. Supp. 3 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation. Affirmed on appeal.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

- Recent FTC Section 13(b) actions[1]

Case	Deal Status	Litigation Result
FTC v. Sanford Health/Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016 (D.N.D. Dec. 15, 2017), aff'd, No. 17-3783, 2019 WL 2454218 (8th Cir. June 13, 2019)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned following unsuccessful appeal.
FTC v. Wilh. Wilhelmsen Holding AS, No. 18-cv-00414-TSC,2018 WL 4705816, at *7 (D.D.C. Oct. 1, 2018)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Tronox Ltd., No. 1:18-CV-01622 (TNM), 2018 WL 4353660 (D.D.C. Sept. 12, 2018)		Entered blocking preliminary injunction after conclusion of administrative evidentiary hearing but before decision. The ALJ found that the transaction violated Section 7. the transaction settled during the appeal to the full Commission of the ALJ's decision.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

- Recent FTC Section 13(b) actions

Case	Deal Status	Litigation Result
FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016), *on remand*, 2017 WL 1022015 (N.D. Ill Mar. 16, 2017)	Preclosing challenge	Preliminary injunction denied. Seventh Circuit reversed and remanded for further proceedings. Preliminary injunction entered on remand.
FTC v. Penn State Hershey Med. Ctr., 838 F. 3d 327 (3d Cir. 2016)	Preclosing challenge	Preliminary injunction denied. Third Circuit reversed and remanded with instructions to enter a blocking preliminary injunction. Transaction abandoned.
FTC v. Staples Inc., 190 F. Supp. 3d 100 (D.D.C. 2016)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Sysco Corp., 113 F.Supp.3d 1 (D.D.C. 2015)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Steris Corp., No. 1:15 CV 1080, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015)	Preclosing challenge	Denied preliminary injunction. Administrative complaint voluntarily dismissed.
FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.

Recent litigated cases

- Recent FTC Section 13(b) actions (con't)

Case	Deal Status	Litigation Result
FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356 (M.D. Ga. 2011), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 133 S.Ct. 1003 (2013)		Dismissed on state action grounds. Affirmed by Eleventh Circuit. Reversed by Supreme Court.
FTC v. Promedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011)	Consummated transaction	Entered preliminary injunction enjoining ProMedica from further consolidating its operations with those of St. Luke's Hospital.
FTC v. Laboratory Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011)	Consummated transaction	Denied preliminary injunction to enjoin Lab Corp from taking further steps to integrated acquired assets. Denial of injunction affirmed. Administrative complaint voluntarily dismissed.
FTC v. Lundbeck, Inc., Civ. Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011)	Consummated transaction	Denied permanent injunction to require Lundbeck to divest acquired assets or rescind acquisition agreement and dismissing action. Affirmed. (There was no accompanying administrative complaint.)
FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.

Recent litigated cases

- Recent FTC Section 13(b) actions (con't)

Case	Deal Status	Litigation Result
FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd and remanded*, 548 F.3d 1028 (D.C. Cir. 2008) (amended and reissued)	Preclosing challenge	Denied preliminary injunction, after which transaction closed. On appeal, reversed, finding FTC had established a likelihood of success on the merits, and remanded for consideration of the equities. Administrative litigation was settled with partial divestitures and Section 13(b) proceeding was voluntarily dismissed.
FTC v. Foster, No. CIV 07-352 JBACT. 2007 WL 1793441 (D.N.M. May 29, 2007)	Preclosing challenge	Denied blocking preliminary injunction. Administrative complaint voluntarily dismissed.
FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004), *appeal voluntarily dismissed*, Nos. 04-5291, 04-7120, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004)	Preclosing challenge	Denied blocking preliminary injunction. Administrative complaint voluntarily dismissed.
FTC v. Libbey, Inc., 211 F. Supp.2d 34 (D.D.C. 2002)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned. Administrative litigation settled after Libbey and Newell agreed to provide the Commission with written notice prior to the acquisition, sale, transfer, or other conveyance of all or part of Anchor or Anchor's Food Service Business.

Recent litigated cases

- Recent FTC Section 13(b) actions (con't)

Case	Deal Status	Litigation Result
FTC v. H.J. Heinz Co., 164 F. Supp.2d 659 (D.D.C.), *on remand from* 246 F.3d 708 (D.C. Cir. 2001), *rev'g and remanding* 116 F. Supp. 2d 190 (D.D.C. 2000)	Preclosing challenge	Denied blocking preliminary injunction. Reversed on appeal. On remand, action dismissed as moot when parties voluntarily terminated merger.
FTC v. Swedish Match, 131 F.Supp.2d 151 (D.D.C. 2000)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned
FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998)	Dual preclosing challenges	Entered blocking preliminary injunction enjoining Cardinal Health's merger with Bergen Brunswig and McKesson's merger with AmeriSource. Transactions abandoned. Bergen Brunswig and AmeriSource then merged.

Recent litigated cases

- Recent FTC actions in federal court for permanent injunctive relief

Case	Deal Status	Litigation Result
FTC v. St. Luke's Health Sys., No. 1:12-CV-00560-BLW (D. Idaho Jan. 24, 2014), *aff'd*, No. 14-35173 (9th Cir. Feb. 10, 2015)	Consummated transaction	Divestiture ordered to sever affiliation between St. Luke's and the Saltzer Medical Group. *Note*: FTC and State of Idaho jointly brought suit seeking permanent injunctive relief. Case was joined with a pending private action and tried simultaneously.

Recent litigated cases

- Recent FTC administrative actions[1]

Case	Deal Status	Litigation Result
In re ProMedica Health Sys., Inc., Dkt. No. 9346 (FTC June 25, 2012), *aff'd*, ProMedica Health System, Inc. v. FTC, No. 12-3583 (6th Cir. Apr. 22, 2014)	Consummated transaction	Divestiture ordered
In re Polypore Int'l, Inc., 149 F.T.C. 486 (Dkt. No. 9327) (FTC Dec. 13, 2010), *aff'd*, Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)	Consummated transaction	Divestiture ordered
In re Evanston Northwestern Healthcare Corp., Dkt. No. 9315 (FTC Aug. 6, 2007, and Apr. 28, 2008) (opinions on liability and remedy)	Consummated transaction	Rejecting ALJ's divestiture order and instead requiring Evanston to set up two separate and independent contract negotiation teams to bargain with managed care organizations to revive competition between Evanston's two hospitals and the Highland Park hospital
In re Chicago Bridge & Iron Co., 138 F.T.C. 1024 (Jan. 6, 2005) (Dkt. No. 9300), *aff'd*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008).	Consummated transaction	Divestiture ordered

[1] Includes actions where an initial decision was issued.

Appeals

Appeals

- Jurisdiction
  - 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
  - Appeals of the grant or denial of injunctive relief
  - Interlocutory appeals certified for appellate review by the district court and accepted by review by the court of appeals

Appeals

- Appeals of final judgments—28 U.S.C. § 1291
  - Courts of appeal have appellate jurisdiction over all "final decisions" of the district courts[1]
    - Once a final judgment is reached, the appellate court has jurisdiction to review all district court orders in the litigation that preceded the judgment[2]
  - Matter of right
    - Appeals of final judgment are available as a matter of right
    - An appeal of a final judgment is initiated by the filing of a notice of appeal in the district court[3]
    - When other avenues of interlocutory appeal are not available, in some circumstances a party may ask the court to enter a final judgment against it, which then would be appealable[4]
      - Key is for the party not to consent to the adverse judgment or dismiss the action—for that would waive its right to appeal—but rather seek a final judgment from the court as opposed to an interlocutory order

[1] 28 U.S.C. § 1291.
[2] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 710 (1996).
[3] Fed. R. App. P. 3.
[4] United States v. Procter & Gamble Co., 356 U.S. 677, 985-86 (1958).

Appeals

- Appeals of final judgments—28 U.S.C. § 1291
  - Entry of final judgment
  - Timing
    - To bring an appeal, a notice of appeal must be filed within
      - 30 days of entry of the final judgment[1]
        - *Exception*: 60 days from entry of final judgment where the United States is a party[2]
        - Under very limited circumstances, the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered[3]
      - Timing requirements are jurisdictional[4]

[1] 28 U.S.C. § 2107(a).
[2] *Id*. § 2107(b).
[3] Fed. R. App. P. 4(a)(6).
[4] Bowles v. Russell, 551 U.S. 205 (2007).

Appeals

- Appeals of the grant or denial of injunctive relief—28 U.S.C. § 1292(a)
  - Courts of appeals have appellate jurisdiction over interlocutory orders of the district courts

    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[1]

[1] 28 U.S.C. § 1292(a)(1).

Appeals

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Background
    - Section 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts[1]
    - "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case."[2]

[1] *See, e.g.,* McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1259 (11th Cir. 2004)
[2] *Id.*

Appeals

- 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*: Appellate jurisdiction exists when the district court in a civil action certifies an interlocutory order for immediate appeal where the court determines that—
      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 litigation[1]
    - *Court of appeals*: Discretionary with appellate court
      - District court's certification only provides the court of appeals with jurisdiction to hear the appeal
      - Certification does not require the appellate court to accept the appeal
    - Courts rarely apply Section 1292(b)
      - Strong policy disfavor of piecemeal appeals
      - Discretionary veto on the part of both the district court and the court of appeals,

[1] 28 U.S.C. § 1292(b).
[2] Katz v. Carte Blanche Corp, 496 F.2d 747, 755 (3d Cir. 1974).

Appeals

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Certification
    - Controlling question of law—Exists if either:
      - an incorrect application of the law would constitute reversible error if presented on final appeal, *or*
      - the question of law is "serious to the conduct of the litigation either practically or legally"[1]
    - Substantial ground for difference of opinion—Exists when:
      - controlling authority fails to resolve the question of law, *and*
      - there is grounds for genuine doubt as to the proper legal standard
    - Material advancement of litigation—Exists if an immediate appeal could either:
      - eliminate the need for a trial, simplify the case by foreclosing complex issues, *or*
      - enable the parties to complete discovery more quickly or less expensively
    - Certification decision lies in the discretion of the district court
      - Court may decline to certify an order even if the parties have satisfied all of the statutory requirements
    - PLUS court of appeals has discretion to hear or decline to hear a certified interlocutory appeal

[1] Katz v. Carte Blanche Corp, 496 F.2d 747, 755 (3d Cir. 1974).
[2] *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 624 (7th Cir. 2010) (accepting certified interlocutory appeal on the sufficiency of a complaint under *Twombly*).

Appeals

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Effect on district court jurisdiction
    - If a Section 1292(b) appeal is accepted by the court of appeals, then the district court will be deprived of jurisdiction over the order certified (and presumably related subject matter) unless the appeal is decided.

Appeals

- Division of jurisdiction between appellate court and trial court
  - An appeal as a matter of right in a civil case is triggered by the filing of a *notice of appeal* in the district court[1]
    - Normally, must be filed with 30 days after the entry of judgment of the order being appealed
    - If the United States or a U.S. agency is a party, then the time is 60 days
  - The filing of a notice of appeal—
    1. confers jurisdiction on the court of appeals, and
    2. divests the district court of its control over those aspects of the case involved in the appeal
  - The filing of the *mandate* by the court of appeals returns jurisdiction to the district court[2]
    - Think of the mandate as the judgment of the appellate court
    - Filing a petition for a writ of certiorari to the U.S. Supreme Court does not automatically stay the mandate
      - But provides a common basis for the appellate court to issue a stay[3]

[1] Fed. R. App. P. 4.
[2] *Id.* 41.
[3] *See id.* 41(d)(2).

Appeals

- Standards of review
  - Interpretation of the law—De novo
    - No deference provided to the district court
    - Applies to—
      - Legal standards used to decide motions
      - Legal standards to decide merits in a bench trial
      - Jury instructions
      - Judgment as a Matter of Law (JMOL)

[1] Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985).
[2] *Id*. at 573-74.
[3] *Id*. at 574.
[4] *Id*. at 575.

Appeals

- Standards of review
  - Finding of facts in a bench trial—Clearly erroneous rule
    - A factual finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"[1]
      - *Test*: "Whether a reviewing judge has a 'definite and firm conviction' that an error has been committed."[2]
      - Does not entitle the reviewing court to reverse finding of trier of fact simply because it is convinced that it would have decided case differently[3]
      - When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous[4]
      - When findings are based on determinations regarding the credibility of witnesses, even greater deference to the trial court's findings is required[5]
    - Applies to—
      - Facts found in a bench trial
      - Expert testimony relied upon by the finder of fact
      - Mixed questions of law and fact

[1] Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985).
[2] Dickinson v. Zurko, 527 U.S. 150, 162 (1999) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).
[3] *Anderson*, 470 U.S. at 573-74.
[4] *Id*. at 574.
[5] *Id*. at 575.

Appeals

- Standards of review
  - Findings of fact by a jury—Substantial evidence rule
    - *Test*: Whether the records contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[1]
    - Applies whether findings are explicit or implicit within the verdict
    - Must view the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of the prevailing party
  - Findings of fact by an administrative agency (including the FTC)—Substantial evidence rule
  - *Query*: Is there a meaningful difference between the clearly erroneous rule and the substantial evidence rule?

> The court/agency standard [the substantial evidence rule], as we have said, is somewhat less strict than the court/court standard [the clearly erroneous rule]. But the difference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.[1]

[1] Dickinson v. Zurko, 527 U.S. 150, 162 (1999).

Appeals

- Standards of review
  - Matters in the trial court's of discretion—Abuse of discretion
    - Occurs when court:
      - Adopts an incorrect legal rule
      - Relies upon a factor not legally cognizable under a proper legal rule
      - Omits consideration of a factor entitled to substantial weight under the proper legal rule
      - Makes a clear error in weighing the factors, or
      - rests its conclusions on clearly erroneous factual determinations.
    - Applies to (examples)—
      - Evidentiary rulings (including *Daubert* motions)
      - Class action decisions