

Class 7 slides

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# Unit 5. Merger Antitrust Litigation

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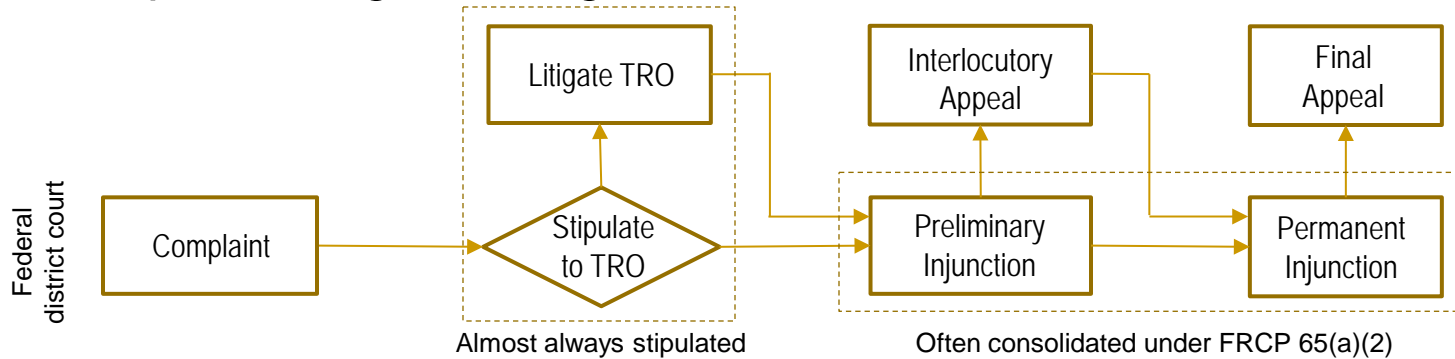
Merger Antitrust Law

Fall 2018 Georgetown University Law Center

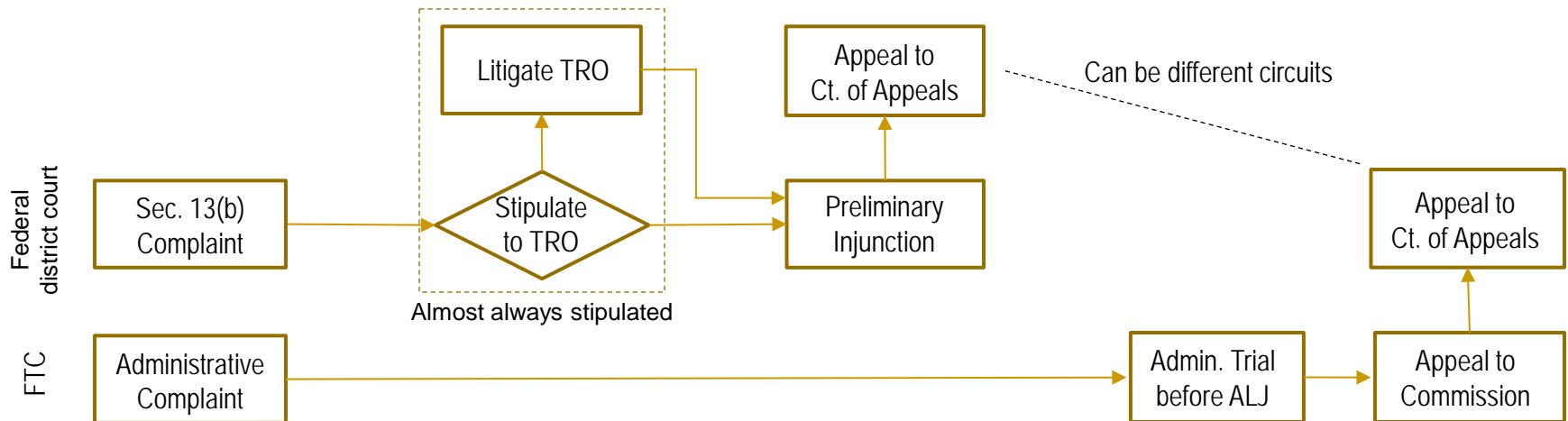
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# Typical litigation paradigms

## DOJ preclosing challenge



## FTC preclosing challenge



# Typical litigation paradigms

## DOJ postclosing challenge



## FTC postclosing challenge



# 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> <sup>1</sup> )
“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 <b>proceedings in equity</b> to prevent and restrain such violations.”	“A [private] plaintiff seeking a preliminary injunction must establish [1] that he is <b>likely to succeed on the merits</b> , <del>[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,</del> [3] that the <b>balance of equities</b> tips in his favor, and [4] that an injunction is in the <b>public interest.</b> ”

<sup>1</sup> *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 <b>‘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</b> 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>

# 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 ALJ on the merits	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint <sup>1</sup>
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

<sup>1</sup> 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).

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# 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: 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
    - Test: “Whether a reviewing judge has a ‘definite and firm conviction’ that an error has been committed.”
  - By a jury or an administrative agency—Substantial evidence rule
    - Test: Whether the records contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
- Others matters
  - In federal court—Abuse of discretion
  - FTC—[No articulated rule?]

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# Unit 6. Merger Antitrust Settlements

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# Topics

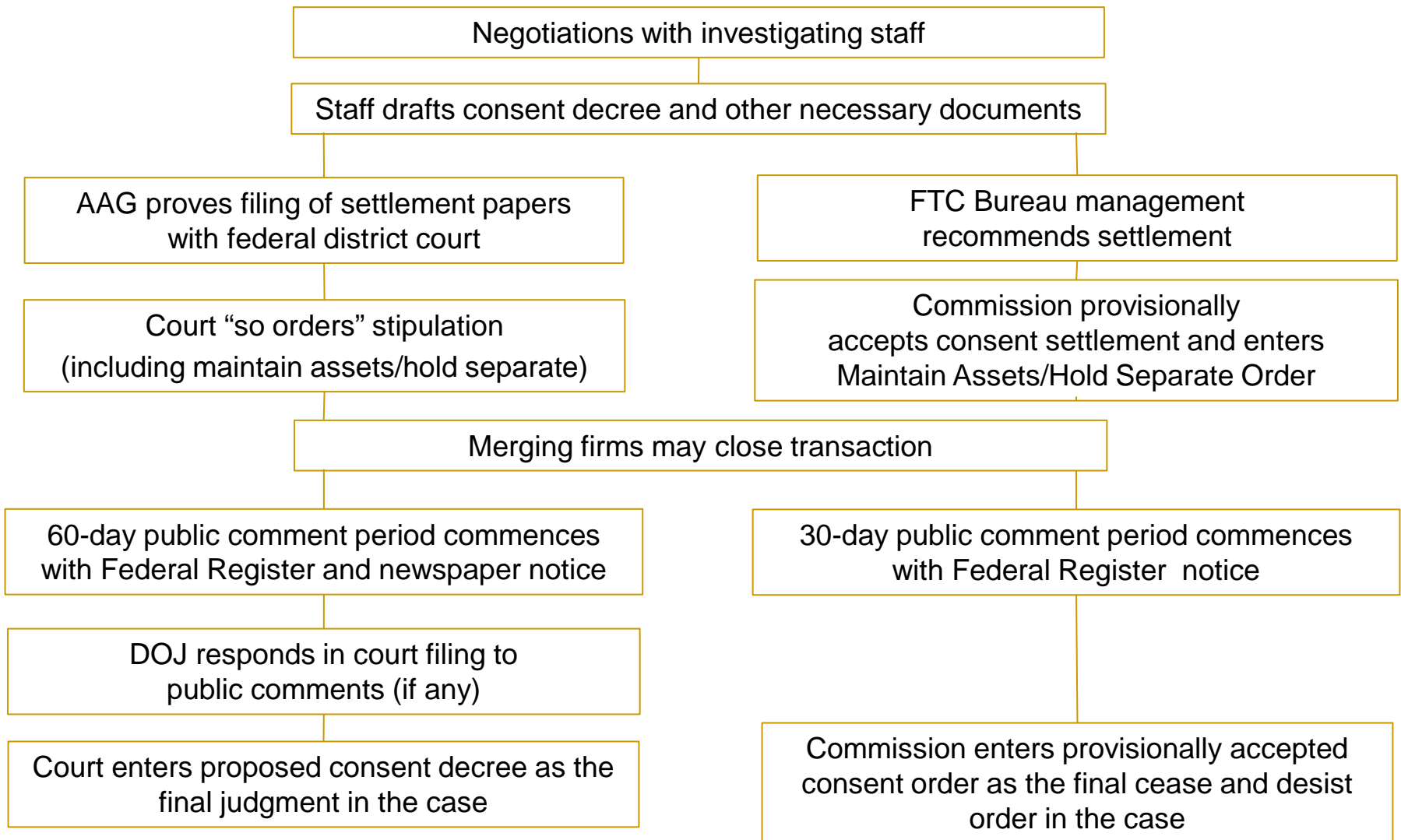
- Adjudicated relief and consent settlements
- Consent settlement documents and procedures
- Consent decree violations

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# Preliminaries

- Adjudicated relief vs. settlement relief
- When will the DOJ/FTC settle a case?

# Typical settlement process



# Consent settlement documents

DOJ (federal district court proceeding)	FTC (FTC administrative proceeding)
Complaint	Administrative complaint
Proposed Hold Separate Stipulation and Order —Proposed Final Judgment —[Contained in body of stipulation]	Agreement Containing Consent Orders —Proposed Decision and Order —Order to Maintain Assets
Competitive Impact Statement	Analysis of Proposed Consent Order to Aid Public Comment
Hold Separate Stipulation and Order (so ordered by the court)	Decision and Order (accepting consent settlement for public comment and entering Order to Maintain Assets)
Federal Register and newspaper notice [Public comment period: 60 days]	Federal Register notice [Public comment period: 30 days]
Final Judgment	Decision and Order (final)

# Consent settlement documents

- Typical contents of a DOJ proposed final judgment
  - Whereas clauses
    - I. Jurisdiction
    - II. Definitions
    - III. Applicability
    - IV. Divestitures
    - V. Appointment of Divestiture Trustee
    - VI. Notice of Proposed Divestitures
    - VII. Financing
    - VIII. Hold Separate
    - IX. Affidavits
    - X. Compliance Inspection
    - XI. Notification
    - XII. No Reacquisition
    - XIII. Retention of Jurisdiction
    - XIV. Expiration of final Judgment
    - XV. Public Interest Determination
  - Signature line for judge

*Note:* The remedial obligations in the settlement are drafted in the form of a court order (or an FTC cease and desist order), so that the judge of the FTC may enter the settlement as a final order without having to adapt its form.

# Consent order violations

## ■ DOJ

- DOJ consent decrees are technically injunctions ordered by a federal district court
- Violations are punishable by civil or criminal contempt
- Actionable contempt requires a showing by “clear and convincing evidence” that the defendant violated a “clear and unambiguous” prohibition in the consent decree

## ■ FTC

- FTC consent orders are technically cease and desist orders issued by the FTC
- Violations are subject to civil penalties in federal district court
  - The maximum amount of the penalty today has been inflation-adjusted to \$41,484 for 2018
  - If the district court enters an injunction in aid of a Commission order pursuant to FTC Act § 5(l), violations of that injunction are subject to civil and criminal contempt sanctions