CLASS 6 SLIDES

Unit 6. Merger Antitrust Litigation

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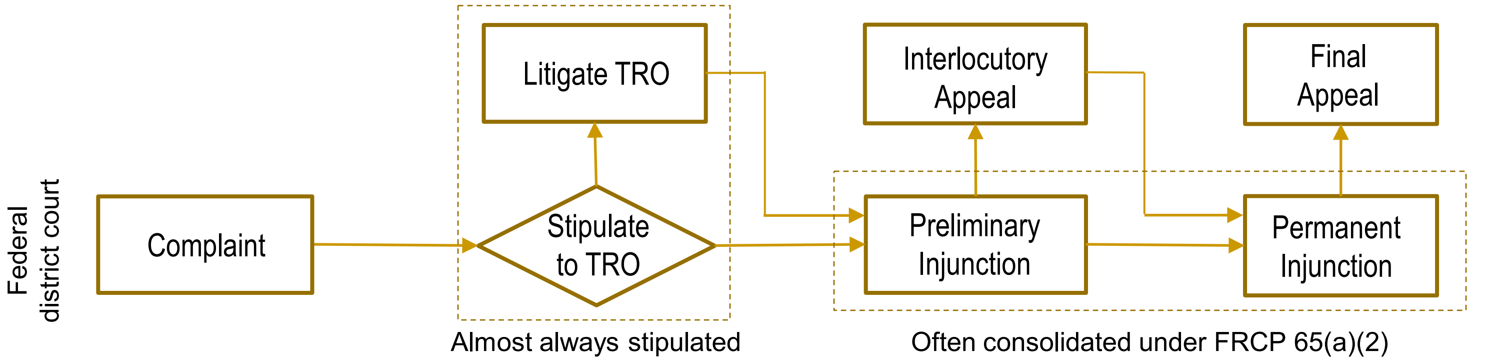
Possible outcomes in DOJ/FTC reviews

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
"Fix it first"	• Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party • Merging parties file new HSR notifications for the restructured transaction • HSR reports also may need to be filed for the restructured transaction • When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement act

Typical Litigation Paradigms

Typical litigation paradigms

DOJ preclosing challenge



Typical litigation paradigms

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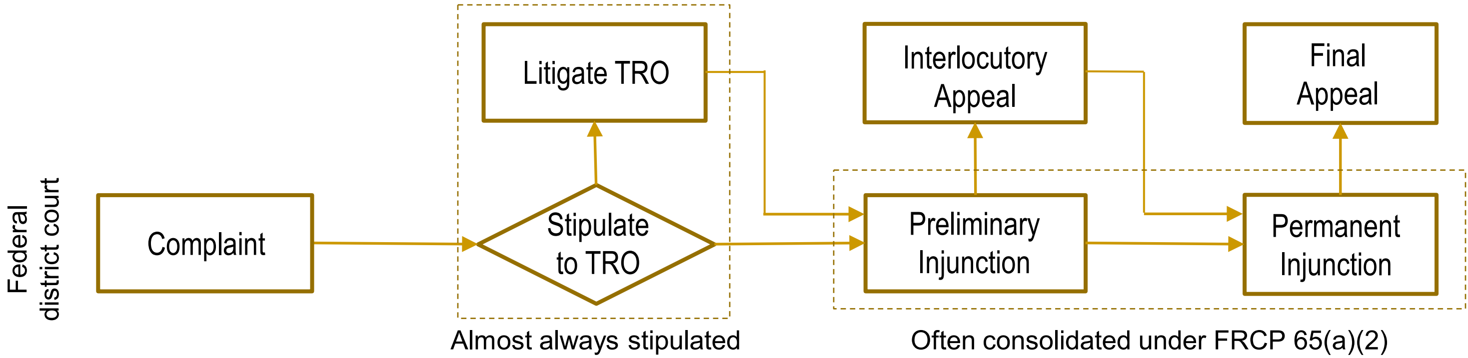
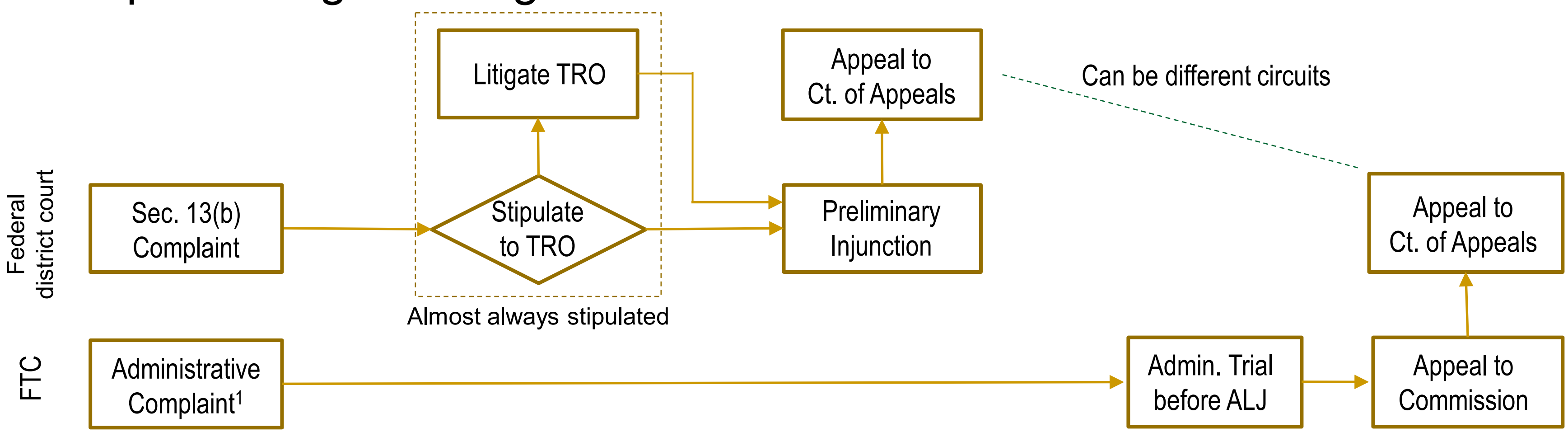


FTC preclosing challenge



[1] The FTC must issue its administrative complaint within 20 days of the entry of a preliminary injunction. FTC Act § 13(b). As a matter of practice, the FTC issues its administrative complaint before or on the date its seeks a preliminary injunction.

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 ALJ 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	At the Commission's discretion
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

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

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 against the lack of higher standards
    - Absent consent, if of a longer duration, the 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 the 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—
    1. Permit the merging parties to take all necessary discovery on an expedited basis before the preliminary injunction hearing, *and*
    2. Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since the same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement

Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15	FTC: FTC Act § 13(b)
"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."	"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 *Winter*[1])
"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."	"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**."

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

Preliminary injunctions

- FTC

FTC: FTC Act § 13(b)	Judicial standard
"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."	"[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.'" + [2] Balance of the equities + [3] Public interest

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 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 in the permanent injunction trial (or even entitled to deference)
  - 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 to hear an appeal
- Jurisdiction in three types of appeal
  1. Appeals of final judgments (28 U.S.C. § 1291)
  2. Appeals of the grant or denial of injunctive relief (28 U.S.C. § 1292(a))
  3. Interlocutory appeals (28 U.S.C. § 1292(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—
    1. 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 litigation[1]
    2. Court of appeals acceptance: Discretionary with the appellate court
  - Rarely successfully invoked

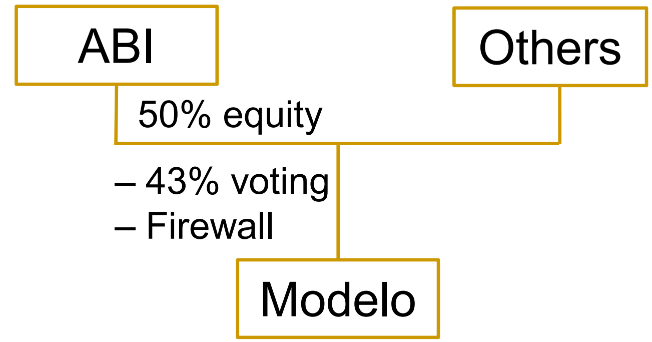
Appeals: Standards of review

- 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]

ABI/Grupo Modelo case study

What was the deal?

- ABI owned 50% of the equity of Grupo Modelo
  - But only owned 43% of the voting securities
  - Also bounded by some firewalls, so Modelo operated independently of ABI
- ABI to buy the remaining 50% for \$20.1 billion
  - Announced June 28, 2012
  - 30% premium (= \$6.03 billion)



Some background

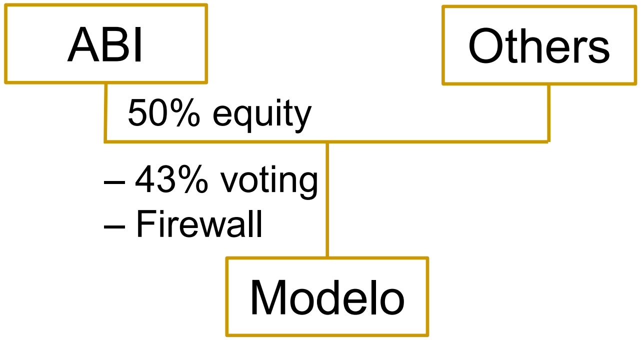
- ABInbev (ABI)
  - #1 firm in the U.S. beer market with a 39% share
  - Budweiser, Busch, Michelob, Natural Light, Stella Artois, Goose Island, Beck's, and 39 other brands of beer
- MillerCoors (joint venture between SAB Miller and MolsonCoors)
  - #2 firm with a 26% share
  - Coors, Coors Light, Miller Genuine Draft, Miller High Life, Miller Lite, Extra Gold Lager, Hamm's
- Grupo Modelo
  - #3 firm with a 7% share
  - Corona Extra, Corona Light, Modelo Especial, Pacifico, Negra Modelo and Victoria
- Other 28%
  - Heineken, Sam Adams, Yuengling, craft beers, others—all relatively small

Why did ABI want to buy Modelo?

- TO MAKE MONEY
  1. Could expand the business and earn more profits
  2. Wanted to secure the rights to sell Corona and Modelo's other Mexican brands worldwide, particularly in Europe and South America.
  3. Could reduce costs
     - Expected $600 million annually in cost savings and synergies
     - Later raised to $1 billion
  4. Was the elimination of competition also an unexpressed goal?

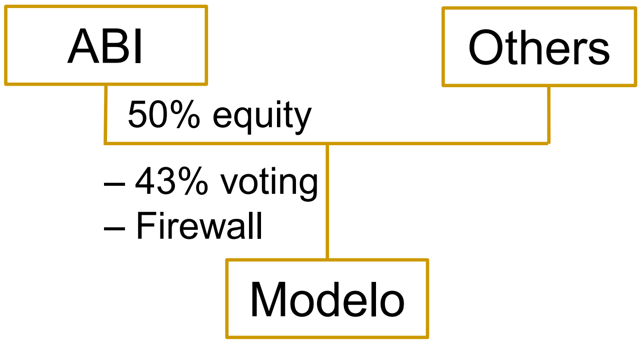
Why did Modelo want to sell?

- TO MAKE MONEY
  - Remember 30% premium (> $6 billion)



Why would ABI pay a 30% premium?

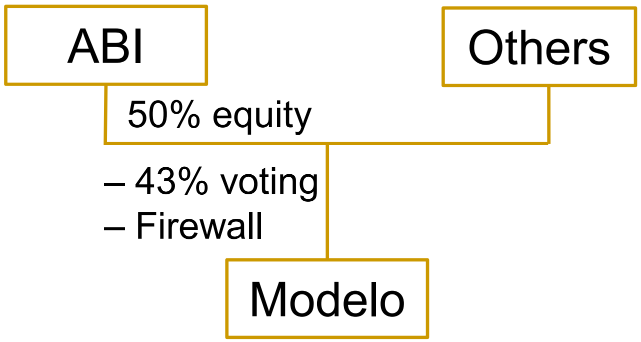
- Had to pay some premium if it wanted to buy the remaining 50% ("control premium")
- Sellers were bargaining for a portion of the synergies



Would the deal still be profitable to ABI?

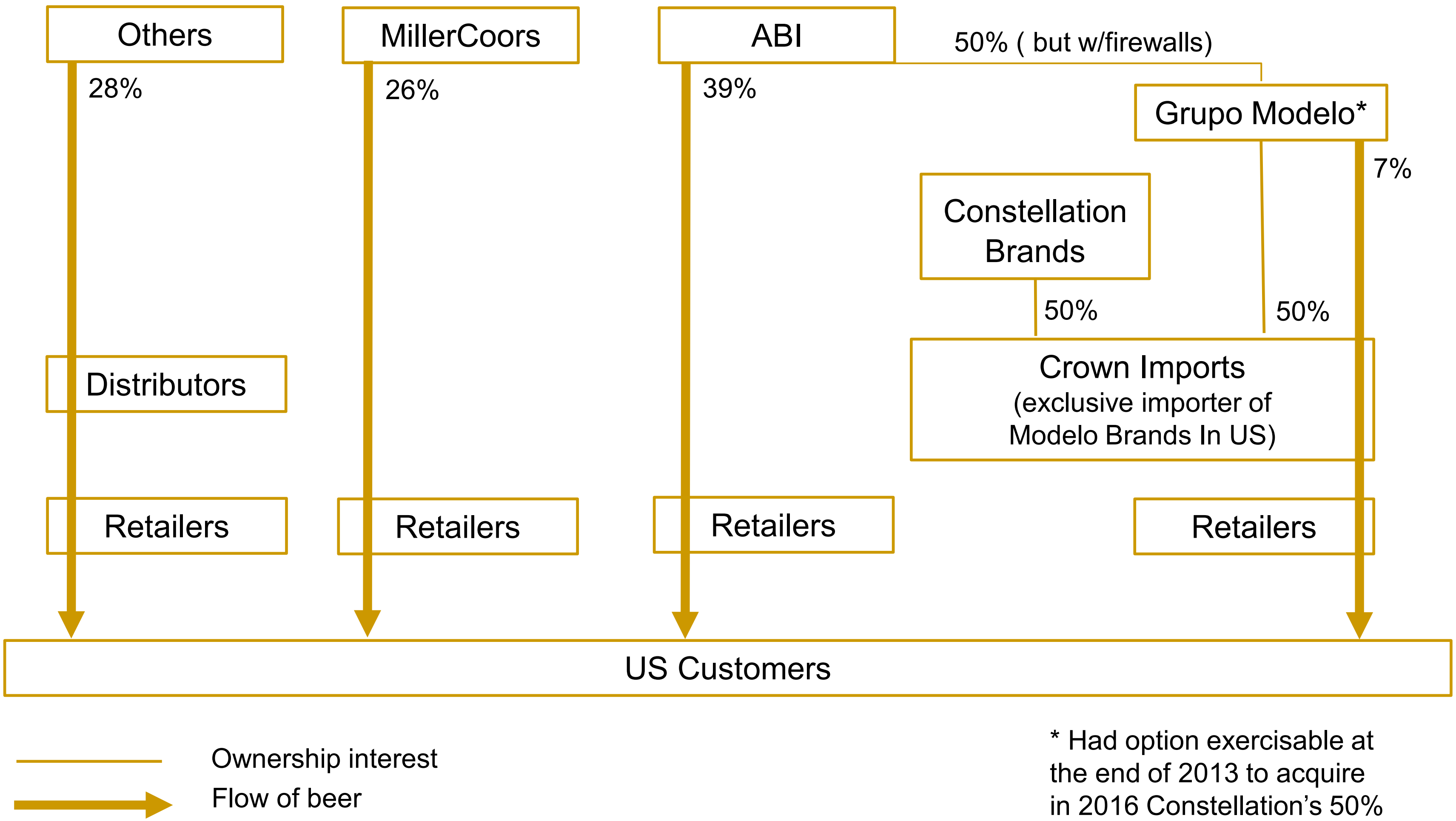
- Present discounted value of annually recurring synergies at 8%/year
  - $600 million/year in perpetuity → $7.5 billion
  - $600 million/year in 10 years → $4.03 billion

  - $1 billion/year in perpetuity → $12.5 billion
  - $1 billion in 10 years→$6.71 billion
- RECALL: Premium = $6 billion
  - With a time horizon of 10 years at 8%, ABI would—
    - Lose money on a PDV basis if synergies were $600 million/year
    - Make over $700 million in present value if synergies were $1 billion/year
  - *WDC*: ABI probably had a time horizon greater than 10 years and a discount rate of < 8%
    - At $600M/yr for 25 years at 8%, the PDV = $6.40B
    - At $600M/yr for 20 years at 7%, the PDV = $6.36B
    - Why might that this be the case?



What else might be happening to make the deal worthwhile to ABI?

U.S. beer landscape premerger



* Had option exercisable at the end of 2013 to acquire in 2016 Constellation's 50% share in Crown Imports

What was ABI's antitrust argument?

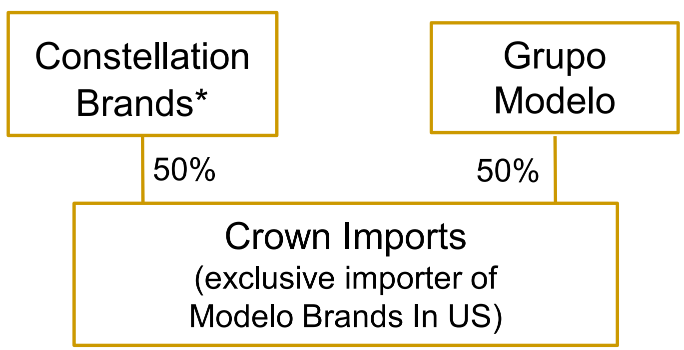
1. Acquisition was too small to make a competitive difference
   - Modelo was a "fringe" firm
   - ABI (39%) + Modelo (7%) = 46%
   - Not materially different than 39%
   - HHIs bad, but not that bad

	Share	HHI	
ABI	39%	1521	
MC	26%	676	
Modelo	7%	49	
Heineken	6%	36	
Others	22%	69	Say 7 firms
	100%	2351	
Combined	46%		
Delta		546	
Post-HHI		2897	

2. Coke/Pepsi model: ABI and MillerCoors were in an intensely competitive duopoly
3. Companies largely did not compete head-to-head in beer segments
   - *Subpremium*: Busch (ABI), Keystone (MC)—No Modelo
   - *Premium*: Bud Light, Coors Light, MillerLite—No Modelo
   - *Premium plus*: Bud Light Platinum, Michelob Ultra (ABI) —No Modelo
   - *High-end*: Corona (Modelo), Heineken, Stella Artois (ABI), other imports—No ABI

What was ABI's strategy to get the deal closed?

- Pre-HSR filing: The Constellation Brands deal
  - ABI agreed to sell Constellation the 50% of Crown Imports that Modelo owned
    - Crown Imports is the exclusive distributor of Modelo brands in the U.S.
      - Third largest beer distributor in the U.S. after ABI and MillerCoors
    - World's leader in premium wine (most notably Robert Mondavi)
  - ABI also agreed to extend the distributor agreement giving Crown exclusive rights to the U.S. for ten years
    - Constellation would have complete control over distribution, marketing and pricing for all Modelo brands in the U.S.
  - The deal
    - Purchase price: $1.85 billion (8.5x EBIT)
    - ABI has a buyback option at 10-year intervals at 13x EBIT



* ABI had an option exercisable at the end of 2013 to acquire in 2016 Constellation's 50% share in Crown Imports

What was ABI's strategy to get the deal closed?

- Pre-HSR filing: Why did ABI do the CB deal?
  - Did it arguably solve the likely DOJ concerns?
    - Probably not: "Fix" (if that is what it was) did not fit at all with DOJ historical remedies
    - Perhaps ABI did not anticipate a U.S. antitrust problem
  - If CB deal was not designed to solve the antitrust concerns, then why ABI do it?
    - Flip CB from a strong opponent of the transaction to a strong supporter
  - *QUERY*: Why would CB oppose the deal?
    - Modelo had no U.S. distribution system other than Crown
      - BUT ABI could easily distribute Modelo brands through its own distribution system
      - If ABI acquired Modelo, Crown Imports would have been dead at the end of the term of its current Modelo supply agreement
  - Also, ABI had limited financial exposure (with 10-year buyback option)
    - *Query*: What else did the 10-year buyback option do?
      - Reduced CB's incentives to compete aggressively against ABI

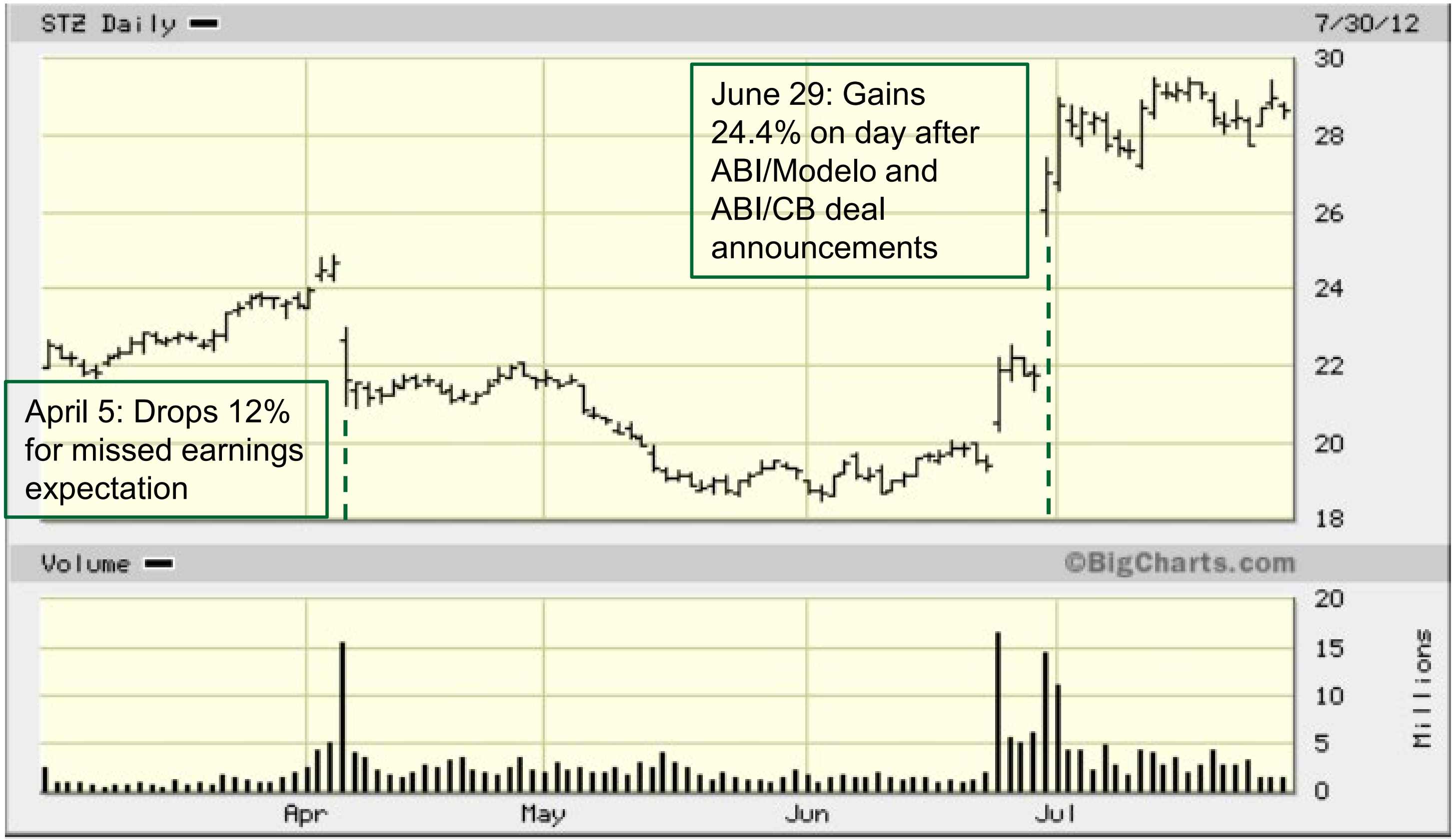
What was ABI's strategy to get the deal closed?

- Pre-HSR filing: Why did CB do the deal?
  - TO MAKE MONEY
    - At risk if ABI acquired Modelo since ABI could use its own distribution system and did not need Crown Imports
    - PLUS: If Grupo Modelo stayed independent, Modelo had an option, exercisable at the end of 2013, to acquire in 2016 the half of Crown it did not already own
  - Must have been a really big concern: The price of CB shares INCREASED 39.7% on the day of the announcement compared to the week before (despite missing revenue targets)

Constellation Brands

What was ABI's strategy to get the deal closed?

- Pre-HSR filing: Why did CB do the deal?
  - Constellation Brands Inc. (STZ) historical stock prices: 3/1/2012 to 7/30/2012



Was the DOJ satisfied?

- No
  - Filed complaint on January 31, 2013, to enjoin deal
  - Two counts
    1. Merger violates Section 7 in 26 local markets in the sale of beer
    2. Merger violates Section 7 in the national market for the sale of beer

Was the DOJ satisfied?

1. Unrestructured merger violates Section 7 in 26 local markets in the sale of beer:

   a. 20 markets: Postmerger HHI > 2500; delta $\geq$ 472

   b. 6 markets: Postmerger HHI $\geq$1822; delta $\geq$ 387

APPENDIX A

Relevant Geographic Markets and Concentration Data

Market	Combined Market Share	Post-Merger HHI	Delta HHI
Oklahoma City, OK	64	4886	1000
Salt Lake City, UT	57	3900	739
Tampa/St Petersburg, FL	56	3720	621
Houston, TX	55	3660	840
Jacksonville, FL	56	3544	531
Minneapolis/St Paul, MN	50	3525	733
Denver, CO	47	3510	486
Birmingham/Montgomery, AL	52	3408	503
Memphis, TN	52	3370	482
Las Vegas, NV	49	3332	832
Dallas/Ft Worth, TX	46	3277	643
Orlando, FL	51	3273	570
Los Angeles, CA	51	3265	1207
Phoenix/Tucson, AZ	48	3139	564
Raleigh/Greensboro, NC	50	3121	485
Miami/Ft Lauderdale, FL	48	3067	964
Hartford, CT/Springfield, MA	51	3053	663
Richmond/Norfolk, VA	48	3044	472
Chicago, IL	35	2919	542
New York, NY	43	2504	778
Atlanta, GA	41	2489	433
Sacramento, CA	40	2382	697
Boston, MA	43	2353	387
San Diego, CA	39	2242	651
Baltimore, MD/Washington, DC	36	1944	465
San Francisco/Oakland, CA	34	1822	563
United States	46	2866	566

Was the DOJ satisfied?

2. Unrestructed merger violates Section 7 in the national market for the sale of beer
   a. *PNB* presumption: Postmerger combined share 46%; HHI > 2800; delta = 566
   b. Maverick theory in the national market
      - ABI and MillerCoors, the mass beer producers, collectively had a 65% share—large enough to be able to affect market prices
      - ABI and MillerCoors are accommodating firms, with MillerCoors and the other brewers were willing to follow ABI's price leadership
      - Grupo Modelo was a maverick—
        - Unwilling to follow ABI's price leadership
        - Has caused ABI to price lower than it would have otherwise
        - Remember, although Modelo was owned 50% by ABI, the firewall prevented ABI from influencing ABI's competitive strategy
      - ABI's acquisition would eliminate Grupo Modelo as a maverick and increase the likelihood and effectiveness of coordination between ABI and MillerCoors (and perhaps other brewers)
   c. Unilateral effects theory
      - Modelo's aggressive pricing for Corona had been a significant unilateral constraint on the pricing by ABI of its beers
      - Modelo had been an aggressive innovator, and its acquisition would reduce innovation competition with ABI

Was the DOJ satisfied?

3. The CB “fix” was insufficient
    - *Supply*: Crown completely reliant on ABI for the supply of Modelo brands
    - *Follow the leader*: CB consistently urged Modelo to follow ABI’s price leadership
    - ABI could terminate the distribution agreement:
        - ABI could terminate the distribution agreement at the end of the 10-year term—take away supply PLUS brand names
        - ABI would then have full control over U.S. distribution of Modelo-branded beer
    - Buyback option (on 10-year intervals)
        - Could eliminate competition by exercising buyback
        - Could discipline CB competition
            - The less disruptive, the greater likelihood the option would not be exercised

Why did CB intervene in the DOJ action?

- CB sought to intervene as a party defendant. Why?
  - The “fix” was a great deal for CB and it wanted to do everything it could to see that the ABI/GM deal closed and was not enjoined
  - By being before the court, they could argue first-hand that they would be aggressive competitors—and so increase the chances the deal *and the fix* would go through

What was ABI's second fix?

- ABI and CB announced a revised deal on February 14, 2013
  - Less than one month into the litigation
- Revised terms:
  - No buyback option
  - ABI to sell Modelo's new Piedras Negras brewery to CB
  - Rights in perpetuity to Modelo's U.S. brands distributed by Crown
  - Addition to purchase price: $2.9B (over original $1.85 billion) = $4.75B total

Did the second fix resolve the DOJ's concerns?

- No
- Why?
  - Piedras Negras would supply only 60% of current U.S., leaving Crown dependent on ABI for the rest and for additional growth

Did the second fix resolve the DOJ's concerns?

- Constellation Brands Inc. (STZ) historical stock prices: 3/1/2012 to 3/30/2013

What was ABI's third fix?

- Another revision to the CB deal was announced on April 19, 2013
- Terms
  - ABI added 3 Modelo brands not yet offered in the U.S.
    - In addition to 7 existing brands
  - CB committed by consent decree to expand Piedras Negras

Did the third fix resolve the DOJ’s concerns?

- Yes: Filed consent settlement stipulation on April 19, 2013
- The ABI/Modelo and the Constellation deals closed on June 4, 2013
  - After the “so ordering” of the settlement stipulation by the court
- The final judgment was entered until October 24, 2013
  - Almost four months later

Did the settlement fix the competitive problems?

- At the time of the consent decree?
  - WDC: No. At least four problems

Did the settlement fix the competitive problems?

- Problem 1: Preservation of Modelo as a maverick
  - CB was said to be a follower
    - Modelo's 50% in Crown Imports + ABI firewall made Crown Imports more aggressive
  - Analysts expected price increases following the ABI/Modelo closing even with the Constellation Brands fix
- Problem 2: Ability of Constellation Brands to supply the U.S.
  - Expansion of the Piedras Negras plant—plans to double capacity in three years
    - BUT would the DOJ really sue CB for not investing as required?
  - Supply of inputs: Yeast, malt, hops, aluminum for cans, glass bottles
    - Sourced from ABI under 3-year transition services agreement
    - Then what?
- Problem 3: Can CB be a successful brewer?
  - How much of this is art and not IP?

Did the settlement fix the competitive problems?

- Problem 4: Can CB afford to spend the $4.75B purchase price + make additions to the Piedras Negras plant?
  - On April 26, 2013 (after the filing of the consent decree), CB had a market cap of only $9.8 billion
  - AND CB raised its estimate for the cost of upgrading its Nava brewery to between $900 million and $1.1 billion
  - But CB did complete the expansion and its market cap has soared

Constellation Brands: The aftermath

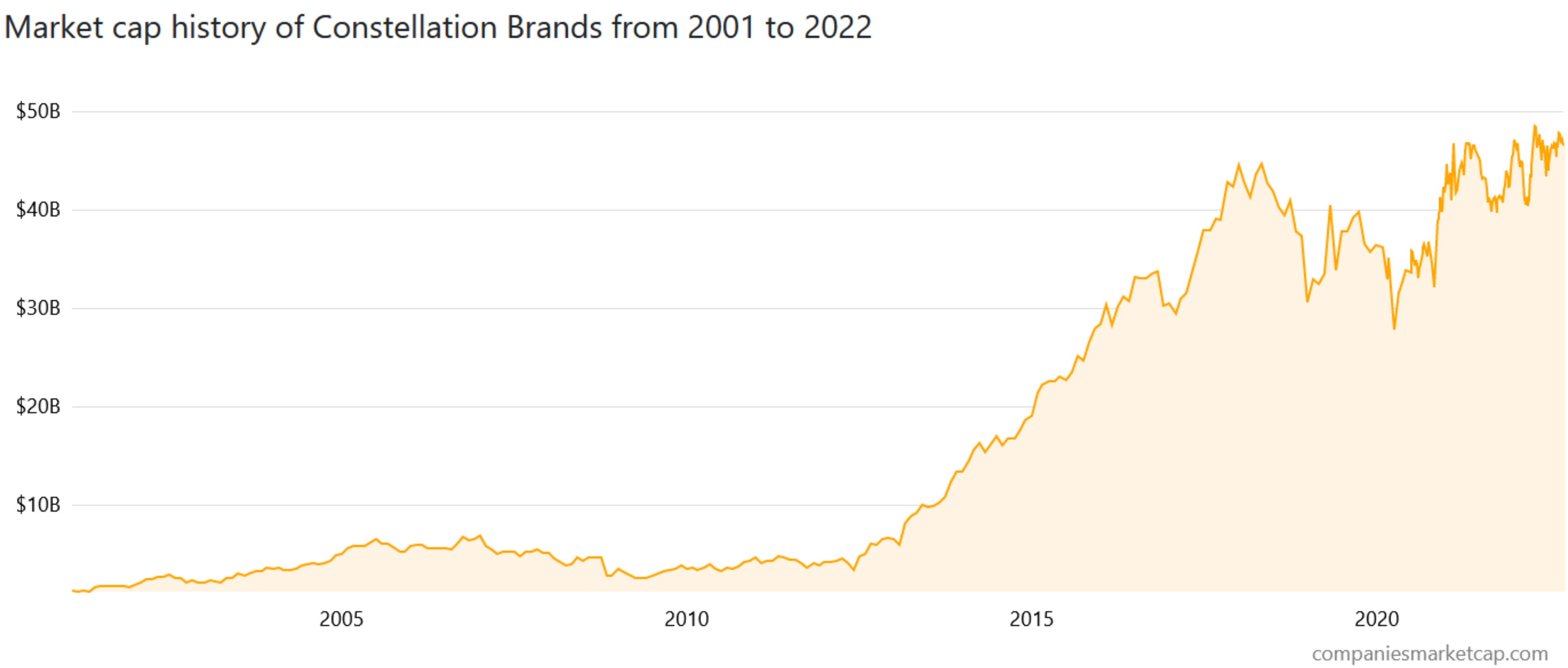
- Constellation Brands Inc. (STZ) historical stock prices: 4/1/2013 – 6/4/2014

Constellation Brands: The aftermath

- Constellation Brands Inc. (STZ) historical stock prices: 4/1/2013 – 9/11/2022

Constellation Brands: The aftermath

- Constellation Brands Inc. (STZ) historical market cap: 2005 to date



- Market cap
  - June 1, 2012: $3.4 billion Before announcement
  - April 26, 2013 : $9.8 billion After filing of consent decree
  - September 14, 2022: $46.54 billion Today

ABI

- Anheuser Busch Inbev SA NV (BUD)
  - New York Stock Exchange

Deal announced: June 28, 2012
Complaint filed: Jan. 31, 2013
Second fix: Feb. 14, 2013
Consent decree filed: Apr. 19, 2013