Unit 6. Merger Antitrust Litigation

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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

"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

Means and incentives to raise challenges

- The DOJ and FTC have the means and incentives
  - The 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
      - Typically contains all of the specifications in a second request
    - Can be issued to the merging firms and third parties in all transactions
  - Charged by Congress to investigate transactions and challenge those they believe are anticompetitive
    - Have the budget to challenge mergers
  - Seeks only injunctive relief—fines not available as a remedy in Section 7 cases

Means and incentives to raise challenges

- State AGs usually have the means but often lack the incentive
  - Can—
    - Investigate on their own (often with precomplaint discovery authority), or
    - join with the federal investigating agency in a joint merger investigation
  - BUT have limited enforcement budgets
  - Merger antitrust challenges are resource-intensive, costly, and time-consuming
    - State AGs frequently 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
  - In practice
    - States will only infrequently open their own investigations
    - BUT frequently will join in a joint investigation with the DOJ or FTC
      - Receive all the information developed by the federal agency
      - Can contribute local expertise in markets (especially in retail deals)
      - Can get “political credit” for participating in the investigation by constituents
      - Entails relatively low costs (especially compared to conducting their own investigations)
      - Demand and obtain cost of investigations from mering parties in settlements and in litigated proceedings in which they are a party-plaintiff
    - State involvement in a federal investigation may result in somewhat greater demands for relief (especially in retail deals) as the states try to make their own contributions to the investigation

Means and incentives to raise challenges

- Private parties typically 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
  - Damages
    - No damages when mergers are challenged preclosing
    - Damages can be awarded in postclosing challenges for—
      - Higher prices paid by customer-plaintiffs
        - BUT REMEMBER: *Illinois Brick* limits private actions for damages to direct customers[1]
      - Antitrust injuries inflected by exclusionary conduct sustained by competitor-plaintiffs
    - But attorneys' fees would be awarded by the court if the private party prevails in litigation
  - Courts are very reluctant to order injunctive relief in private cases
    - Judges are often skeptical, if not hostile, to private merger challenges of transactions where the federal antitrust agencies have conducted a second request investigation
  - BUT private parties—especially customers and competitors—can and do often complain to the DOJ or FTC in the hope that the agency will review and then intervene to block the transaction

[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

Plaintiffs and Forums

Antitrust merger litigation generally

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

Constitutional challenges to the FTC's adjudicative authority. Recently, respondents in FTC administrative adjudications have raised constitutional challenges to the FTC's adjudicative process. These challenges have increased in the wake of Axon Enterprise v. FTC, 142 S. Ct. 895 (2023), where the Supreme Court held that constitutional challenges to the structural aspects of an agency adjudicative process may be litigated collaterally in district court.

The DOJ/FTC as plaintiffs

- By far the most likely challenger
  - Both agencies are charged with enforcing Section 7 of the Clayton Act
  - DOJ: Section15 of the Clayton Act provides 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 claim in an administrative trial (15 U.S.C. § 21(b))
    - Section 13(b) of the FTC Act provides the FTC with a cause 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"
      - The FTC seldom uses this authority unless it intervenes as a plaintiff in an ongoing litigation started by a state or third party.
      - The FTC strongly prefers administrative adjudications on the merits, where the Commission will make the findings of fact and conclusions of law (which are then appealable to the court of appeals)

[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 provision 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
  1. Are large and well-funded
     - DOJ[1]
       - The Antitrust Division's 2025 budget request asks for $288.0 million and 993 FTEs (including 476 attorneys)
       - 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[2]
       - The FTC's 2025 budget request asks for $273.416 million and 744 FTEs for competition work
       - For merger work, the FTC's budget request asks for $76.112 million and 269 FTEs for merger enforcement or 27.8% of the FTC's proposed total competition budget
     - Observations
       - Approximately two-thirds of ATR funding is derived from the Hart-Scott-Rodino (HSR) premerger filing fees paid by companies planning to merge. The filing fee revenue is divided evenly between the ATR and the Federal Trade Commission
       - Given their enforcement agenda, the antitrust agencies want significantly increased funding, but—
         - The Biden-McCarthy debt ceiling bill effectively capped FY2024 spending at 1% more than FY2023 and FY2025 spending at 1% more than FY2024 levels[3]
         - Efforts by sympathetic members of Congress to increase funding by the Biden-McCarthy levels has failed

[1] U.S. Dep't of Justice, Antitrust Division: FY 2025 Performance Budget Congressional Justification (CJ) Submission 4 (undated).
[2] Fed. Trade Comm'n, Fiscal Year 2025: Congressional Budget Justification 8, 55 (transmitted March 11, 2024).
[3] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (June 3, 2023).

The DOJ/FTC as plaintiffs

- By far the most likely challenger (con't)
  2. Have the benefit of the HSR Act
     - Premerger notification of pending transactions
     - Waiting periods to delay closing to allow for investigation
     - Discovery tools
       - Most notably, the "second request"
  3. Have successful merger antitrust litigation experience
     - Although still at a marked disadvantage in experience and resources compared to large private law firms

Non-DOJ/FTC challenges

- Other third-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 and then only when the merged firm has increased 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 transaction they believe would have a significant anticompetitive effect in their state
      - The 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 said that they would step up their own merger enforcement actions if the DOJ and FTC in the Trump administration became too lenient, this did not come to pass

Non-DOJ/FTC challenges

- Frequency
  - Customers and competitors
    - Very infrequently bring challenges
      - Merger challenges are extremely expensive to prosecute given the requirement of proving—
        - The dimensions of one or more relevant markets, *and*
        - A reasonably probable anticompetitive effect in each relevant market
      - There are no damages if the challenge is to a transaction that has not yet closed
        - But there can be damages in transaction challenged postconsummation [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]

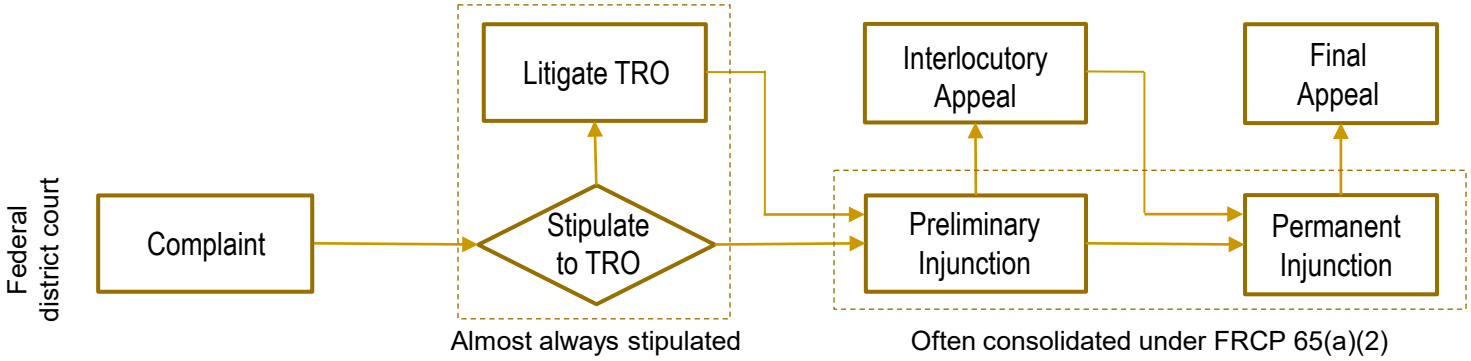
[1] A significant example occurred in 2018. *See* Steves & Sons, Inc. v. Jeld-Wen, Inc., No. 3:16-CV-545, 2019 WL 1186847 (E.D. Va. Mar. 13, 2019) (denying defendants' JMOL motion in the wake of a jury verdict awarding Steves $12,151,873 for past damages under both the Clayton Act and breach of contract claims and $46,480,581 in future lost profits under the Clayton Act claim) (Clayton Act amounts to be trebled).

[2] 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).

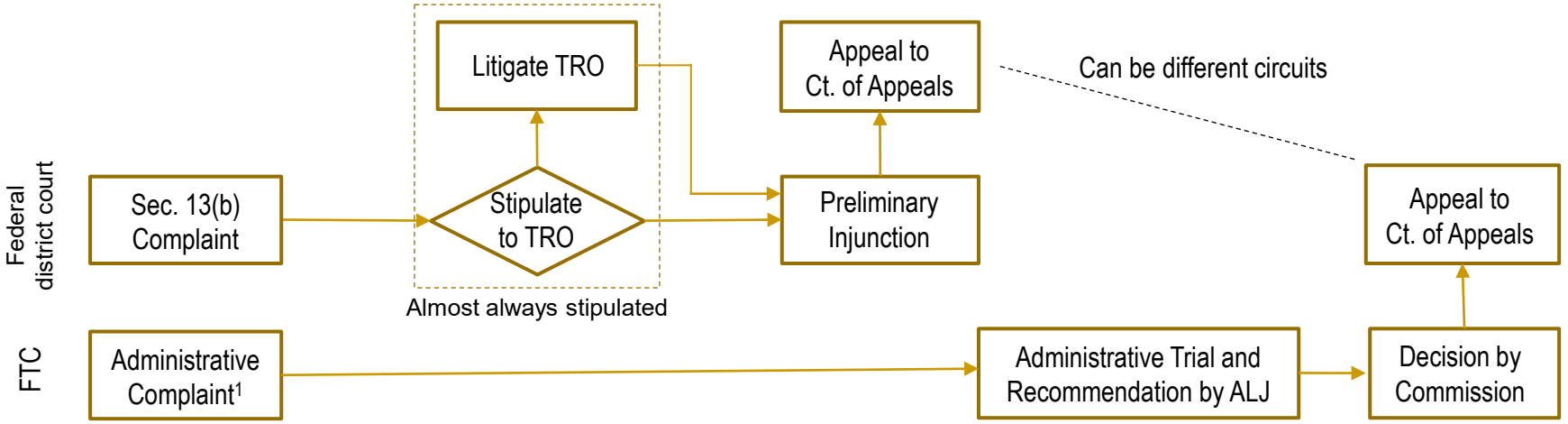
Typical Litigation Paradigms

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



[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 it seeks a preliminary injunction.

Typical litigation paradigms

DOJ postclosing challenge

FTC postclosing challenge

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)
Recommended decision of ALJ on the merits	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint[1]
Decision by the Commission	FTC	Full FTC (all commissioners)	Indeterminant
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).

Litigation timing—Preclosing challenges

	DOJ		FTC			
	JetBlue/ Spirit	Assa Abloy/ Spectrum	Novant/ Comm. Health	IQVIA/ Propel Media	Microsoft/ Activision	Meta/Within
Complaint	3/7/2023	9/15/2022	1/25/2024	7/18/2023	6/12/2023[2]	7/27/2022 (N.D. Cal.)
PI hearing	Consolidated	Consolidated	Consolidated	11/20/2023 (7 days)	6/22/2023 (5 days)	12/8/2022 (7 days)
PI				12/29/2023 (Granted)	7/10/2023 (Denied)	2/3/2023 (Denied)
PI appeal				None		None
Merits hearing (trial days)	10/31/2023 (17 days)	4/24/2023 (6 days)	5/2/2024 (6 days)	Following the entry of the PI, the parties abandoned the transaction without an appeal		After the district court denied the preliminary injunction, the parties closed the transaction on 2/8/2023. The FTC dismissed its administrative complaint on 2/24/2023.
Live witnesses	18 + 4 experts					
Initial merits decision/R&R (FTC)		--				
Final decision	1/16/2024	Trial paused 5/3/2023[1]	6/5/2024 (dismissed)		7/10/2023	
Merits appeal			Dismissed			
Total time to conclusion	10 months (DC)	7.5 months	4.5 months	5.5 months	1 month (PI)	5.5 months

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1 The judge sua sponte paused the trial, told the DOJ it was losing, and essentially forced the DOJ to settle. The parties announced a settlement on 5/5/2023.

2 Discovery in the administrative proceeding had been completed by the time the FTC filed its Section 13(b) complaint.

Litigation timing—Preclosing challenges

	DOJ			FTC		
	U.S. Sugar/ Imperial	UHC/ Change	Penguin/ S&S	Hackensack/ Englewood	Thomas Jefferson Univ.	Peabody/ Arch Coal
Complaint	11/23/2021 (D. Del.)	2/24/2022 (D.D.C.)	11/2/2021 (D.D.C..)	12/4/2020 (D.N.J.)	2/27/2020 (E,D, Pa.)	2/26/2020 (E.D. Mo.)
PI hearing	Consolidated	Consolidated	Consolidated	5/10/2021 (7 days)	9/15/2020 (6 days)	7/14/2020 (9 days)
PI				8/4/2021	12/8/2020	9/29/2020
PI appeal				3/22/2022	3/4/2021 (withdrawn)	None
Merits hearing (trial days)	4/18/2022 (4 days)	8/1/2022 (12 days)	8/1/2022 (13 days)	Transaction abandoned after the PI was affirmed on appeal. The parties abandoned the transaction on 4/5/2021.	After the district court denied the preliminary injunction, the FTC appealed. After the FTC withdrew its appeal, the parties closed the transaction on 10/4/2021.	Following the entry of the PI, the parties abandoned the transaction without an appeal
Live witnesses		>20 2+2 experts	____ 2+1 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	9/28/2022	9/19/2022	10/31/2022			
Merits appeal	7/13/2023					
Total time to conclusion	9 months (Tr)[1] 9.5 months (A)	7 months	12 months	9 months (PI) 6.5 months (A)	6.5 months (PI)	7 months

Subject to COVID delays

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[1] Time to the judgment dismissing the complaint. The parties closed the deal on 11/30/2022.

Litigation timing—Preclosing challenges

	DOJ		FTC			
	Sabre/ Farelogix	AT&T/ Time-Warner	Evonik/ PeroxyChem	Sanford Health	Wilhelmsen	Tronox
Complaint	8/20/2019 (D. Del.)	11/20/2017 (D.D.C.)	8/2/2019 (D.D.C.)	6/22/2017 (D.N.D.)	2/23/2018 (D.D.C.)	7/10/2018[1] (D.D.C.)
PI hearing	Consolidated	Consolidated	11/12/2020 (11 days)	10/30/2017 (4 days)	5/29/2018 (10 days)	8/7/2018 (3 days)
PI			1/24/2020	12/15/2017	7/21/2018[2]	9/7/2018
PI appeal			None	6/13/2019	None	None
Merits hearing (trial days)	1/27/2020 (8 days)	3/22/2018 (23 days)	After the district court denied the preliminary injunction, the FTC dismissed its administrative complaint. The transaction closed on February 3, 2020.	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	16 fact 2 experts	23 fact 5 experts				
Initial merits decision (FTC)	--	--				
Final decision	4/7/2020	6/12/2018				
Merits appeal	Dismissed	2/26/2019				
Total time to conclusion	7.5 months (Tr)	7 months (Tr) 8.5 months (A)	6 months (PI)	6 months (PI) 18 months (A)	5 months (PI)	2 months

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[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				Transaction closed; administrative proceeding dismissed	Transaction abandoned after PI	Transaction abandoned after PI
Merits hearing	9/6/11 (9 days)	6/6/04	11/8/01 (10 hours)			
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 termination date ("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, business people need a good sense of the timing 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 has not continued litigation on the merits if it has been 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
  - Conversely, I am not aware of any case in the last 40 years where the merging parties have proceeded to a full trial on the merits after a blocking preliminary injunction has been granted
    - That is, a preliminary injunction kills the transaction

Historically, the preliminary injunction proceeding decides the outcome for the merger

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

Contrasts between the DOJ and FTC

- Adjudicators
  - FTC actions
    - When The FTC petitions a district court judge for a preliminary injunction, the judge has no further involvement in the case other than deciding the PI
    - ALJ (an FTC employee) hears the evidence and recommends a decision to the full Commission
      - Prior to June 2, 2023, the ALJ issued an *initial decision* that was appealable to the full Commission
        - Unless a party sought review of the ALJ's decision, it automatically became the decision of the Commission
      - On June 2, 203, the Commission changed the rule so that the ALJ only makes a *recommendation* to the Commission—the only decision issued in the matter will be the Commission's decision[1]
      - Each recommended decision is be subject to automatic Commission review—there is no longer an "appeal" to the Commission
      - Reason for the change
        - One of the constitutional attacks on the FTC's adjudicative process is that ALJs are Article I judges and hence "inferior officers" and subject to removal by the president, which they are not by statute. If ALJs are empowered only to make recommendations and not adjudicative decisions, they are not Article I judges.[2]
        - A collateral benefit to the current Commission is that this change reduces the weight of the ADJ's decisions, which recently have been in favor of the respondents in several major competition matters

[1] Fed. Trade Comm'n, Revisions to Rules of Practice, 88 Fed. Reg. 42872 (July 5, 2023) (codified at 16 C.F.R. § 3.51).
[2] *See* U.S. Const. art. II, § 2, cl. 2.

Contrasts between the DOJ and FTC

- Adjudicators
  - FTC actions
    - The full Commission—usually most if not all the same people who voted out the complaint—can:
      - Accept the ALJ's recommended decision without change
      - Chane or reject the ALJ's conclusions of law and findings of law as the Commission see fit, or
      - Issue an entirely new decision
    - The parties may appeal the Commission's decision to any federal court of appeals with venue
    - Appellate standard:[1]
      - 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."[1]
        - 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."

[1] ProMedica Health Sys., Inc. v. FTC, No. 12-3583, at 7 (6th Cir. Apr. 22, 2014).
[2] *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 the preliminary injunction hearing with the trial on the merits
  - FTC: Never consents to consolidation—always insists on separate administrative trial and appeal to the full Commission[1]
- 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
    - The FTC Rules do not incorporate the FRCP or FRE
      - For example, the FTC Rules do not adopt limitations on the number of interrogatories or the length of depositions

[1] There may be an exception when the FTC joins an ongoing litigation (say, by a state AG) as a plaintiff and decides to continue the case through on the merits in federal district court.

Contrasts between the DOJ and FTC

- Simultaneous proceedings (FTC)
  - The FTC must issue its administrative complaint within 20 days of the entry of a preliminary injunction.[1]
  - As a matter of practice, the FTC issues its administrative complaint before or on the date the agency seeks a preliminary injunction, so that both the federal court and administrative litigations proceed simultaneously
    - Increasingly, the FTC will initiate administrative litigation but not file a Section 13(b) petition for a preliminary injunction in federal district court if the transaction cannot close shortly because of the running of a suspension period (waiting period) under another jurisdiction's merger control laws—only when the suspension period will end shortly or will the FTC commence a Section 13(b) petition
    - Merging parties generally do not like this—Section 13(b) proceedings are decided much more quickly than an administrative litigation (6.5 months compared to 18+ months) and the FTC practice is to terminate the administrative litigation if it loses in the Section 13(b) proceeding
- Preliminary injunction standard
  - Arguably lower threshold in FTC Section 13(b) proceedings than in DOJ Section15 proceedings (discussed below)

[1] FTC Act § 13(b).

Aside: Constitutional challenges to the FTC

- History
  - Prior to 2023
    - Constitutional challenges to the FTC's administrative adjudicative process could only be made in the course of the administrative adjudication
    - However, the administrative agency is not competent to decide the constitutionality of its own processes, so the resolution of the constitutional claims had to await an appeal to the court of appeals following a final administrative decision
  - *Axon*
    - In Axon Enterprise v. FTC,[1] the Supreme Court rejected this view and held that constitutional challenges to the structural aspects of an agency adjudicative process may be litigated collaterally in district court
      - Constitutional challenges related to the conduct of a particular administrative adjudication still have to be litigated in the administrative proceeding
  - Upshot
    - Respondents in FTC administrative adjudications are raising raised constitutional challenges to the FTC's adjudicative process in—
      - Collateral district court proceedings, *and*
      - FTC Act 13(b) preliminary injunction proceedings
    - *Query*: Is it legal malpractice today not to raise a constitutional challenge to the FTC's administrative adjudicative process if the FTC commences administrative litigation against the deal?

[1] 142 S. Ct. 895 (2023).

Aside: Constitutional challenges to the FTC

- *Example*: Intercontinental Exchange/Black Knight[1]
  - Raised as defenses to the PI and independently as counterclaims for a declaratory judgment
    1. Constraints on removal of the Commissioners and the Administrative Law Judge violate Article II of the Constitution and the separation of powers
    2. Congress unconstitutionally delegated legislative power to the Commission by failing to provide an intelligible principle by which the Commission would exercise the delegated power
    3. Granting the relief sought would constitute a taking of Intercontinental Exchange's property in violation of the Fifth Amendment to the Constitution
    4. The adjudication of the Complaint against Intercontinental Exchange through the related administrative proceedings violates Intercontinental Exchange's Seventh Amendment right to a jury trial
    5. The adjudication of the complaint against Intercontinental Exchange through the related administrative proceedings adjudicates private rights and therefore violates Article III of the U.S. Constitution and the Seventh Amendment

[1] Defendant Intercontinental Exchange, Inc.'s Answer and Affirmative Defenses and Counterclaims, Defenses Fourth through Eight and Counterclaims ¶¶ 39-48, FTC v. Intercontinental Exchange, Inc., No. 3:23-cv-01710-AMO (N.D. Cal. filed Apr. 25, 2023). The case settled in August shortly before the PI hearing, so the constitutional issues will not be decided. *See* Joint Stipulation For Dismissal Without Prejudice, FTC v. Intercontinental Exchange, Inc., No. 3:23-cv-01710-AMO (N.D. Cal. filed Aug. 7, 2023). *Query*: To what extent did the constitutional challenges put pressure on the FTC to settle?

Aside: Constitutional challenges to the FTC

- FTC diminishes the role of administrative law judges
  - In part in response to the constitutional challenges and in part to gain more control and authority over Commission decisions, the Commission has revised its rules of practice to diminish the role of its administrative law judges in administrative adjudications
  - Prior to July 5, 2023, ALJs issued "initial decisions," which became the order of the Commission unless modified or reversed on appeal.
    - As such, ALJ initial decisions has some informal "weight" even if they were modified or rejected by the Commission on appeal
  - Effective July 5, 2023, ALJs issue only a "recommended decision"
    - The Commission decides the case de novo on the evidentiary record complied by the ALJ in the administrative trial
    - The Commission may accept the ALJ's recommended decision, modify the recommended findings of fact, conclusions of law, or order of relief, or may reject the recommendation in its entirety and issue a completely different decision
    - In effect, ALJs have reverted to hearing examiners

1 *See* Fed. Trade Comm'n, Rules of Practice, 88 Fed. Reg. 42872 (July 5, 2023); Press Release, Fed. Trade Comm'n, FTC Approves Publication of Federal Register Notice on Revisions to Parts 0-4 of the Commission's Rules of Practice (June 2, 2023); Jonathan M. Moses, Nelson O. Fitts & Adam L. Goodman, FTC Diminishes Role of Administrative Law Judge (June 12, 2023).

Interim Injunctive Relief

Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (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)[3]

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

[1] Blocking injunctions are injunctions 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. Recission is extremely rare in merger antitrust cases. In two cases, a preliminary injunction of recission was ordered in non-HSR reportable transactions that the government learned about prior to closing and asked the parties to delay the closing until the government has an opportunity to investigate the transaction, and the parties responded by accelerating the closing. *See* FTC v. Weyerhaeuser Co., 648 F.2d 739, 1981-1 Trade Cas. (CCH) 63,935, 1981-1 Trade Cas. (CCH) 63,970 (D.C. Cir. 1981); FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131 (N.D. Ill. 1988).

[3] *See* Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), aff'd, 139 F.3d 1180 (8th Cir. 1998).

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 outweigh any private equities when there is a likelihood of success on the merits
      - The public interest in effectively enforcing the antitrust laws
      - The public interest in ensuring that effective relief may be ordered if the government succeeds at the trial on the merits (secondary)
    - I am unaware of any merger antitrust where the court found that the private equities outweighed the public equities if the agency demonstrated a likelihood of success on the merits
  - Therefore, the critical factor when the government seeks a preliminary injunction is the likelihood of success on the merits

Therefore, the critical factor when the government seeks a preliminary injunction is the likelihood of success on the merits

Antitrust 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 insufficient relief

Antitrust preliminary injunctions

- Deal realities
  - 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 12-18 months of signing
    - An HSR merger review is likely to take 8-12 months
    - Little time left practically for a trial and a decision, much less 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 complete 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
    - As the agencies bring more merger cases outside the DDC, judges in other jurisdictions are largely following the DDC approach
- Other observations
  - As noted above, since the public equities will always outweigh the private equities, 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 success on the merits required for a permanent injunction

Antitrust preliminary injunctions

- Implications—DOJ actions
  - Merging parties often seek to avoid a separate stand-alone preliminary injunction proceeding (and the technically lower standard of proof) by stipulating to a TRO to stay in place until the merits are decided
    - Actually, the practice is to add five business days after the final judgment to allow time for the losing side to seek an injunction pending appeal if the government loses
  - 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 an earlier calendar date
    - Typically seek to consolidate the preliminary injunction hearing with the trial on the merits under FRCP 65(a)(2)
  - DOJ practice is to consent (provided it obtains enough trial days to present the 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.").

Antitrust 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 the statutory scheme indicates a strong congressional intent that the FTC 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 a 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

Antitrust preliminary injunctions

- Implications—FTC actions (con't)
  - Consequences
    - FTC has an incentive to seek a very quick preliminary injunction hearing date to minimize the ability of the merging parties to take adequate discovery, prepare expert testimony, and make a complete case in the Section 13(b) proceeding
      - FTC correctly believes that a 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 have the 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 to incentivize the FTC to dismiss the administrative complaint as futile
      - Two points to remember—
        1. A decision on a PI usually will precede an ALJ's decision by 2-4 months
        2. The FTC policy is to dismiss an administrative complaint if it losses the PI motion (although have been exceptions)
      - But the parties 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 make it likely that the merging parties will lose (e.g., a judge who is apparently unsympathetic or unsophisticated in complex antitrust litigation)

Antitrust preliminary injunctions

- 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*: Modified *Winter* test
    - Requires showing of—
      1. Likelihood of the plaintiff's success on the merits, *and*
      2. A public interest in the entry of an injunction
    - BUT irreparable injury requirement is modified—
      - Either eliminated altogether, OR
      - Requisite injury must be to the public (and not the government) and is conclusively presumed when there is the requisite a likelihood of a violation

      NB: In either case, not a meaningful element on which the preliminary injunction decision will be based
    - Possibility of substantial harm to other interested parties from a grant of injunctive relief
      - But always outweighed by the public's interest in preventing an anticompetitive merger
  - Likelihood of success is the determinative factor
    - Usually requires a showing that there is a "reasonable probability of success at trial"
    - Courts give lip service to other factors but they are rarely if ever important in DOJ cases

[1] 15 U.S.C. § 25.

Antitrust 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—
    1. "[u]pon a proper showing that, weighing the equities and
    2. considering the Commission's likelihood of ultimate success, such action would be in the public interest."[1]

    No requirement to show irreparable harm
  - Some courts have asked at what stage in the litigation is likelihood to be measured?
    - The is some authority that in a Section 13(b) proceeding the district court should assess the "likelihood of success" in the administrative proceedings before the Commission[3]
    - WDC: Is this a meaningful question?
      - Shouldn't we assume that the Commission will properly find the facts and apply the law, so that the Commission's decision will be affirmed on appeal?
      - Also, isn't the only indication of what the record in the administrative proceeding will be is the record that the FTC and the merging parties create in the Section 13(b) proceeding?
      - So shouldn't the question simply be whether the FTC has shown a threshold "likelihood of ultimate success" by asking what is the likelihood of success givent he Section 13(b) record?

[1] 15 U.S.C. § 53(b).
[2] *See* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *urged in* FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232, at *7 (S.D.N.Y. Jan. 8, 2024).
[3] *See, e.g.,* FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001); FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2022 WL 16637996, at *4 (N.D. Cal. Nov. 2, 2022).

Antitrust preliminary injunction standard

- FTC
  - Debate over the Section 13(b) likelihood standard
    - FTC:
      - Often urges that the agency need only show "a fair and reasonable chance of ultimate success on the merits"[1]
      - Another standard, more commonly cited by the courts, is the "serious question" standard (see next slide)

[1] *See* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *urged in* FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232, at *7 (S.D.N.Y. Jan. 8, 2024).

Antitrust preliminary injunction standard

- FTC: "Serious questions" test

> 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."[1]

[1] 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. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *8 (N.D. Cal. Feb. 3, 2023); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 290 (D.D.C. 2020); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 44 (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).

[2] *See* FTC v. University Health, 938 F.2d 1206, 1218 (11th Cir.1991); Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); FTC v. Staples, Inc., 970 F. Supp. 1066, 1072 (D.D.C. 1997).

Antitrust preliminary injunction standard

- FTC: "Serious questions" test
  - Notwithstanding this test (and some even while citing it), several courts have required the Commission to show a reasonable probability of success on the merits[1]
    - Example: *Tronox* (2018):

> For relief under Section 13(b), the Commission must establish that "there is a reasonable probability that the challenged transaction will substantially impair competition." F.T.C. v. Staples Inc., 190 F.Supp.3d 100, 114 (D.D.C. 2016).[2]

    - Example*: Meta Platforms* (2023):

> The FTC is therefore required to provide more than mere questions or speculations supporting its likelihood of success on the merits, and the district court must decide the motion based on "all the evidence before it, from the defendants as well as from the FTC." *Id.* (citations omitted); *see* United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (noting that "the Government must do far more than merely raise sufficiently serious questions with respect to the merits" in demonstrating a "reasonable probability" of a Section 7 violation.).[3]

[1] *See* FTC v. University Health, 938 F.2d 1206, 1218 (11th Cir.1991); Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 290 (D.D.C. 2020); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); FTC v. Staples, Inc., 970 F. Supp. 1066, 1072 (D.D.C. 1997); *see also* FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *8 (N.D. Cal. Feb. 3, 2023) (citing United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (noting in turn that "the Government must do far more than merely raise sufficiently serious questions with respect to the merits" in demonstrating a 'reasonable probability' of a Section 7 violation)).

[2] FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018).

[3] FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *8 (N.D. Cal. Feb. 3, 2023)

Antitrust preliminary injunction standard

- FTC
  - 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
      - Even so, the FTC has significantly diversified where it brings its cases
      - In particular, the FTC does not like to bring cases in the District of Columbia, where the judges are more familiar with antitrust law—and the Circuit has more antitrust precedent, especially in mergers—than other circuits. Although there is nothing in the public record that confirms this, it is apparent that the FTC (and the DOJ) want to avoid the District of Columbia, its experienced judges, and the Circuit’s precedent.
      - As the FTC brings cases in districts that have little or no experience with merger antitrust cases, the probability increases that the judges will take the “serious question” language seriously and significantly lower the threshold for entering a preliminary injunction

Antitrust preliminary injunction standard

- Private parties (includes states)
  - 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
    - *Definition*: Irreparable harm is harm not remediable by damages
      - Courts typically find that harm to private parties in merger antitrust cases is not irreparable → Damages are sufficient
      - But some cases hold that a harm resulting from a lessening of competition is an 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 the 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.

Antitrust 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 the deal has been challenged and settled by the DOJ or FTC
      - There are some limited exceptions[1]

[1] *See, e.g.*, Boardman v. Pacific Seafood Grp., 822 F.3d 1011 (9th Cir. 2016); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989); Bon-Ton Stores, Inc. v. May Department Stores Co., 881 F. Supp. 860 (W.D.N.Y. 1994); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250 (E.D. Pa. 1987); *see also* Sprint Nextel Corporation v. AT&T Inc., 821 F. Supp. 2d 308 (D.D.C. 2011) (recognizing the standing of a private plaintiff to pursue injunctive relief against AT&T's proposed acquisition of T-Mobile); *see generally* California v. Am. Stores Co., 495 U.S. 271 (1990) (holding that courts can order divestiture as a remedy in appropriate private merger antitrust actions under Clayton Act § 16).

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 closes and will be difficult to unwind postclosing (almost a presumption)
    - BUT as a practical matter the merging parties and their counsel are always make themselves 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 offset to the low proof standards
    - Absent consent, if of a longer duration a 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 the 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
      - Usually plus five business days after a denial of the PI to allow for a motion for an emergency injunction pending appeal
  - Since the 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 in civil actions 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
    - In merger antitrust cases, however, the PI record is usually very close, if not identical, to what the full record for a trial on the merits would be
- 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. American Airlines Grp., No. CV 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023)	Consummated joint venture	Tried on the merits. Permanent injunction dissolving Northeast Alliance between American and JetBlue granted. Merging parties did not appeal.
United States v. Bertelsmann SE & Co. KGaA, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction granted.
United States v. U.S. Sugar Corp., C.A. No. 21-1644 (MN), 2022 WL 4544025 (D. Del. Sept. 9, 2022), aff'd, 73 F.4th 197 (3d Cir. 2023)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes. Affirmed on appeal..
United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes.
United States v. Sabre Corp., No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes.

Recent litigated cases

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

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.

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

Case	Deal Status	Litigation Result
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.
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.

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

Case	Deal Status	Litigation Result
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. Novant Health, Inc., No. 5:24-cv-00028 (W.D.N.C. June 5, 2024)	Preclosing challenge	Denied blocking preliminary injunction. The FTC appealed. After the Fourth Circuit granted the FTC's emergency motion for an injunction pending appeal, the parties voluntarily terminated their transaction.
FTC v. IQVIA, No. 1:23-cv-06188-ER (S.D.N.Y. Dec. 29, 2023; public version Jan. 8, 2024)	Preclosing challenge	Entered blocking preliminary injunction. The parties abandoned their joint venture without appeal.
FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023)	Preclosing challenge	Denied blocking preliminary injunction. The FTC decided not to pursue an appeal and agreed to dismiss the case. The parties subsequently closed the deal.
FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021) (unpublished), *aff'd*, 30 F.4th 160 (3d Cir. 2022)	Preclosing challenge	Blocking preliminary injunction entered and affirmed on appeal. The parties subsequently abandoned the transaction.
FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522 (E.D. Pa. Dec. 8, 2020), appeal dismissed, No. 20-3499 (3d Cir. 2021)	Preclosing challenge	Denied blocking preliminary injunction. The FTC decided not to pursue an appeal and agreed to dismiss the case. The parties subsequently closed the deal.

[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. v. Peabody Energy Corp., No. 4:20-CV-00317-SEP, 2020 WL 5893806 (E.D. Mo. Oct. 5, 2020)	Preclosing challenge	Entered blocking preliminary injunction. The parties abandoned their joint venture without appeal.
FTC v. RAG-Stiftung, No. CV 19-2337 (TJK), 2020 WL 532980 (D.D.C. Feb. 3, 2020)	Preclosing challenge	Denied blocking preliminary injunction. The FTC did not appeal and dismissed its administrative complaint. The parties subsequently closed the deal.
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.

Recent litigated cases

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

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. Transaction abandoned.
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. Transaction closed.
FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
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.

Recent litigated cases

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

Case	Deal Status	Litigation Result
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.
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.

Recent litigated cases

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

Case	Deal Status	Litigation Result
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.
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

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.
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 administrative actions[1]

Case	Deal Status	Litigation Result
In re Altria Group, No. 9393 (F.T.C. June 30, 2023)	Consummated transaction	Challenge to Altria's purchase of a 35 percent interest in Juul Labs. ALJ dismissed the antitrust charges in the complaint on the merits and complaint counsel appealed. After Altria sold off its investment, the Commission vacated the initial decision and dismissed the complaint
In re Illumina, Inc., No. 9401 (F.T.C. Mar. 31, 2023*), vacated and remanded sub, nom*. Illumina, Inc. v. FTC, No. 23-60167, 2023 WL 8664628 (5th Cir. Dec. 15, 2023)	Consummated transaction	Challenge to Illumina's vertical acquisition of GRAIL The ALJ dismissed the complaint on the merits. On appeal, the Commission reversed the ALJ's initial decision and ordered divestiture. On appeal to the Fifth Circuit, the court of appeals held that the Commission applied an erroneous standard at the rebuttal stage, vacated the Commission's decision, and remanded for further proceedings.
In re Otto Bock HealthCare North America, Inc., No. 9738 (F.T.C. Nov. 1, 2019)	Consummated transaction	Divestiture ordered
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

[1] Includes actions where a recommended/initial decision was issued.

Recent litigated cases

- Recent FTC administrative actions[1]

Case	Deal Status	Litigation Result
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 and affirmed

[1] Includes actions where a recommended/initial decision was issued.

The Biden merger antitrust litigation record

- The Biden administration's merger antitrust litigation record has been one of the least successful in antitrust history
  - Overall, of thirteen cases concluded in court as of July 29, 2024:

	Wins	Losses[1]
Total	4	9
DOJ	3	4
FTC	1	5

  - Surprisingly, the problem is less that the agencies are bringing and losing cases on novel antitrust theories—they have brought very few of those—but rather they are losing for insufficient prosecution evidence in cases with traditional theories
    - In several cases, the parties prevailed by litigating a fix that prior administrations would have accepted in a consent settlement of the investigation
      - Although no court has yet expressly so stated in an opinion, it is likely that some judges are hostile to the agencies—the DOJ in particular—refusing to enter into consent decrees when consent settlements have been the overwhelming solution to resolve agency concerns over the last 40 years.

[1] I have counted the three settlements during litigation as losses since in each case the prosecuting agency could have obtained materially similar relief at the end of the investigation and the agency's impetus for settlement was that it was likely going to lose the case on the merits if the agency proceed to trial.

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Horizontal Mergers						
L	6/5/2024	FTC	Novant/ Community Health	W.D.N.C	PI denied	After the Fourth Circuit entered an emergency blocking injunction pending appeal, the parties terminated the transaction
W	1/16/2024	DOJ	JetBlue/Spirit	D. Mass.	Permanent injunction	
W	12/29/2023	FTC	IQVIA/ Propel Media	S.D.N.Y.	PI entered	
L	8/7/2023	DOJ	ICE/ Black Knight	N.D. Cal.	Settled before trial	
W	5/19/2023	DOJ	American Airlines/ JetBlue	D. Mass.	Permanent injunction	
L	5/5/2023	DOJ	Assa Abloy/ Spectrum Brands	D.D.C.	Settled during trial	Litigated the fix Settlement forced by the court
W	11/15/2022	DOJ	Bertelsmann/ Simon & Schuster	D.D.C.	PI entered	

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Horizontal Mergers						
L	9/9/2022	DOJ	U.S. Sugar/ Imperial Sugar	D. Del	Dismissed	Affirmed on appeal
W	8/4/2021	FTC	Hackensack Meridian Health	D.N.J..	PI entered	Affirmed on appeal

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Vertical Mergers						
L	7/10/2023	FTC	Microsoft/ Activision	N.D. Cal.	PI denied	Litigated the fix On appeal
L	9/21/2022	DOJ	UnitedHealth/ Change	D.D.C.	Dismissed	Litigated the fix
Potential Competition Mergers						
L	2/3/2022	FTC	Meta/ Within	N.D. Cal.	Dismissed	On appeal
Conglomerate Mergers						
L	9/1/2023	FTC	Amgen/ Horizon	N.D. Ill.	Settled before trial	

Appeals

Appeals

- Jurisdiction
  - Courts of appeal must be assigned jurisdiction by statute to hear an appeal[1]
- Jurisdiction in four types of appeal
  1. Appeals of final judgments
  2. Appeals of the grant or denial of injunctive relief
  3. Interlocutory appeals certified for appellate review by the district court and accepted by review by the court of appeals
  4. Appeals of final "collateral orders"

[1] U.S. Const. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

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 given an adverse ruling on some contested issue, which then would be appealable[4]
      - Key is for the party to reserve the contested issue for appeal and not consent to the adverse judgment or dismiss the action—for that would waive its right to appeal

[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 issues that the court of appeals can rule as a pure, controlling question of law without having to delve beyond the surface of the record 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. an immediate appeal from the order may materially advance the ultimate termination of the litigation[1]
    - *Court of appeals*: Discretionary with the 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 standards
    1. 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]
    2. 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[2]
    3. 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

[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)
  - Discretion in both district court *and* court of appeals
    - Certification decision lies in the discretion of the district court
      - Court may decline to certify an order even if the parties have satisfied all the statutory requirements
    - PLUS court of appeals has discretion to hear or decline to hear a certified interlocutory appeal
  - Observations
    - Although not common, the Supreme Court has granted a writ of certiorari in antitrust cases involving Section 1292(b) certified interlocutory appeals[1]
      - *WDC*: Given the Court's current composition, I strongly suspect that the Court would easily grant certiorari in a Section 1292(b) case where the court of appeals sustained a novel antitrust theory that departed from the consumer welfare standard

[1] *See, e.g.*, Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 206 (1990); Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 336 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 644 (1980); Reiter v. Sonotone Corp., 442 U.S. 330, 336 (1979); Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 311 (1978); Abbott Lab'ys v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 6 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 192 (1974); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972); Minnesota Min. & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 313 n.1 (1965).

Appeals

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

Appeals

- Final "collateral orders"—28 U.S.C. § 1291
  - Rule
    - In Cohen v. Beneficial Indus. Loan Corp, the Supreme Court held that Section 1291 not only judgments that terminate an action, but also a "small class" of collateral rulings that, although they do not end the litigation, are deemed "final"[1]
    - *The* Cohen *requirements*: "That small category includes only decisions [1] that are conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action."
  - Limited application
    - In applying the Cohen collateral order doctrine, the Supreme Court has stressed that it must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered."[3]
    - "The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes."
    - Consequently, courts have strictly applied the three Cohen requirements, especially the requirements that—
      - The appeal resolve important questions separate from the merits, and
      - The asserted error are effectively unreviewable on appeal from the final judgment in the underlying action[5]

[1] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *accord* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009).
[2] Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995); *accord*, *Mohawk Indus.,* 558 U.S. at 106.
[3] Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994),
[4] *Mohawk Indus.,* 558 U.S. at 107.
[5] Id.

Appeals

- Division of jurisdiction between the appellate court and the 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]
    - Usually must be filed within 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
  - Timing[2]
    - The court's mandate must issue
      - 7 days after the time to file a petition for rehearing expires, *or*
      - 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.
    - The court may shorten or extend the time by order.

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

Appeals

- Division of jurisdiction between the appellate court and the trial court
  - The filing of the *mandate* by the court of appeals returns jurisdiction to the district court[1]
    - 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[2]

[1] Fed. R. App. P. 41.
[2] *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)

Appeals

- Standards of review
  - Finding of facts in a bench trial or by an administrative agency—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 a finding of the trier of fact simply because it is convinced that it would have decided the 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 contain "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
  - *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.[2]

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

Appeals

- Standards of review
  - Matters in the trial court's 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

Appeals

- Preserving the status quo pending appeal[1]
  - Types of orders
    - *Stay pending appeal* when relief has been ordered
      - By the district court
      - By the court of appeals
    - *Injunction pending appeal* when injunctive relief has been denied
      - By the district court
      - By the court of appeals
  - Rules
    - Ordinarily, a party must move first in the district court for either type of relief[2]
    - If the requested relief is denied by the district court, the party may seek the same relief in the court of appeals (usually through an emergency motion[3])

[1] *See generally* Fed. R. App. P. 8 (Stay or Injunction Pending Appeal).
[2] *Id*. 8(a).
[3] The procedure for emergency motions is usually governed by the circuit local rules. *See, e,g*., 9th Cir. R. 27-3; D.C. Cir. R. 27(e).

Appeals

- Preserving the status quo pending appeal[1]
  - Standard
    - Although the articulation of the standard varies among circuits, the general requirements are materially the same
    - Analogous standards apply to stays and injunctions pending appeal
  - Examples: Stay pending appeal
    - Supreme Court:

> Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. *See* Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[4]

[1] *See generally* Fed. R. App. P. 8 (Stay or Injunction Pending Appeal); Fed. R. Civ. P. 62 (Stay of Proceedings to Enforce a Judgment).
[2] Fed. R. App. P. 8(a).
[3] The procedure for emergency motions is usually governed by the circuit local rules. *See, e,g*., 9th Cir. R. 27-3; D.C. Cir. R. 27(e).
[4] Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *accord* Nken v. Holder, 556 U.S. 418, 426 (2009).

Appeals

- Preserving the status quo pending appeal[1]
  - Examples: Stay pending appeal
    - Seventh Circuit:

> In deciding whether to stay an injunction pending appeal, we apply a standard that parallels the preliminary injunction standard but also keeps in mind the district court's exercise of equitable discretion. A party seeking a stay must show a likelihood of success on the merits and a threat of irreparable harm absent a stay. If those criteria are satisfied, we must consider the balance of harms, primarily in terms of the balance of risks of irreparable harm in case of a judicial error, and we must consider the public interest, which refers primarily to the interests of those who are not parties to the suit.[1]

    - Tenth Circuit:

> We evaluate a motion for an injunction pending appeal using the preliminary injunction standard. Thus, Leachco "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.[2]

[1] Camelot Banquet Rooms, Inc. v. United States Small Bus. Admin., 14 F.4th 624, 628 (7th Cir. 2021).
[2] Leachco, Inc. v. Consumer Prod. Safety Comm'n, No. 22-7060, 2023 WL 5747726, at *1 (10th Cir. Jan. 30, 2023) (some internal quotation marks and citations omitted)..