MERGER ANTITRUST LAW

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READING GUIDANCE

Class 3 (September 2): Sanford Health Mid Dakota Clinic (Unit 2)

Today, we start on our second case study: the proposed acquisition by Sanford Health of Mid Dakota Clinic, P.C. Our primary case materials will be the complaint and answer in the case.[1] In these classes, we will cover merger antitrust litigation and introduce the major elements of horizontal merger antitrust analysis: market definition, theories of anticompetitive harm, and defenses. I assure you that the time you spend on this unit will pay significant returns as the course proceeds, especially when the cases get much more complicated. But before we get into the facts, which are easily understood and largely uncontested, a quick comment on advocacy.

Advocacy. Effective advocacy—whether as a prosecutor or defense counsel—requires persuading both the heart and the mind of the decision maker, whether that is agency leadership or a federal judge.

Consider advocacy before a federal district judge. Persuading the judge's heart means appealing to her judgment, experience, common sense, and ultimately to her sense that your position best serves justice. If you succeed, the judge will be inclined to see the case your way. But that alone is not enough. You must also persuade the judge's mind by providing a legal and analytical framework that justifies the outcome under the governing law and precedent. More to the point, ideally you should provide the judge with legal arguments and supporting evidence that the judge can incorporate into her opinion that will make the judge look like a scholar to the bench and bar, is likely to be regarded as a model by other judges writing opinions in future cases, and (by no means least) will not be reversed on appeal.

The bottom line: Even if the judge believes you are "right," you may still lose unless you give her a way to reach that result within the analytical framework the law demands. At the same time, capturing the judge's heart remains critical, for a judge who is not persuaded that your position is just and reasonable is unlikely to search for a legal basis to rule in your favor. Persuasion requires both components.

As a quick practice aside, when writing briefs, the fact section should be written not only to provide the factual predicates for the theory of the case but also to provide a compelling narrative to appeal to the "heart" of the judge. The argument section is more intended to speak to the judge's "mind." If the judge is not convinced that you have right on your side by the time the judge has finished reading the fact section, you have a problem.

[1] I have not included the district court's opinion because it is long, not written in the common format for merger antitrust opinions, and is difficult to read. The Eighth Circuit's opinion, which we will read, is shorter but does not contain everything we need for the case study. Besides, you will find it valuable to become familiar with merger antitrust complaints and answers.

The facts. Sanford Health is an integrated healthcare system operating in North Dakota and several other states.[2] In the Bismarck-Mandan region of North Dakota, Sanford operates an acute care hospital, eight primary care clinics, and several specialty clinics. It employs approximately 160 physicians in the region, including 37 adult primary care physicians (PCPs), five pediatricians, eight OB/GYN physicians, and four general surgeons.

For all practical purposes, Sanford has only two competitors in the Bismarck-Mandan region: Mid Dakota Clinic (MDC) and Catholic Health Initiatives St. Alexius Health (CHI).

MDC is a multispecialty for-profit physician group with nine clinics and one ambulatory surgery center in the region.[3] MDC has approximately 60 physicians, including 23 adult PCPs, six pediatricians, eight OB/GYN physicians, and five general surgeons.

CHI operates CHI St. Alexius, the only other acute care hospital in the Bismarck-Mandan area. CHI employs approximately 88 physicians, primarily hospitalists.[4] Only five are adult PCPs, and it does not employ any pediatricians, OB/GYNs, or general surgeons.

The following table summarizes physician counts by specialty and provider:

Physicians in the Bismarck-Mandan Region

	Sanford Bismarck	Mid Dakota	CHI St. Alexius	Others
Adult PCPs	37	23	5	10
Pediatricians	5	6	0	1
OB/GYNs	8	8	0	1
General surgeons	4	5	0	0

The litigation. On June 22, 2017, the Commission voted to issue an administrative complaint and commence an adjudicative proceeding on the merits of the proposed Sanford/MDC transaction.[5] The administrative complaint alleged that the acquisition, if consummated, would violate Section 7 of the Clayton Act by threatening to lessen competition in the provision of adult primary care physician, pediatric, OB/GYN, and general surgery physician services—each

[2] An integrated healthcare system is one comprised of both hospital services and physician services and which sometimes also includes insurance companies and research and education components.

[3] A multispecialty for-profit physician group is a privately owned medical practice that includes physicians from multiple clinical specialties, such as primary care, pediatrics, obstetrics/gynecology, and general surgery, and operates as a for-profit business entity. These groups typically offer coordinated care across specialties, share administrative infrastructure, and generate revenue through professional fees, contracts with insurers, and ownership of related facilities such as ambulatory surgery centers.

[4] A hospitalist is a dedicated in-patient physician who works exclusively in a hospital.

[5] *See* Complaint, *In re* Stanford Health, No. 9376 (F.T.C. issued June 22, 2017); News Release, Fed. Trade Comm'n, FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota (June 22, 2017).

alleged to be a separate relevant product market—sold to commercial insurers in the Bismarck-Mandan area of North Dakota.[6]

At the same meeting, the Commission authorized its staff to seek preliminary injunctive relief in federal court to block the transaction pending resolution of the administrative adjudicative proceeding. The next day, the staff filed a complaint under Section 13(b) of the FTC Act in the District of North Dakota. For relief, the FTC sought a temporary restraining order and a preliminary injunction to prevent the parties from consummating the transaction before the Commission could adjudicate the case on the merits.

The State of North Dakota joined the federal complaint as a co-plaintiff, alleging a violation of Section 7 and seeking similar relief under Section 16 of the Clayton Act. The state also alleged a violation of North Dakota Century Code § 51-08.1, the state's antitrust statute, and sought additional remedies under state law.

Because the only relief sought by the plaintiffs was injunctive, the trier of fact would be the court rather than a jury. In common parlance, there would be a "bench trial." Although the parties had the right to have the case tried before a federal district judge, all parties consented to try the case on the merits before a magistrate judge under 28 U.S.C. § 636(c).[7]

The FTC's allegations. The complaint alleged that Sanford and Mid Dakota Clinic were the two largest providers of four categories of physician services in the Bismarck-Mandan region: (1) adult primary care physician services, (2) pediatric services, (3) OB/GYN services, and (4) general surgery physician services. According to the FTC, each category constitutes a separate relevant product market, and the relevant geographic market for all four was no broader than the four-county Bismarck, ND Metropolitan Statistical Area. The complaint alleged that postmerger, Sanford would control 77% of adult PCPs, over 80% of pediatricians, over 85% of OB/GYNs, and 100% of general surgeons in the region, making the transaction presumptively unlawful under the Merger Guidelines and relevant case law.

The FTC framed its competitive concerns in terms of both price and non-price effects. It alleged that Sanford and Mid Dakota were each other's closest competitors for inclusion in commercial payers' provider networks and competed vigorously on price, technology investment, patient access, and service offerings. The merger, the FTC contended, would eliminate this head-to-head competition, increasing Sanford's bargaining leverage with commercial payers and allowing it to negotiate higher reimbursement rates and other less favorable terms for payers. The resulting increases in provider costs would likely be passed through to employers and their employees in the form of higher premiums, deductibles, and other out-of-pocket expenses. The FTC also alleged that the merger would reduce incentives to invest in service quality, adopt new technologies, and expand patient access.

The complaint invoked both the 2010 Merger Guidelines and the *Philadelphia National Bank* presumption. It alleged that the transaction would significantly increase market concentration in

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[6] The FTC, as is its practice, also alleged that the entry into the merger agreement violated Section 5 of the FTC Act in its administrative complaint. *See* Complaint § IX, *In re* Stanford Health, No. 9376 (F.T.C. issued June 22, 2017);

[7] This is extremely unusual in antitrust cases generally and merger antitrust cases in particular. I can find no other case other than *Sanford Health* where the parties consented to a trial on the merits before a magistrate judge. If you are interested, read the orders of recusal and my note on judicial recusal in federal courts (pp. 79-86). You can also read the oder reassigning the cse to the magistrate judge and my note on the magistrate judges (pp. 87-92).

already highly concentrated markets and create a dominant provider in each relevant service line. To support the claim that Sanford and Mid Dakota were close competitors, the FTC cited internal documents, marketing materials, and a diversion analysis showing that, for adult PCP services, approximately 77% of Sanford's patients would switch to Mid Dakota if Sanford were unavailable and 82% of Mid Dakota's patients would switch to Sanford if MDC was not available.

The FTC preemptively addressed potential defenses. It alleged that entry by new or existing providers into the relevant markets would not be timely, likely, or sufficient. The complaint identified barriers to entry such as the difficulty of recruiting physicians to the region, the financial challenges of launching an independent practice, and the need for sufficient staffing to maintain hospital privileges and call coverage. It also challenged the parties' claimed efficiencies as speculative, not merger-specific, and in any event insufficient to offset the likely anticompetitive effects of the merger.

The FTC concluded that a temporary restraining order and preliminary injunction were necessary to maintain the status quo and prevent interim harm to competition while the Commission adjudicated the case on the merits in an administrative proceeding.

To get your bearings, read the FTC's press release announcing the action (pp. 7-8) and then read the complaint (pp. 9-43). The introduction and Section I of the complaint give a good summary of the theory of the case. Section II.A provides the jurisdictional allegations and sets forth the causes of action. Sections II.B and II.C describe the parties and summarize the transaction and the investigation. Skim Sections III–IX to see how the FTC structures its argument.

Merger Antitrust Litigation

This is the only class in the course that focuses systematically on how merger cases are litigated. Future classes will address litigation strategy and burden shifting as they arise in particular decisions, but only briefly. In this class, we take a step back and walk through the litigation structure from the perspective of both the government and the merging parties.

The antitrust laws provide a statutory cause of action to the DOJ, FTC, states, and private parties injured or threatened with injury to bring suit to block anticompetitive mergers (slides 5-15). The DOJ and FTC enforce Section 7 as public agencies with a mandate to protect competition broadly. Their decisions about whether, and how, to litigate a merger are influenced not only by the strength of the case but also by institutional priorities, political oversight, and resource constraints. State attorneys general may bring independent actions under federal or state antitrust laws and sometimes challenge mergers that the federal agencies have cleared. Their incentives may reflect local political or economic considerations. Private plaintiffs—typically competitors, customers, or suppliers—may also sue under Section 7. However, courts apply a demanding standing doctrine and are reluctant to enjoin transactions that the DOJ or FTC has already reviewed. Because most merger cases are challenged before closing, when there are no damages to recover, private merger challenges are rare. The vast bulk of merger antitrust challenges are from the federal antitrust agencies.

The FTC and DOJ enforce Section 7 of the Clayton Act through two distinct paradigms (slides 16-18). The DOJ is purely a prosecutorial agency—all of its merger litigation occurs in federal court, where it seeks permanent injunctive relief under Section 15 of the Clayton Act

(p. 142). The FTC, by contrast, has a bifurcated litigation procedure. To adjudicate the merits of a merger challenge, the FTC may file an administrative complaint under Section 5(b) of the FTC Act and conduct an internal proceeding before an administrative law judge, with the Commission ultimately deciding whether to issue a permanent injunction (p. 143). But the FTC cannot issue or enforce interim relief to block a transaction from closing while the administrative adjudication is pending. If the agency wants a temporary restraining order or preliminary injunction to preserve the status quo, it must seek that interim relief from a federal district court under Section 13(b) of the FTC Act (p. 142). Section 13(b) also authorizes the FTC to seek permanent injunctive relief in federal court. Although the agency typically prefers to litigate the merits administratively, it may choose to remain in federal court for a decision on the merits, particularly when it joins as a party plaintiff in a suit brought by a state attorney general.

Litigation timing. Read the class notes on litigation timing (slides 19–26). You should be generally familiar with the details, but one point is especially important: if the merging parties intend to litigate, they must allow at least 6.5 months between the filing of a DOJ complaint or an FTC Section 13(b) complaint and the termination date in the merger agreement.[8] That time is needed to allow the court to reach a decision on the merits. This consideration can be critical when negotiating the termination date and any extensions. Otherwise, if the litigation is still ongoing when the termination date arrives, one of the parties may choose to terminate the agreement, essentially achieving the same result as a blocking permanent injunction. To hold the counterparty in the contract and reach a decision on the merits, the litigation must conclude before the termination date.

Why is 6.5 months so important? By the time a complaint is filed, the deal most likely will have been pending for nearly a year, if not longer, since the merger agreement was signed. The parties will already have spent months responding to a second request, negotiating with agency staff, and trying to resolve the investigation. But deals are hard to hold together much longer than that. Uncertainty surrounding the outcome can disrupt internal operations and distract management from running the business. Employees may worry about layoffs or role changes and begin to leave, while customers and suppliers may hedge their bets by shifting business elsewhere. Strategic priorities may evolve during the delay, especially in dynamic industries, and broader market conditions—such as financing, interest rates, or competitive threats—may change materially. As the timeline stretches, the risk increases that one party will reassess the deal and seek to walk away, which they can do unilaterally after the termination date arrives. Given the strain of holding the deal open, the merging parties rarely set a termination date more than 18 months after signing.[9] If the federal court proceeding pushes the timeline past that point, the deal is likely to terminate before a decision can be reached, effectively achieving the agency's goal of blocking the transaction.

Courts recognize these timing pressures of a deal that has already faced around a year delay because of a second request investigation and will typically expedite merger litigation to ensure that it can be completed within six months or so. Despite the compressed schedule, the stakes are

[8] The termination date, often colorfully called the *drop-dead date*, is the date on which either merging party can unilaterally terminate the merger agreement, without cause, upon written notice. In merger antitrust practice, it is one of the most important provisions in the merger agreement.

[9] As we will see in Class 6, the standard practice in almost all merger agreements is a termination date one year after signing, with an extension of six months for deals likely to face significant antitrust scrutiny and possibly litigation.

high enough that the merging parties will devote the resources required to complete discovery and compile a full evidentiary record for the court. For the agency, the burden is lighter, as it should have already conducted extensive discovery—both from the merging parties and from third parties—during its second request investigation. Unlike preliminary injunction proceedings in many other areas of law, judges in merger cases typically conduct multiday evidentiary hearings with live lay and expert witnesses, allowing the judge to assess the credibility of the witnesses and ask questions. In making a decision, judges typically write detailed opinions—often well over a hundred pages in typescript—with extensive analyses of the evidence, findings of fact, and credibility assessments of the witnesses.

Given the completeness of the record by the time of trial, including a multiday evidentiary hearing, and the low likelihood that additional discovery would produce any new material evidence, since the early 1980s the DOJ has routinely agreed to consolidate the preliminary injunction hearing with the trial on the merits in its merger cases under Rule 65(a)(2) of the Federal Rules of Civil Procedure.[10] Notably, the DOJ is willing to agree to this consolidation even though the legal standards for the two types of relief differ significantly. A permanent injunction requires proof of an actual violation (success on the merits). In contrast, a preliminary injunction requires only the less demanding showing of a "likelihood of success on the merits." The DOJ's willingness to consolidate strongly suggests—correctly, in my view—that the agency believes that, given completed lay and expert discovery, a full trial record and evidentiary hearing, and the stakes involved, the judge is likely in practice to apply the permanent injunction standard even in a preliminary injunction proceeding.[11] In any event, the DOJ probably has also concluded that, since the same judge would preside over the trial on the merits as over the preliminary injunction proceeding, the agency is unlikely to get a different result if it takes a second bite at the apple. As a result, there is no strategic advantage to the DOJ in resisting consolidation.

The practice with the FTC is different, but the result is the same. The FTC will not agree to a Rule 65(a)(2) consolidation, preferring to try the merits in an administrative proceeding. This preference reflects both institutional and strategic considerations. As an administrative agency, the FTC has greater flexibility in applying the law, unconstrained by the more rigid precedential framework that binds federal courts and free to develop competition policy through its own adjudicative process. Additionally, in an administrative proceeding, the judge will be different from the federal judge in the preliminary injunction proceeding, allowing the agency to start fresh with a tribunal that has not already been exposed to—and potentially influenced by—the merging parties' arguments and evidence. Finally, as we will examine shortly, the FTC believes

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[10] *See* Fed. R. Civ. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."). As a condition of agreeing to a Rule 65(a)(2) consolidation, the DOJ will require the merging parties to stipulate to a TRO blocking the closing of the deal until the district court reaches its decision. This eliminates the need for a preliminary injunction in a DOJ case pending a decision on the merits.

The last case where the Justice Department pursued separate proceedings for the preliminary injunction hearings and the trial on the merits was United States v. Siemens Corp., 490 F. Supp. 1130 (S.D.N.Y.) (denying preliminary injunction relief), *aff'd*, 621 F.2d 499 (2d Cir. 1980).

[11] In a preliminary injunction proceeding, judges will invariably state in their opinions that they applied the preliminary injunction standard to avoid reversible error. The relevant inquiry, however, is what standard they actually applied in practice, not what they claimed to apply. A more charitable interpretation is that judges do apply the preliminary injunction standard but find, given the completeness and strength of the evidentiary record, that the permanent injunction standard would be satisfied as well.

that the preliminary injunction standard that applies in Section 13(b) cases is even less demanding than the preliminary injunction standard in DOJ cases.

However, the FTC usually seeks a preliminary injunction to enjoin the closing pending the completion of the administrative proceeding. The situation in federal court will be much the same as in a DOJ litigation except for the absence of consolidation: an expedited proceeding, complete discovery, a full trial record, a multiday evidentiary hearing, and a detailed, lengthy opinion supporting its decision. Over the past 45 years, when a preliminary injunction is entered, the merging parties have consistently terminated the transaction and not continued to litigate to conclusion the merits in an administrative trial. Interestingly, if the preliminary injunction is denied, the FTC has almost always discontinued litigation as well and dismissed its administrative complaint.

> *The bottom line*: As a practical matter, all of the action is in the federal court proceeding, regardless of whether the DOJ or FTC brings the case, as long as the FTC seeks a preliminary injunction.

Now read the class notes for a quick summary of the contrasts between DOJ and FTC (slides 27-33). Also, you should know that the FTC adjudicative structure is under constitutional attack (slides 34-36). In 2023, a unanimous Supreme Court in *Axon Enterprise, Inc. v. FTC*[12] overruled the prior precedent and held that parties could bring challenges to the structure of the FTC adjudicative process directly in federal district court without first raising these challenges in the administrative proceeding. Since then, many merging parties have responded to a complaint challenging their transaction with both constitutional defenses in their answers and separate actions affirmatively alleging constitutional claims in federal court. As of August 12, 2025, however, no court has definitively ruled on any of these claims. This lack of resolution likely reflects the expedited nature of merger litigation: since merger cases typically resolve within six or so months of the administrative complaint being filed—through deal abandonment, settlement, or the FTC withdrawing its administrative complaint—the constitutional challenges often become moot before federal courts can rule on them, despite the procedural breakthrough that *Axon* represents.

Injunctive relief generally. The class notes treat injunctive relief in some detail. Read the class notes on the types of interim injunctions in merger antitrust litigation (slide 38), the *Winter* test for preliminary injunctive relief (slides 39-40), antitrust preliminary injunctions (slides 41-55), temporary restraining orders (TROs) (slides 56-58), and permanent injunctions (slides 59-61). Rule 65 of the Federal Rules of Civil Procedure applies to all injunctive proceedings in federal district court, and you should at least skim it (pp. 148-49).

Temporary restraining orders (TROs). A temporary restraining order (TRO) is a form of interim injunctive relief designed to preserve the status quo until the court can hold a hearing on a preliminary injunction. Under Rule 65(b) of the Federal Rules of Civil Procedure, a TRO issued without the consent of the opposing party ordinarily may last no more than 14 days, with a possible extension for good cause. The court also may enter a TRO with the consent of the litigating parties, in which case it remains in effect for as long as the parties have agreed. In merger antitrust cases, merging parties almost always stipulate to a TRO to remain in effect until the judge decides the case, plus five days for the losing party to file post-trial motions (including,

[12] 598 U.S. 175 (2023).

if necessary, a motion to the court of appeals for emergency relief). Stipulating avoids a contested TRO hearing that is almost certain to result in the order being granted, preserves the judge's goodwill, and allows both sides to focus resources on the expedited preliminary injunction proceeding. In this case, the parties stipulated to a TRO on the day the complaint was filed, and the court adopted the stipulation the same day. Now read the stipulation for the entry of a TRO, the order adopting the stipulated TRO, and the note on TROs (pp. 68–79).

The scheduling order. Next, read the Scheduling Order of the court (pp. 93–95), which is one of the most important documents in merger antitrust litigation. It sets the timeline for discovery, trial date, hearing duration, and deadlines for expert disclosures and briefing—each of which can materially affect litigation strategy and case preparation. Typically, the agency and merging parties negotiate a proposed scheduling order and present it to the court, identifying areas of agreement and disagreement, along with each side's reasoning. In this case, the parties disagreed on the hearing schedule: the FTC sought a two-day hearing in late September, while the defendants requested a four-day hearing starting October 30. This dispute reflects the strategic considerations each side weighed regarding whether to prioritize additional preparation time or a faster resolution. The court adopted the defendants' request, scheduling a four-day hearing to begin October 31, 2017, with tight deadlines for fact discovery, expert reports, briefing, and exhibit preparation. The TRO made this later start date possible without prejudicing the FTC, which could still obtain relief before the transaction closed. This scheduling order illustrates how compressed timelines become once a TRO is in place in merger litigation, requiring counsel to complete discovery, prepare witnesses, and present expert testimony within weeks. Read the scheduling order carefully to see how the court sequences these tasks and to appreciate the intense logistical demands of a fast-track preliminary injunction proceeding.

The preliminary injunction standard. As noted above, there is a vigorous debate on whether the preliminary injunction standard for the FTC under FTC Act § 13(b) is more lenient than the DOJ's preliminary injunction standard under *Winter* (slides 49-52). The FTC has always taken an aggressive position that it has a lower standard than the DOJ, but in the Biden administration, the FTC was more aggressive than usual. In its brief supporting its Section 13(b) challenge to the IQVIA/PropelMedia merger,[13] for example, the FTC argued that it only needs to show a "fair and tenable chance" of success on the merits to obtain a preliminary injunction pending a decision on the merits in an administrative proceeding.[14] Moreover, the FTC argued that "it is not the role of the court at this stage 'to embark upon a detailed analysis' of the factual record or 'resolve these factual issues on this motion.'"[15] The merging parties vigorously opposed this standard and argued instead that the FTC must show a "likelihood of success" on the merits.[16] The court has a lengthy discussion of the standard in its opinion, but it is not clear (at least to me) what the court decided was the proper operational test.[17] You can find a well-reasoned argument

[13] AppliedAntitrust.com collects the most important papers filed in the case (see here).

[14] *See* Plaintiff's Memorandum of Law in Support of its Motion for Preliminary Injunction at 5, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed July 18, 2023).

[15] *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law COL ¶ 4, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed Dec. 7, 2023; redacted version filed Dec. 18, 2023).

[16] *See* Defendants' Memorandum of Law in Opposition to the FTC's Motion for Preliminary Injunction at 11-12, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed Nov. 13, 2023).

[17] *See* Opinion & Order, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER, at *13-17 (S.D.N.Y. Dec. 29, 2023; public version Jan. 8, 2024).

that the FTC's standard is the same as that of the DOJ in TechFreedom's amicus brief in *IQVIA/PropelMedia* (pp. 150-73). It is worth a quick read.

As a practical matter, however, the debate over Section 13(b) standards to date has been largely academic. As discussed in some detail above, while judges pay lip service to the different articulations of the standards, it appears that most decide FTC Section 13(b) merger antitrust preliminary injunctions under a permanent injunction standard regardless of what they state in their opinions.

Other litigation materials. Read the Judgment in A Civil Case, the Notice of Appeal, and the accompanying notes (pp. 100-15). Many law students are not familiar with these documents, but you should understand them because they formally record the court's decision, trigger important post-judgment deadlines, and initiate appellate review. A working knowledge of these documents is essential for understanding the procedural steps that follow a trial court's ruling.

I also have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 62-78) and a summary of the Biden administration's success in court (slides 79-82), but there is no need to study them in any detail.

Litigating the fix. Arch Coal has a very short order on "litigating the fix" (pp. 174-78). The idea here is that if the investigating agency refuses to settle an investigation on terms the parties are willing to accept and proceeds to litigation, the parties can restructure the deal on their own. The court will then adjudicate the merits of the restructured transaction, not the original transaction on which the challenge was based. Initially, the agencies vigorously resisted this approach, arguing that the court should adjudicate the merits of the original transaction on which the complaint was based. However, the courts rejected this view because any anticompetitive effect would result from the restructured transaction, not the original one. The principle now seems well-established in the courts. There remain, of course, questions of how far the merging parties have to go in the restructuring—do they have to have a signed agreement with a divestiture buyer or is simply a promise to divest enough?—and how much advance notice the merging parties must give the agency of the restructuring. There is also the question of how much opportunity the agency should have to vet the restructuring before the court adjudicates the merits. Finally, the question of whether the parties' "fix" is adequate to eliminate the competitive problem, of course, is a subject for litigation.[18]

The notes on appeals—when an appeal can be taken (slides 84-95), the standard of review on appeal (slides 96-99), and orders to preserve the status quo pending appeal (slides 100-02)—contain details fundamental to litigation practice and antitrust counseling. If you already know all this from another course, you can just skim these slides. If this material is new or you have forgotten the details, the appeals section of the class notes is well worth studying with some care.

[18] The T-Mobile/Sprint merger provides an example. The DOJ accepted a divestiture consent decree, but fourteen states—led by New York and California—believed the fix to be inadequate and sued to block the transaction. The district court's decision mostly addresses the adequacy of the fix. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020). The court rejected the states' challenge, but as time passed it was increasingly obvious that the states were correct that the fix was inadequate. *See, e.g.*, Karl Bode, *The Dish 'Fix' for the T-Mobile-Sprint Merger Seems More Shortsighted than Ever*, Wired.com (July 21, 2021); Melody Wang & Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal From the Start*, ProMarket.com (Apr. 23, 2021); Hal Singer, *Beefing Up Merger Enforcement by Banning Merger Remedies*, ProMarket.com (Aug. 5, 2021). The T-Mobile/Sprint consent decree has become the posterchild for those who believe that the federal antitrust agencies should litigate to block deals rather than settle.

I also have included the relevant statutes and rules in the required reading (pp. 180-87). Read 28 U.S.C. § 1291 (final decisions of district courts) and 28 U.S.C. § 1292 (interlocutory decisions) carefully. These are important statutes, and you should know them. There is no need to study the remaining appellate materials in depth, but you should at least skim them so that you have a general idea of what is in them.

Substantive Merger Antitrust Law

Next, read the materials on the substantive legal standard that governs merger enforcement under Section 7 of the Clayton Act. These cover Section 7, the incipiency standard and the burden-shifting framework that courts use to decide merger cases.

Section 7. Begin by reviewing the statutory text (p. 189). Section 7 prohibits acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." This language reflects an "incipiency" standard that allows the government to challenge mergers before anticompetitive harm occurs, based on a prediction that harm is likely.

The incipiency standard. To understand how courts apply this incipiency standard, read the excerpt from *FTC v. Tapestry, Inc*. (pp. 190-91). This recent opinion illustrates how modern courts interpret the statute's predictive mandate. The accompanying note (pp. 191-93) explores the implications of that standard: while the government need not prove harm with certainty, it must offer a coherent theory of harm supported by evidence sufficient to show a reasonable probability that competition will be lessened.

Baker Hughes burden shifting. One of the most important questions in merger antitrust law is how much evidence the merging parties must produce to rebut the government's prima facie case. *United States v. Philadelphia National Bank* (*PNB*)[19] established that a showing of high market shares and increased concentration in a properly defined relevant market gives rise to a presumption that a merger is likely to substantially lessen competition. That presumption, the Court stated, could be rebutted only with "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[20] Notwithstanding this indication that the presumption was rebuttable, as a practical matter the lower courts quickly treated the presumption as if it were conclusive. In 1974, the Supreme Court in *United States v. General Dynamics Corp.*[21] firmly reestablished that the *PNB* presumption was rebuttable, but despite some implicit skepticism of the "clear showing" standard, the Court did not explicitly change it. As a result, the "clear showing" standard continued to be invariably invoked by the DOJ and FTC in their merger antitrust litigations.

As a general rule, courts did not push back too hard until the D.C. Circuit's 1990 opinion in *Baker Hughes*.[22] In that case, the court of appeals explicitly rejected the "clear showing" standard and adopted instead a three-step burden-shifting approach to the allocation of the burden of proof in a horizontal merger antitrust case:

[19] 374 U.S. 321 (1963).
[20] *Id*. at 363; *accord* United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350, 366 (1970).
[21] 415 U.S. 486 (1974).
[22] 908 F.2d 981 (D.C. Cir. 1990).

1. The plaintiff bears the burden of proof in market definition, market shares, and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation.
2. If the plaintiff satisfies this burden, the *burden of production* shifts to the defendants to adduce evidence sufficient to rebut the *PNB* presumption and raise a factual question for the trier of fact as to the likely competitive effects of the transaction.
3. If the defendant satisfies its burden of production, then the plaintiffs have the *burden of persuasion* to prove, in light of all of the evidence in the record, that the merger is reasonably probable to have an anticompetitive effect in the relevant market.[23]

The *Baker Hughes* court of appeals also directly confronted the *Philadelphia National Bank* "clear showing" language and concluded that *General Dynamics* and other cases had implicitly changed the standard. The three-step burden-shifting approach became the law of the circuit in the District of Columbia, where most merger antitrust cases historically had been brought, and was quickly adopted by other courts. The *Baker Hughes* approach now appears well-entrenched in law, especially since its author (Clarence Thomas) and another panel member (Ruth Bader Ginsburg) became long-serving Supreme Court justices.

When you read the excerpt from *Baker Hughes* (pp. 194-97), pay attention both to the articulation of the three-step burden-shifting approach and to the panel's rejection of the *PNB* "clear showing" rule. The note on *Baker Hughes* (pp. 197-202) provides a deeper dive into burdens on the parties at each of the three steps. In my experience, most practitioners and even judges do not really understand the *Baker Hughes* approach, and a thorough understanding will enable you to make much better arguments and write much better briefs.[24]

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We will not spend too much class time walking through the details of merger antitrust litigation. The litigation materials are self-contained, and I would largely be repeating what you can absorb just as easily on your own. Instead, we will focus our class discussion on drawing out implications, clarifying any areas of confusion, and highlighting connections to broader themes in merger enforcement. If time permits, we may begin our discussion of the merits of the FTC's case against Sanford Health/MDC. But I have already assigned a substantial amount of reading for Class 3, so I will not add anything further. If we do reach the merits in class, I will give you all of the necessary background during our discussion.

[23] *Id.* at 982-83.

[24] As you will read, Thomas based his three-step burden-shifting approach on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981), a civil rights case. Consequently, the *Baker Hughes* approach has application beyond antitrust cases. For those of you who have taken the basic antitrust course, think about how the Barker-Hughes three-step burden-shifting approach to mergers compares with the allocations of the burdens of proof in rule of reason cases under Section 1.