MERGER ANTITRUST LAW

LAW 1469 — Tuesdays and Thursdays, 3:30-5:30 pm
Georgetown University Law Center — Dale Collins
Fall 2026 — wdc30@georgetown.edu
www.appliedantitrust.com

READING GUIDANCE

Class 4 (September 3): Sanford Health/Mid Dakota Clinic (Unit 3)

Today, we begin our second case study: the proposed acquisition by Sanford Health of Mid Dakota Clinic, P.C. This unit introduces many of the foundational concepts in horizontal merger antitrust analysis. Our primary case materials will be the complaint and answer.[1] In today's class, we will cover the facts of the case, assess merger antitrust risk and merger antitrust litigation, and review the substantive legal framework—Section 7, the incipiency standard, and the *Baker Hughes* burden-shifting approach—that governs the rest of the unit. The next three classes will introduce the major elements of horizontal merger antitrust analysis: Class 5 takes up product market definition; Class 6 covers geographic market definition and the *Philadelphia National Bank* (*PNB*) presumption; and Class 7 turns to the explicit theories of anticompetitive harm and the defenses. 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 your desired 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 not only provide the factual predicates for the theory of the case but also offer a compelling narrative that appeals to the judge's "heart." The argument section is more intended to speak to the judge's "mind." If the

[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 other materials in this document—especially the FTC's complaint and the defendants' answer—provide what we need for the case study.

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.

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), 5 pediatricians, 8 OB/GYN physicians, and 4 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 9 clinics and 1 ambulatory surgery center in the region.[3] MDC has approximately 60 physicians, including 23 adult PCPs, 6 pediatricians, 8 OB/GYN physicians, and 5 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 purchase price for Sanford Health's acquisition of Mid Dakota Clinic was not publicly disclosed, although the transaction was reportedly not subject to HSR Act reporting requirements.

Preliminary antitrust risk analysis. In class, after we do a quick review of the facts, we will conduct a preliminary antitrust risk analysis. This analysis is the initial legal assessment that antitrust counsel performs when a client first proposes an acquisition or merger. This analysis serves as an early warning system to identify potential regulatory hurdles and guide strategic decision-making before significant resources are committed to the transaction. The client typically wants to understand three key risks: (1) whether the transaction is likely to be investigated by the antitrust authorities, (2) whether the investigating agency would likely

[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.

conclude that the merger violates antitrust laws, and (3) if so, what, if any, restructuring of the transaction might be necessary to negate the agency's antitrust concerns.[5]

Recall from Unit 2 that merger antitrust risk can be divided into three categories: inquiry risk, substantive risk, and remedies risk. We will use that framework to conduct our preliminary assessment of Sanford/Mid Dakota Clinic. Unit 3A of the class notes then concentrates on the core analytic task of assessing substantive risk under Section 7 of the Clayton Act. The notes distinguishdownstream markets, where sellers merge and any anticompetitive harm is borne by customers, from upstream markets, where buyers merge and any anticompetitive harm is borne by suppliers, and explain that the practical framework developed in the notes addresses only downstream markets. For downstream markets, the framework asks whether the merger is likely to cause anticompetitive harm to any identifiable customer group, with particular attention in practice to price effects. It identifies the evidence that most influences enforcement decisions—including the parties' documents, closeness of competition, customer complaints, natural experiments, and market structure—and introduces the principal defenses, the role of synergies/efficiencies, and the way counsel structures a complete defense. We will examine upstream markets and the individual substantive theories, market-definition tools, and defenses in much greater detail later in the course.

Now read the Unit 3A class notes front to back. They are short and are intendedto provide an introductory framework rather than a substitute for the detailed treatment that follows in this unit and later in the course.Their purpose is to give you a practical way to think about substantive merger antitrust risk as an integrated, real-world counseling problembefore we turn to the doctrinal machinery for analyzing particular theories of harm and defenses. As you read, focus especially on the basic customer-harm question, the evidence that would cause an agency to investigate or challenge a transaction, the relative strength of the available defenses, and the importance of developing a procompetitive deal rationale supported by credible evidence of synergies. Use the framework to ask, before reading the FTC's allegations, whether Sanford/MDC should have looked problematic to antitrust counsel, what facts would have driven that assessment, and what the parties could have said or done in response. The same framework will recur throughout the course as we examine market definition, concentration, competitive effects, and defenses in greater detail.

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.[6] 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

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[5] In an initial meeting with a merging party-client, you might want to explore these risks with a slightly different set of questions: (1) Who could, or believes they could, be harmed by the merger? (2) Who has the incentive and ability to investigate the transaction? (3) Will they likely decide to challenge the transaction? (4) If so, what are the client's options?

[6] *See* Complaint, *In re* Sanford 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.[7]

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, not 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, they consented to have it tried on the merits before a magistrate judge under 28 U.S.C. § 636(c).[8]

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. The agency 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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[7] 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* Sanford Health, No. 9376 (F.T.C. issued June 22, 2017);

[8] 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. 80-87). You can also read the order reassigning the case to the magistrate judge and my note on the magistrate judges (pp. 88-93).

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 Mid Dakota were not available.

The FTC preemptively addressed potential defenses. The agency 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, including 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. At the same time, 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. 8-9) and then quickly skim the Complaint (pp. 10-43). Now go back and read with more care the introduction and Section I, which give a good summary of the theory of the case (pp. 10-14), and Section II.A, which provides the jurisdictional allegations and sets forth the causes of action (pp. 14-16). You do not need to read Sections II.B and II.C again, which describe the parties and summarize the transaction and the investigation (pp. 16-19). You should also read the introduction to the Answer (pp. 44-45) and the Defenses (pp. 63-65), but you can quickly skim the denials (pp. 45-63).

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 (Unit 3B slides 5-16). The DOJ and the 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 federal antitrust agencies bring the vast majority of merger antitrust challenges.

The DOJ and FTC have historically enforced Section 7 of the Clayton Act through two distinct litigation paradigms (Unit 3B slides 17-19). 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. 123). The FTC, by contrast, has traditionally used a bifurcated litigation procedure. To adjudicate the merits of a merger challenge administratively, 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 an administrative remedial order, such as an order requiring the parties to cease and desist from violating the antitrust laws or to divest assets (p. 124). But the FTC cannot itself issue or enforce interim relief to prevent a pending 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. 123). Section 13(b) also authorizes the FTC to seek permanent injunctive relief in federal court.

Significantly, the FTC practice may now be changing. Although the agency historically preferred to litigate the merits of mergers administratively, it also has the authority to pursue permanent injunctive relief in federal court. In December 2025, the FTC filed a merger challenge in federal court seeking a permanent injunction against Henkel AG & Co. KGaA's proposed acquisition of A-Paint Topco, Inc., the owner of Liquid Nails, without initiating a parallel administrative proceeding.[9] The complaint invoked Section 13(b) of the FTC Act and sought both a temporary restraining order and a permanent injunction to prevent consummation of the transaction on the ground that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act. In February 2026, Chairman Andrew Ferguson confirmed the new approach in remarks at the George Mason Law Review's 29th Annual Antitrust Symposium, stating that the FTC should bring merger challenges directly in federal court rather than through the traditional dual-track model.[10] He justified that position on the grounds that federal court litigation enhances institutional credibility, avoids the recurring constitutional challenges to FTC administrative adjudication that have followed *Axon*, and aligns the FTC's merger litigation posture more closely with the DOJ's. That alignment changes the role of the Section 13(b) preliminary injunction standard. The FTC may still seek preliminary relief under Section 13(b), but when it proceeds directly to a federal court merits determination and seeks a permanent injunction, it ultimately must prove a Section 7 violation rather than merely satisfy the potentially less demanding standard for interim relief. *See* Unit 3B Slides 20-22.

Because Ferguson has cast this as the administration's general practice rather than a one-off, the open question is no longer whether *Henkel/Liquid Nails* was merely tactical but whether the

[9] Complaint for Permanent Injunction ¶¶ 13-18, FTC v. Henkel AG & Co. KGaA, No. 1:25-cv-10371-KPF (S.D.N.Y. filed Dec. 15, 2025); *see* Press Release, Fed. Trade Comm'n, FTC Sues to Stop Loctite, Liquid Nails Construction Adhesive Merger (Dec. 11, 2025). The major litigation filings in the case may be found here.

[10] Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Remarks at the George Mason Law Review 29th Annual Antitrust Symposium (Feb. 20, 2026) (video on C-SPAN) (stating that the FTC should bring merger challenges directly in federal court and describing direct federal-court filing as, in substance, already the administration's practice in merger cases, with no reason not to continue it); *see* Sonia Kuester Pfaffenroth, Matthew Tabas & Summer Perez, Arnold & Porter, Antitrust Agency Insights: Developments at the U.S. Antitrust Enforcement Agencies—First Quarter 2026 (Apr. 15, 2026); Wiggin and Dana LLP, FTC Foregoes Administrative Proceeding Option, Indicating Procedural Changes to Merger Enforcement are Underway (Mar. 31, 2026); David L. Carden et al., WilmerHale, The FTC's Henkel/A-Paint Challenge: A Paradigm Shift for Future FTC Merger Litigation? (Jan. 8, 2026).

practice will prove durable—whether a future administration reverts to the dual-track model, or whether the FTC locks the approach in through notice-and-comment rulemaking, as some commentators have urged.[11] For purposes of *Sanford Health*, however, the traditional model remains essential. The case illustrates the classic FTC structure: an administrative complaint on the merits, coupled with a federal Section 13(b) action seeking interim relief to preserve the status quo while the administrative proceeding remained pending.

Litigation timing. Skim the class notes on litigation timing (Unit 3B slides 23–30). There is no need for you to know the details, but you should know this list exists. One point, however, is especially important: the chart strongly indicates that, if the merging parties intend to litigate, they should 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.[12] That time is needed to allow the court to decide on the merits. This consideration can be critical when negotiating the termination date and any extensions. Otherwise, if litigation is still ongoing on the termination date, either party may terminate the agreement, effectively achieving the same result as a 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 few deals can be sustained 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.[13] 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 the timing pressures of a deal that has already faced around a year's delay due to a second request investigation and will typically expedite merger litigation to ensure it can be completed within 6 months or so. Despite the compressed schedule, the stakes are high enough that the merging parties will devote the resources required to complete discovery and

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[11] *See* Vinson & Elkins LLP, The FTC's Shift Away from Dual-Track Merger Challenges (Apr. 2026) (characterizing the change as a deliberate departure from the dual-track model). The American Hospital Association has urged the Commission to codify the approach through notice-and-comment rulemaking so that it would bind future administrations. *See* Letter from Am. Hosp. Ass'n to Hon. Andrew N. Ferguson, Chairman, Fed. Trade Comm'n 1-2 (Feb. 24, 2026)

[12] 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.

[13] As we will see in Class 9, 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.

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 them to assess the witnesses' credibility 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.[14] 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.[15] 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 traditional practice with the FTC has been different, but the practical result has often been the same. The FTC ordinarily has not agreed to Rule 65(a)(2) consolidation, preferring instead to try the merits in an administrative proceeding. This preference reflected both institutional and strategic considerations. As an administrative agency, the FTC had 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. In an administrative proceeding, the judge also would be different from the federal judge in the preliminary-injunction proceeding, allowing the agency to start fresh before a tribunal that had not already been exposed to—and potentially influenced by—the merging parties' arguments

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[14] *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).

[15] 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.

and evidence. Finally, as we will examine shortly, the FTC has argued that the preliminary injunction standard applicable in Section 13(b) cases is less demanding than that in DOJ cases.

Even under the traditional FTC model, however, the federal court proceeding usually decided the fate of the transaction as a practical matter. The FTC typically sought a preliminary injunction to prevent closing pending completion of the administrative proceeding. The federal court case then resembled a DOJ merger litigation in most practical respects: an expedited schedule, substantial discovery, expert reports, a full evidentiary record, a multiday hearing with live lay and expert witnesses, and a detailed opinion addressing the likely competitive effects of the transaction. Over the past 45 years, when a preliminary injunction has been entered, merging parties have consistently terminated the transaction rather than continue litigating through an administrative trial. Conversely, when the preliminary injunction has been denied, the FTC has almost always discontinued the litigation and dismissed the administrative complaint.

The Ferguson litigation policy is unlikely to change the practical need to allow at least 6.5 months between the filing of the FTC's federal complaint and the termination date in the merger agreement. If the FTC foregoes administrative adjudication and litigates the merits entirely in federal district court, the court's first substantive decision—whether on a preliminary injunction or, following consolidation under Rule 65(a)(2), on a permanent injunction—will almost certainly determine the fate of the transaction as a practical matter. Even if the FTC refuses to consolidate the proceedings, a preliminary injunction decision will remain effectively dispositive for the same reasons it was under the traditional dual-track model. The historical record suggests that federal courts are likely to issue the first decision within approximately 6.5 months of the complaint being filed.

> *The bottom line under the traditional model: As a practical matter, all of the action was in the federal court proceeding, regardless of whether the DOJ or FTC brought the case, as long as the FTC sought a preliminary injunction.*

Historical contrasts between DOJ and FTC litigation. The traditional DOJ and FTC litigation models differed in several important respects beyond timing. In a DOJ action, the same federal district judge ordinarily decided both interim relief and the merits, and the DOJ routinely agreed to consolidate the preliminary injunction hearing with the trial on the merits under Rule 65(a)(2). Under the FTC's traditional dual-track model, by contrast, the federal judge decided only whether to enter interim relief, while an administrative law judge developed the merits record and the Commission ultimately decided the case. The FTC historically has resisted Rule 65(a)(2) consolidation, conducted the administrative proceeding under its own rules rather than the Federal Rules of Civil Procedure and Evidence, and typically litigated the federal and administrative proceedings simultaneously. These differences gave the FTC procedural and strategic advantages but also exposed its administrative process to the constitutional challenges discussed below. See the class notes for a discussion of these contrasts (Unit 3B slides 31-37).

Constitutional challenges to the FTC adjudicative process. You should also know that the FTC adjudicative structure has been under constitutional attack (Unit 3B slides 38-41). In 2023, a unanimous Supreme Court in *Axon Enterprise, Inc. v. FTC*[16] overruled prior precedent and held that parties could bring structural constitutional challenges to the FTC's adjudicative process directly in federal district court without first exhausting those challenges in the

[16] Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

administrative proceeding. Since then, many merging parties have responded to FTC administrative complaints by asserting constitutional defenses and by filing separate federal actions challenging the FTC's administrative adjudicative structure. This development created a recurring procedural complication in FTC merger cases: the agency could seek a preliminary injunction in federal court while simultaneously defending constitutional attacks on the legality of its own administrative forum.

Axon did not decide the merits of these constitutional challenges; it held only that they could be heard directly in federal district court. Under the Ferguson policy described above, the challenges should have much less practical significance in merger cases because the FTC ordinarily will not commence the administrative adjudication that gives rise to them. However, they would return if a future Commission revived the dual-track model.

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 (Unit 3B slide 43), the Winter test for preliminary injunctive relief (Unit 3B slides 44-45), antitrust preliminary injunctions (Unit 3B slides 46-60), temporary restraining orders (TROs) (Unit 3B slides 61-66), and permanent injunctions (Unit 3B slides 67-69). 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. 129-31).

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 opposing party's consent ordinarily may last no more than 14 days, with a possible extension for good cause of up to an additional 14 days. The court may also enter a TRO with the consent of the litigating parties, in which case it remains in effect for as long as the parties agree. 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, 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 skim the *Sanford Health* stipulation for the entry of a TRO, the order adopting the stipulated TRO, and the note on TROs (pp. 69-79).[17]

The scheduling order. Next, read the Scheduling Order of the court (pp. 94–96), which is one of the most important documents in merger antitrust litigation. It sets the timelines for discovery,

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[17] Paramount's recent experience illustrates the risk of contesting a TRO in a government merger case. Paramount and Warner Bros. Discovery opposed the plaintiff states' motion for a TRO, but the district court granted the motion after briefing and oral argument, applying the Ninth Circuit's sliding scale preliminary injunction standard and making preliminary findings favorable to the states on the merits. Order Granting Motion for Temporary Restraining Order, California v. Paramount Skydance Corp., No. 4:26-cv-07116-AMO (N.D. Cal. July 20, 2026). The parties subsequently stipulated not to close until five days after the court's merits determination or June 1, 2027. Stipulation and [Proposed] Order Not to Close ¶¶ 1-2, California v. Paramount Skydance Corp., No. 4:26-cv-07116-AMO (N.D. Cal. filed July 24, 2026). Thus, Paramount obtained no meaningful ability to close by contesting the TRO, but gave the plaintiffs an early favorable ruling and the resulting litigation momentum. See here for the major filings in the case.

the trial date, the 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 can be in merger litigation once a TRO is in place, requiring counsel to complete discovery, prepare witnesses, and present expert testimony within two or three months—litigation that normally would take years. 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 over whether the preliminary injunction standard for the FTC under FTC Act § 13(b) is more lenient than the standard applied in DOJ actions under *Winter* (Unit 3B slides 52-57). The FTC historically has argued that it need not establish a conventional likelihood of success on the merits. In *IQVIA/PropelMedia*, for example, the FTC argued that it needed to show only a "fair and tenable chance" of ultimate success and that the district court should not conduct a detailed factual analysis or resolve disputed factual issues. The merging parties responded that Section 13(b) requires the FTC to show a genuine likelihood of success on the merits. Two recent decisions reached sharply different conclusions after the Supreme Court's decision in *Starbucks Corp. v. McKinney*.[18] In *Kroger*, the District of Oregon held that Section 13(b) expressly displaces the traditional *Winter* test and, following controlling Ninth Circuit precedent, applied the rule that the FTC satisfies the merits component by raising questions that are "serious, substantial, difficult and doubtful." The court nevertheless went further and found that the plaintiffs were likely to succeed on the merits. In *Tempur Sealy*, by contrast, the Southern District of Texas held that Section 13(b) eliminates the traditional requirement of irreparable injury but retains requirements that the FTC make a clear showing of likelihood of success and that the equities favor relief. Relying on *Starbucks*, the court rejected the FTC's request for a less exacting merits inquiry as inconsistent with the statutory text and the traditional equitable standard. Read the excerpts from *Kroger*/Albertsons and *Tempur Sealy/Mattress Firm* (pp. 132-37) and compare their treatment of Section 13(b), *Starbucks*, and the FTC's burden.[19]

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

[18] 602 U.S. 339 (2024).

[19] Brief of Amicus Curiae TechFreedom in Support of Defendants IQVIA Holdings, Inc. and Propel Media, Inc., FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. Dec. 7, 2023), is in the supplemental reading materials. It presents a focused defense-side argument that Section 13(b) should require a merits showing substantially equivalent to the standard applicable to DOJ merger challenges and is a useful example of sophisticated amicus advocacy.

preliminary injunctions under a permanent injunction standard regardless of what they state in their opinions.

Other litigation materials. Read the *Sanford Health* Judgment in a Civil Case (p. 101) and look at the Notice of Appeal (pp. 106-08). If you are unfamiliar with Rule 54 judgments, skim the accompanying note (pp. 102-05). Sanford later appealed, and the Eighth Circuit affirmed.[20] For those interested in the mechanics of the appeal, the supplemental materials also include the appellate judgment, mandate, and a short note on appellate judgments and mandates.[21] After the Eighth Circuit's decision, the merging parties abandoned the transaction. The FTC's July 9 press release summarizes that development (pp. 109-10). Complaint counsel and the respondents then jointly moved to dismiss the administrative complaint (pp. 111-18), and the Commission granted the motion (p. 119). The short note on the dismissal of the administrative complaint (pp. 120-21) explains why the parties moved to dismiss the still-pending FTC administrative proceeding rather than the federal court proceeding.

I have also included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (Unit 3B slides 70-85) and a summary of the Biden administration's success in court (Unit 3B slides 86-90), but there is no need to study them in any detail.

Litigating the fix. 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 opposed this approach, arguing that the court should adjudicate the merits of the original transaction underlying the complaint. 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.[22] There remain, of course, questions

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[20] FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019). For our purposes, the opinion adds relatively little to the materials we already cover.

[21] The note on notices of appeal explains the function and timing of a notice of appeal and the jurisdictional consequences of filing one. The note on appellate judgments and mandates explains the distinct functions of an appellate judgment and mandate and when jurisdiction returns to the trial court. Both notes and the Eighth Circuit's opinion are in the supplemental materials.

[22] *See, e.g.*, FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977) (recognizing that a premerger divestiture may avoid a Section 7 violation); White Consolidated Industries, Inc. v. Whirlpool Corp., 781 F.2d 1224 (6th Cir. 1986) (affirming vacation of preliminary injunction after parties amended curative-divestiture provisions to permit divestiture buyer to compete independently). Successful modern examples include FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (considering concurrent divestiture as part of challenged transaction and denying preliminary injunction); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (crediting divestiture to experienced independent buyer with assets sufficient to operate a standalone business); United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) (entering judgment for defendants after concluding proposed divestiture would likely replace competitive intensity lost through merger); and FTC v. Tempur Sealy International, Inc., 768 F. Supp. 3d 787 (S.D. Tex. 2025) (denying preliminary injunction after crediting proposed divestitures and accompanying commitments). Unsuccessful examples include FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002) (evaluating amended transaction but finding it remained likely to lessen competition); FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015) (finding proposed divestiture buyer too small and dependent on merged firm to replace competitive intensity lost); United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017) (finding proposed divestiture inadequate because buyer lacked experience, provider networks, and capacity to replace lost competition); and FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024) (finding proposed divestiture inadequate in scope and proposed buyer insufficiently experienced and too dependent on merged firm).

about how far the merging parties must go in the restructuring—do they need a signed agreement with a divestiture buyer or is a simple 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.[23]

Appeals. I have included the appellate statutes and rules in the reading materials (pp. 138-44). The class notes also discuss when federal courts of appeals have appellate jurisdiction and the standards of review (Unit 3B slides 92-110). You do not need to review them in detail for Class 4, but they are important to know before you enter practice. The merger-specific points you should know are that the grant or denial of a preliminary injunction is immediately appealable and that a party may seek emergency relief to preserve the status quo pending appeal.

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. These materials are essential to this unit.

Section 7. Begin by reviewing the statutory text (p. 147). 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. (p. 148). This recent opinion illustrates how modern courts interpret the statute's predictive mandate. The accompanying note (pp. 149-51) 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*)[24] 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 lessen competition substantially. That presumption, the Court stated, could

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[23] 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.

[24] 374 U.S. 321 (1963).

be rebutted only with "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[25] Notwithstanding this indication that the presumption was rebuttable, in practice the lower courts quickly treated it as conclusive. In 1974, the Supreme Court in *United States v. General Dynamics Corp.*[26] 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.[27]

As a general rule, courts did not push back too hard until the D.C. Circuit's 1990 opinion in *Baker Hughes*.[28] In that case, the court of appeals explicitly rejected the "clear showing" standard and adopted a three-step burden-shifting approach to the allocation of the burden of proof in a horizontal merger antitrust case:

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.[29]

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. 152-54), 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. 155-61) 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.[30]

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25 *Id*. at 363; *accord* United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350, 366 (1970).

26 415 U.S. 486 (1974).

27 There are no materials to read on the *PNB* presumption for this class. We will cover it in some detail in Class 6.

28 908 F.2d 981 (D.C. Cir. 1990).

29 *Id.* at 982-83.

30 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 Baker-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.

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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 more than enough reading for Class 4, so I will not add anything further. If we reach the merits in class, I will provide you with the necessary background during our discussion.

If you have any questions and would like to discuss them before class, send me an email.