7. Merger Antitrust Litigation and Settlement

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April 11, 2025

Topics

- Plaintiffs and forums
- Typical litigation paradigms
- Litigation durations
- Contrasts in litigating with the DOJ and FTC
- Strategic litigation behavior at the FTC
- Interim injunctive relief
  - Winter v. Natural Res. Def. Council, Inc.
  - Temporary restraining orders (TROs)
  - Preliminary injunctions
  - Differences in the PI standards for the DOJ and FTC
- Permanent injunctions
- Recent litigated cases
- Settlements

Possible outcomes in DOJ/FTC reviews

Close investigation	• Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or • Agency grants early termination prior to normal expiration
Litigate	• DOJ: Seeks preliminary and permanent injunctive relief in federal district court • FTC: Seeks preliminary injunctive relief in federal district court Seeks permanent injunctive relief in administrative trial
Settle w/consent decree	• Typical resolution for problematic mergers • DOJ: Consent decree entered by federal district court • FTC: Consent order entered by FTC in administrative proceeding
Parties terminate transaction	• Parties will not settle at the agency's ask and will not litigate, or • Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate • Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext
"Fix it first"	• Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party • Merging parties file new HSR notifications for the restructured transaction • HSR reports also may need to be filed for the restructured transaction • When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement act

Merger Antitrust Litigation

Antitrust merger litigation generally

Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC –Preliminary inj. –Permanent inj.	 Federal district court FTC administrative trial	 Court of appeals Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal district court	Court of appeals

* May bring state claims in state court or join state claims in federal court

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

Relief in merger antitrust cases

- Almost all merger antitrust cases are brought by the DOJ or FTC
  - There are exceptions: both state AGs and private parties occasionally bring merger antitrust cases
- The DOJ and FTC only bring injunctive relief actions against mergers
  - The DOJ has never prosecute a merger antitrust case criminally under the Sherman Act
  - Neither the DOJ nor the FTC has authority to bring actions to obtain civil fines
  - Since actions for injunctive relief sound in equity, they are tried to the court, not to a jury

Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (TRO)	Maintain status quo pending decision on a preliminary injunction	
Preliminary injunction	Premerger:	Blocking injunctions[1]
	Postmerger:	Hold separate/preserve assets for divestiture
		Rescission in appropriate cases[2]
Permanent injunction	Premerger:	Blocking injunction
	Postmerger:	Divestiture (recission in one case)

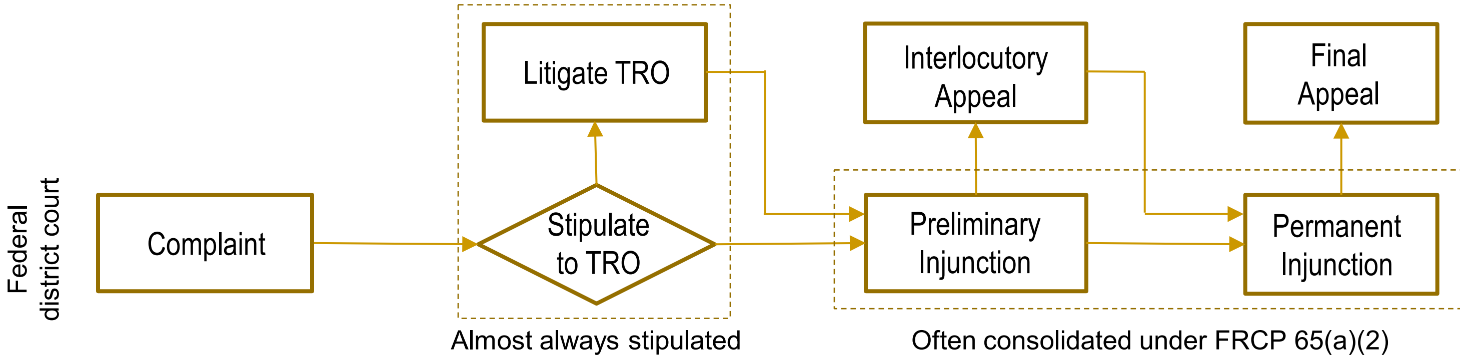
NB: Since actions for injunctive relief sound in equity, they are tried to the court, not to a jury

[1] Blocking injunctions are injunction that prevent the parties from closing their transaction. By contrast, a "hold separate injunction" is an injunction that permits the parties to close their transaction but requires the combined firm to operate the businesses separately and in a way that allows for an effective separation in the event that the transaction is ultimately found to violate Section 7 on the merits. Hold separate injunctions are highly disfavored and have not been entered by modern courts.

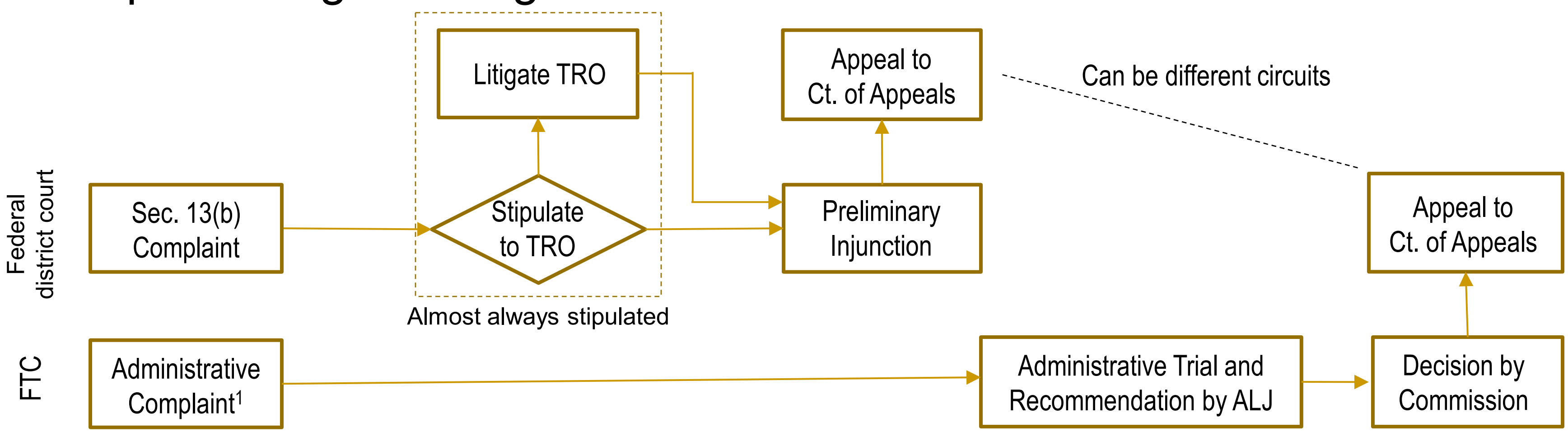
[2] Rescission is an injunction that "unwinds" the deal to the premerger status quo. An appropriate case for recission is in a non-HSR reportable transaction that the government learns about prior to closing and asks the parties to delay the closing until the government has an opportunity to investigate the transaction, and the parties respond by accelerating the closing.

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



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

Typical litigation paradigms

DOJ postclosing challenge

FTC postclosing challenge

Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Forum	Likely timing
Preliminary injunction	DOJ or FTC	Federal district court	6.5 months from filing of the complaint
Appeal from the grant or denial of a PI	DOJ or FTC	Federal court of appeals	Likely to be granted expedited treatment, in which case 6 months
Full trial on the merits	DOJ	Federal district court	Typically consolidated with PI hearing under Rule 65(a)(2)
Recommended decision of ALJ on the merits	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint[1]
Decision by the Commission	FTC	Full FTC (all commissioners)	Indeterminant
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

[1] By FTC rule, the administrative trial must begin no less than 5 months after the filing of the administrative complaint if the FTC has sought preliminary injunctive relief under Section 13(b). 16 C.F.R. § 3.11(b)(4). The evidentiary hearing may last no more than 30 trial days (about 1.5 calendar months). *Id*. § 3.41(b). The parties must file their proposed findings of fact, conclusions of law, and order within 21 days of the close of the evidentiary hearing. *Id*. § 3.46(a). The ALJ must issue a decision with 70 days of the filing of the proposed findings of fact and conclusions of law. *Id*. § 3.51(a).

Litigation timing—Preclosing challenges

	DOJ		FTC			
					Tempur Sealy/ Mattress Firm	Tapestry/Capri
Complaint					7/2/2024	4/23/2024 (S.D.N.Y.)
PI hearing					11/12/2024 (seven days)	9/9/2024 (seven days)
PI					1/31/2025 (denied)	10/24/2024 (Granted)
PI appeal						None
Merits hearing (trial days)					Following the entry of the PI and after the FTC announced it would not seek an emergency injunction pending appeal, the parties closed the transaction	Following the entry of the PI, the parties abandoned the transaction without an appeal
Live witnesses						
Initial merits decision/R&R (FTC)						
Final decision						
Merits appeal						
Total time to conclusion					4.3 months	6.0 months

Litigation timing—Preclosing challenges

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

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

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

Litigation timing—Preclosing challenges

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

Subject to COVID delays

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

Litigation timing—Preclosing challenges

	DOJ		FTC			
	Sabre/ Farelogix	AT&T/ Time-Warner	Evonik/ PeroxyChem	Sanford Health	Wilhelmsen	Tronox
Complaint	8/20/2019 (D. Del.)	11/20/2017 (D.D.C.)	8/2/2019 (D.D.C.)	6/22/2017 (D.N.D.)	2/23/2018 (D.D.C.)	7/10/2018[1] (D.D.C.)
PI hearing	Consolidated	Consolidated	11/12/2020 (11 days)	10/30/2017 (4 days)	5/29/2018 (10 days)	8/7/2018 (3 days)
PI			1/24/2020	12/15/2017	7/21/2018[2]	9/7/2018
PI appeal			None	6/13/2019	None	None
Merits hearing (trial days)	1/27/2020 (8 days)	3/22/2018 (23 days)	After the district court denied the preliminary injunction, the FTC dismissed its administrative complaint. The transaction closed on February 3, 2020.	Transaction abandoned after the PI was affirmed on appeal and the administrative complaint dismissed on 7/8/2019	Transaction abandoned after the PI was affirmed on appeal and the administrative complaint dismissed on 7/31/2018	Following the entry of the PI, the parties settled with a curative divestiture consent order on 4/18/2019
Live witnesses	16 fact 2 experts	23 fact 5 experts				
Initial merits decision (FTC)	--	--				
Final decision	4/7/2020	6/12/2018				
Merits appeal	Dismissed	2/26/2019				
Total time to conclusion	7.5 months (Tr)	7 months (Tr) 8.5 months (A)	6 months (PI)	6 months (PI) 18 months (A)	5 months (PI)	2 months

[1] The FTC filed its administrative complaint on Dec. 5, 2017. When the PI was filed eight months later, the trial was over and an ALJ decision was pending.
[2] PI: 15 fact witnesses; 3 experts. The opinion was issued on Oct. 1, 2018

Litigation timing—Preclosing challenges

	DOJ			FTC		
	Energy Solutions	Anthem	Aetna	Advocate Health Care	Penn State Hershey	Staples
Complaint	11/16/2016	7/21/2016	7/21/2016	12/22/2015	12/9/2015	12/8/2015
PI hearing	Consolidated	Consolidated	Consolidated	4/11/2016 (6 days)	4/11/2016 (4 days)	3/21/2016 (10 days)
PI				6/14/2016[1]	5/9/2016[2]	3/21/2016[3]
PI appeal				10/31/2016	9/27/2016	None
Merits hearing (trial days)	4/24/2017 (10 days)	11/21/2016 (20 days)	12/5/2016 (13 days)	Transaction abandoned after PI entered and administrative complaint dismissed on 3/20/2017	Transaction abandoned after PI entered and administrative complaint dismissed on 10/23/2016	Transaction abandoned after PI entered
Live witnesses	6-8 fact 3 experts	29 fact 5 experts	>30 fact 7 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	6/21/2017	2/8/2017	1/23/2017			
Merits appeal	None	4/28/2017	None			
Total time to conclusion	7 months	6.5 months (tr) 2.5 months (a)	6 months	6 months (PI) 4.5 months (A)	5 months 4 months	3.5 months

[1] PI: Witness count not reported
[2] PI: 14 fact witnesses; 2 experts.
[3] PI: 10 fact witnesses; 5 experts

Litigation timing—Preclosing challenges

	DOJ			FTC		
	H&R Block	Oracle	Sunguard	Steris	Sysco	CCC
Complaint	5/23/2011	2/24/2004	10/23/2001	5/29/2015	2/20/2015	11/25/2008
PI hearing	Consolidated	Consolidated	Consolidated	8/17/2015 (3 days)	5/5/2015 (8 days)	1/8/2009 (9 days)
PI				9/24/2015	6/23/2015	3/18/09
PI appeal				Transaction closed; administrative proceeding dismissed	Transaction abandoned after PI	Transaction abandoned after PI
Merits hearing	9/6/11 (9 days)	6/6/04	11/8/01 (10 hours)			
Live witnesses	8 fact 3 experts		3 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	10/31/11	9/9/04	11/14/01			
Merits appeal	None	None	None			
Total time to conclusion	5 months	6.5 months	3 weeks	4 months	4 months	4 months

Litigation timing

- Some initial observations
  - Litigation timing can be critical in deals that have yet to be consummated
    - The acquisition agreement will specify a termination date (“drop-dead date”)—that is, the date on which either party can terminate the agreement unilaterally and without cause
    - If the deal is not closed by the drop-dead date, there is a risk that one of the parties may walk away or seek to renegotiate the terms of the transaction (especially the purchase price) as an inducement to stay in the deal
    - For this reason, business people need a good sense of the timing to understand what they should be seeking (and what they might be giving up) in negotiating for a specific drop-dead date in the acquisition agreement
  - The DOJ/FTC has not continued litigation on the merits if it has been denied a preliminary injunction (although the agency might appeal an adverse PI decision)
    - DOJ has not continued on the merits after losing a PI since 1980
    - FTC, which had consistently continued litigation until 1995, when it discontinued the practice for the most part
  - Conversely, I am not aware of any case in the last 40 years where the merging parties have proceeded to a full trial on the merits after a blocking preliminary injunction has been granted
    - That is, a preliminary injunction kills the transaction

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

Contrasts between the DOJ and FTC

- Authority
  - DOJ
    - Purely a prosecutorial agency
  - FTC
    - Both prosecutes and adjudicates

Contrasts between the DOJ and FTC

- Adjudicators
  - DOJ actions
    - Same district court judge decides preliminary injunction and merits/permanent injunction
    - Appeal to the federal court of appeals in the circuit containing the district court
    - Appellate standard: Abuse of discretion
  - FTC actions
    - District court judge only decides preliminary injunction—has no further involvement in the merger challenge
    - ALJ (an FTC employee) decides permanent injunction
    - Initial appeal lies to the full Commission—usually most if not all of the same five people who voted out the complaint
    - Appeal to any federal court of appeals with venue
    - Appellate standard:[2]
      - Legal conclusions: De novo
      - Factual findings: Substantial evidence rule—regarded as very deferential
        - Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."[3]
        - 15 U.S.C. § 45(c) provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

[2] ProMedica Health Sys., Inc. v. FTC, No. 12-3583, at 7 (6th Cir. Apr. 22, 2014).
[3] *Id*. (quoting Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011)

Contrasts between the DOJ and FTC

- Consolidation under FRCP 65(a)(2)
  - DOJ: Will consent to consolidating the preliminary injunction hearing with the trial on the merits
  - FTC: Never consents to consolidation—always insists on separate administrative trial and appeal to the full Commission[1]
- Rules of procedure and evidence
  - DOJ
    - Must follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence applicable to all federal court proceedings
  - FTC
    - Follows the FTC Rules of Practice
    - The FTC Rules do not incorporate the FRCP or FRE
      - For example, the FTC Rules do not adopt limitations on the number of interrogatories or the length of depositions

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

Contrasts between the DOJ and FTC

- Simultaneous proceedings (FTC)
  - The FTC must issue its administrative complaint within 20 days of the entry of a preliminary injunction. FTC Act § 13(b)
  - As a matter of practice, the FTC issues its administrative complaint before or on the date the agency seeks a preliminary injunction, so that both the federal court and administrative litigations proceed simultaneously
- Preliminary injunction standard
  - Arguably lower threshold in FTC Section 13(b) proceedings than in DOJ Section15 proceedings (discussed below)

Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (TRO)	Maintain status quo pending decision on a preliminary injunction	
Preliminary injunction	Premerger:	Blocking injunctions[1]
	Postmerger:	Hold separate/preserve assets for divestiture
		Rescission in appropriate cases[2]
Permanent injunction	Premerger:	Blocking injunction
	Postmerger:	Divestiture (recission in one case)[3]

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

[1] Blocking injunctions are injunctions that prevent the parties from closing their transaction. By contrast, a "hold separate injunction" is an injunction that permits the parties to close their transaction but requires the combined firm to operate the businesses separately and in a way that allows for an effective separation in the event that the transaction is ultimately found to violate Section 7 on the merits. Hold separate injunctions are highly disfavored and have not been entered by modern courts.
[2] Rescission is an injunction that "unwinds" the deal to the premerger status quo. Recission is extremely rare in merger antitrust cases. In two cases, a preliminary injunction of recission was ordered in non-HSR reportable transactions that the government learned about prior to closing and asked the parties to delay the closing until the government has an opportunity to investigate the transaction, and the parties responded by accelerating the closing. *See* FTC v. Weyerhaeuser Co., 648 F.2d 739, 1981-1 Trade Cas. (CCH) 63,935, 1981-1 Trade Cas. (CCH) 63,970 (D.C. Cir. 1981); FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131 (N.D. Ill. 1988).
[3] *See* Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995), aff'd, 139 F.3d 1180 (8th Cir. 1998).

Winter v. Natural Res. Def. Council, Inc.[1]

- Seminal Supreme Court case on preliminary injunctions
- "A preliminary injunction is an extraordinary remedy never awarded as of right."[2]
- *Winter* test

> A [private] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.[3]

- Sliding scale
  - Prior to *Winter*, many courts held that the four factors could be balanced on a sliding scale, so that, for example, a weak showing of likelihood of success could be offset by a strong showing of irreparable harm
  - Post-*Winter*, some courts have rejected the sliding scale, holding that *Winter* requires a likelihood of success on the merits as an independent, free-standing requirement for a preliminary injunction

[1] 555 U.S. 7 (2008).
[2] *Id*. at 24.
[3] *Id* at 20.

Winter v. Natural Res. Def. Council, Inc.

- DOJ/FTC challenges
  - Irreparable harm is presumed to result if the law is violated
    - Other cases hold that the element of irreparable harm is simply not part of the test when the government is the plaintiff and is seeking to prevent a violation of law
  - Balance of the equities
    - The public equities outweigh any private equities when there is a likelihood of success on the merits
      - The public interest in effectively enforcing the antitrust laws
      - The public interest in ensuring that effective relief may be ordered if the government succeeds at the trial on the merits (secondary)
    - I am unaware of any merger antitrust where the court found that the private equities outweighed the public equities if the agency demonstrated a likelihood of success on the merits
  - Therefore, the critical factor when the government seeks a preliminary injunction is the likelihood of success on the merits

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

Temporary restraining orders (TROs)

- Emergency interim relief a court may enter to maintain the status quo pending a fuller hearing on a motion for a preliminary injunction
  - May be used to block the imminent closing of a challenged merger
  - Initiated by motion (usually filed simultaneously with the complaint) accompanied by a request to see the judge immediately
- Ex parte entry[1]
  - May be entered ex parte (without notice or participation by the adverse party) if—
    - immediate and irreparable injury will result before the adverse party can be heard in opposition, and
    - the movant sought to give notice to the adverse party or there are good reasons why notice could not be given
  - In merger antitrust cases—
    - Immediate and irreparable injury will be threatened if the transaction will close and will be difficult to unwind postclosing (almost a presumption)
    - BUT as a practical matter the merging parties and their counsel are always available to appear to oppose the TRO
    - So TROs are never entered ex parte in government merger antitrust cases

[1] Fed. R. Civ. P. 65(b)(1).

Temporary restraining orders (TROs)

- Duration[1]
  - Standard
    - Not to exceed 14 calendar days
    - May be extended for good cause by the court for an additional 14 calendar days
    - The parties may agree on a longer extension (stipulated TRO)
  - Short duration is the safeguard to the lack of higher standards
    - Absent consent, if of a longer duration TRO will be treated as a preliminary injunction and must conform to the more rigorous preliminary injunction standards[2]
- Standard
  - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction[3]
    - If issued ex parte, efforts to give notice also may be taken into account
  - But the respective harms to the parties and the public interest will be assessed in light of very limited duration of the TRO (as opposed through the end of the trial on the merits for a preliminary injunction)

[1] Fed. R. Civ. P. 65(b)(2).

[2] Sampson v. Murray 415 U.S. 61, 86 & n.58 (1974); *accord* United Airlines, Inc. v. U.S. Bank, N.A., 406 F.3d 918, 923 (7th Cir. 2005).

[3] United States v. Tribune Publ'g Co., No. CV1601822AB (PJWX), 2016 WL 2989488, at *1 (C.D. Cal. Mar. 18, 2016) (entering TRO in newspaper merger case).

Temporary restraining orders (TROs)

- Rarely employed in modern merger antitrust practice
  - Judges strongly dislike the timing pressures of a TRO and believe that the litigating parties should be able to agree on a scheduling order that will—
    - Permit the merging parties to take all necessary discovery on an expedited basis prior to the preliminary injunction hearing
      - HSR-reportable transaction: If the investigating agency has done its job properly, it should not need additional discovery (BTW the agency almost always disagrees)
      - Non-HSR reportable transaction: Likely that both sides will require discovery
    - Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement

Preliminary injunctions

- Purpose
  - To maintain the status quo ex ante until a final decision on the merits
  - In merger antitrust law, this usually means a blocking preliminary injunction if the transaction has not yet closed
    - Modern courts have held that “hold separate” injunctions, which allow the deal to close but require merged parties to be operated separately and not integrated, are usually regarded as inadequate relief

Antitrust preliminary injunctions

- Deal realities
  - A transaction is unlikely to survive as a business matter the time it would take for both a preliminary injunction and a subsequent trial on the merits
    - Most deals start to flounder if they have not closed within 12-18 months of signing
    - An HSR merger review is likely to take 8-12 months
    - Little time left practically for a trial and a decision, much less an appeal
  - Federal judges in the District of Columbia recognize the time sensitivity of deals and usually give the parties the opportunity on a very expedited basis to present a complete case in the preliminary injunction proceeding
    - Usually includes 3-6 days of evidentiary hearings for live witnesses
    - *Trade-off*: Due to court schedules, the more trial days the parties want, the more delayed the hearing
    - As the agencies bring more merger cases outside the DDC, judges in other jurisdictions are largely following the DDC approach
- Other observations
  - As noted above, since the public equities will always outweigh the private equities, the DOJ/FTC need only show a likelihood of success on the merits for a preliminary injunction
    - This is a lower standard than the actual success on the merits required for a permanent injunction

Preliminary injunctions

- Implications—DOJ actions
  - Merging parties seek to avoid separate a stand-alone preliminary injunction proceeding by stipulating to a PI in return for an accelerated trial on the merits
  - Advantages for merging parties
    - Results in the use of the "actual success on the merits" standard, and
    - Shortens the time to get a trial on the merits
    - May sacrifice some trial days to get earlier calendar date
    - May consolidate preliminary injunction hearing with trial on the merits under FRCP 65(a)(2)
  - DOJ practice is to consent (provided it obtains enough trial days to present case)
    - Recognizes that discovery will be complete before the PI hearing
    - Recognizes that judges (in D.D.C.) expect a full merits case to be presented even in a preliminary injunction proceeding, that they do not want two evidentiary proceedings, and that they are unlikely to reach a different conclusion in a full merits proceeding[1]

[1] *See, e.g.*, United States v. Gillette Co., 828 F. Supp. 78, 86 n.12 (D.D.C. 1993) ("Despite the limited time involved, both parties have provided the court with a remarkably complete and detailed record; in fact, the record is more complete than many cases are after trial. Thus, the court feels confident in reaching its conclusion that plaintiff is not likely to succeed on the merits after a full trial, should a full trial ever occur in this case.")

Preliminary injunctions

- Implications—FTC actions
  - Merging party incentives
    - Merging parties have the same incentives to avoid separate a stand-alone preliminary injunction proceeding and to proceed on an "actual success" standard
  - BUT FTC will not cooperate
    - Will not consent to consolidation of preliminary injunction hearing and trial on the merits under FRCP 65(a)(2)
      - Insists that statutory scheme indicates a strong congressional intent that the FTC to try the case on the merits in its own administrative proceeding
      - Federal courts have exhibited no willingness to consolidate over FTC opposition
    - Likes to litigate under the Section 13(b) standard (see below)
    - Cannot be pressured by federal court
      - The federal judge's only role is to conduct the Section 13(b) proceeding
      - The federal judge will have no involvement in the trial on the merits

Preliminary injunctions

- Implications—FTC actions (con't)
  - Consequences
    - FTC has incentive to seek a very quick preliminary injunction hearing date to minimize ability of merging parties to take adequate discovery, prepare expert testimony, and make a complete case in the Section 13(b) proceeding
      - FTC believes that a strong win in the Section 13(b) proceeding will dissuade the parties from pursuing litigation on the merits in a post-PI administrative proceeding given the long length of time to litigate to conclusion on the merits (including an appeal) and the nature of the forum (the same commissioners that voted out the complaint will hear any appeal from the initial decision by the administrative law judge)
      - Also, by the end of an HSR merger review the FTC staff should have completed discovery for its affirmative case, while the merging parties have no opportunity for third-party discovery until a complaint has been filed.
    - Merging parties has incentive to litigate the Section 13(b) PI if they believe they can make a strong evidentiary showing and obtain a denial of the PI by a (neutral) federal judge, so as to incentivize the FTC to dismiss the administrative complaint as futile
      - Two points to remember—
        - A decision on a PI will be 2-4 months faster than an ALJ's decision (plus an additional 4 months in the likely event of an appeal to the full Commission regardless of who wins)
        - The FTC policy is to dismiss an administrative complaint if it losses the PI motion
      - But may stipulate to a PI and avoid a Section 13(b) decision if the time available to prepare is too short to take adequate discovery and prepare experts or if there are other reasons that make it likely that the merging parties will lose (e.g., a judge who is apparently unsympathetic or unsophisticated in complex antitrust litigation)

Preliminary injunction standard

- DOJ
  - *Clayton Act § 15*: Authorizes the district courts in antitrust cases brought by the Attorney General to "make such temporary restraining order or prohibition as shall be deemed just in the premises."[1]
  - *Test*: Modified *Winter* test
    - Requires showing of—
      - Likelihood of the plaintiff's success on the merits
      - A public interest in the entry of an injunction
    - BUT irreparable injury requirement is modified—
      - Either eliminated altogether, OR
      - Requisite injury must be to the public (and not the government) and is conclusively presumed when there is the requisite a likelihood of a violation

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

[1] 15 U.S.C. § 25.

Preliminary injunction standard

- FTC
  - *FTC Act § 13(b)*: Authorizes the district court to enjoin consummation of a merger pending completion of an FTC administrative adjudication "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[1]
    - No requirement to show irreparable harm
  - *Test*: "Serious questions"

    > The issue is whether the Commission has demonstrated a likelihood of ultimate success. The Commission meets its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[2]

  - Application
    - While the law recognizes FTC as an "expert agency" that (in principle) is entitled to some deference, most courts in practice appear to hold the FTC to the same standard as the DOJ (a "likelihood of success on the merits") even if they do not explicitly say so
    - *Query*: Is a question "serious" only if the evidence shows a likelihood of success on the merits?

[1] 15 U.S.C. § 53(b).
[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); *id*. at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Staples, Inc., No. CV 15-2115 (EGS), 2016 WL 2899222, at *6 (D.D.C. May 17, 2016); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

Preliminary injunction standard

- Private parties
  - Clayton Act § 16
    - Provides private persons (including states) with a right of action to "sue for and have injunctive relief ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[1]
      - Interpreted to include TROs and preliminary injunctions as well as permanent injunctions
  - Test: Same as DOJ + immediate threat of irreparable harm
    - Irreparable harm is harm no remediable by damages
      - Courts typically find that harm is not irreparable → Damages are sufficient
      - But some cases hold that a harm resulting from a lessening of competition is a irreparable harm[2]
      - *Query*: Which is the proper reading in a private case?
    - Threat of irreparable harm must be immediate
      - Means that the plaintiff "is likely to suffer irreparable harm before a decision on the merits can be rendered."[3]
    - Also requires actual or threatened antitrust injury and prudential standing
    - The equities and the public interest count in the analysis (although still secondary to likelihood of success on the merits)

[1] 15 U.S.C. § 26.
[2] *See, e.g.*, Boardman v. Pacific Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016).
[3] *Winter*, 555 U.S. at 22.

Preliminary injunction standard

- Private parties (con't)
  - Type of relief
    - While private parties can obtain preliminary injunctive relief, courts are reluctant to grant it
      - Especially true when deal has been challenged and settled by the DOJ or FTC
      - There are exceptions[1]
    - Courts typically find that harm is not irreparable → Damages are sufficient

[1] *See, e.g.*, Boardman v. Pacific Seafood Grp., 822 F.3d 1011 (9th Cir. 2016).

Preliminary injunction—Appeals

- Appeal
  - The grant or denial of a motion for a preliminary injunction is immediately appealable as a matter of right under 28 U.S.C. § 1292(a)(1):

    > [T]he courts of appeals shall have jurisdiction of appeals from:
    > (1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

  - The standard of review is abuse of discretion
    - Review legal conclusions de novo
    - Review factual findings for clear error

Permanent injunctions

- Identical to usual federal court preliminary injunction standard
  - EXCEPT that a permanent injunction requires *actual* success on the merits[1]
  - Success on the merits requires proof by the preponderance of the evidence
  - Also, the record for a decision on a permanent injunction may be more developed if additional discovery and briefing have occurred since the preliminary injunction hearing
- Factual findings in the preliminary injunction hearing
  - Not binding
  - BUT unlikely to be overturned in the absence of new evidence

[1] Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

Recent Litigated Cases

Recent litigated cases

- Recent DOJ actions litigated to conclusion (not settled)

Case	Deal Status	Litigation Result
United States v. American Airlines Grp., No. CV 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023)	Consummated joint venture	Tried on the merits. Permanent injunction dissolving Northeast Alliance between American and JetBlue granted. Merging parties did not appeal.
United States v. Bertelsmann SE & Co. KGaA, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction granted.
United States v. U.S. Sugar Corp., C.A. No. 21-1644 (MN), 2022 WL 4544025 (D. Del. Sept. 9, 2022), aff'd, 73 F.4th 197 (3d Cir. 2023)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes. Affirmed on appeal..
United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes.
United States v. Sabre Corp., No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction denied. Deal closes.

Recent litigated cases

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

Case	Deal Status	Litigation Result
United States v. AT&T Inc., No. CV 17-2511 (RJL), 2018 WL 2930849 (D.D.C. June 12, 2018)	Preclosing challenge	Case dismissed on the merits; appeal pending Note: This was a vertical transaction and the only nonhorizontal challenge in the list
United States v. Energy Solutions, Inc., 265 F. Supp. 3d 415 (D. Del. July 13, 2017)	Preclosing challenge	Blocking permanent injunction entered.
United States v. Anthem Inc., 2017 WL 685563 (D.D.C. Feb. 9, 2017)	Preclosing challenge	Blocking permanent injunction entered.
United States v. Aetna Inc., 2017 WL 325189 (D.D.C. Jan. 23, 2017)	Preclosing challenge	Blocking permanent injunction entered. Parties abandoned merger.
United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. 2014)	Consummated transaction	No PI sought. Tried on the merits. Permanent injunction entered.
United States v. H & R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011)	Preclosing challenge	Consolidated under FRCP 65(a)(2). Tried on the merits. Blocking permanent injunction entered.
United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

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

Case	Deal Status	Litigation Result
United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation.
United States v. Franklin Elec. Co., 130 F. Supp. 2d 1025 (W.D. Wis. 2000)	Preclosing challenge	Stipulated PI. Tried on the merits. Blocking permanent injunction entered.
United States v. Engelhard Corp., 970 F. Supp. 1463 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation.
United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation.
United States v. Mercy Health Servs., 902 F. Supp. 968 (N.D. Iowa 1995), *vacated*, 107 F.3d 632 (8th Cir. 1997)	Preclosing challenge	Stipulated PI. Tried on the merits. No violation. Judgment vacated when parties later terminated the transaction.
United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993)	Preclosing challenge	Preliminary injunction denied. DOJ dismissed case and did not pursue a full merits decision.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

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

Case	Deal Status	Litigation Result
United States v. Baker Hughes Inc., 731 F. Supp. 3 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990)	Preclosing challenge	Consolidated under FRCP 65(a)(2). No violation. Affirmed on appeal.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

- Recent FTC Section 13(b) actions[1]

Case	Deal Status	Litigation Result
FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023)	Preclosing challenge	Denied blocking preliminary injunction. The FTC decided not to pursue an appeal and agreed to dismiss the case. The parties subsequently closed the deal.
FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021) (unpublished), *aff'd*, 30 F.4th 160 (3d Cir. 2022)	Preclosing challenge	Blocking preliminary injunction entered and affirmed on appeal. The parties subsequently abandoned the transaction.
FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522 (E.D. Pa. Dec. 8, 2020), appeal dismissed, No. 20-3499 (3d Cir. 2021)	Preclosing challenge	Denied blocking preliminary injunction. The FTC decided not to pursue an appeal and agreed to dismiss the case. The parties subsequently closed the deal.
FTC v. v. Peabody Energy Corp., No. 4:20-CV-00317-SEP, 2020 WL 5893806 (E.D. Mo. Oct. 5, 2020)	Preclosing challenge	Entered blocking preliminary injunction. The parties abandoned their joint venture without appeal.
FTC v. RAG-Stiftung, No. CV 19-2337 (TJK), 2020 WL 532980 (D.D.C. Feb. 3, 2020)	Preclosing challenge	Denied blocking preliminary injunction. The FTC did not appeal and dismissed its administrative complaint. The parties subsequently closed the deal.

[1] Includes actions where a decision was rendered on a preliminary or permanent injunction. Does not include actions where complaints were filed but were settled prior to a decision on a preliminary or permanent injunction.

Recent litigated cases

- Recent FTC Section 13(b) actions

Case	Deal Status	Litigation Result
FTC v. Sanford Health/Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016 (D.N.D. Dec. 15, 2017), aff'd, No. 17-3783, 2019 WL 2454218 (8th Cir. June 13, 2019)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned following unsuccessful appeal.
FTC v. Wilh. Wilhelmsen Holding AS, No. 18-cv-00414-TSC,2018 WL 4705816, at *7 (D.D.C. Oct. 1, 2018)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Tronox Ltd., No. 1:18-CV-01622 (TNM), 2018 WL 4353660 (D.D.C. Sept. 12, 2018)		Entered blocking preliminary injunction after conclusion of administrative evidentiary hearing but before decision. The ALJ found that the transaction violated Section 7. the transaction settled during the appeal to the full Commission of the ALJ's decision.
FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016), *on remand*, 2017 WL 1022015 (N.D. Ill Mar. 16, 2017)	Preclosing challenge	Preliminary injunction denied. Seventh Circuit reversed and remanded for further proceedings. Preliminary injunction entered on remand. Transaction abandoned.
FTC v. Penn State Hershey Med. Ctr., 838 F. 3d 327 (3d Cir. 2016)	Preclosing challenge	Preliminary injunction denied. Third Circuit reversed and remanded with instructions to enter a blocking preliminary injunction. Transaction abandoned.

Recent litigated cases

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

Case	Deal Status	Litigation Result
FTC v. Staples Inc., 190 F. Supp. 3d 100 (D.D.C. 2016)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Sysco Corp., 113 F.Supp.3d 1 (D.D.C. 2015)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Steris Corp., No. 1:15 CV 1080, 2015 WL 5657294 (N.D. Ohio Sept. 24, 2015)	Preclosing challenge	Denied preliminary injunction. Administrative complaint voluntarily dismissed. Transaction closed.
FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356 (M.D. Ga. 2011), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 133 S.Ct. 1003 (2013)		Dismissed on state action grounds. Affirmed by Eleventh Circuit. Reversed by Supreme Court.
FTC v. Promedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011)	Consummated transaction	Entered preliminary injunction enjoining ProMedica from further consolidating its operations with those of St. Luke's Hospital.

Recent litigated cases

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

Case	Deal Status	Litigation Result
FTC v. Laboratory Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011)	Consummated transaction	Denied preliminary injunction to enjoin Lab Corp from taking further steps to integrated acquired assets. Denial of injunction affirmed. Administrative complaint voluntarily dismissed.
FTC v. Lundbeck, Inc., Civ. Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011)	Consummated transaction	Denied permanent injunction to require Lundbeck to divest acquired assets or rescind acquisition agreement and dismissing action. Affirmed. (There was no accompanying administrative complaint.)
FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned.
FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd and remanded*, 548 F.3d 1028 (D.C. Cir. 2008) (amended and reissued)	Preclosing challenge	Denied preliminary injunction, after which transaction closed. On appeal, reversed, finding FTC had established a likelihood of success on the merits, and remanded for consideration of the equities. Administrative litigation was settled with partial divestitures and Section 13(b) proceeding was voluntarily dismissed.
FTC v. Foster, No. CIV 07-352 JBACT. 2007 WL 1793441 (D.N.M. May 29, 2007)	Preclosing challenge	Denied blocking preliminary injunction. Administrative complaint voluntarily dismissed.

Recent litigated cases

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

Case	Deal Status	Litigation Result
FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004), *appeal voluntarily dismissed*, Nos. 04-5291, 04-7120, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004)	Preclosing challenge	Denied blocking preliminary injunction. Administrative complaint voluntarily dismissed.
FTC v. Libbey, Inc., 211 F. Supp.2d 34 (D.D.C. 2002)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned. Administrative litigation settled after Libbey and Newell agreed to provide the Commission with written notice prior to the acquisition, sale, transfer, or other conveyance of all or part of Anchor or Anchor's Food Service Business.
FTC v. H.J. Heinz Co., 164 F. Supp.2d 659 (D.D.C.), *on remand from* 246 F.3d 708 (D.C. Cir. 2001), *rev'g and remanding* 116 F. Supp. 2d 190 (D.D.C. 2000)	Preclosing challenge	Denied blocking preliminary injunction. Reversed on appeal. On remand, action dismissed as moot when parties voluntarily terminated merger.
FTC v. Swedish Match, 131 F.Supp.2d 151 (D.D.C. 2000)	Preclosing challenge	Entered blocking preliminary injunction. Transaction abandoned

Recent litigated cases

- Recent FTC actions in federal court for permanent injunctive relief

Case	Deal Status	Litigation Result
FTC v. St. Luke's Health Sys., No. 1:12-CV-00560-BLW (D. Idaho Jan. 24, 2014), *aff'd*, No. 14-35173 (9th Cir. Feb. 10, 2015)	Consummated transaction	Divestiture ordered to sever affiliation between St. Luke's and the Saltzer Medical Group. *Note*: FTC and State of Idaho jointly brought suit seeking permanent injunctive relief. Case was joined with a pending private action and tried simultaneously.
FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998)	Dual preclosing challenges	Entered blocking preliminary injunction enjoining Cardinal Health's merger with Bergen Brunswig and McKesson's merger with AmeriSource. Transactions abandoned. Bergen Brunswig and AmeriSource then merged.

Recent litigated cases

- Recent FTC administrative actions[1]

Case	Deal Status	Litigation Result
In re Altria Group, No. 9393 (F.T.C. June 30, 2023)	Consummated transaction	Challenge to Altria's purchase of a 35 percent interest in Juul Labs. ALJ dismissed the antitrust charges in the complaint on the merits and complaint counsel appealed. After Altria sold off its investment, the Commission vacated the initial decision and dismissed the complaint
In re Illumina, Inc., No. 9401 (F.T.C. Mar. 31, 2023*), vacated and remanded sub, nom*. Illumina, Inc. v. FTC, No. 23-60167, 2023 WL 8664628 (5th Cir. Dec. 15, 2023)	Consummated transaction	Challenge to Illumina's vertical acquisition of GRAIL The ALJ dismissed the complaint on the merits. On appeal, the Commission reversed the ALJ's initial decision and ordered divestiture. On appeal to the Fifth Circuit, the court of appeals held that the Commission applied an erroneous standard at the rebuttal stage, vacated the Commission's decision, and remanded for further proceedings.
In re Otto Bock HealthCare North America, Inc., No. 9738 (F.T.C. Nov. 1, 2019)	Consummated transaction	Divestiture ordered
In re ProMedica Health Sys., Inc., Dkt. No. 9346 (FTC June 25, 2012), *aff'd*, ProMedica Health System, Inc. v. FTC, No. 12-3583 (6th Cir. Apr. 22, 2014)	Consummated transaction	Divestiture ordered

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

Recent litigated cases

- Recent FTC administrative actions[1]

Case	Deal Status	Litigation Result
In re Polypore Int'l, Inc., 149 F.T.C. 486 (Dkt. No. 9327) (FTC Dec. 13, 2010), *aff'd*, Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)	Consummated transaction	Divestiture ordered
In re Evanston Northwestern Healthcare Corp., Dkt. No. 9315 (FTC Aug. 6, 2007, and Apr. 28, 2008) (opinions on liability and remedy)	Consummated transaction	Rejecting ALJ's divestiture order and instead requiring Evanston to set up two separate and independent contract negotiation teams to bargain with managed care organizations to revive competition between Evanston's two hospitals and the Highland Park hospital
In re Chicago Bridge & Iron Co., 138 F.T.C. 1024 (Jan. 6, 2005) (Dkt. No. 9300), *aff'd*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008).	Consummated transaction	Divestiture ordered and affirmed

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

The Biden merger antitrust litigation record

- The Biden administration's antitrust litigation record has been one of the least successful in antitrust history
  - Overall, of 17 cases concluded in court during the Biden administration:

	Wins	Losses[1]
Total	8	10
DOJ	3	5
FTC	7	10

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

[1] I have counted DOJ settlements during litigation as losses since the DOJ's practice is not to settle. I have also counted FTC settlements as losses where the FTC was offered or could have easily obtained the same settlement during the investigation. The agencies count both types of settlements as wins.

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Horizontal Mergers						
W	8/4/2021	FTC	Hackensack Meridian Health	D.N.J..	PI entered	Affirmed on appeal
L	9/9/2022	DOJ	U.S. Sugar/ Imperial Sugar	D. Del	Dismissed	Affirmed on appeal
L	10/17/2022	DOJ	Booz Allen/ Everwatch	D. Md.	Dismissed	After the DOJ lost its motion for a preliminary, it dismissed the case
W	11/15/2022	DOJ	Bertelsmann/ Simon & Schuster	D.D.C.	Permanent injunction	
L	5/5/2023	DOJ	Assa Abloy/ Spectrum Brands	D.D.C.	Settled during trial	Litigated the fix Settlement forced by the court
W	5/19/2023	DOJ	American Airlines/ JetBlue alliance	D. Mass.	Permanent injunction	
L	8/7/2023	DOJ	ICE/ Black Knight	N.D. Cal.	Settled before trial	“Litigate the fix” Settled on terms available during the investigation
W	1/8/2024	FTC	IQVIA/ Propel Media	S.D.N.Y	PI entered	Also vertical

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Horizontal Mergers (con't)						
W	1/16/2024	DOJ	JetBlue/Spirit	D. Mass.	Permanent injunction	
L	6/5/2024	FTC	Novant/ Community Health	W.D.N.C.	PI denied	The Fourth Circuit entered an injunction pending appeal and the parties terminated the transaction
W	10/24/2024	FTC	Tapestry/ Capri	S.D.N.Y	PI entered	Deal abandoned
W	12/10/2024	FTC	Kroger/Albertsons	D. Or.	PI entered	Deal abandoned
Vertical Mergers						
L	9/21/2022	DOJ	UnitedHealth/ Change	D.D.C.	Dismissed	Litigated the fix
L	7/10/2023	FTC	Microsoft/ Activision	N.D. Cal.	PI denied	Litigated the fix On appeal
L	1/31/2025	FTC	Tempur Sealy/ Mattress Firm	S.D. Tex.	PI denied	

The Biden merger antitrust litigation record

	Date	Agency	Parties	Court	Result	Comments
Potential Competition Mergers						
L	2/3/2022	FTC	Meta/ Within	N.D. Cal.	Dismissed	On appeal
Conglomerate Mergers						
L		FTC	Amgen/ Horizon	N.D. Ill.	Settled before trial	

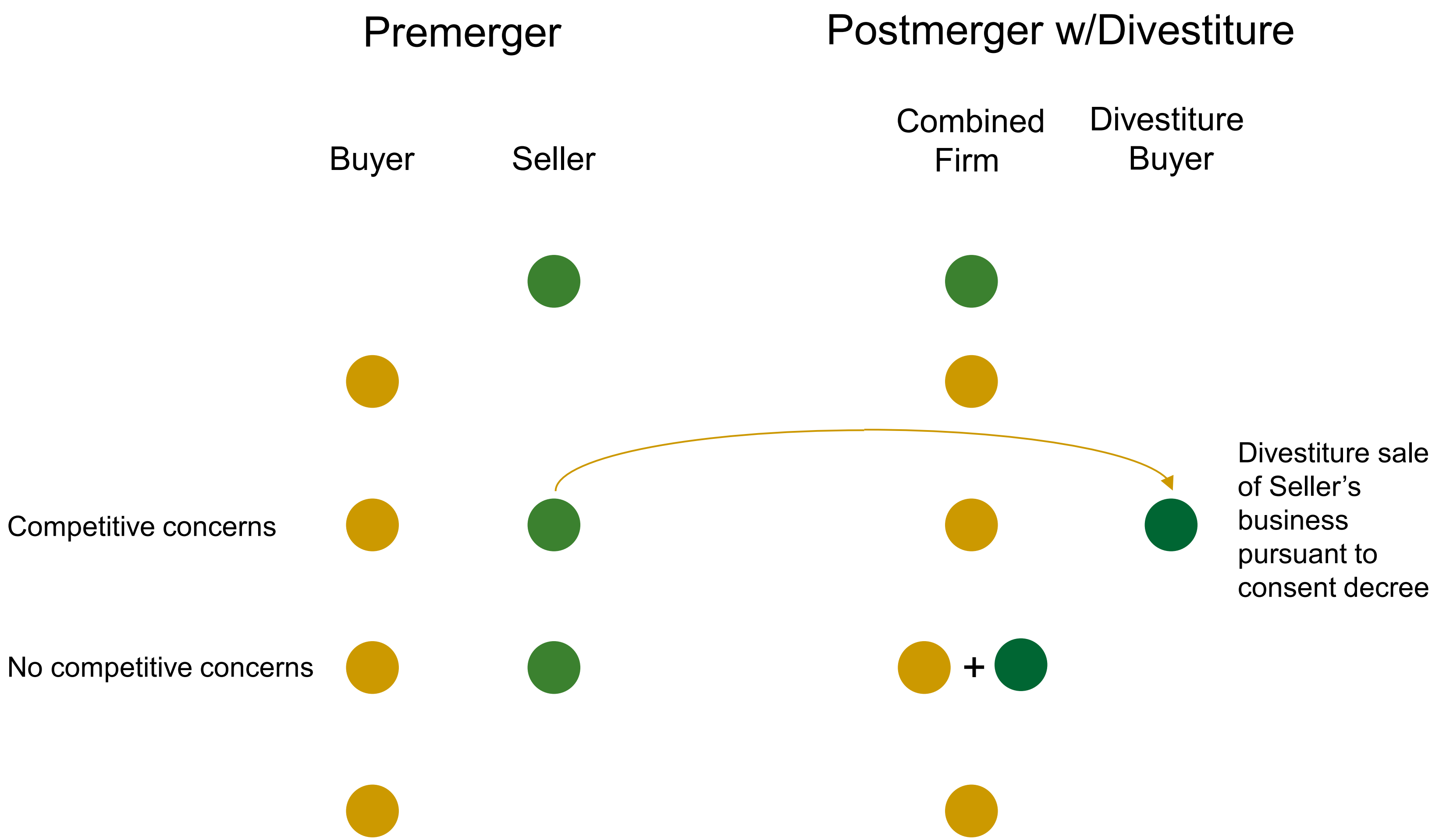
Settling Merger Investigations

Consent decree relief: The basic idea

- The basic idea
  - A horizontal transaction violates Section 7 because the combination of the respective businesses of the parties would likely result in a substantial lessening of competition or a tendency to monopoly in some relevant market
  - The violation could be avoided if the parties did not combine the problematic businesses in the relevant market
  - *Solution*:
    - Divest the business of one of the parties to a third party capable of operating the divested business postmerger with the same competitive force as the divestiture seller sis premerger. Make the divestiture and related relief enforceable as a judicial order.
    - *Schematically*: Buyer is to acquire multiple businesses from Seller. The only business in which both parties manufacture and sell ("overlap") is widgets, which are sold nationwide. The FTC alleges that the combination of two widget businesses would violate Section 7. The merging parties agree in a consent decree with the FTC pursuant to which the combined firm will sell the Seller's widget business to a Divestiture Buyer who can operate the business with the same competitive force postmerger as did the Seller premerger. Premerger, Buyer competed with Seller in the manufacture and sale of widgets. Postmerger, Buyer competes with Divestiture Buyer in the manufacture and sale of widgets. In principle, no competition will be lost and the Buyer is permitted to acquire the other nonproblematic businesses of the Seller without interference from the FTC.

Consent decree relief: The basic idea

- Multiproduct merger with one problematic overlap

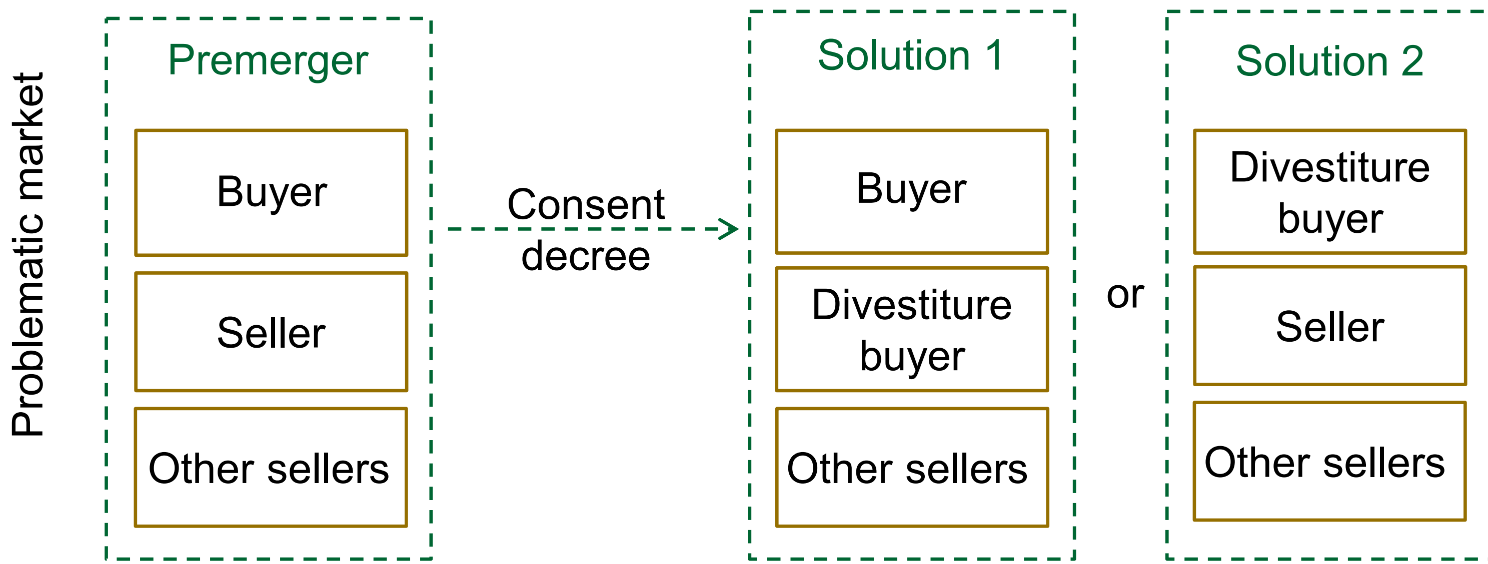


Consent decree relief: The basic idea

- The basic requirement:

  The divestiture buyer must preserve the level of premerger competition in the market of concern following the closing of the main transaction

  - The divestiture buyer is said to “step into the shoes” of the divestiture seller
    - The identity of the owner of the divestiture business changes, but the structure of the problematic market remains unchanged:



Divestiture buyer buys seller’s overlapping business

Divestiture buyer buys buyer’s overlapping business

Agency perspectives

- If a competitive concern exists, the solution must—
  1. Fix the agency's competitive concern
  2. Be workable in practice
  3. Must not involve the agency in continuous oversight or affirmative regulation
  4. Although price increases are the central concern in merger antitrust law, DOJ/FTC will not accept settlements that impose price caps
     - Some state consent decrees impose price caps
- Consent settlements
  - If the parties are willing to offer a consent settlement ("fix") that satisfies the agency's above requirements, the agency will accept it
  - If the parties are unwilling to offer a fix that satisfies the agency's requirements, the agency will litigate to obtain a suitable permanent injunction
- Some deals cannot be fixed
  - In some situations, however, the investigating agency will conclude that there is no remedy that will resolve its concerns and that the deal must be blocked in its entirety
    - Examples: Staples/Office Depot (1997); AT&T/T-Mobile (2011); NASDAQ/NYSE Euronext (2011); Staples/Office Depot (2015); Sysco/US Foods (2015)

Consent decree relief: The basic idea

- *Illustration*: DaVita/University of Utah[1]
  - The deal
    - In September 2021, DaVita, the largest operator of outpatient dialysis clinics in the United States, agreed to acquire the University of Utah's 18 dialysis clinics in and around Utah in a non-HSR reportable transaction
  - The antitrust problem
    - In the greater Provo market, there are only three dialysis providers: UoU (3 clinics); DaVita (4 clinics); Fresenius (1 clinic)
    - Barriers to entry into dialysis clinics are very high and no new entry was likely postmerger
    - The transaction would reduce the number of competitors in the Provo market from three to two (a "3 → 2 transaction"), with DaVita operating seven out of the eight clinics in the area
  - The FTC found no antitrust problems with DaVita's acquisition of the other 15 UoU clinics

The key to a consent decree is the existence of other parts of the deal that do not present antitrust problems and the separability of the parts of the deal that do

[1] For the consent order and related documents, see the DaVita/University of Utah case study in the Unit 5 supplemental materials.

Consent decree relief: The basic idea

- *Illustration*: DaVita/University of Utah
  - The consent decree
    - The FTC and DaVita resolved the FTC's concerns at the end of the investigation through a consent decree requiring DaVita to—
      - Divest the three UoU Provo clinics to Sanderling Renal Services, Inc. ("SRS"), a small but established operator of dialysis clinics nationwide but without any presence in Utah ← Requires a "buyer upfront" (standard in most cases)
      - Provide transition services to SRS for up to one year ← Standard provision
      - Assist SRS in hiring the employees at the divested clinics and refrain from soliciting those employees for 180 days ← Standard provision
      - Prohibits DaVita from entering into or enforcing noncompete agreements with any University nephrologist ← New provision
      - Prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire ← New provision
      - Requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah ← New provision

Reflects the FTC's new concerns about the effect of mergers on labor

Once the FTC provisionally accepted the consent order on October 25, 2021, the parties were free to close the main transaction. The settlement, however, required DaVita to divest the three Provo clinics to SRS within ten days of the closing of the main transaction.

Adjudicated relief/consent decrees

- Usual outcome: Overwhelmingly consent relief
  - Rare for merger cases to go to court
  - Even so, noticeable increase in litigations in recent years
    - The agency concludes that nothing less than enjoining the transaction in its entirety is acceptable and the parties are willing to litigate
    - Prelitigation agency demands for a consent settlement are too high and the parties think that they can do better if they begin litigation and then settle
- But—
  - Current policy (last four years):
    - Consent solutions should match adjudicated permanent injunctive relief if the agency were to litigate and win
    - Up until 2012, agencies showed more of a willingness to compromise
  - Agency negotiates consent relief—
    - Not only to remediate competitive concern with the immediate deal
    - But also with an eye to implications for consent decree negotiations in future deals
- Upshot
  - Agencies have found that they do not have to give much away in negotiations

Horizontal remedies: Agency requirements

- Almost always require the sale of a complete "business"
  - Agency view: Essential to the effectiveness/viability of the solution
  - Implication: Entire business of one or the other merger parties in the problematic market must be sold
    - Example: In a supermarket chain store acquisition, Buyer has 10 stores and Seller has 4 stores in a problematic market.
      - Buyer must sell all of Seller's 4 stores, even if acquiring only 1 of the Seller's stores would not have raised an antitrust concern.
      - Moreover, Buyer cannot sell 2 of its stores and 2 of the Seller's stores, even if the two Buyer stores are comparable to the 2 Seller's stores that the Buyer wants to keep (no "mix and match" with market)
    - Rule not followed religiously by agencies
    - Where there a multiple problematic markets, the Buyer pick whether to sell Buyer or Seller business market-by-market (can "mix and match" across markets)
  - Exceptions:
    - Divestiture buyer has necessary infrastructure and limited divestiture assets will enable rapid and effective entry into divestiture business
    - Divestiture assets are commonly traded (e.g., grocery stores)
- Will permit "trade up" solutions
  - Buyer may sell its own business in order to purchase a larger business

Horizontal remedies: Agency starting point

- Everything associated with the divested business must go
  - Agency will negotiate exclusions
  - But must be convinced that the exclusions will not undermine the effectiveness or viability of the solution
    - Agencies tend to be very differential to the divestiture buyer

Horizontal remedies: Elements

- Divest physical assets
  - Production plants, distribution facilities, sales offices, R&D operations
  - All associated equipment
  - Leases/property from which business operated
- Divest IP
  - Sale of any IP rights used exclusively in the divestiture business
  - Sale and license back/license of IP rights used in both retained and divested operations
  - Divestiture buyer must have ability to develop and own future IP

Horizontal remedies: Elements

- Make "key" employees available for hire by divestiture buyer
  - All employees necessary for—
    - production,
    - R&D,
    - sales & marketing, and
    - any other specific function connected with the divestiture business
  - Must facilitate access to key employees
  - Divestiture may make offers to key employees
  - Merging parties annot make counteroffer or offer other inducement to prevent defection

Horizontal remedies: Elements

- Assign/release customer contracts and revenues
  - Matter of course for contracts served out of divestiture facilities
  - May also include other contracts to “bulk up” the divestiture business
  - If contracts not assignable, offer customers ability to terminate with no penalties in order to rebid business
- Transfer business information
  - Especially customer-related information
- Provide short-term transition services and support
  - Usually limited to one year
  - May include input supply agreement, technical support, administrative support
- No long-term entanglements
  - Agencies require complete separation between the merged company and the divestiture buyer
  - Long-term entanglements are usually fatal to a consent settlement
    - *Example*: Long-term agreement for merged company to provide divestiture buyer with an input

Horizontal remedies: Agency right of approval

- Agency will demand right of approval over divestiture buyer and the divestiture sales agreement
  - In agency's sole discretion
  - Remedy must eliminate agency's antitrust concerns
  - Buyer must have no antitrust problem in acquiring divested business
  - Buyer must be capable of replacing competition the agency believes would otherwise be lost as a result of the acquisition
- Can be problematic for the merging parties even after the consent decree has been negotiated
  - Agency wants to know if the divested assets are "enough" to make the divestiture buyer a meaningful firm in the market for the divested product
  - If the staff concludes that more content needs to be added to the divestiture commitment, (regardless of what the decree requires), it can refuse to approve the divestiture buyer and the divestiture sales agreement
    - The divestiture seller has essentially no option other than to make the requested changes due to consent decree time limits on finding an approved divestiture buyer and an approved divestiture sales agreement
    - Can create incentives for the divestiture buyer to engage in "strategic behavior"

Horizontal remedies: Divestiture deadlines

- Agency will require a very tight deadline for closing the divestiture
  - More often than not will require a buyer "up front"
    - That is, the parties must—
      - find a divestiture buyer,
      - negotiate and sign a sale and purchase agreement (subject to agency approval and the closing of the main transaction), and
      - obtain approval of the agency of the divestiture buyer and the divestiture agreement

      before the agency will allow the main transaction to close
  - Almost always results in a "fire sale"
    - That is, a sale with a purchase price materially below fair market value
    - The fire sale nature of a divestiture should be anticipated and taken into account with the buyer at the time the seller is deciding on its offer price

> *Practice note*: Unless protected by attorney-client privilege or the work doctrine, business documents and financial modeling of possible divestitures will be disclosable to the investigating agency in response to the second request.

Vertical remedies

- To remedy foreclosure concerns
  - Non-discriminatory access undertakings
  - Undertakings to maintain open systems to enable interoperability
- To remedy anticompetitive information access
  - Information firewalls

Example: Panasonic/Sanyo (horizontal)

- FTC concern
  - Merging parties produce the highest quality NiMH batteries and are closest competitors of one another
- Consent decree—Divestiture of Sanyo's NiMH assets
  - Buyer upfront—Fujitsu
  - Divestiture package
    - Manufacturing facility in Takasaki, Japan
      - NB: The DOJ and FTC do not hesitate to accept /force divestitures of facilities outside of the United States
    - Supply agreement for NiMH battery sizes not produced at Takasaki
    - All Sanyo IP, including patents and licenses related to portable NiMH batteries
    - Access to identified "key" employees
      - Financial incentives to employees (up to 20% of salary) to move to divestiture buyer
    - Transition services and support for 12 months

Example: Comcast/NBCU (vertical)

- DOJ concern
  - JV between Comcast, NBCU and GE would give Comcast control over NBCU's video programming
- Consent decree
  - Obligate NBCU to continue to license NBCU programming content to competing multichannel video programming distributors
  - Obligate jv to license the JV's programming to emerging online video distributor competitors
    - Commercial arbitration if cannot reach agreement on license terms
    - Prevents restrictive licensing practices
  - Hulu
    - Comcast to relinquish voting and other governance rights in Hulu
    - Comcast precluded from receiving confidential or competitively sensitive information about Hulu's operations

Consent decree violations

- DOJ
  - DOJ consent decrees are technically injunction orders by a federal district court
  - Violations are punishable by civil or criminal contempt
    - Civil contempt sanctions
      - Designed to enforce compliance with court orders and to compensate those injured by an order violation
      - A sanction designed to coerce compliance, such as a daily fine for each day the defendant violates the order or imprisonment until the defendant complies with the order, remains civil provided that the contempt sanction is subject to purging by compliance with court order
    - Criminal contempt sanctions
      - Designed to vindicate the power of the court by punishing violators: "Criminal contempt is a crime in the ordinary sense."[1]
      - Are punitive rather than remedial, and are characterized by fixed, unconditional sentences or fines
  - A finding of contempt in the D.C. circuit requires a showing by "clear and convincing evidence" that the defendant violated a "clear and unambiguous" prohibition in the consent decree[2]

[1] Bloom v. Illinois, 391 U.S. 194, 201 (1968); *accord*, International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994).
[2] *See* United States v. Microsoft Corp., 980 F. Supp. 537, 541 (D.D.C. 1997). Other circuits have similar requirements, although the articulation may be different.

Consent decree violations

- FTC
  - Violations of an FTC cease and desist order issued under FTC Act § 5 are subject to civil penalties and possible subsequent criminal sanctions
  - Civil penalties: FTC Act § 5(l)

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.[1]

- The maximum amount of the penalty today has been adjusted to $51,744 (effective Jan. 10, 2023).
- If the district court enters an injunction in aid of a Commission order pursuant to Section 5(l), violations of that injunction are subject to civil and criminal contempt sanctions

[1] 15 U.S.C. § 5(l).

Consent decree violations

- Violation of FTC consent order: *Boston Scientific*[1]
  - 1995, Boston Scientific agreed to acquire Cardiovascular Imaging Systems (CVIS)
    - At the time, Boston Scientific and CVIS were the two of the three suppliers of intravascular ultrasound (IVUS) catheters, an emerging new technology for diagnosing heart disease, and collectively accounted for 90% of the sales of IVUS catheters
    - They were also involved in vigorous patent infringement cross-litigation to block each other from continuing to manufacture and sell IVUS catheters
  - Boston Scientific agreed to an FTC consent order requiring it to license specific intellectual property rights in IVUS catheter technology to Hewlett-Packard to enable it to enter into the manufacture and sell of IVUS catheters
    - HP had been in a joint venture with Boston Scientific whereby HP developed, manufactured and sold the electronic console that displayed the images generated by the Boston Scientific IVUS catheter.
  - Boston Scientific signed an IP license agreement requiring it to provide HP with the rights specified in the FTC consent order but it breached this agreement
    - HP gave up trying to enter the catheter market and exited the console market altogether in November 1998
    - In early 1999, HP filed a private action against BSC alleging breach of contract, monopolization and attempted monopolization (subsequently settled)

[1] *See* United States v. Boston Scientific Corp., 253 F. Supp. 2d 85 (D. Mass. 2003).

Consent decree violations

- Violation of FTC consent order: *Boston Scientific/CVIS*
  - In 2000, the DOJ, acting on behalf of the FTC, filed suit for civil penalties under Section 5(l)
  - In 2003, after significant litigation, the court found in favor of the government and ordered Boston Scientific to pay $7.04 million in civil penalties for two violations
    - In determining penalty amount, the court looked at six factors:
      - harm to the public;
      - benefit to the violator;
      - good or bad faith of the violator;
      - the violator's ability to pay;
      - deterrence of future violations by this violator and others; and
      - vindication of the FTC's authority
    - Calculation
      - FTC final decision and order: April 5, 1995
      - ADP violation
        - May 5, 1995: Boston Scientific takes position not to supply ADP technology rights to HP
        - July 9, 1997: FTC staff opines that ADP technology is covered in consent decree
        - March 1, 1998: HP exits market
        - Court: $5000 per day from May 5, 1995 to July 8, 1997 + $10,000 per day from July 9, 1997 to March 1, 1998 = $6,325,000 (maximum civil penalties available in the respective time periods)
      - Discovery violation: $11,000 per day from March 1, 1998 (when samples of the Discovery catheter were available for promotion) and May 5, 1998 (the end of the supply period required by the FTC order) = $715,000