XI. GOVERNMENT ENFORCEMENT

A. Overview

At the forefront of antitrust enforcement in the United States are the two federal antitrust agencies: the Federal Trade Commission and the U.S. Department of Justice. At the FTC, the Bureau of Competition (often "BC" or "the Bureau" in antitrust-speak) handles most antitrust enforcement work, with support from the Bureau of Economics, while DOJ's antitrust enforcement is housed in the Antitrust Division (often "ATR" or "the Division"). These two agencies bring many of the United States's most complex and important antitrust cases, handle the vast majority of the nation's merger and conduct government-enforcement workload, and play a critical role in developing antitrust policy and doctrine. In addition to the federal enforcers, the 50 states—along with the District of Columbia, Guam, and Puerto Rico—play an important role in detecting and combating antitrust violations.

This Chapter takes a look at these government enforcers and some aspects of their operation and relationships. Sections B and C introduce the nation's two federal antitrust enforcers in turn. Section D explores the unusual fact that we have two antitrust enforcers rather than one, and considers some of the implications (and the resulting litigation). Section E completes our examination of the federal institutions with a look at the Hart-Scott-Rodino ("HSR") Act, which structures the merger review process that represents the majority of each agency's civil workload. In Section F, we will briefly meet the state Attorneys-General, an important additional source of antitrust enforcement authority in the United States. Finally, in Section G, we will turn to antitrust remedies in the context of government enforcement, as we examine the injunctive relief that constitutes the usual remedy in government antitrust cases. In the next Chapter we will complete our survey of remedies when we consider damages: although the Justice Department and the states can sue for damages under the Sherman Act, on behalf of the federal government and state citizens respectively, damages are primarily important in connection with private litigation. (We will touch briefly on government damages and private injunctions in Chapter XII.)

B. The Federal Trade Commission

The Federal Trade Commission is an independent and bipartisan administrative agency, created in 1914 by the Federal Trade Commission Act. The FTC was created to augment the federal government's powers of economic regulation and to supplement the Department of Justice's existing antitrust jurisdiction.[886]

1. Structure and Organization

The FTC is overseen by a Commission of five Commissioners serving staggered seven-year terms, of whom no more than three may come from one political party, and each of whom is nominated by the President and confirmed by the Senate.[887] One Commissioner is designated by the President to serve as Chair of the agency. The President may remove a Commissioner only for cause—specifically for "inefficiency, neglect of duty, or malfeasance in office"—an arrangement that the Supreme Court authorized as consistent with the constitutional

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[886] *See, e.g.*, Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 Antitrust L.J. 701 (2011); Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 Antitrust L.J. 145 (2010); Gerald Berk, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009); Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003); ABA, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted at* 59 Antitrust L. J. 43 (1989); James C. Lang, *The Legislative History of the Federal Trade Commission Act*, 13 Washburn L.J. 6 (1974); Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969); ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Academy of Pol. Sci. in the City of N.Y. 114 (1926).

[887] 15 U.S.C. § 41.

balance of institutional powers in its *Humphrey's Executor* decision in 1935. The case is notable for the unusual facts that gave rise to litigation, for its distinctive picture of the FTC's function and powers, and for its status as a magnet for criticism.[888]

Humphrey's Executor v. United States

295 U.S. 602 (1935)

Justice Sutherland.

[1] William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

[2] The commissioner declined to resign; and on October 7, 1933, the President wrote him: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

[3] Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. [. . .]

[4] [Under the FTC Act, the]first commissioners appointed [were] to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous. {*Eds.: In other words, under the Act, the President could not remove a Commissioner without cause.*} . . .

[5] The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.

[6] The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate . . . the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said: "The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." [. . .]

[888] *See*, *e.g.*, Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015); Sen. Mike Lee, *Take Care Act* (June 7, 2019), https://www.lee.senate.gov/2019/6/take-care-act-floor-remarks.

[7] The debates in both houses demonstrate that the prevailing view was that the Commission was not to be subject to anybody in the government but only to the people of the United States; free from political domination or control or the probability or possibility of such a thing; to be separate and apart from any existing department of the government—not subject to the orders of the President. [. . .]

[8] Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

[9] We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here. . . .

[10] . . . To support its contention that the removal provision of section 1 [of the FTC Act], as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States, 272 U.S. 52 [(1926).] . . . [T]he narrow point actually decided [in *Myers*] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. [. . .]

[11] The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

[12] The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition," that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

[13] If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not

only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.

[14] We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

[15] The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) s 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers."

[16] The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

Daniel A. Crane, Debunking *Humphrey's Executor*

83 Geo. Wash. L. Rev. 1835 (2015)

With a hundred years of natural experiment, it is worth pausing to consider the actual experience of the FTC and ask whether the Court's quartet of assumptions in *Humphrey's Executor* were correct.

In fact, they were largely incorrect—or, at least, fail to capture the dominant character of the FTC over time. First, the FTC's independence and nonpartisanship are overstated. Work in political science and economics has shown that the FTC tends to be compliant to the will of Congress and particular congresspersons. This may create some separation of powers between the FTC and other executive branch agencies that pursue similar goals under the will of the President, but separation of powers is a different justification than the sort of technocratic independence suggested in *Humphrey's Executor*.

Second, the FTC is not uniquely expert. For much of its history, presidents appointed Commissioners as a matter of political patronage rather than expertise in competition and consumer protection. Even as the FTC grew into a more professional and expert agency in the last several decades, it enjoyed no comparative advantage in expertise over purely executive agencies, like the Justice Department's Antitrust Division, which fulfills almost identical functions. Third, the description of the FTC as "quasi-legislative" has been more wrong than right. In its original antitrust capacity—the sole capacity it had at the time of *Humphrey's Executor*—the FTC has not been legislative at all, issuing virtually no substantive rules. It has issued some consumer protection rules in the last few decades, although rulemaking remains a very limited portion of its docket. Finally, adjudication is a very small part of what the agency does. A new empirical study, reported in this Essay, shows that the FTC's predominant mode of law enforcement is through consent decrees, which involve no adjudication, and that the FTC is more prone to sue in federal district court as a plaintiff than to adjudicate matters administratively in the event there is adjudication.

The upshot is that the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was. The FTC functions primarily by enforcing the antitrust and consumer protection laws as a plaintiff, no more expert than the executive branch agencies doing the same thing. The principal structural difference from the executive branch agencies is that the FTC is beholden to Congress rather than to the President.

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The core of the agency is its three Bureaus: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. They are complemented by Offices which report to the Chair, dealing with competition and consumer-protection policy, international affairs, and congressional relations, among others.

The FTC's antitrust enforcement arm is the Bureau of Competition. Led by a Director and managed by a "front office" that includes Deputy Directors and a rotating group of Counsel—experienced attorneys on detail from the Bureau's divisions—the Bureau includes:

- Four merger enforcement divisions:
    - Mergers I, which primarily investigates mergers involving pharmaceuticals, medical devices, defense, and tech businesses;
    - Mergers II, which primarily investigates mergers involving semiconductors, chemicals, heavy industries, and computer hardware / software;
    - Mergers III, which primarily investigates mergers involving oil and gas and a range of consumer and consumer-facing products and services; and
    - Mergers IV, which primarily investigates mergers involving hospital and physicians as well as retail businesses;
- Three divisions focused on conduct enforcement:
    - the Technology Enforcement Division, which primarily investigates practices (and some transactions) in digital markets;
    - the Health Care division, which primarily investigates practices in pharmaceutical and healthcare markets; and
    - the Anticompetitive Practices Division, which primarily investigates practices in other markets;
- And three other divisions:
    - the Compliance division (which advises on matters of remedy and investigates compliance matters);
    - the Premerger Notification Office (which handles merger notifications under the HSR merger review process and conducts the initial review of all merger filings);
    - the Office of Policy & Coordination (which provides policy and research support to the rest of the Bureau).

The work of the Bureau of Competition is also supported by the staff of the FTC's Regional Offices in New York, San Francisco, and Seattle. Overall, the FTC budgeted for 675 full-time equivalent (FTE) staff dedicated to competition work in Fiscal Year 2023.[889]

Crucial support for the antitrust enforcement function is provided by the Ph.D. economists in the Bureau of Economics, who work alongside attorneys on investigations and litigations. BE economists occasionally serve as testifying experts in the FTC's antitrust actions. The FTC supplements BE with extensive use of economists from private consulting firms to advise on, and testify in, antitrust matters. The expenses of so doing represent a significant portion of the Commission's enforcement budget.[890]

[889] FTC, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2024 (Mar. 13, 2023), 8.
[890] FTC, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2024 (Mar. 13, 2023), 11 ("Expert witnesses are a critical element of all antitrust litigations, where explaining complex market dynamics to generalist judges is essential. . . . . It is commonplace for defendants in FTC litigations to outspend the Commission by a significant amount on expert support[.]").

A majority vote of the Commission is required to undertake key actions, including to issue a complaint, to authorize compulsory process (*i.e.*, civil investigative demands or subpoenas), or to voluntarily withdraw or settle a case.[891]

2. Powers and Functions

a) FTC Act Section 5

The FTC's two principal functions—competition and consumer protection—are reflected in Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair methods of competition" ("UMC") and "unfair or deceptive acts and practices" ("UDAP"). The latter language, which forms the basis for the FTC's consumer protection enforcement authority, was added by Congress in 1938 after the FTC's efforts at consumer protection were blocked by the Supreme Court for want of statutory authority.[892] The FTC also issues guidance (alone and with DOJ) and is active as an amicus in antitrust cases.

The statutory prohibition on UMC, plus the Clayton Act, forms the accepted basis for the FTC's antitrust enforcement authority. As the Supreme Court put it in 1948, the FTC's mandate to prohibit UMC reflected "a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the Federal District Courts but also to supplement that enforcement through the administrative process of the new Trade Commission."[893] But the limits of its substantive scope is unclear. Courts and commentators generally agree that the phrase "unfair methods of competition" includes *at least* all the conduct prohibited by the antitrust laws and at least some margin more, but they disagree about how much more broadly it reaches: that is, what the set of "standalone" Section 5 violations might be.[894]

It is broadly agreed that "invitations to collude"—that is, unilateral and unaccepted proposals to enter into a nakedly anticompetitive agreement, which do not generally violate the antitrust laws—violate Section 5.[895] But the consensus more or less stops there. After a trio of adverse decisions in the 1980s,[896] and with a couple of exceptions,[897] the FTC generally gave up the effort to assert "standalone" Section 5 theories other than those dealing with invitations to collude. (At least: until the effort, beginning in 2022, to reboot Section 5! We will come to that shortly.)

One case in the 1980s trio was *du Pont*, in which the FTC challenged the parallel but non-collusive use of practices that facilitated oligopolistic pricing by producers of "antiknock" gasoline additives. Specifically, the FTC's complaint charged that the producers had violated Section 5 by engaging, without agreement, in parallel practices including: (1) selling at a "delivered" price that included the cost of transportation; (2) using MFN

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[891] Compulsory process is increasingly authorized on a categorical "omnibus" basis, rather than for individual matters. *See*, *e.g.*, FTC, Press Release, Federal Trade Commission Authorizes Three New Compulsory Process Resolutions for Investigations (Aug. 26, 2022).

[892] *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931). For some history, *see* J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003).

[893] FTC v. Cement Inst., 333 U.S. 683, 692 (1948).

[894] See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972); for a wide range of perspectives, *see generally* Sandeep Vaheesan, *Resurrecting "A Comprehensive Chapter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. Pa. L. Bus. L. 645 (2017); Tim Wu, *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty?"*, Colum. Pub. L. Research Paper 14-508 (2016); Debbie Feinstein, *A Few Words About Section 5*, COMPETITION MATTERS (Mar. 13, 2015); James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. Antitrust Enf't 87, 88 (2015); William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 20 Minn. J. Int'l L. 274 (2010); Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, Antitrust Source (Feb. 2009); ABA, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted at* 59 Antitrust L. J. 43 (1989); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227 (1980); Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 Villanova L. Rev. 517 (1962).

[895] *See*, *e.g.*, Analysis to Aid Public Comment, In the Matter of Fortiline, LLC, File No. 151-0000 (F.T.C. Aug. 9, 2016); Analysis to Aid Public Comment, In the Matter of U-Haul Int'l, Inc., File No. 081-0157 (F.T.C. June 9, 2010).

[896] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[897] *See*, *e.g.*, Complaint, In the Matter of Negotiated Data Solutions LLC., FTC File No. 51-94 (F.T.C. filed Sept. 23, 2008).

clauses (see Chapter VI!) in their contracts with buyers; (3) using contractual provisions that required 30 days' notice of any change in prices; and (4) giving advance notice of price increases to the press. Each of these practices had been used by Ethyl Corporation when it had been the sole supplier in the market; other firms, upon entering the market, had embarked on the practices as well. Such behavior would generally not violate the Sherman Act, given the absence of either agreement or individual monopoly power: the Second Circuit held that it did not violate Section 5 of the FTC Act either. In the process, the court indicated that there are some limits on the reach of the unfairness prohibition. The FTC would take this message to heart, cutting back its efforts to apply Section 5 beyond the antitrust laws.

E.I. du Pont de Nemours & Co. v. FTC

729 F.2d 128 (2d Cir. 1984)

Judge Mansfield.

[1] Congress' use of the vague general term "unfair methods of competition" in § 5 without defining what is "unfair" was deliberate. The statute's legislative history reveals that, in reaction to the relatively narrow terms of the Sherman Act as limited by the Supreme Court's adoption of the Rule of Reason in Standard Oil Co. v. United States, 221 U.S. 1 (1911), Congress sought to provide broad and flexible authority to the Commission as an administrative body of presumably practical men with broad business and economic expertise in order that they might preserve business' freedom to compete from restraints. Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled. Indeed, Congress, in the process of drafting § 5, gave up efforts to define specifically which methods of competition and practices are competitively harmful and abandoned a proposed laundry list of prohibited practices for the reason that there were too many practices to define and many more unforeseeable ones were yet to be created by ingenious business minds. The specific practices that might be barred were left to be defined by the Commission, applying its expertise, subject to judicial review. Congress did not, however, authorize the Commission under § 5 to bar any business practice found to have an adverse effect on competition. Instead, the Commission could proscribe only "unfair" practices or methods of competition. Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.

[2] During the period since the enactment of the Federal Trade Commission Act the courts have established certain principles bearing on the scope of the Commission's powers. Although the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter. It may bar incipient violations of those statutes, and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit. In prosecuting violations of the spirit of the antitrust laws, the Commission has, with one or two exceptions, confined itself to attacking collusive, predatory, restrictive or deceitful conduct that substantially lessens competition.

[3] The Commission here asks us to go further and to hold that the "unfair methods of competition" provision of § 5 can be violated by non-collusive, non-predatory and independent conduct of a non-artificial nature, at least when it results in a substantial lessening of competition. We recognize that § 5 invests the Commission with broad powers designed to enable it to cope with new threats to competition as they arise. As the Supreme Court stated in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972):

> Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

[4] However, as the Court noted in the same case, appropriate standards must be adopted and applied to protect a respondent against abuse of power. As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review. A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be

"analogous" to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system.

[5] The term "unfair" is an elusive concept, often dependent upon the eye of the beholder. A line must therefore be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition. Lessening of competition is not the substantial equivalent of "unfair methods" of competition. Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in determining whether the challenged conduct is "unfair." Nor does the statute obligate a business to engage in competition; if that were the case, many acceptable pricing and market decisions would be barred. A manufacturer, for instance, would be prevented from making a concededly lawful change in its distribution system, designed to increase sales efficiency, by unilaterally reducing the number of its wholesalers, since the effect would be to diminish substantial competition at the wholesaler level. Similarly, if anticompetitive impact were the sole test, the admittedly lawful unilateral closing of a plant or refusal to expand capacity could be found to be "unfair." The holder of a valid product patent could be prevented from exercising its lawful monopoly to charge whatever the traffic would bear, even though "a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains [the right to trade with whom he wishes]."

[6] When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition. The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws. It represents a condition, not a "method;" indeed it could be consistent with intense competition. Labelling one producer's price change in such a market as a "signal," parallel price changes as "lock-step," or prices as "supracompetitive," hardly converts its pricing into an "unfair" method of competition. To so hold would be to condemn any such price increase or moves, however independent; yet the FTC has not suggested that § 5 authorizes it to ban all price increases in an oligopolistic market. On the contrary, it states that "Section 5 should not prohibit oligopolistic pricing alone, even supracompetitive parallel prices, in the absence of specific conduct which promotes such a result." This fine distinction creates doubt as to the types of otherwise legitimate conduct that are lawful and those that are not. The doubt is increased by the Commission's concession that price uniformity is normal in a market with few sellers and homogeneous products, such as that in the antiknock compound industry.

[7] In view of this patent uncertainty the Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability. The Commission's decision in the present case does not provide any guidelines; it would require each producer not only to assess the general conduct of the antiknock business but also that of each of its competitors and the reaction of each to the other, which would be virtually impossible. Some idea of the fickleness and uncertainty of the FTC's position in the present case can be gathered from its ambivalent view towards some of the practices which it attacks. Certain otherwise-legitimate practices were declared unlawful only when used cumulatively with other practices. Others were found unfair when used by certain producers (Du Pont and Ethyl) but not when used by others (PPG and Nalco). Press announcements of price increases and contractual 30-day price increase notice requirements were held permissible but giving buyers a few days additional notice was found to be unfair even though there was no proof that the extra days made any competitive difference. Indeed, with or without the additional days' notice the initiator of a price increase was not precluded from withdrawing or modifying it within the 30-day period or from extending the 30-day notice period itself. Thus the FTC's rulings and order appear to represent uncertain guesswork rather than workable rules of law.

[8] In our view, before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must

exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. If, for instance, a seller's conduct, even absent identical behavior on the part of its competitors, is contrary to its independent self-interest, that circumstance would indicate that the business practice is "unfair" within the meaning of § 5. In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason. To suggest, as does the Commission in its opinion, that the defendant can escape violating § 5 only by showing that there are "countervailing procompetitive justifications" for the challenged business practices goes too far.

[9] In the present case the FTC concedes that the petitioners did not engage in the challenged practices by agreement or collusively. Each acted independently and unilaterally. There is no evidence of coercive or predatory conduct. If the petitioners nevertheless were unable to come forward with some independent legitimate reason for their adoption of these practices, the Commission's argument that they must be barred as "unfair" when they have the effect of facilitating conscious price parallelism and interdependence might have some merit. But the evidence is overwhelming and undisputed, as the ALJ found, that each petitioner independently adopted its practices for legitimate business reasons which we have described.

[10] The tenuousness of the Commission's finding that the challenged practices are "unfair" is illustrated by the fact that it does not tell us when the practices became unlawful: at the time of their original adoption by Ethyl when it was the sole manufacturer of antiknock compounds, when Du Pont entered the market in 1948, when PPG entered in 1961, when Nalco appeared on the scene in 1964, or at some other time. The matter is of some importance for the reason that during the period from 1948 (when Du Pont entered) to 1974 Ethyl's share of the market fell from 100% to 33%. Du Pont's share likewise fell from 50% in 1961, the time of PPG's entry, to 38% in 1974. In the meantime PPG and Nalco, using aggressive competitive measures, captured substantial shares of the market. If the challenged business practices engaged in by the four producers were "unfair" during the 1974-1979 period one would expect that they would be viewed as unfair during the 1960s. Yet the evidence is clear beyond doubt that they did not "facilitate" conscious price parallelism during that earlier period; indeed, from 1960 to 1974 the price of one ingredient of antiknock compounds, TEL (tetraethyl lead) increased only 17% while the price of the other, TML (tetramethyl lead) fell 10%, even though the overall price index rose 57% during the same period. This casts doubt upon the FTC's selection of the 1974-1979 period as indicative of the effect of the business practices at issue. It is difficult to believe that a practice deemed lawful when competitive forces were producing changes in the market became "unfair" when market conditions stabilized.

[11] The Commission contends that although the business practices at issue here might not be unfair under other market conditions, they assume that unlawful character when adopted in a concentrated or oligopolistic market in which a few producers sell a homogenous product, demand is inelastic, prices are "supracompetitive," and barriers to entry are high. It is argued that in such a milieu the practices assist the producers in independently maintaining prices at higher levels than would otherwise be the case. Perhaps this argument would be acceptable if the market were clearly as so described and a causal connection could be shown between the practices and the level of prices. Indeed the Commission majority concedes that "facilitating practices will be found to violate § 5 as unfair methods of competition only if the weight of the evidence shows that competition has been substantially lessened" and that it was required to "establish a clear nexus between the challenged conduct and adverse competitive effects before invoking our authority in this regard." But the record does not contain substantial evidence supporting many of the Commission's conclusions or showing a causal connection between the challenged practices and market prices. Indeed, it appears to be riddled with deficiencies and inconsistencies, many of which are noted by Chairman Miller in his dissent.

[12] In the first place, price uniformity and parallelism was much more limited than the FTC would have it. During the relevant period (1974-1979) Nalco extended price discounts on more than 80% of its sales and PPG on more than one-third of its sales, the latter increasing to 58% of its sales in 1979 as the sellers competed for fewer buyers in a diminishing market. Although there was for the most part price parallelism on the part of Du Pont and Ethyl, they effectively met the price discounts of the other two producers by providing competition in the form of extensive services which had the effect of retaining old customers or luring away new ones. Thus the

total package, including free valuable services and discounts, presents a picture of a competitive market in which large, sophisticated and aggressive buyers were making demands and were satisfied with the results. To the extent that there was price uniformity, that condition is as consistent with competitive as with anticompetitive behavior.

[13] The problems faced by anyone thinking of entering the market were not "barriers" in the usual sense used by economists, such as requirements for high capital investment or advanced technological know-how. The main problem has been that market demand, due to factors uncontrolled by petitioners, is sharply declining. A dying market, which will soon dry up altogether, does not attract new entries. Absent some reasonable prospect that a price reduction would increase demand-and there is none-it is not surprising that existing producers have not engaged in as much price competition as might exist under other conditions. To suggest that industry-wide use of delivered instead of f.o.b. pricing {*Eds.: f.o.b. = "free on board," or not including transportation costs*} restrained price competition in such a market ignores the de minimis part freight charges played in the price paid by customers. It also overlooks the fact that f.o.b. pricing is not necessarily more competitive than delivered pricing.

[14] In short, we do not find substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition.

* * *

In 2015, the FTC issued a brief "Statement of Enforcement Principles" relating to the meaning of the UMC prohibition, tying it to the principles of antitrust enforcement.

FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

August 13, 2015

In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

* * *

But in 2021, the Commission withdrew the Statement, and signaled a determination to take a fresh, and broader, look at the scope of Section 5.[898] In November 2022, a new policy statement emerged (as did a vigorous dissent![899]).

[898] FTC, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021).

[899] *See* Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (July 9, 2021), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf ("Instead of a law enforcement document, [the Statement] resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the

FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act

November 10, 2022

[1] Pursuant to the FTC's analysis of the decided cases and prior enforcement actions, this policy statement describes the key principles of general applicability concerning whether conduct is an unfair method of competition. Consistent with the Supreme Court's interpretation of the FTC Act in at least twelve decisions, this statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions. [. . .]

[2] In enacting Section 5, Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts. Congress purposely introduced the phrase, "unfair methods of competition," in the FTC Act to distinguish the FTC's authority from the definition of "unfair competition" at common law. It also made clear that Section 5 was designed to extend beyond the reach of the antitrust laws. Concluding that a static definition would soon become outdated, Congress wanted to give the Commission flexibility to adapt to changing circumstances. [. . .]

[3] Relying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law, this statement describes the most significant general principles concerning whether conduct is an unfair method of competition under Section 5 of the FTC Act.

[4] Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition. Conversely, violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition.

[5] The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.

[6] There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

[7] These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions. Even when conduct is not facially unfair, it may violate Section 5. In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.

[8] The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress

approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that 'honest businesses' can map the boundaries of lawful conduct.").

recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused *actual* harm in the specific instance at issue. Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent. Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions. Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.

[9] In the event that conduct prima facie constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence. There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether. [. . .]

[10] If parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well. The nature of the harm is highly relevant to the inquiry; the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind. In addition, whether harmed parties share in the purported benefits of the practice may be relevant to the inquiry.

[11] Some well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well. It is the party's burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. In addition, the asserted benefits must not be outside the market where the harm occurs. Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases. [. . .]

[12] A non-exclusive set of examples of conduct that have been found to violate Section 5 include:

- Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws).
- Conduct deemed to be an incipient violation of the antitrust laws. Incipient violations include conduct by respondents who have not gained full-fledged monopoly or market power, or by conduct that has the tendency to ripen into violations of the antitrust laws. Past examples of such use of Section 5 of the FTC Act include:
    - invitations to collude,
    - mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws,
    - a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws, and
    - loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.
- Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the

antitrust laws or that may or may not fall into a "gap" in those laws. As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:

- practices that facilitate tacit coordination,
- parallel exclusionary conduct that may cause aggregate harm,
- conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market,
- fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications,
- price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,
- de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market,
- a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,
- mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition,
- using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets,
- conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition,
- interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act,
- commercial bribery and corporate espionage that tends to create or maintain market power,
- false or deceptive advertising or marketing which tends to create or maintain market power, or
- discriminatory refusals to deal which tend to create or maintain market power.

* * *

The FTC's authority to enforce Section 5 is subject to some jurisdictional carveouts. Most importantly, banks (including federal credit unions), common carriers, air carriers, and entities subject to the Packers and Stockyards Act are all beyond the FTC's reach under Section 5.[900] In addition, due to a peculiarity of the definition of "corporation" in 15 U.S.C. § 44, nonprofits fall outside Section 5's reach, preventing the FTC from tackling practices by, for example, nonprofit hospitals.[901] (*California Dental* established that the FTC can challenge nonprofit actors organized to promote the profit of their members.[902]) These create gaps in the FTC's powers, within which the Department of Justice alone must fulfil the enforcement function. In addition to its powers under Section 5, the FTC also has authority to enforce Section 7 of the Clayton Act directly.[903]

b) FTC Act Section 6(b)

The FTC has a unique power under Section 6(b) of the FTC Act, 15 U.S.C. § 46, to conduct market studies by means of compulsory process and to compel businesses subject to Section 5 to respond under oath. The FTC has

[900] 15 U.S.C. § 45.

[901] 15 U.S.C. § 44 (defining corporation, in relevant part, as "organized to carry on business for its own profit or that of its members").

[902] California Dental Ass'n v. FTC, 526 U.S. 756, 766–67 (1999) (holding that "proximate relation to lucre must appear" but that "[n]onprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts").

[903] *See* 15 U.S.C. § 21(a)

used this power to conduct reports on a wide variety of topics, some of which have led to further enforcement or policy action.[904]

3. Enforcement Procedure

FTC antitrust enforcement begins with an investigation, which is almost invariably handled by a conduct or merger division in the Bureau of Competition. Such investigations typically begin with an informal or voluntary phase (in which potential targets as well as customers, trading partners, and competitors are invited to submit documents and information and/or to participate in interviews) following which the Commission may vote to authorize the use of compulsory process—that is, civil investigative demands ("CIDs") and subpoenas[905]—with which compliance is mandatory.[906] Some investigations are governed by so-called "omnibus resolutions," providing pre-authorization for the use of compulsory process in certain categories of cases.[907]

The FTC has an unusual choice of venues in which to pursue enforcement litigation. It may file administrative litigation, pursuant to Part 3 of the FTC Rules of Practice, to obtain entry of a cease and desist order.[908] This typically involves an initial trial before an FTC Administrative Law Judge, with plenary review by the Commission itself.[909] A respondent may appeal from a decision of the Commission to any federal circuit court of appeals.[910] On appeal, factual findings are reviewed to determine whether they are supported by substantial evidence, while conclusions of law are reviewed *de novo* with some limited deference to the FTC's view of whether a particular practice is "unfair" under Section 5.[911] Violations of an FTC order are punishable by civil penalties of up to $51,744 per violation.[912]

Administrative litigation presents the slightly odd prospect of the Commission first voting to bring a case, and then sitting in an adjudicative capacity to decide the case that it has, itself, authorized. In order to separate the functions of prosecutor and adjudicator, once the Commission votes to file a complaint in Part 3, a firewall (the "Part 3 wall") is raised between the litigating staff and members of the Commission, including the Chair.[913] But criticism of this arrangement persists. (Indeed, as we shall see later in this Chapter, this feature of the FTC has been a target of litigation.)

[904] *See*, *e.g.*, FTC, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (Oct. 2016); FTC, Press Release, FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information (Dec. 14, 2020); FTC, Press Release, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020).

[905] The Commission must have "reason to believe" the recipient is in possession, custody, or control of relevant information before issuing a CID. *See* 15 U.S.C § 57b-1(c). *See also* 15 U.S.C. § 49 (subpoena power).

[906] *See generally* 16 C.F.R. Part 2 (nonadjudicative procedures).

[907] *See*, *e.g.*, FTC, Resolution Directing Use of Compulsory Process Regarding Acts or Practices Affecting Healthcare Markets, FTC File No. P210100 (July 1, 2021)

[908] *See* 15 U.S.C. § 45(b) (cease and desist order); 16 C.F.R. Part 3.

[909] *See* 16 C.F.R. § 3.52 (appeal from initial decision to Commission).

[910] 15 U.S.C. § 45(c) (allowing appellate review in "any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business").

[911] 15 U.SC. § 21(c) (appeal court review of factual findings limited to determining whether such findings are supported by "substantial evidence"); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (under the substantial evidence test, "the court must accept the Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *id.* at 454 ("The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'").

[912] 15 U.S.C. 45(*l*). Penalties are annually adjusted for inflation. *See* FTC, Press Release, *FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023* (Jan. 6, 2023).

[913] *See* 5 U.S.C. § 554(d) (APA requirement of separation between investigational and adjudicative functions).

Maureen K. Ohlhausen, Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?

J. Comp. L. & Econ. (2016)

[T]he FTC's administrative litigation process . . . stands accused of being a rigged system. In a Part 3 proceeding, the FTC serves prosecutorial and adjudicative roles. After a staff investigation and recommendation, and following party meetings, the Commissioners may vote out a Part 3 complaint if they find "reason to believe" that a section 5 violation occurred and that the action would serve the public interest. An independent administrative law judge (ALJ) subsequently reaches an initial decision, based on a full trial. The Commissioners, however, then decide the merits of the case without deferring to the ALJ's factual or legal findings pursuant to their regulatory authority. Due-process objections result. The worry is that, once the FTC authorizes a Part 3 complaint, liability is inevitable no matter how the ALJ rules or what new facts or legal issues emerge. To evidence those claims, some commentators have argued that the Commission almost always rules in complaint counsel's favor. Is such criticism accurate? [. . .]

[C]onsider five findings. First, a recurring claim is that the FTC always imposes liability. That claim is true, but only for recent cases, which are relatively few. Although the Commission found liability in 92 percent of its 12 Part 3 decisions in the last decade, it dismissed 29 percent of the 143 Part 3 matters in which it made a liability-dismissal decision since January 1977. The Commission dismissed 16 percent of Part 3 matters on the merits. Those dismissals do not include the 21 matters in which the Commission found liability, but also trimmed counts or respondents, suggesting careful review. Notably, the Commission dismissed 40 percent of Part 3 antitrust complaints overall. And, of the antitrust matters adjudicated on the merits, 29 percent were dismissed.

Second, although the Commission dismissed more administrative cases historically—36 percent from 1987 to 1996, for example—its recent trend of finding liability coincides with a higher rate of success before the appellate courts. . . . .

Third, what of the criticism that the Commission is biased in deciding the merits simply because it previously instituted the proceedings? In fact, in 72 percent of Part 3 cases, the commissioners who authorized the administrative litigation had either left or no longer formed a majority at the liability-dismissal stage. . . . .

Fourth, a fascinating question is whether the Commission finds liability more often when the same majority authorized the Part 3 complaint. If claims of bias have merit, the FTC should be more likely to dismiss when different commissioners authorized the case. The results are the opposite. When the same Commission majority endured—that is, when "bias" would presumably exist—it dismissed 33 percent of cases. When a different majority decided the case than voted out the complaint, however, it was less likely to dismiss—doing so in 27 percent of matters.

* * *

Under certain circumstances the FTC may bring suit in federal district court under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Sometimes district-court litigation is an alternative to the administrative process, but in other cases it may be a complement. In particular, because the remedy in a Part 3 case is limited to a cease and desist order, the FTC cannot use the administrative process to obtain interim relief, such as a preliminary injunction to block a merger. In those cases, the FTC may seek a preliminary injunction in district court *and* simultaneously move forward with administrative litigation to obtain a permanent injunction.[914]

[914] *See, e.g.*, FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 527 (E.D. Pa. 2020) ("The Federal Trade Commission and Pennsylvania Office of Attorney General, collectively the Government, seek to preliminarily enjoin a proposed merger between Thomas Jefferson University and the Albert Einstein Healthcare Network pending an administrative determination of whether the combination violates Section 7 of the Clayton Act.").

But Section 13(b) is not a blank check to bring any antitrust suit in federal court: by contrast, the language of the provision sets up some important limitations on when the FTC can go to court, and what it can get when it does.[915] Here is the text of the statute.

15 U.S.C. § 53(b)

(b)Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
>> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

The peculiar language of Section 13(b) sets up at least three possible limitations on the FTC's powers as a district-court litigant: first, the "is violating, or is about to violate" language might mean that the FTC is unable to go to district court to seek a remedy for past antitrust violations; second, the brief reference to "a permanent injunction" might mean that certain forms of equitable relief—such as disgorgement of profits or restitution of ill-gotten gains—are unavailable; and, third, that the "in a proper case" language might mean that injunctive relief is available in only a subset of litigated matters. All three of these issues were litigated in recent years: the FTC won one but lost two others, with dramatic implications for the scope of the agency's remedial powers.

FTC v. Shire ViroPharma, Inc.

917 F.3d 147 (3d Cir. 2019)

Chief Judge Smith.

[1] Section 13(b) requires that the FTC have reason to believe a wrongdoer "is violating" or "is about to violate" the law. We conclude that this language is unambiguous; it prohibits existing or impending conduct. Simply put,

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[915] For one perspective on the role of 13(b) over time, *see* Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. Rev. 567 (2006).

Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant "is" committing or "is about to" commit another violation.

[2] The plain language of Section 13(b) is reinforced by its history. Generally, where the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. When Congress added Section 13(b), the provision was expected to be used for obtaining injunctions against illegal conduct pending completion of FTC administrative hearings. See S. Rep. No. 93-151, at 30 (1973) ("The purpose of [Section 13(b)] is to permit the [FTC] to bring an immediate halt to unfair or deceptive acts or practices when [a]t the present time such practices might continue for several years until agency action is completed."). The provision was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur. Nor was it meant to duplicate Section 5, which already prohibits past conduct. [. . .]

[3] The FTC's arguments to the contrary are unconvincing. The FTC contends that relief under Section 13(b) is appropriate when it shows a reasonable likelihood that past violations will recur. In other words, when a defendant has already violated the law but the illegal conduct has ceased, injunctive relief should be granted if 'there exists some cognizable danger of recurrent violation.

[4] The FTC borrows its "likelihood of recurrence" standard from the common law standard for an award of injunctive relief. A party can generally obtain injunctive relief for past conduct that is likely to recur; the wrongdoer cannot avoid an injunction by voluntarily ceasing its illegal conduct. Although injunctive relief can survive discontinuance of the illegal conduct, the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

[5] The FTC insists that other courts have consistently applied the likelihood of recurrence standard in Section 13(b) cases. This is true, and unsurprising, given that Section 13(b) explicitly authorizes the FTC to obtain injunctions. But none of the cases cited by the FTC considers the issue presented here—the meaning of Section 13(b)'s threshold requirement that a party "is" violating or "is about to" violate the law. [. . .]

[6] [T]he FTC trots out the old adage that a remedial statute like the FTC Act should be construed broadly. Because Section 13(b)'s "is" or "is about to" requirement allegedly conflicts with the remedial purpose of the FTC Act, the FTC says we should disregard the plain meaning of that language. Of course, none of the authority the FTC cites stands for the broad proposition that we can ignore clear statutory language if it does not promote a remedial interpretation.

[7] The FTC points to a parade of horribles that it predicts will result if we uphold the District Court's decision. *See*, *e.g.*, Br. Of Appellant [FTC] 35 ("Limiting the FTC's Section 13(b) authority to cases of ongoing or imminent violation would make it easy for wrongdoers to evade Congress' purposes in creating the regime. As soon as a potential defendant got wind that the FTC was investigating its activities, it could simply stop those activities and render itself immune from suit in federal court unless the FTC could allege and prove an imminent re-violation."). But there is no reason to believe that our decision today unnecessarily restricts the FTC's ability to address wrongdoing. Section 5 authorizes administrative proceedings based on past violations. And, of course, if the FTC believes that a wrongdoer is "about to violate" the law during the pendency of an administrative proceeding, it could then come to court and obtain an injunction under Section 13(b).

[8] The FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language. If the FTC wants to recover for a past violation—where an entity "has been" violating the law—it must use Section 5(b). If the FTC instead chooses to use Section 13(b), it must plead that a violation of the law "is" occurring or "is about to" occur. Here, the FTC wants to use the most advantageous aspects of each statutory provision—to punish Shire for a past violation using the less onerous enforcement mechanism. But the FTC's attempt to squeeze Shire's conduct into the "about to violate" category distorts Section 13(b) beyond its intended purpose. Section 13(b) cannot accommodate the FTC's interpretation—that "about to violate" means only that a violation could recur at some future point.

[9] In short, we reject the FTC's contention that Section 13(b)'s "is violating" or "is about to violate" language can be satisfied by showing a violation in the distant past and a vague and generalized likelihood of recurrent conduct. Instead, "is" or "is about to violate" means what it says—the FTC must make a showing that a defendant is violating or is about to violate the law.

CASENOTE: FTC v. Surescripts, LLC, and The Idea of a "Proper Case"

424 F.Supp.3d 92 (D.D.C. 2020)

When the FTC sued the e-prescribing platform Surescripts for using loyalty discounts to induce exclusivity, it did so in federal court, pursuant to Section 13(b) of the FTC Act. As noted above, that provision states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

In moving to dismiss the FTC's complaint, Surescripts argued that the language "in proper cases" should act as a meaningful limit on the scope of Section 13(b). In particular, Surescripts argued that injunctive relief should be available only in "routine, straightforward" cases. And the FTC's challenge to its loyalty discounts, Surescripts argued, was not a routine case: "it involves complex and novel issues of antitrust law, such as how to understand the two-sided e-prescription markets" in light of *AmEx*. Surescripts pointed to some legislative history suggesting that Congress may have intended the FTC to seek permanent injunctions in district court in routine cases in which it was not attempting to develop or extend the law. In opposing Surescripts's motion, the FTC's argued that Surescripts was overreading the language. A "proper" case, the FTC argued, is "any case in which a permanent injunction would be 'appropriate,' i.e., any case in which a law enforced by the FTC has been violated and equitable remedies are needed to make harmed consumers whole."

The district court agreed with the FTC. It was true, the court allowed, that a "proper case" could not mean "any case." The phrase "proper case" could be understood as an effort to distinguish between cases that were proper for a permanent, rather than preliminary, injunction—or as a reference to cases that did not rely on the FTC's "scientific expertise." But, leaving the boundaries of the zone for another day, it was enough that this case was an effort to enforce existing law, not to define new legal standards: "The FTC grounds its legal argument here in Circuit precedent, and does not seek to rely on its agency expertise to develop the law. Under such circumstances, the Court concludes that the complaint adequately alleges a 'proper case.'"

Surescripts thus gave the FTC a robust win on the "proper case" question, but it did not entirely foreclose future efforts by defendants to make some hay out of this enigmatic turn of phrase in Section 13(b).

AMG Cap. Mgmt., LLC v. FTC

593 U.S. 67 (2021)

Justice Breyer.

[1] [S]everal considerations, taken together, convince us that § 13(b)'s "permanent injunction" language does not authorize the Commission directly to obtain court-ordered monetary relief. For one thing, the language refers only to injunctions. It says, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). An "injunction" is not the same as an award of equitable monetary relief. We have, however, sometimes interpreted similar language as authorizing judges to order equitable monetary relief.

[2] But if this language alone is not enough, there is more. The language and structure of § 13(b), taken as a whole, indicate that the words "permanent injunction" have a limited purpose—a purpose that does not extend to the grant of monetary relief. Those words are buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief.

{*Eds.: the Court here quoted Section 13(b), reproduced above.*}

[3] Taken as a whole, the provision focuses upon relief that is prospective, not retrospective. Consider the words "is violating" and "is about to violate" (not "has violated") setting forth when the Commission may request injunctive relief. Consider too the words "pending the issuance of a complaint," "until such complaint is dismissed," "temporary restraining order," "preliminary injunction," and so forth in the first half of the section. These words reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness. And the appearance of the words "permanent injunction" (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction. They might also be read, for example, as granting authority for the Commission to go one step beyond the provisional and ("in proper cases") dispense with administrative proceedings to seek what the words literally say (namely, an injunction). But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large dog.

[4] Further, the structure of the Act beyond § 13(b) confirms this conclusion. Congress in § 5(l) and § 19 gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission has issued cease and desist orders, *i.e.*, where the Commission has engaged in administrative proceedings. Since in these provisions Congress explicitly provided for "other and further equitable relief," 15 U. S. C. § 45(l), and for the "refund of money or return of property," § 57b(b), it likely did not intend for § 13(b)'s more cabined "permanent injunction" language to have similarly broad scope. [. . .]

[5] It is highly unlikely that Congress would have enacted provisions expressly authorizing conditioned and limited monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations. Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its traditional § 5 administrative proceedings.

[6] At the same time, to read § 13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then § 19's redress provisions (which include limitations). And the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. By contrast, the Commission's broad reading would allow it to use § 13(b) as a substitute for § 5 and § 19. For the reasons we have just stated, that could not have been Congress' intent. Cf. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, (2001) ("Congress does not hide elephants in mouseholes").

4. Competition Rulemaking Authority

In addition to its power to sue violators of Section 5 and conduct market studies under Section 6(b), the FTC has some power to undertake some rulemaking.

The FTC's principal rulemaking powers are aimed at consumer protection. The most important source of such authority is the Magnuson-Moss Act, codified at 15 U.S.C. § 57a. This is reserved for consumer-protection matters,[916] and requires the FTC to follow a lengthy process (including the publication of an advance notice of proposed rulemaking, followed by a notice of proposed rulemaking, followed by informal hearings, and finally judicial review before the D.C. Circuit at the behest of any interested person) before enforcing the rule.[917] The FTC also has some narrow authorities to make particular kinds of rules, subject to the Administrative Procedures Act, created by individual federal statutes over the years.[918]

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[916] 15 U.S.C. § 57a(a).

[917] *See generally*, *e.g.*, Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 G.W.L. Rev. 1979 (2015); Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 Harv. L. & Pol'y Rev. 519 (2022).

[918] *See*, *e.g.*, 15 U.S.C. § 68d (wool labeling).

But the FTC also has some statutory authority that can arguably be understood to authorize competition rulemaking. In particular, the FTC has power under Section 6(g) of the FTC Act, 15 U.S.C. § 46(g), to "[f]rom time to time classify corporations and (except as provided [in the Magnuson-Moss Act]) to make rules and regulations for the purpose of carrying out the provisions of this subchapter." The "subchapter" in question—15 U.S.C. §§ 41–58—includes among other things Section 5 of the FTC Act, 15 U.S.C. § 5.

The meaning of this Section 6(g) language is deeply controversial. Some commentators suggest that this statutory language creates a broad rulemaking power to "carry[] out" the FTC's function to prohibit unfair methods of competition—that is, a power to engage in general competition rulemaking—and they cite a 1973 D.C. Circuit opinion, *National Petroleum Refiners Association*, in support of this reading.[919] Other commentators argue that this language is a slender reed on which to hang a broad competition rulemaking power, and point to more recent cases that appear inconsistent with the earlier one.[920] To muddy the waters a little further: there appears to be exactly one example of pure UMC rulemaking in the FTC's history between 1914 and 2022. The "Tailored Clothing Rule" was promulgated in 1967 to clarify the application of the Robinson-Patman Act (which, as you may recall, prohibits certain forms of price discrimination) to promotional allowances in the tailored clothing industry: that rule was never enforced and was repealed in 1994.[921]

The FTC has recently called this question: launching a rulemaking effort aimed at the prohibition of labor non-compete agreements.[922] The final rule was issued in April 2024 and was promptly challenged in federal court: at the time of writing, the litigation is pending.[923]

The Chair's Statement accompanying the Notice of Proposed Rule-Making pointed to *National Petroleum Refiners Association* as "the only case that directly addresses the FTC's Section 6(g) rulemaking authority" and representing the "current state of the law."[924] We turn now to that case. In *National Petroleum Refiners Association*, the FTC had promulgated a rule stating that the failure to post "octane rating numbers" for gasoline at service stations was *both* an unfair method of competition *and* an unfair or deceptive act or practice. (The case thus involved a mingling of antitrust and consumer protection functions through the enaction of a rule.) The D.C. Circuit was asked to decide whether Section 6(g) supported the enaction of the rule, and it held that it did.

Nat'l Petroleum Refiners Ass'n v. FTC

482 F.2d 672 (D.C. Cir. 1973)

Judge Skelly Wright.

[1] Our duty here is not simply to make a policy judgment as to what mode of procedure—adjudication alone or a mixed system of rule-making and adjudication, as the Commission proposes—best accommodates the need for effective enforcement of the Commission's mandate with maximum solicitude for the interests of parties whose activities might be within the scope of the statutory standard of illegality. The Federal Trade Commission is a creation of Congress, not a creation of judges' contemporary notions of what is wise policy. The extent of its powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background. The question to be answered is not what the Commission thinks it should do but what Congress has said it can do. [. . .]

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[919] *See, e.g.*, Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).

[920] *See, e.g.*, Maureen K. Ohlhausen & Ben Rossen, *Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition" Rulemaking*, in Daniel A. Crane (ed.), RULEMAKING AUTHORITY OF THE FEDERAL TRADE COMMISSION (2022).

[921] *See* 59 Fed. Reg. 8527 (Feb. 23, 1994) (recounting nature of rule, history, and reason for rescission).

[922] FTC, Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023).

[923] *See* 16 C.F.R. Part 910; FTC, Press Release, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024); Complaint, Ryan LLC v. FTC, Case No. 3:24-cv-986 (N.D. Tex., filed Apr. 23, 2024).

[924] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses, FTC File No. P201200 (Jan. 5, 2023) 4 n.12.

[2] [T]he [Federal] Trade Commission Act includes a provision which specifically provides for rule-making by the Commission to implement its adjudicatory functions under Section 5 of the Act. Section 6(g) of the Act, 15 U.S.C. § 46(g), states that the Commission may "[f]rom time to time . . . classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of [relevant sections] of this title."

[3] According to appellees, however, this rule-making power is limited to specifying the details of the Commission's nonadjudicatory, investigative and informative functions spelled out in the other provisions of Section 6 and should not be read to encompass substantive rulemaking in implementation of Section 5 adjudications. We disagree for the simple reason that Section 6(g) clearly states that the Commission "may" make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied. [. . .]

[4] [I]t is at least arguable that [previous] cases go no farther than to justify utilizing Section 6(g) to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers. But we see no reason to import such a restriction on the "rules and regulations" permitted by Section 6(g). On the contrary, as we shall see, judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term "rules and regulations." The substantive rule here unquestionably implements the statutory plan. Section 5 adjudications—trial type proceedings—will still be necessary to obtain cease and desist orders against offenders, but Section 5 enforcement through adjudication will be expedited, simplified, and thus "carried out" by use of this substantive rule. And the overt language of both Section 5 and Section 6, read together, supports its use in Section 5 proceedings. [. . .]

[5] Our belief that "rules and regulations" in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure is reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies. There is, of course, no doubt that the approved practices of agencies with similar statutory provisions is a relevant factor in arriving at a sound interpretation of the Federal Trade Commission's power here. [. . .]

[6] The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court. [. . .]

[7] [W]hile we believe the historical evidence is indecisive of the question before us, we are convinced that the broad, undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914 would indeed be furthered by our view as to the proper scope of the Commission's rule-making authority. The multiplicity of differing plans proposed for a trade commission prior to 1914 and during the intensive debates in 1914 immediately preceding enactment of the Trade Commission Act demonstrates, of course, that proponents of the agency were hardly agreed on exactly what powers the agency should assume. But the variety of plans and the proponents of the agency all unquestionably shared deep objections to the existing structure of judicial monopolization of cases involving unfair, anticompetitive business practices. Those who believed from the start in a commission with independent enforcement powers, as the Commission was finally given in the 1914 legislation, and those who believed the Commission should have lesser powers, agreed that entrusting enforcement of congressional policy to prevent undue incursions on competition exclusively to the courts was a serious mistake. The courts were said to lack sufficient expertise in matters of economic complexity, their decisions were said to be wanting in the clarity planners of complicated business transactions and innovations required, and finally and most importantly, the courts lacked both the resources and the skill to proceed with speed and expedition in the trial and disposition of complicated cases involving economic questions. This concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take.

[8] In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. In the absence of an unmistakable directive, we cannot construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate. Indeed, as Mr. Justice

Harlan put it in a case involving a question of the Federal Power Commission's power under a general rule-making provision to alter radically its customary modes of proceeding, [t]his Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. This view was reiterated just a few weeks ago by Mr. Chief Justice Burger, writing for the Court:

> Where the empowering provision of a statute states simply that the agency may make such rules and regulations as may be necessary to carry out the provisions of this Act, we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). In short, where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers. In this way we may be sure we are construing the statute rather than constructing a new one. [. . .]

[9] Despite the import of Section 6(g)'s plain language, the overwhelming judicial support given to expansive agency readings of statutory rule-making authorizations that are not flatly inconsistent with other statutory provisions, and the incontestable relationship between the broad policies behind the 1914 Act and the utility of substantive rule-making power, appellees argue that substantive rule-making represents a sufficiently important innovation in Commission practice for us to balk at authorizing its use on the basis of an arguably ambiguous statute in the absence of very firm indications of affirmative and specific legislative intent. Indeed, courts have assumed such a stance toward novel assertions of agency powers. . . .

[10] [But unlike some earlier cases], this case does not involve nearly so drastic a departure from accustomed modes of agency proceeding. The rule here does not bypass the Commission's statute-based cease-and-desist proceedings. It merely supplements them. Moreover, in light of the concern evident in the legislative history that the Commission give attention to the special circumstances of individual businesses in proceeding against them, the Commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. [. . .]

[11] Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, the standard must get its final meaning from judicial construction.

[12] As we suggested earlier, our task in determining the meaning of this legislation is the usual one of starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us. It is as clear as it is unlimited: "The Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions of Section 5." Ambiguous legislative history cannot change the express legislative intent. The Commission is using rule-making to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the Commission must be upheld.

[13] Our conclusion as to the scope of Section 6(g) is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power. As the Supreme Court put it in *United States v. Morton Salt Co.*, [338 U.S. 632 (1950),] a case which involved what was thought to be a novel assertion of the FTC's statutory authority:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by [nonuse].

[. .]

[14] [Courts have not hesitated] in construing broad grants of rule-making power to permit promulgation of rules with the force of law as a means of agency regulation of otherwise private conduct. . . .

[15] The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court. [. . .]

[16] There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rule-making and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. Without the rule, the Commission might well be obliged to prove and argue that the absence of the rating markers in each particular case was likely to have injurious and unfair effects on consumers or competition. Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious. Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it. [. . .]

[17] [The] relationship between rule-making's probable benefits and the broad concerns evident when the FTC was created, together with the express language of Section 6(g), help persuade us that any purported ambiguity of the statute be resolved in favor of the Commission's claim. [. . .]

[18] A more troubling obstacle to the Commission's position here is the argument that Congress was made fully aware of [a] formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rule-making authority to the Commission in discrete areas allegedly on the premise that the 1914 [legislative] debate withheld such authority. Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a de facto ratification by Congress.

[19] But de facto ratification through acquiescence in an administrative construction is not lightly attributed. The argument before us is not that Congress, by a combination of its knowledge of the agency construction and its inaction . . . could be said to have accepted the construction. Even in these cases it can be argued quite plausibly that imputing ratification in this fashion fails to take into account significant practical aspects of the legislative process: those legislators actually aware of the construction in question may not have been so concerned as to raise it to the attention of most members, and even in the event some legislators were deeply troubled by the construction, the press of other business was such as to keep the question on the "back burner." Here the situation is different. The view that the Commission lacked substantive rule-making power has been clearly brought to the attention of Congress and, rather than simply failing to act on the question, Congress, in expanding the agency's powers in several discrete areas of marketing regulation, affirmatively enacted limited grants of substantive rule-making authority in the Wool Products Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953 as amended in 1967, the Textile Fiber Products Identification Act of 1958, and the Fair Packaging and Labeling Act of 1967. Thus it is argued that Congress would not have granted the agency such powers unless it had felt that otherwise the agency lacked rule-making authority.

[20] Conceding the greater force of this argument than one premised on congressional inaction, we believe it must not be accepted blindly. In such circumstances, it is equally possible that Congress granted the power out

of uncertainty, understandable caution, and a desire to avoid litigation. While this argument, like any theory requiring us to draw inferences from congressional action or inaction, may be speculative, we believe it cannot be ignored here. For there is ample evidence that, while some of the limited rule-making legislation may well have been influenced by the belief that the 1914 Act did not grant the Commission substantive rule-making power, at least during the passage of the Packaging and Labeling Act of 1967, this assumption was not accepted and was thought by many congressmen to be an open question, despite the protestations of the Commission's chairman that the agency was powerless under the 1914 Act. . . . [I]mputing congressional ratification to a disputed administrative construction of its powers is, in the words of the Supreme Court, shaky business. Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the de facto ratification argument is unwise. In such circumstances, we must perform our customary task of coming to an independent judgment as to the statute's meaning, confident that if Congress believes that its creature, the Commission, thus exercises too much power, it will repeal the grant.

[21] In sum, we must respectfully register our disagreement with the District Court's painstaking opinion. Its result would render the Commission ineffective to do the job assigned it by Congress.

The Supreme Court and Administrative Agency Power

Alabama Ass'n of Realtors v. Dept. of Health and Human Servs., 141 S.Ct. 2485 (2021); West Virginia v. EPA, 142 S.Ct. 2587 (2022)

Despite what you have just read, there is considerable doubt whether the approach outlined in *National Petroleum Refiners Association* would be followed today. The Supreme Court's 2021 decision in *Alabama Association of Realtors* and its 2022 decision in *West Virginia* exemplify current skepticism in the federal judiciary about broad (and particularly novel) assertions of agency power—even when statutory text can be read to confer considerable power.

In *Alabama Association of Realtors*, the Center for Disease Control had enacted an eviction moratorium in reliance on a broad delegated rulemaking power. The statutory power—§ 361(a) of the Public Health Service Act—empowered the Surgeon General, with the approval of the Secretary of Health and Human Services, to: "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." The next sentence continued: "For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

The Supreme Court struck down the eviction moratorium for want of authority.[925] First, the Court pointed out, the second sentence of § 361(a) "informs" the first, by illustrating the kinds of measures that might be necessary to respond to disease within the meaning of the provision. An eviction moratorium "relates to interstate infection far more indirectly" than do the various activities in the second, making it a "stretch" to imagine that the first sentence contained such a power.

But even if the text were more ambiguous, the Court held, "the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. That is exactly the kind of power that the CDC claims here. At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium." In addition, the eviction moratorium intruded into "an

[925] *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (holding that for "major" policy decisions, "something more than a merely plausible textual basis for the agency action is necessary," and "[t]he agency instead must point to 'clear congressional authorization' for the power it claims").

area that is the particular domain of state law: the landlord-tenant relationship. Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."

More generally, reading § 361(a) to give the CDC the power to block evictions "would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure necessary. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?" Such an "unprecedented" reading of § 361(a) would dramatically break with the historical use and understanding of the provision. Indeed, "[s]ince [its] enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."

The following year, in 2022, the Court decided West Virginia v. Environmental Protection Agency, holding among other things that "something more than a merely plausible textual basis for . . . agency action is necessary" to justify assertions of power in ways that would amount to an "extraordinary grant of regulatory authority" or work a "radical or fundamental change" in a statutory scheme. The Court would henceforth presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies": in such "major question" cases, "clear congressional authorization for the power [the agency] claims" would be required. In that case, the Court applied the major-questions doctrine to conclude that the EPA lacked power, under the Clean Air Act, to cap CO_2 emissions pursuant to a "generation shifting" plan designed to spur a transition to cleaner energy sources.

Plainly these cases indicate a much less charitable approach to agency efforts to implement broad policy initiatives pursuant to capacious but ambiguous statutory language. Do they imply the end of *National Petroleum Refiners*?

NOTES

1) What kinds of practices should constitute "unfair methods of competition" that do not constitute violations of the antitrust laws? Why?
2) In what respects is the 2022 Section 5 policy statement different from the 2015 one? In what respects is it different from the rules imposed by the antitrust statutes?
3) When Congress created the FTC, why do you think it left DOJ with power to enforce the antitrust laws after doing so?
4) The market-study power allows the FTC to require compulsory production of documents and information from companies.
    a. What three market studies would you undertake and why? Specify the recipients, the nature of the specifications in the studies, and the payoff of the study for antitrust enforcement and policy.
    b. The market study power is limited in practice by the OMB requirement for burdensome additional process (under the Paperwork Reduction Act) for studies with more than nine respondents. What effect do you think this has in practice? Is it a good rule?[926]
5) Does it add value to have antitrust and consumer protection (from "unfair" and "deceptive" acts and practices) under the same roof at the FTC?
6) Imagine that the FTC was given plenary rulemaking power by Congress to enact rules to prevent unfair methods of competition, defined as violations of the antitrust laws. (In other words, assume a broad rulemaking power but a narrow definition of UMC under Section 5.). What rules would you write and why?

[926] *See, e.g.*, FTC, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (Oct. 2016) 37 (noting that the FTC began the process of obtaining authorization in September 2013, eventually receiving approval in August 2014). *See generally*, *e.g.*, *Methodologies for Conducting Market Studies—Note by the United States*, OECD Working Paper DAF/COMP/WP3/WD(2017)19 (May 26, 2017) (detailing FTC's approach to market studies under 6(b), including the OMB requirements).

7) When should the FTC use its internal administrative litigation process rather than litigating in district court? Should this option exist at all?
8) Do you think the FTC has competition rulemaking power today? Do you think it should have?
9) Do you think the reasoning in *Humphrey's Executor* is undermined by the later introduction of the FTC's power to litigate in district courts?

C. The Department of Justice

The Department of Justice was the nation's first antitrust enforcer, and is the only federal criminal antitrust authority.

1. Structure and Organization

The Antitrust Division of the Department of Justice is led by an Assistant Attorney General ("AAG") for the Antitrust Division, and managed by a front office that also includes Deputy Assistant Attorneys General and a number of Counsel. The AAG reports to the Attorney General and serves at the pleasure of the President.

The Division consists of the following sub-components:

- Seven civil sections, which handle merger and nonmerger matters in their respective industries:
  - the Defense, Industrials, and Aerospace Section;
  - the Financial Services, Fintech, and Banking Section;
  - the Healthcare and Consumer Products Section;
  - the Media, Entertainment, and Communications Section;
  - the Technology and Digital Platforms Section;
  - the Transportation, Energy, and Agriculture Section; and
  - a Civil Conduct Task Force to coordinate and facilitate nonmerger enforcement;
- Criminal enforcement units:
  - two Criminal Sections based in Washington, D.C.;
  - criminal enforcement teams in Chicago, New York, and San Francisco;
  - a Procurement Collusion Strike Force to tackle bid-rigging and other crimes affecting government procurement;
- an Economic Analysis Group; and
- a variety of other offices handling policy, appellate, international, administrative, and other matters.

Overall, the Antitrust Division reported 1,022 "direct authorized positions" for Fiscal Year 2023.[927] The Division works closely with other components of the Department of Justice, including the Office of the Solicitor General, which leads and coordinates work on Supreme Court matters and advises on some appeals.[928]

2. Powers and Functions

Just like the FTC, the DOJ's civil investigations commonly begin with an informal or voluntary phase, featuring voluntary interviews and productions of documents and information, which may progress to the issue of compulsory process—CIDs—with the approval of the Assistant Attorney General.[929] The Antitrust Division Manual sets out helpful guidance on DOJ's conduct of civil antitrust investigations.[930]

DOJ enforces the Sherman Act and the Clayton Act directly. Pursuant to 15 U.S.C. § 25, DOJ may file suit in district court "to prevent and restrain" antitrust violations. DOJ may also sue under the antitrust laws to recover

[927] https://www.justice.gov/d9/2023-03/atr_bs_section_ii_omb_cleared_3.8.23.pdf.

[928] The FTC generally has independent litigating authority (*i.e.*, independent of DOJ), including some limited independence to litigate in the Supreme Court. *See* 15 U.S.C. § 56.

[929] 15 U.S.C. § 1312.

[930] *See* https://www.justice.gov/atr/division-manual.

treble damages for injuries suffered by the United States (*e.g.*, when the federal government is itself an injured customer or supplier).[931] As a result, DOJ faces none of the complexities or controversies raised by the FTC's unique structure, nor must it struggle with the peculiarities of Section 13(b) of the FTC Act. Like the FTC, DOJ issues guidance to consumers and businesses, and files amicus briefs and statements of interest in antitrust cases.

The Expediting Act

From 1903 to 1974, a statute called the Expediting Act provided for direct appeal from a district court to the Supreme Court—bypassing the courts of appeal—in civil antitrust cases brought by DOJ. The statute aimed to empower the Court to build a coherent national antitrust jurisprudence.[932] But it came with real costs. In *Brown Shoe*, for example, Justice Clark complained that the Act "deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals,"[933] while Justice Harlan grumbled that there was "much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony any exhibits to determine whether a single district judge's findings of fact are supportable."[934] In 1974, Congress amended the Act, allowing direct appeal only if the district court certifies that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice."[935] President Ford's signing statement noted that the change would "halt the practice of clogging the Supreme Court docket by taking all antitrust appeals directly to that tribunal, thus denying it the wisdom and advice of the U.S. Circuit Courts of Appeals."[936] Perhaps coincidentally, the Court's last substantive merger decision was in 1975.[937]

The Justice Department also has unique statutory authority to undertake certain kinds of antitrust investigations, including those relating to certain kinds of telecommunications, banks, railroads, and airlines, including by virtue of carveouts from FTC jurisdiction.[938]

However, the Department of Justice does face some unique constraints as a civil enforcer. Unlike the Federal Trade Commission (which simply makes proposed consent decrees available for public comment before they are finally entered by the Commission), DOJ is subject to the Tunney Act, which provides for federal court review of DOJ consent decrees to determine that the settlement is in the public interest.[939] (The Tunney Act was enacted as a response to Congressional concern regarding the Nixon Administration's interference with a DOJ investigation of ITT.[940]) As part of that process, DOJ files with the court a "Competitive Impact Statement" explaining why the proposed remedy resolves the relevant antitrust concerns, and the court reviews the settlement and evidence bearing on its suitability.

Tunney Act review has sometimes led to changes in relief. Most famously, following the district court's Tunney Act review of the blockbuster consent decree breaking up AT&T in 1982, Judge Greene required additional provisions to be added to address his concerns.[941] But there is room for some disagreement about the scope of

[931] 15 U.S.C. § 15a.

[932] Robert C. Bonges, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 Mich. L. Rev. 1240, 1242 (1965); W. Wallace Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 Geo. Wash. L. Rev. 746, 748 (1969).

[933] Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (Clark, J., concurring).

[934] Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (Harlan, J., concurring in part and dissenting in part).

[935] 15 U.S.C. § 29(b).

[936] Statement by the President re: S.782 Antitrust Procedures and Penalties Act (Dec. 21, 1974), https://www.fordlibrarymuseum.gov/library/document/0055/1668810.pdf.

[937] United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86 (1975).

[938] *See supra* notes 900–901 and accompanying text.

[939] 15 U.S.C. § 16.

[940] *See* George Lardner Jr., *On Tape, Nixon Outlines 1971 "Deal" to Settle Antitrust Case Against ITT*, WASHINGTON POST (Jan. 4, 1997).

[941] United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982). *See also* Memorandum Order, United States v. Comcast Corp., Case No, 1:11-cv-106 (D.D.C. filed Sept. 1, 2011) (ordering additional relief pursuant to consent decree in light of hearing).

review and the extent to which DOJ should enjoy deference.[942] The next extract, taken from one such statement, states DOJ's view of the purpose and scope of Tunney Act review; the following note sets out Judge Leon's perspective.

Competitive Impact Statement, United States v. Intuit Inc.

Case No. 1:20-cv-3441 (D.D.C. filed Dec. 10, 2020)

[1] The Clayton Act, as amended by the [Antitrust Procedures and Penalties Act], requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to broad discretion to settle with the defendant within the reaches of the public interest.

[2] As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not make de novo determination of facts and issues. Instead, the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court should bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest. More demanding requirements would have enormous practical consequences for the government's ability to negotiate future settlements, contrary to congressional intent. The Tunney Act was not intended to create a disincentive to the use of the consent decree.

[3] The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. The ultimate question is whether the remedies obtained by the Final Judgment are so inconsonant with the allegations charged as to fall outside of the reaches of the public interest.

[4] Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to construct its own hypothetical case and then evaluate the decree against that case. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place, it follows that "the court is only authorized to review the decree itself, and not to effectively redraft the complaint to inquire into other matters that the United States did not pursue.

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[942] For a thoughtful overview of the issues, *see*, *e.g.*, Alexandra P. Clark, *Leaving Judicial Review with the Judiciary: The Misplaced Role of Agency Deference in Tunney Act Public Interest Review*, 78 Wash. & Lee L. Rev. 925 (2022). *See also*, *e.g.*, Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 Antitrust Bull. 113 (2018).

CASENOTE: Tunney Act in Action: United States v. CVS Health Corp.

407 F. Supp. 3d 45 (D.D.C. 2019)

Despite some of the language in the preceding extract, the full reach of the Tunney Act was demonstrated in 2019 when Judge Leon of the U.S. District Court for the District of Columbia undertook an extensive review—effectively, a mini-trial—of the proposed resolution of the CVS / Aetna merger. His opinion contains an extended discussion of the role and nature of Tunney Act review, and offers an interesting complement to DOJ's perspective above.

The court began by underscoring the importance of the Tunney Act: "Industry players, consumer groups, and state regulatory bodies have all raised concerns about CVS's acquisition of Aetna. The merger combines two healthcare giants. Its effects, for better or worse, will be felt by millions of consumers. As I explained to the parties near the outset of this case, with so much at stake, the congressionally mandated public interest inquiry must be thorough. Indeed, if the Tunney Act is to mean anything, it surely must mean that no court should rubberstamp a consent decree approving the merger of one of the largest companies in the United States and the nation's third-largest health-insurance company, simply because the Government requests it!"

The court then outlined the government's obligations during the Tunney Act process: (1) the government must "publish its proposed final judgment and a competitive impact statement in the Federal Register at least sixty days before the effective date of the proposed judgment"; (2) during this 60-day period, the government "must receive and consider written comments about its proposed judgment"; (3) once the period ends, it must "publish a response to those comments in the Federal Register and file the same response with the Court," and "publish the proposed final judgment and competitive impact statement in a newspaper of general circulation in the district where the case is pending and to furnish the competitive impact statement to members of the public upon request."

In addition to these steps, the court explained, the Tunney Act requires the court to "determine that the entry of such judgment is in the public interest." In this case, the court was far from satisfied with the government's written responses to the comments received. The response was "rife with conclusory assertions that merely reiterate the Government's confidence in its proposed remedy, but shed little light on the reasons for that confidence. Indeed, the Government's perfunctory response to the public comments was particularly disappointing in light of the volume and quality of the comments to which it was responding!"

As a result, the court decided to take an unusual step. "Rather than risk an uninformed public interest determination that relied too heavily on responses like these from the Government, I decided to hold hearings on the Motion to Enter the Proposed Final Judgment. The hearings were designed to assist the Court in evaluating the public record. The parties and the amici were given the opportunity to propose up to three witnesses who could be called to testify. The Court alone would decide which of those witnesses it believed would be most helpful to its analysis and how much time would be allotted to each witness. In the end, the amici were allowed to call a combined total of three witnesses who were permitted to testify for a total of four hours. CVS and the Government were allowed the same combined total of witnesses and the same combined total number of hours of testimony. To reinforce my repeated emphasis that the hearings were not a trial, cross-examination was not permitted. Only the Court was allowed to ask follow-up questions during the direct examination of each witness."

The court's public-interest determination would be guided by the language of the Tunney Act, 15 U.S.C. § 16(e)(1), which required the court to consider: "(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint." In exercising this function, Judge Leon allowed, a court cannot "force the government to make a claim. The Government, alone, chooses which causes

of action to allege in its complaint." But this does not mean the court should be blinkered: "[W]hile the Government is certainly entitled to great deference—if not a presumption of accuracy—when it contends that a proposed final judgment is in the public interest, evidence by third parties that persuasively demonstrates actual or likely harm to the public interest will overcome that presumption and the proposed final judgment will be denied."

In this case, as it turned out, the hearing had vindicated the government's position. The variety of concerns raised by amici had "shed a healthy light on this merger," but had not "persuasively demonstrate[ed] that the concerns currently exist or are likely to develop." Indeed, "the markets at issue are not only very competitive today, but are likely to remain so post-merger." Accordingly, there was no basis for rebuttal of the presumption in favor of the government's position, and the government's motion to enter the final judgment would be granted.

Unlike the FTC, DOJ has a criminal antitrust jurisdiction. This enforcement function is part of the Justice Department's overall (*i.e.*, non-antitrust) criminal enforcement program. The criminal program represents a significant share of DOJ's resource allocation and enforcement activity: in calendar year 2019, for example, DOJ initiated 38 criminal grand jury investigations and filed 26 criminal cases, compared to 72 merger and 18 non-merger civil investigations and 19 civil cases.[943] In criminal cases, the Sherman Act provides for imprisonment for up to ten years and/or criminal fines of up to $1 million for individuals and $100 million for corporations. A separate federal statute (18 U.S.C. § 3571) provides for criminal fines for up to twice the amount of gain or loss resulting from the offense, which may be an even larger amount.

In recent decades, criminal antitrust enforcement had been aimed only at conduct that is *per se* illegal under Section 1 of the Sherman Act: as we saw in Chapters IV and V, this includes price-fixing, market division, and bid-rigging. But the Division has recently signaled an expansion of its criminal enforcement program on at least two fronts.

First, the Division has undertaken for the first time criminal enforcement efforts relating to the fixing of wages by employers. The pathbreaking effort here was the prosecution of Neeraj Jindal and John Rogers in the U.S. District Court for the Eastern District of Texas for fixing wages to be paid to physical therapists. As we saw in Chapter V, the defendants argued that, while their conduct was nakedly anticompetitive, the fact that they were fixing purchase prices for labor rather than sale prices for other products or services meant that criminal scrutiny was inappropriate, including because they were denied fair notice that their conduct could be criminally prosecuted. The court disagreed and agreed with the Division that price-fixing and wage-fixing should be treated alike under Section 1, including in criminal cases. (However, the defendants were subsequently acquitted of wage-fixing by a jury.[944])

In a second—and rather more far-reaching—development, the Justice Department has recently launched an effort to criminally prosecute monopolization cases:

> One enforcement tool that the division has not recently utilized is Section 2. But unlike labor market collusion, Section 2 has not always been underenforced. Historically, the division didn't shy away from bringing criminal monopolization charges, frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended to monopolize markets.
>
> Our job is straightforward: We enforce the laws that Congress passes. When it comes to criminal antitrust, that means prosecuting violations of not just Section 1, but also Section 2. Moving forward we intend to do our job as law enforcers and fully prosecute violations of our competition laws.

[943] U.S. Dept. of Justice, *Antitrust Division Workload Statistics FY2010–19*, https://www.justice.gov/atr/file/788426/download.

[944] *See* U.S. Dept. of Justice, Press Release, Former Health Care Staffing Executive Convicted of Obstructing FTC Investigation into Wage-Fixing Allegations (Apr. 14, 2022).

> Section 2 is a criminal statute that's been on the books for over 130 years. It has been a felony for more than 40 years, which Congress reaffirmed in 2004 when it increased the felony penalties. Yet, since the late 1970s, the Antitrust Division effectively ignored Section 2 when it came to criminal enforcement. Going forward, the division will no longer ignore Section 2. A long history of Section 2 prosecutions and accompanying case law show us the way forward. If the facts and the law, and a careful analysis of department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the division will not hesitate to enforce the law.[945]

As we saw in Chapter VII, the law of monopolization is complex and enigmatic: as a result, many commentators expressed surprise that the Justice Department would take its criminal enforcement program in this direction. Among other things, courts have rejected constitutional fair-notice challenges to criminal enforcement under Section 1 because prosecution is limited to a reasonably clear set of *per se* offenses.[946]

In October 2022, DOJ pushed this program ahead by obtaining a guilty plea to criminal attempted monopolization in a case involving "highway crack-sealing services." As the press release explained:

> The president of a paving and asphalt contractor based in Billings, Montana, has pleaded guilty to attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming.
>
> According to the one-count felony charge filed on Sept. 19 in the U.S. District Court for the District of Montana, Nathan Nephi Zito attempted to monopolize the markets for highway crack-sealing services in Montana and Wyoming by proposing that his company and its competitor allocate regional markets. The charge states that as early as January 2020, Zito approached a competitor about a "strategic partnership" and proposed that the competitor stop competing with Zito's company for highway crack-sealing projects administered by Montana and Wyoming. In return, Zito's company would stop competing with the competitor for projects administered by South Dakota and Nebraska. Zito offered to pay his competitor $100,000 as additional compensation for lost business in Montana and Wyoming. Zito further proposed that he and his competitor enter into a sham transaction to disguise their collusion. The charge states that Zito intended to monopolize the highway crack-sealing services markets in Montana and Wyoming. Today, the District Court accepted the guilty plea that was allocuted on Oct. 14, when Zito admitted to the facts contained in the charge.
>
> "Congress criminalized monopolization and attempted monopolization to combat criminal conduct that subverts competition," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm."[947]

The charged conduct here appears to have amounted to an invitation to collude: a practice that had been hitherto regarded as a matter warranting only civil antitrust enforcement under Section 5 of the FTC Act.[948]

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[945] Richard A. Powers, *Effective Antitrust Enforcement: The Future Is Now* (remarks of June 3, 2022); *see also* Jonathan Kanter, *Remarks at 2022 Spring Enforcers Summit* (Apr. 4, 2022) ("We will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization.").

[946] *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 350 (1964); United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985) ("The sufficiency of fair notice of the acts proscribed by a statute must be examined in the context of the conduct with which a defendant is charged. . . . A defendant cannot challenge a statute on the ground that it may not give fair notice that conduct other than that with which he is charged is forbidden. . . . The indictment charges Miller with price-fixing. Because price-fixing has repeatedly been held to be per se illegal under the Sherman Act . . . Miller could not have had any reasonable doubt that his conduct violated section one."); United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 979 (W.D. Pa. 1988) ("In light of the decision in *Professional Engineers* . . .and the substantial case law holding that restrictions upon competitive bidding constitute price-fixing, a per se violation of the Sherman Act, the Court finds little merit in defendants' claims that they were not given fair notice that split agreements could constitute violations of § 1.").

[947] U.S. Dept. of Justice, Press Release, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022).

[948] *See supra* note 895 and accompanying text.

Why do you think DOJ chose to pursue a criminal enforcement path under Section 2 here? Further prosecutions have followed.[949]

The DOJ Cartel Leniency Program

One of the most significant challenges in fighting cartels is finding them. Cartel agreements are seldom publicized by their participants, and it can be difficult to spot collusive behavior in the marketplace. In order to aid the detection and prosecution of price-fixing cartels and other criminal practices (like bid-rigging schemes), DOJ has developed a highly successful leniency program to obtain information and cooperation from a surprising place: the cartel participants themselves.[950]

The core of the program is simple. DOJ grants immunity from criminal prosecution, and significant protection from civil prosecution,[951] to the first participant in an individual cartel to come forward, disclose the cartel to DOJ, and cooperate fully with the Department's investigation and prosecution efforts, while also making best efforts to provide restitution to victims.[952] Subsequent applicants for a particular cartel do not qualify for the protection of the leniency scheme, although they may obtain some benefits—in the form of Division support for a sentencing reduction—if they are first to self-report a *second* cartel while cooperating in the investigation into the first. Priority order is determined by a "marker" system that ensures that the first entity to contact DOJ and request leniency will be the protected applicant if it satisfies the substantive criteria for leniency.

The prospect of leniency for the first applicant, leaving the applicant's competitors to face investigation, prosecution, and penalties, is intended to have a destabilizing effect on cartels. It creates strong incentives for cartel participants to inform the authorities and cooperate against their competitors: thus undermining what may already be a fragile relationship among the cartelists.

NOTES

1) Should DOJ expand its criminal antitrust program beyond *per se* violations of the antitrust laws? To what?
2) The cartel leniency program has been successful. Could, and should, we introduce something similar for non-criminal antitrust violations? If so, what might it look like, and how would it work?

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[949] U.S. Dept. of Justice, Press Release, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022).

[950] *See generally* U.S. Dept. of Justice Antitrust Division Manual § 7-3.300 ("Antitrust Division Leniency Policy and Procedures"), https://www.justice.gov/atr/page/file/1490246/download; *see also* Antitrust Division Leniency FAQs, https://www.justice.gov/atr/page/file/1490311/download.

[951] Specifically, limitation of liability to single damages for conduct individually attributable to the applicant, rather than treble damages for the conduct of the conspiracy as a whole. 15 U.S.C. § 7a-1(a).

[952] "Type A" leniency may be granted to an applicant if: "1. At the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; and 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity." Type B leniency may be granted to an organization that does not qualify for Type A leniency if: "1. At the time the applicant reports the illegal activity, the Antitrust Division does not yet have evidence against the applicant that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the applicant; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity; and 7. The applicant is the first to qualify for leniency for the illegal activity reported and the Antitrust Division determines that granting leniency to the applicant would not be unfair to others." U.S. Dept. of Justice Antitrust Division Manual § 7-3.300 ("Antitrust Division Leniency Policy and Procedures"), https://www.justice.gov/atr/page/file/1490246/download

3) Should the DOJ Antitrust Division be apolitical, responsive to the views of the White House, both, or neither? Explain your view.
4) As *CVS / Aetna* demonstrates, the Tunney Act can be used to run something like a mini-trial in which the nominal "parties" are aligned and the judge is testing their joint position. Is this desirable? What concerns or challenges might arise in this context?
5) As noted above, the Expediting Act was repealed in 1974; the last substantive Supreme Court merger decision was in 1975.[953] Do you think these are related? Should we bring back the Expediting Act?

D. The Two-Agency Model

In general, the two federal antitrust agencies typically enjoy a close and cooperative relationship. The agencies work together to avoid duplicative investigations through the "clearance" process, a somewhat informal system of allocating proposed investigations to one agency or another based, first, on statutory power (antitrust investigations in some industries, like airlines, are allocated to DOJ by statute); second, on comparative expertise and experience (a critical consideration in practice: for example, the FTC has unparalleled experience in handling hospital and physician mergers, while the DOJ has unrivalled expertise in certain agricultural markets); and, finally, on relative workload at the time the matter arises. Most of the time, this process works well enough to avoid generating significant headaches for either the agencies or for parties who appear before them.

But the overlapping jurisdiction of the antitrust agencies is, at least, not an obvious way to structure an antitrust enforcement system. The existence of two agencies, with different structures, internal processes, and leadership may strike an observer as odd, and it certainly raises some questions.

There is plenty to be said in defense of the arrangement. There are some striking complementarities between the Department of Justice, on the one hand (which can be highly responsive to democratic changes in the White House), and the Federal Trade Commission (which—given the staggered seven-year terms of the members of its bipartisan Commission—has a history of continuing policy and enforcement programs across multiple Administrations[954]). In addition, each agency has unique advantages that the other does not: for example, the Department of Justice has the power to conduct criminal prosecutions, and faces no threat of "deadlock" due to recusals or vacancies; while the Federal Trade Commission has some unique tools—including the market study power in Section 6(b), the ability to serve as a specialized antitrust court for administrative litigation, and very significant policy resources—that are well adapted to bringing specialized expertise to bear on complex civil matters. In addition, the FTC's simultaneous role as a consumer protection regulator (including its role as the nation's leading privacy enforcer) creates scope for competition concerns to be addressed in a manner that is sensitive to consumer protection ones, and vice versa. The two-agency model is also, of course, exactly what Congress intended in enacting the FTC Act.

However, there are also fair grounds for worry and for criticism on prudential grounds (setting aside here the concern expressed by some, noted above, that the FTC's structure may be constitutionally unsound[955]). These include:

- **Risk of actual conflict.** Critics point to the risk—and occasionally the reality—that the agencies will take different positions on antitrust enforcement and policy issues. This came to an unfortunate head in the *Qualcomm* litigation, in which the Department of Justice intervened in an FTC antitrust enforcement action, before the Ninth Circuit, on the side of the defendant and against the FTC(!).[956] In 2023, the

[953] United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86 (1975).

[954] For example, in recent decades the FTC has pursued long, cross-Administration, bipartisan campaigns to roll back the scope of state-action immunity, invigorate hospital merger enforcement, and enforce the antitrust laws on the IP/antitrust frontier.

[955] *See supra* note 888 and accompanying text.

[956] *See, e.g.*, Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, FTC v. Qualcomm Inc., Case No. 19-16122 (9th Cir. Aug. 30, 2019) (supporting Qualcomm in its litigation with the FTC); Brief for the United States as Amicus Curiae, FTC v. Schering-Plough Corp., No 05-723 (May 2006) (opposing the FTC's petition for certiorari in its first pharmaceutical patent "reverse payment" case and criticizing the FTC's approach).

U.S. Government Accountability Office published a study of the jurisdictional overlap between the agencies, concluding that interagency conflicts are rare.[957]

- **Divergent positions on enforcement and policy.** More generally, the agencies have divided in recent years on enforcement policy relating to the interaction between antitrust and intellectual property, with the FTC generally favoring more aggressive antitrust enforcement in this area, while the Justice Department—at least during the Trump Administration—favored greater deference to the perceived demands of IP policy.[958]
- **Nonpublic procedures.** Critics also charge that there is some procedural unfairness in the fact that businesses are subject to the jurisdiction of two agencies, with different leadership and policy preferences, and that antitrust matters are allocated between those agencies through a largely informal, nonpublic, and non-transparent "clearance" process. Divergences in substantive law or policy—for example, the FTC's unilateral withdrawal from the Vertical Merger Guidelines in 2021, with DOJ declining to follow suit—have fueled this criticism.[959]
- **Possibility of parallel proceedings.** One could imagine circumstances under which the FTC and DOJ were both investigating the same practice or transaction. The Supreme Court has expressly held that such parallel proceedings are legally unobjectionable, in light of the broader reach of Section 5 of the FTC Act,[960] but such an outcome might—at a minimum—raise sharp questions about whether federal enforcement resources were being efficiently and prudently deployed.

A prominent challenge to this arrangement was filed in 2020 by Axon Enterprise, a manufacturer of police body cameras that acquired Vievu, a key rival, triggering an FTC administrative challenge to unwind the merger. Axon responded by filing a complaint for declaratory judgment in federal district court in Arizona, mounting a facial challenge to the dual-enforcement system, as well as the constitutional soundness of the FTC itself. The ensuing litigation prompted the Supreme Court to rule unanimously that federal courts may hear constitutional challenges to the FTC's structure even while administrative proceedings are pending.[961] Following that decision, the FTC abandoned its challenge.[962]

Complaint, Axon Enterprise, Inc. v. FTC

Case No. 2:20-cv-14 (D. Ariz. filed Jan. 3, 2020)

1. Plaintiff Axon Enterprise, Inc. ("Axon") brings this case to challenge the unconstitutional structure and processes employed by Defendant, the Federal Trade Commission ("FTC" or "Commission"), to prohibit lawful mergers and extract unwarranted settlements. The FTC exists as a Constitutional anomaly. In one hand, it wields a mighty sword—the power to not only prosecute cases, but to judge them too; in the other, a massive shield—near-total protection from political accountability, with the Commissioners who direct its actions subject to neither democratic election nor at-will removal by the President. For decades, the agency has leveraged that power against American companies indiscriminately—including, most recently, Axon. No longer. [. . .]

30. Because the DOJ and FTC have dual jurisdiction to review mergers, the agencies have created a "clearance" process to decide which agency will investigate a merger. Over the years, the agencies have reached a series of informal, non-public understandings as to how they will divvy up merger investigations. Clearance is an opaque, black-box process. The agencies maintain complete control over the structure and implementation of the clearance process and have total discretion to decide which agency will undertake a particular merger

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[957] GAO, ANTITRUST: DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT, GAO-23-105790 (Jan. 2023).

[958] *See, e.g.*, Anita Alanko, *New Madison Approach to Antitrust Law and IP Law*, 28 Cath. U. J. L. & Tech 219, 238–41 (2020) (noting divergence)

[959] *See* U.S. Dept. of Justice, Press Release, *Justice Department Issues Statement on the Vertical Merger Guidelines* (Sept. 15, 2021).

[960] FTC v. Cement Inst., 333 U.S. 683, 694 (1948).

[961] Axon Enterprise, Inc. v. FTC, 598 U.S. __, No. 21-86 (Apr. 14, 2023).

[962] Order Returning Matter to Adjudication and Dismissing Complaint, In the Matter of Axon Enterprise, Inc., FTC Dkt. No. 9389 (F.T.C. Oct. 6, 2023) ("[W]e have come to the difficult conclusion that the public interest requires that this litigation no longer be continued.").

investigation. Merging parties have no insight or input into which agency will investigate their merger. Moreover, clearance rules and procedures are not mandated by statute, subject to Congressional scrutiny, or promulgated through notice-and-comment rulemaking.

31. Which agency reviews a consummated transaction is critical. The DOJ's only means of unwinding a consummated merger is to sue in federal court. The FTC, on the other hand, has the option to sue in federal court under Section 13(b) of the Act, or to commence an internal administrative hearing before either a single Commissioner or an ALJ on the FTC's payroll.

32. The FTC's internal administrative hearing provides none of the substantive or procedural protections enjoyed by litigants in federal district court. These proceedings are, instead, fraught with Due Process and Equal Protection deficiencies.

- Federal district court judges are Article III impartial fact-finders who owe no allegiances to the DOJ. In contrast, any FTC Commissioner (including one who voted to sue the defendant) is permitted to preside over the administrative hearing; and, at best, an ALJ appointed by the FTC and on the FTC's payroll will preside.
- Federal court proceedings are governed by the Federal Rules of Evidence and Federal Rules of Civil Procedure. Neither apply in FTC administrative proceedings.
- The DOJ must satisfy a more rigorous standard of finding that a merger or acquisition "substantially lessens competition," whereas the FTC can satisfy a less onerous "unfair competition" standard in the administrative context.
- Litigants in federal court can appeal adverse decisions to impartial circuit court judges. Decisions rendered in FTC administrative proceedings must first be appealed to the same FTC Commissioners who voted to sue the defendant at the outset.
- The DOJ cannot change the findings made by the district court when appealing a decision to the circuit court. However, the FTC Commissioners, on appeal, can ignore and completely change the merits decision rendered in the administrative proceedings *before* the defendant appeals to the circuit court.
- Different appellate standards of review also apply depending on where the case originated. The district court's factual findings in a DOJ case are reviewed for "clear error," whereas "[t]he findings of the Commission as to the facts, if supported by evidence, shall be *conclusive*." 15 U.S.C. § 45(c) (emphasis added).

33. Given the inherently biased and unfair nature of administrative hearings at the FTC and the limited review of its factual findings on appeal, it is no surprise that the agency believes itself to be virtually untouchable in its internal arena. [. . .]

36. Worse still, the FTC lacks any political check on how it exercises its unfair procedures against the companies that happen to fall within its bailiwick. Although Article II "vested" all "executive Power" in the President, Art. II, § 1, cl. 1, and charged the President alone with "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, the FTC enforces the antitrust laws outside of Presidential control. [. . .]

40. FTC Commissioners, however, are shielded from at-will Presidential removal—and hence from the key mechanism of democratic accountability—in violation of Article II. The FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a 7-year term. 15 U.S.C. § 41. But once appointed, the Commissioners are not subject to removal by the President absent a finding of "inefficiency, neglect of duty, or malfeasance in office." Id. This means FTC Commissioners are not politically accountable for their actions. So long as the Commissioners stop short of "malfeasance," the President can do nothing but stand by and watch, no matter how much he disagrees with them. Moreover, because the FTC-appointed ALJ can also only be removed for "good cause" in accordance with statutory procedures, 5 U.S.C. § 7521(a), (b)(1), an impermissible "dual-layer of protection" even further restricts Executive control.

41. This means that crucial law enforcement actions, sometimes with massive consequences for the American economy (and here, for public safety), are currently taken by individuals not elected by the People, and not

controlled by the President. That runs directly contrary to Article II and the democratic principles underlying the Constitution. [. . .]

COUNT I (Violation of Axon's Fifth Amendment Rights) [. . .]

58. The imminent administrative proceeding, in which the FTC will act as prosecutor, judge, and jury, violates Axon's Due Process rights, including but not limited to depriving Axon of the ability to make its case before a neutral arbiter.

59. By arbitrarily subjecting Axon to unfair procedures before an administrative body, rather than to a fair trial before a neutral judge appointed in accordance with Article III of the Constitution with the procedural protections of a federal court, the FTC has violated Axon's Equal Protection rights. [. . .]

COUNT II (The FTC's Structure Violates Article II) [. . .]

62. The FTC's actions separately violate Axon's Constitutional rights because the agency's structure, on its face, is unconstitutional under Article II. In particular, Article II requires that Executive officials exercising law-enforcement power be removable at will by the President. Although the FTC clearly exercises law-enforcement power—including but not limited to Axon's case—its Commissioners are shielded from at-will removal. Moreover, ALJs appointed by the FTC, who also can only be removed for cause, create an impermissible dual-layer of insulation. Because the agency's structure violates Article II, any actions taken against Axon under its present structure are invalid.

COUNT III (Declaratory Judgment that Axon's Acquisition Did Not Violate Antitrust Laws) [. . .]

64. Axon's acquisition of Vievu did not violate Clayton Act § 7 or any other antitrust law. The acquisition was not likely to substantially lessen competition and in fact has not done so.

NOTES

1) How would you allocate enforcement authority between the agencies?
2) How important is it that antitrust enforcement is: (a) responsive to political change; or (b) bipartisan? Why?
3) The clearance process for allocating investigations between the agencies is nonpublic and effectively unreviewable. Is this a problem?
4) Suppose that you are the head of the Antitrust Division (or FTC Chair) and the FTC (or the Division) files a complaint with which you disagree. Specifically, you think the enforcement action represents bad and harmful policy. What should you do?
5) Does the FTC's 2022 Section 5 statement affect the strength of Axon's constitutional objections?

E. Merger Review and the Hart-Scott-Rodino ("HSR") Act

Both agencies allocate a majority of their civil enforcement resources (including personnel and dollars) to merger enforcement: indeed, merger review is sometimes described as the agencies' primary function. To get a sense of the relative importance of merger review compared to conduct investigations, take a look at this DOJ workload chart covering 2010–19:

U.S. Department of Justice Antitrust Division Workload Statistics FY 2010–2019: Investigations

Total Investigations Initiated, by Primary Type of Conduct	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Sherman §1 - Restraint of Trade [inc. civil and criminal]	46	47	31	25	30	39	42	38	44	52
Sherman §2 - Monopoly	2	2	2	2	0	3	1	0	0	6
Clayton §7 - Mergers	64	90	74	65	81	67	65	55	65	72
Others	3	3	0	0	2	2	4	7	5	4

Source: *https://www.justice.gov/atr/file/788426/download* (footnotes omitted)

The merger review function at both agencies is governed by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, which sets out the statutory framework for premerger notification in the United States and establishes a timeline under which most merger review is conducted. The Premerger Notification Office ("PNO") of the FTC administers the HSR system on behalf of both agencies. The HSR statute is supplemented by implementing regulations,[963] and by informal interpretations issued by PNO.[964]

HSR was enacted in 1976 to create a system in which a purchaser that plans to undertake a merger or acquisition of a certain size must notify that transaction to the antitrust agencies *before* consummating the deal (*i.e.*, before the buyer actually becomes the owner of the target). The central purpose of the Act is to impose a "waiting period" to give the agencies a chance to review the deal, during which time the parties may not consummate the transaction.[965]

Under the Act, only certain mergers are "reportable" or subject to the notification obligation. The requirements are somewhat intricate, adjusted every year for inflation, and subject to some exceptions and special rules,[966] but in very broad terms (and with effect from March 6, 2024):

- transactions valued up to $119.5 million are not reportable;
- transactions valued at more than $478 million are reportable;
- transactions valued at between $119.5 million and $478 million are reportable *if*:
    - one party has assets or annual sales of at least $23.9 million *and*
    - the other party has assets or annual sales of at least $239 million.[967]

Under the Act, if a transaction is reportable, merger review begins with a "merger notification": a form, a fee, and a set of materials containing basic information about the proposed transaction.[968] An "initial waiting period" then follows—in most cases, 30 days after the notification[969]—in which the agencies have an opportunity to decide whether further investigation is appropriate, to determine which agency will be cleared to conduct that investigation, and (at least to some extent) conduct an initial review of the transaction. This may involve requesting and receiving some documents and information from the parties and/or from other market participants.

During the initial waiting period, the HSR Act forbids the parties from closing the deal. For the purposes of the antitrust laws, the merging parties are still considered separate entities during this time: coordination on commercial or competitive matters may, accordingly, constitute an antitrust violation. (Improper coordination with the other side of a deal that has been proposed but not consummated is often known as "jumping the gun" or a "gun-jumping violation."[970])

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[963] 16 C.F.R. Parts 801–03.

[964] *See* https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations.

[965] For thoughtful discussion of the HSR system, its history, and its purposes, *see* Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Fiscal Year 2020 Hart-Scott Rodino Annual Report to Congress (Nov. 8, 2021); Noah Phillips, *The Repeal of Hart-Scott-Rodino*, Global Comp. Rev. (Oct. 6, 2021); William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825 (1997); Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865 (1997); William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 Admin. L. Rev. 889 (1997); James W. Mullenix, *The Premerger Notification Program at The Federal Trade Commission*, 57 Antitrust L.J. 125, 130-31 (1988); Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679, 681-82 (1977).

[966] *See*, *e.g.*, 15 U.S.C. § 18a(c) (listing various categories of exempt transactions); 16 C.F.R. Part 802 (exemption rules).

[967] *See generally* 16 C.F.R. Part 801 (coverage rules).

[968] See 16 C.F.R. Part 803, Appendix A (HSR Form); Appendix B (instructions for completing the form).

[969] *See* 15 U.S.C. § 18a(b)(1)(B) (30 day default and 15-day period for cash tender offers); 11 U.S.C. §363(b) (abbreviated waiting period for certain filings in connection with a bankruptcy proceeding); FTC Premerger Notification Office Informal Interpretation 1307002 (July 19, 2013) (interpreting same).

[970] A number of merging parties have fallen into this trap. *See*, *e.g.*, U.S. Dept. of Justice, Press Release, Justice Department Reaches Settlement with Duke Energy Corporation for Violating Premerger Notification and Waiting Period Requirements (Jan. 18, 2017); U.S. Dept. of Justice, Press Release, Justice Department Settles Lawsuit Against Computer Associates For Illegal Pre-Merger Coordination (Apr. 23, 2002). *See generally*, *e.g.*, M. Howard Morse, *Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing*, 57 Bus. Lawyer 1463 (2002).

The agencies may grant early termination of the waiting period if they conclude there are no competitive concerns and further delay is unwarranted.[971] At the time of writing, however, this practice is suspended—the agencies cited the transition to a new Administration and the volume of HSR requests as a reason to suspend the practice for a short time.[972]

At the expiration of the initial waiting period, the agency must decide whether to do nothing and simply let the waiting period expire (thus leaving the parties free to close their deal), or whether to issue a "Second Request." This is a demand pursuant to the HSR Act for additional documents and information relating to the transaction. Typically, a Second Request requires the production of a very significant amount of material, representing months of work by the company's employees and attorneys. When a Second Request is issued, a new waiting period begins, and runs until 30 days after the parties have substantially complied with the Second Request.[973] The HSR rules allow a party to withdraw and immediately refile a notification once (a "pull and refile") without needing to pay an additional filing fee.[974]

HSR violations (which might include failure to produce relevant materials, or violations of the suspensory obligation) are punishable by statutory penalties of up to $51,744 per day.[975] Failure to substantially comply with a notification requirement of a Second Request may also result in an order to comply, an extension of the statutory waiting period, or other equitable relief.[976]

The following brief extract from the FTC's public Model Second Request should give you a flavor of what a Second Request looks like in practice, and the kinds of information that are included.

FTC, Model Second Request (revised January 2024)

REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [COMPANY]

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Request for Additional Information and Documentary Material (the "Request") requires a complete search of "the Company" as defined in Definition D1 of the Definitions, which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss any questions and possible modifications with the Commission representatives identified in Instruction I(11) of this Request. All modifications to this Request must be agreed to in writing by a Commission representative. Submit the information requested in Specifications 1 and 10(a) of this Request promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search or interrogatory response obligations.

SPECIFICATIONS

1. Submit:

> (a) one copy of each organization chart and personnel directory in effect since January 1, [Yr-2] for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product [Service];
>
> (b) a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other Persons retained by the Company in any capacity relating to the Proposed Transaction or any Relevant Product [Service]

[971] 15 U.S.C. § 18a(b)(2); 16 C.F.R. § 803.11.

[972] FTC, Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021).

[973] *See* 15 U.S.C. § 18a(e)(1).

[974] 16 C.F.R. § 803.12.

[975] 15 U.S.C. § 18a(g); FTC, Press Release, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023 (Jan. 6, 2023).

[976] 15 U.S.C. § 18a(g).

(excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);

(c) for each Person identified in response to Specification 1(b), the agent's or representative's title, business address, and telephone number, as well as a description of that Person's responsibilities in any capacity relating to the Proposed Transaction or any Relevant Product [Service] provided in any Relevant Area; and

(d) a Information Systems Diagram for the Company.

2. List each Relevant Product manufactured or sold [Service provided] by the Company in the Relevant Area, and for each:

(a) provide a detailed description of the product [service] [including its end uses]; and
(b) state [the brand name and] the division, subsidiary, or affiliate of the Company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each Relevant Product [Service] listed in response to Specification 2 above, state or provide:

(a) the Company's Sales to all customers in each Relevant Area, stated separately in units and dollars;

(b) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured in the U.S.;]

(c) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured outside the U.S.;]

(d) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products purchased from sources outside the Company and resold by the Company rather than of products manufactured by the Company;

(e) the names and addresses of the [XX] Persons who purchased the greatest unit and dollar amounts of the Relevant Product [Service] from the Company in each Relevant Area;

(f) [a sample contract for each customer type]; and

(g) the name, address, estimated Sales, and estimated market share of the Company and each of the Company's competitors in each Relevant Area in the manufacture or sale of the Relevant Product [provision of the Relevant Service].

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any Relevant Product [provides or has provided any Relevant Service] in the Relevant Area for the Company, and for each such facility state: the current nameplate and practical capacity and the [annual, monthly] capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity; the number of shifts normally used at the facility; and the feasibility of increasing capacity [by X% or more], including the costs and time required.

5. For each Relevant Product manufactured or sold [Service provided] in the Relevant Area, submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising [and marketing] Plans and strategies.

6. Submit all documents relating to the Company's or any other Person's Plans relating to any Relevant Product [Service] [in the Relevant Area], including, but not limited to, business plans; short-term and long-range strategies and objectives; expansion or retrenchment plans; research and development efforts; presentations to management committees, executive committees, and boards of directors; and budgets and financial projections. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents for prior years, and cumulative year-to-date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:

(a) the Sales, market share, or competitive position of the Company or any of its competitors;

(b) the relative strength or weakness of Persons producing or selling each Relevant Product [providing each Relevant Service];

(c) supply and demand conditions;

(d) attempts to win customers from other Persons and losses of customers to other Persons, [including, but not limited to, all sales personnel call reports and win/loss reports];

(e) allegations by any Person that any Person that manufactures or sells any Relevant Product [provides any Relevant Service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints; and threatened, pending, or completed lawsuits; and

(f) any actual or potential effect on the supply, demand, cost, or price of any Relevant Product [Service] as a result of competition from any other possible substitute product [service].

8. Submit:

(a) all documents relating to the Company's or any other Person's price lists, pricing Plans, pricing policies, pricing forecasts, pricing strategies, price structures, pricing analyses, price zones, and pricing decisions relating to any Relevant Product [Service] in the Relevant Area; and

(b) all studies, analyses, or assessments of the pricing or profitability of any Relevant Product [Service] sold or provided by the Company, [by third-party distributors/lessee dealers/etc.], or through other channels of trade in any Relevant Area.

9. Identify the Person(s) at the Company responsible for creating or monitoring price strategy, [price zones,] pricing practices, and pricing policies for the Relevant Product [Service] in the Relevant Area. Describe in detail the Company's pricing strategy, pricing practices, and pricing policies, including, but not limited to:

(a) a description regarding how, and how often, the prices for each Relevant Product [Service] in each Relevant Area are determined;

(b) whether, and how, pricing based on customer characteristics, presence of other competitors, or other factors are used by the Company in determining the prices for each Relevant Product [Service] in each Relevant Area; and

(c) [whether, and how, price zones and/or pricing based on geographic areas, the presence of local competitors, or other factors are used by the Company for each Relevant Product [Service] in each Relevant Area.]

10. Identify each electronic database used or maintained by the Company in connection with any Relevant Product [Service] at any time after January 1, [Yr-3], that contains information concerning the Company's (i) products [services] and product codes; (ii) facilities; (iii) production; (iv) shipments; (v) bids or sales proposals; (vi) sales; (vii) prices; (viii) margins; (ix) costs, including but not limited to production costs, distribution costs, standard costs, expected costs, and opportunity costs; (x) patents or other intellectual property; (xi) research or development projects; or (xii) customers. . . .

{*Eds: the full Model Second Request has 31 specifications, 19 definitions, and 11 instructions!*}

* * *

In practice, the baseline timing (*i.e.*, substantial compliance plus 30 days) is often modified by entry into a negotiated "timing agreement" with the reviewing agency.[977] In this agreement, the parties and the agency typically agree that the parties will provide something less than full substantial compliance with the Second Request, in exchange for giving the agency a longer period of time in which to review the transaction after receiving the materials.

The HSR system transformed merger review. It gave the agencies the opportunity to detect and investigate troubling deals before they happen, and it gives businesses a measure of confidence that a merger is unlikely to be challenged by the agencies after it has been reviewed.[978] But the HSR system does *not* provide affirmative "clearance"—in the sense of positive approval—of a deal. The antitrust agencies can challenge deals after HSR review, and even after a Second Request. Indeed, the HSR Act expressly says so: "Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law."[979] And, on rare occasions, the agencies have been willing to do so in practice.[980] But whether and when it is sound policy to challenge an HSR-reviewed merger, and whether the fact of a previous HSR review should weigh against a later challenge, is a matter of considerable controversy.[981]

A recent judicial discussion of this issue arose in the second motion-to-dismiss decision in the *Facebook* litigation. Facebook argued that the FTC's challenge to its consummated acquisitions of Instagram and WhatsApp was inappropriate, including because both transactions were notified under the HSR system, and the Instagram deal proceeded to a Second Request. The court held that this was no barrier to the suit.

FTC v. Facebook, Inc.

581 F. Supp. 3d 34 (D.D.C. 2022)

Judge Boasberg.

[1] As required by the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, the FTC reviewed the acquisition of Instagram prior to closing to assess whether it posed anticompetitive concerns. Whereas most mergers are cleared quickly, in this instance the review took over four months. During that scrutiny, the agency took the rare step of requiring the submission by the parties of additional information or documentary material relevant to the proposed acquisition. Eventually, however, Facebook and Instagram satisfied the agency's concerns, and in August (over four months after the merger was announced), the Commission voted 5-0 to allow it to proceed without any challenge or conditions.

[2] Facebook's acquisition of WhatsApp was also subject to Hart-Scott-Rodino Act pre-merger review, but the FTC, once again, did not block it. Although the FTC again conveniently omits any mention of this review in its Complaint, the Court may take judicial notice of that public agency action.

[3] Facebook thus argues that because the FTC unconditionally cleared both acquisitions under Section 7 of the Clayton Act, which Congress enacted to address incipient threats to competition that Section 2 would not condemn, it is hypocritical for the agency to now claim that the acquisitions run afoul of Section 2. The FTC, for its part, counters that HSR filings do not result in acquisitions being approved or blessed by the FTC or DOJ, that the HSR Act merely established reporting requirements for acquisitions over a certain size, and that the prior HSR reviews are simply beside the point here.

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[977] See FTC Model Timing Agreement (Feb. 27, 2019), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf

[978] For a variety of perspectives on HSR, *see* supra note 965.

[979] 15 U.S.C. § 18a(i)(1).

[980] *See*, *e.g.*, Complaint, United States v. Parker-Hannifin Corp., Case No. 1:17-cv-01354 (D. Del. filed Sept., 26, 2017); Menesh S. Patel, *Merger Breakups*, 2020 Wis. L. Rev. 975, 990–91 (2020) (noting same).

[981] *See*, *e.g.*, Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 Criterion J. on Innovation 29 (2020).

[4] The FTC has the better argument, at least insofar as its HSR reviews at the time of the acquisitions do not bear significantly on the issue now before the Court. The HSR Act does not require the FTC to reach a formal determination as to whether the acquisition under review violates the antitrust laws. On the contrary, it merely obliges the parties to the merger to report certain information to the agency and to wait to consummate the deal until the expiration of the statutory waiting period, which the FTC may extend while it gathers additional information. Indeed, while the FTC conducted an investigation of the challenged acquisitions here and eventually voted to close the investigation, its closing letter to Facebook expressly stated, "This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require." That letter is in keeping with the Act's explicit language making clear that the FTC can bring post-review challenges, notwithstanding the previous closing of HSR review without an antitrust-violation determination: "Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law." 15 U.S.C. § 18a(i)(1).

[5] In light of that reality, the FTC's decisions to close the investigations into Facebook's acquisitions do not provide a basis to grant the company's Motion. The Commission could have decided to close the investigations for many reasons, and it would be improper to draw a merits conclusion about the legality of the mergers on the basis of those decisions, especially at the motion-to-dismiss stage. *Cf. Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 713–14 (4th Cir. 2021) (affirming district court's exclusion of evidence relating to Department of Justice's investigation of merger without challenging it and holding that Department's "decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources").

NOTES

1) How many different values does a merger review process serve? In what order do you think it is important that merger review be: (a) fast; (b) thorough; and (c) final?
2) Under what circumstances, if any, should the fact of a previous HSR review (without a challenge) weigh against an agency challenge to a consummated transaction, either (a) as a matter of law, or (b) as a matter of enforcement policy? Why? What impact, if any, should it have on a *private* challenge by an injured customer?
3) Some merging parties have received "close at your own risk" letters from the FTC at the end of the HSR waiting period, stating that the agency will not sue to block the deal but that the parties are on notice that the agency may investigate further and/or take enforcement action in the future. When, if ever, should the agencies send such letters?
4) As earlier noted, the Early Termination program has been suspended. Is there an argument that it should be removed permanently from the HSR procedures? What are the best arguments in favor of, and against, the Early Termination program?
5) A transaction may have a high valuation without raising competition concerns; conversely, it may have a low valuation and present a serious threat to competition. So why does the size of the parties matter for HSR reportability? Can you think of better criteria for reportability?
6) If you were designing or amending the HSR statute, what penalties or other consequences would you apply to an acquiror that has misrepresented facts, or withheld documents, in an HSR filing? *See* 15 U.S.C. § 18a(g).

F. The States

The fifty states, plus the District of Columbia, Guam, and Puerto Rico, are active to varying degrees in antitrust enforcement. The level and depth of state involvement varies widely. Some states include teams with experience and expertise to litigate significant antitrust matters: in particular, among others, New York, California, Colorado, Washington state, and Texas have established reputations as prominent actors in antitrust

enforcement. In addition, states cooperate to investigate and pursue matters that affect more than one jurisdiction.[982]

Under the federal antitrust laws, states may bring suit to obtain injunctive relief to protect themselves as direct victims of antitrust wrongdoing, under the provision that entitles private parties to injunctive relief, or on behalf of their citizens in what is sometimes called a "parens patriae" action.[983] States may also sue for treble damages suffered by them or by their citizens.[984] 15 U.S.C. § 15f directs the Attorney General of the United States to notify a State AG when the federal AG has filed an antitrust suit and has "reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws."[985]

In addition to its powers under the federal antitrust system, every state has its own antitrust and competition laws. Although these usually resemble federal antitrust law—including equivalents of Sherman Act Sections 1 and 2, Clayton Act Section 7, and FTC Act Section 5—closely, some states' laws exhibit important differences. For example, California's unfair-competition law was of critical importance in the antitrust battle between Epic Games and Apple.[986] Many states allow indirect purchasers—such as those who buy at an overcharge from an intermediary that buys from an antitrust wrongdoer—to sue for damages: as we shall see in Chapter XII, federal law does not.[987] Some states are considering significant change to their antitrust statutes in ways that would create serious divergence from federal antitrust law.[988] The Supreme Court has held that federal antitrust law does not preempt state antitrust statutes that reach more broadly,[989] although other federal statutes have been held to do so on occasion.[990] While the vast majority of state antitrust enforcement is civil, there is a limited amount of state criminal enforcement.[991]

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[982] This has been the case in some recent tech enforcement actions. *See, e.g.*, New York v. Facebook, Inc., Case No. 1:20-cv-3589 (D.D.C. filed Dec. 9, 2020); United States v. Google, Case No 1:20-cv-3010 (D.D.C. filed Oct. 20, 2020); Colorado v. Google LLC, Case No. 1:20-cv-3715 (D.D.C. filed Dec. 17, 2020); Texas v. Google, Case No. 4:20-cv-957 (E.D. Tex. filed Dec. 16, 2020).

[983] Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of s 16 of the Clayton Act, 15 U.S.C.A. s 26; she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by reason thereof. But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. . . . There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts."); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972) ("Hawaii plainly qualifies as a person . . . whether it sues in its proprietary capacity or as parens patriae."). *See also* Memorandum Amicus Curiae of the United States Regarding Microsoft Corporation's Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, United States v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. filed Apr. 15, 2002) 4–9 (discussing same and collecting authorities).

[984] 15 U.S.C. § 15c (parens patriae damages); 15 U.S.C. § 15 (injured-person damages).

[985] 15 U.S.C. § 15f.

[986] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1052–53 (N.D. Cal. 2021) ("As a competitor who claims to have suffered injury from Apple's unfair practices, [to sue under California's Unfair Competition Law,] Epic Games must show that Apple's conduct (1) threatens an incipient violation of an antitrust law, (2) violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or (3) otherwise significantly threatens or harms competition. These findings must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. As a quasi-consumer, on the other hand, Epic Games has several tests available for showing unfairness. Although some courts have continued to apply the "tethering" test stated above, others have applied a "balancing" test that requires the challenged business practice to be immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers based on the court's weighing of the utility of the defendant's conduct against the gravity of the harm to the alleged victim. Stated otherwise, the balancing test involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.").

[987] *See infra* § XII.C.

[988] *See, e.g.*, N.Y. Senate Bill S933C, https://legislation.nysenate.gov/pdf/bills/2021/S933C (proposed "abuse of dominance" bill).

[989] California v. ARC Am. Corp., 490 U.S. 93, 102 (1989) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States. . . . Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. . . . And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law.").

[990] *See, e.g.*, Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 635 (1975).

[991] *See, e.g.*, Office of the New York Attorney General, Press Release, *A.G. Schneiderman Announces Bust Of Broome County Waste Management Cartel For Colluding To Rig Bids And Fix Prices* (Apr. 9, 2018), https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-bust-broome-county-waste-management-cartel-colluding.

In practice, while relatively few states have the resources to undertake major antitrust litigations alone, they often serve as critical partners to the federal agencies.[992] State Attorneys-General may be the first to learn about anticompetitive practices or transactions, bringing them to the attention of the federal enforcers and working with them on investigations; and if matters proceed to litigation, states may serve as important partners in court.[993] The support of a state Attorney General not only means that more talented litigators with local knowledge are available for an enforcement effort: it may also may help to reassure a judge that the competitive concerns are shared by those with local expertise, rather than being a theoretical concern held only by distant D.C. regulators.

Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement

53 Duke L.J. 673 (2003)

The most accepted roles for the states are ones derived from the states' comparative advantages. Three advantages stand out: familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals.

1. Familiarity with Local Markets. For all the talk about globalization of competition, antitrust enforcement is routinely concerned about competition in local markets. Almost half of the FTC's merger complaints make allegations involving local markets, which should not be surprising given the number of challenges to mergers in groceries, gasoline retailing, construction, natural gas transportation, and health care. Intimate knowledge about local competitive conditions is essential to effective antitrust enforcement. State attorneys general have a clear comparative advantage in understanding local markets. . . .

2. Familiarity with Local Institutions. State attorneys general are more likely than federal enforcers to know and be known and be trusted by state and local government officials. They are thus uniquely situated to help prevent anticompetitive harm from being inflicted on or by government agencies. Government and nonprofit entities play major roles, even in the United States' capitalist economy. . . . Although federal enforcers regularly engage in "competition advocacy," as it is called, no Washington-based voice is likely to be listened to as carefully as the voice of the state attorney general.

3. Compensating Individuals. State attorneys general recover money for injured individuals in two ways. First, states implicitly represent taxpayers by recovering overcharges exacted from state purchasing operations. Beyond that, state attorneys general are the only governmental officials specifically authorized by federal statute to recover monetary relief in treble damages for natural persons injured by Sherman Act violations. The Justice Department has no such power, and the FTC finds authority for a court to award consumer redress only by implication (and very rarely invokes the authority in antitrust cases). {*Eds.: this extract was written before the Supreme Court's decision in* AMG Capital.}

* * *

The final point mentioned in this extract—the states' power to obtain consumer redress—has acquired additional importance with the FTC's loss in *AMG Capital* of its power to obtain equitable monetary relief in district court. The continuing ability of state enforcers to do so ensures that at least one path to this form of redress remains open.[994]

Of course, the federal and state enforcers do not always see eye to eye on every issue, and some friction is a hallmark of any polycentric system. Thus, sometimes one or more states may take a different position on

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[992] For a very different perspective, *see* Richard Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940–42 (2001) (refusing to "make a fetish of federalism" and arguing that the states should be stripped of their authority to enforce the federal antitrust laws for reasons including "the poor quality of the briefs and arguments").

[993] *See*, *e.g.*, FTC, Press Release, FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems (Feb. 27, 2020); U.S. Dept. of Justice, Press Release, Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020) (noting suit along with 11 State AGs).

[994] *See generally* Schonette Walker, Steve Scannell & Abigail Wood, *Bridging the Gorge: States Prevent Retention of Ill-Gotten Profits Through Disgorgement*, Comp. Pol'y Int'l (Aug. 2021).

antitrust enforcement from the federal agencies: for example, state AGs may litigate when the federal government declines to do so.[995] In Sprint / T-Mobile, famously, the Antitrust Division negotiated a consent decree that, in the view of the Department of Justice, resolved the competitive concerns, but a group of state Attorneys-General disagreed and filed suit in an (unsuccessful) effort to block the deal.[996] In rejecting the challenge, the court treated DOJ's decision as "informative but not decisive."[997] This episode generated some high-profile controversy about the relationship between federal and state antitrust enforcement.[998]

Statement of Interest of the United States of America, New York v. Deutsche Telekom

Case No. 1:19-cv-5434 (S.D.N.Y. filed Dec. 20, 2019)

[1] The United States, through the Department of Justice's Antitrust Division and the FCC, investigated the proposed merger of T-Mobile US, Inc. ("T-Mobile") and Sprint Corporation ("Sprint"). The Antitrust Division (along with a number of state Attorneys General) and the FCC concluded that consumers would benefit from the combination of T-Mobile and Sprint accompanied by the divestitures and other relief the Antitrust Division (in its proposed Final Judgment) and the FCC (in its order) secured to protect competition and promote the public interest. This outcome benefits consumers through the combination's enhanced output—the increased availability of a higher quality mobile wireless network for consumers. Specifically, TMobile has committed to providing 5G coverage to 85% of the rural population within three years, and 90% of the rural population within six years. In addition, the relief the Antitrust Division and the FCC secured will maintain the competitive structure of the industry through a substantial divestiture of assets from T-Mobile to DISH Network Corporation ("DISH"), which has committed to building a nationwide network that will put its idle spectrum holdings into use by mobile wireless consumers for the first time. As a result, the relief the Antitrust Division (and a number of state Attorneys General) and the FCC secured means consumers in rural areas will gain new access to high quality 5G networks and consumers nationwide will continue to have four fully competitive options for their mobile wireless services.

[2] A group of thirteen states and the District of Columbia (the "Litigating States") seek to block the merger in its entirety. In doing so, they ask this court to undo the benefits of the relief secured by the Antitrust Division (and our fellow state Attorneys General) and the FCC. The Litigating States face a high bar in their challenge. To win a permanent injunction that would block the merger, they must convince the court their request to block the merger in its entirety is in the public interest, among other obstacles. In other words, they must convince this honorable court that it is not merely acceptable, but beneficial to the public, to deprive consumers nationwide of a higher quality T-Mobile network and DISH's commitment to build a nationwide retail mobile wireless network, and to deprive consumers in rural states, which have disproportionately chosen to support the Antitrust Division's settlement rather than join in this litigation, of new access to 5G networks. Indeed, that the Litigating States' proposed remedy will affirmatively harm consumers in rural states by denying them these benefits weighs strongly against a nationwide injunction. [. . .]

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[995] *See, e.g.*, California v American Stores, 495 U.S. 271 (1990) (states permitted to sue for injunctive relief, notwithstanding FTC negotiation of a consent order).

[996] New York v. Deutsche Telekom AG, 439 F.Supp.3d 179 (S.D.N.Y. 2020).

[997] New York v. Deutsche Telekom AG, 439 F.Supp.3d 179, 224 (S.D.N.Y. 2020) ("Not only have the FCC and DOJ conditioned the transaction before the Court, the Court will accord their views some deference. Where federal regulators have carefully scrutinized the challenged merger, imposed various restrictions on it, and stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices[,] we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Indeed, the Supreme Court has looked to the views of federal regulators on multiple occasions for assistance in conducting its Section 7 analysis. As Plaintiff States note, however, the views of the FCC and DOJ cannot simply be adopted entirely at face value, as their assessment of a merger's legality may be guided by considerations that are outside the scope of Section 7. Ultimately, the Court will treat the views of the FCC and DOJ as informative but not conclusive. . . . [M[indful that the agencies are intimately familiar with this technical subject matter, as well as the competitive realities involved, the Court treats their views and actions as persuasive and helpful evidence in analyzing the competitive effect of this merger[.]") (cleaned up).

[998] *See, e.g.*, Michael Murray, U.S. Department of Justice, Antitrust Federalism (remarks of Aug. 31, 2020) (explaining DOJ perspective on deference owed to federal enforcers' decisions).

[3] . . . The proposed Final Judgment outlines a structural settlement that preserves the existence of a fourth competitor in the nationwide market for retail mobile wireless service. The settlement requires T-Mobile to divest to DISH certain retail wireless business and network assets, and supporting assets and provide to DISH all services, access, and assets necessary, to facilitate DISH building and operating its own mobile wireless services network and to enable it to compete in the marketplace. This is intended to ensure the development of a new national facilities-based mobile wireless carrier competitor to ultimately remedy the anticompetitive harms that flow from the change in the market structure that otherwise would have occurred as a result of the merger. Further, DISH will bring spectrum (that it currently has no obligation to build out in this way) into service as a mobile broadband 5G service that will serve consumers across the country.

[4] The Antitrust Division reached these conclusions in its role as the enforcer of the federal antitrust law on behalf of consumers nationwide. This required, among other things, considering the interests of differently situated consumers. Ultimately, the proposed Final Judgment fulfills the twin goals of a merger remedy. It permits the merger to proceed, enabling rural, and other, consumers to benefit from its promised efficiencies, while adopting remedies that will protect consumers in and bring new competition to urban areas that may have been at greater risk without this settlement. Currently, ten states—Arkansas, Colorado, Florida, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, and Texas—have joined the Antitrust Division's suit seeking approval of its settlement, and three more states—Arizona, New Mexico, and Utah—have publicly supported the deal. [. . .]

[5] Just as the existence of the remedies secured by the Antitrust Division and the FCC are important factors in this court's equitable relief analysis, so too are the conclusions of both agencies that the remedies they secured are in the public's interest. Giving weight to these determinations is all the more justified here, where granting the Litigating States' request for a nationwide injunction would directly conflict with the Antitrust Division's proposed Final Judgment and the FCC's order, effectively displacing these remedies and preventing the merger's significant procompetitive efficiencies from flowing to consumers. [. . .]

[6] Both the Antitrust Division and the FCC had the ability to pursue a nationwide injunction to block the merger, but after an extensive review and analysis, instead chose to secure other relief. After studying the merger for fifteen months on the basis of its antitrust expertise and from the perspective of the nation as a whole, the Antitrust Division reached a settlement that provided substantial long-term benefits for American consumers by allowing consumers to benefit from the transaction's efficiencies while protecting them from its harms. Similarly, the FCC conducted a thorough and lengthy investigation, informed by its expertise regarding competition among providers of various telecommunications services and its nationwide perspective, and concluded that the proposed transaction, as modified by the FCC's own set of conditions, would be in the public interest. [. . .]

[7] As Congress recognized, state government bodies do not hold the same policy concerns as federal government bodies. In representing the rights and interests of their residents, they do not consider the rights and interests of the nation as a whole. In particular, they do not possess the expansive view of federal enforcers who regularly oversee antitrust investigations and make remedy recommendations on a national scale. They have neither the authority nor the responsibility to act on behalf of the nation, and while their concerns are not invalid, they are bound by state borders. [. . .]

[8] The Litigating States' strong interest in this merger does not justify their attempt to substitute their judgment for the nationwide perspective of the United States. The United States does not intend to discourage private party plaintiffs—whether states, businesses, or individuals—from spending their time and effort assisting the federal government in antitrust enforcement. The Clayton Act was enacted not merely to provide private relief, but to serve as well the high purpose of enforcing the antitrust laws. At the same time, states cannot and should not displace the federal government's role as the nation's federal antitrust enforcer. When a group of states attempts to do so by seeking relief that quite arguably may benefit certain citizens while harming others, such a remedy is not in the public interest, and, respectfully, should not satisfy this court's test for injunctive relief.

* * *

In other circumstances, however, the Antitrust Division has argued that *no* inference ought to be drawn from a federal agency's decision not to challenge a transaction, in the adjudication of a subsequent challenge by another plaintiff. In an amicus brief filed in the *Steves and Sons v. JELD-WEN* private merger challenge, the Division denied that the defendant could rely on the Justice Department's decision not to intervene, urging the court that:

> [N]o inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI. As the United States has stated twice previously in this case in response to JELD-WEN's assertions, there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.[999]

Are these positions consistent? Are there reasons of principle why a decision to affirmatively accept a remedy might warrant different treatment from a decision not to take enforcement action?

NOTES

1) What are the benefits and risks of increased state-level antitrust enforcement activity? When and why should we allocate national tax dollars to support state rather than federal antitrust enforcement?
2) State antitrust laws usually follow the contours of the federal antitrust statutes, but they do not always do so. Is this a reason for concern, a cause for celebration, or both? Explain.
3) Are there circumstances under which a court should defer to a state enforcer's view rather than the contrary view of the federal agencies?
4) Are there any reasons why it might not be optimal for the states have power to sue for parens patriae damages on behalf of their citizens?
5) What kinds of interstate cooperation could help improve the effectiveness of state enforcement? How?[1000]

G. Remedies I: Injunctive Relief

The primary remedy in government cases—whether brought by the FTC, DOJ, or state governments—is usually injunctive relief: that is, a court order designed to terminate and remedy the antitrust violation, after liability has been established. (Damages—the signature remedy in private cases, although sometimes available to government plaintiffs—are considered in the next chapter.) In the following extract, Doug Melamed gives a very brief tour of the most important purposes of an antitrust remedy.

A. Douglas Melamed, Afterword: The Purposes of Antitrust Remedies

76 Antitrust L.J. 359 (2009)

Broadly speaking, antitrust remedies serve four different purposes:

(1) *Compensation of victims of unlawful conduct.* The most straightforward purpose is compensation of those who have been harmed by the unlawful conduct. . . .

(2) *Punishment and deterrence of unlawful conduct.* Furthering the punishment and deterrence objectives requires remedies the ex ante anticipation of which would cause economic actors to expect conduct that violates the antitrust laws to be ultimately unprofitable. . . . .

(3) Terminating and preventing the recurrence of unlawful conduct. There is probably no dispute that a determination that the defendant has violated the antitrust laws should at the very least be cessation of the unlawful conduct and some kind of assurance that the unlawful conduct will not be resumed in the near future. . . . .

[999] Brief for the United States of America as Amicus Curiae in Support of Appellee Steves And Sons, Inc., Steves and Sons, Inc. v. JELD-WEN, Inc., Case No. 19-1397, at *15 (4th Cir. filed Aug. 23, 2019).

[1000] The National Association of Attorneys General is very active in facilitating antitrust cooperation. *See* https://www.naag.org/issues/antitrust/.

(4) Restoring competitive conditions to the market harmed by the unlawful conduct. Questions regarding this remedial objective are in some ways the most difficult and controversial. Restorative remedies can include divestiture and mandatory injunctions. They can be problematic for three basic reasons. They could impose a disproportionate and inequitable burden on the defendant. They could wittingly or unwittingly substitute government regulation for market competition. And they could fail to achieve their purpose because of the inability of those fashioning the remedy fully to understand the markets and to foresee the future. In these ways, the cure of restorative remedies could be worse than the disease.

* * *

Antitrust injunctions may be preliminary (*i.e.*, granted on an interim basis, usually to preserve the status quo, pending some more extensive proceeding) or permanent (*i.e.*, reflecting a full and final merits adjudication). The agencies are situated a little differently with respect to their access to injunctive relief. When the FTC contemplates permanent proceedings in administrative court, preliminary relief—such as an injunction preventing the parties closing a notified transaction after the expiration of the HSR waiting period—is only available in district court, because the Commission (and its ALJs) can only award a permanent cease-and-desist order.[1001] As a result, the FTC has a practice, in merger cases, of filing complaints simultaneously in administrative court (seeking permanent relief) *and* in federal district court (seeking a preliminary injunction, and perhaps a temporary restraining order preventing the parties from closing the deal during the preliminary injunction proceedings). DOJ, by contrast, has no power to litigate administratively and no limits on its ability to litigate in district court: as a result, DOJ's practice usually involves a combined proceeding in federal district court to obtain both preliminary and permanent injunctive relief.

The agencies also face slightly different standards when seeking preliminary relief. DOJ's power to obtain an injunction is grounded in Section 15 of the Clayton Act, 15 U.S.C. § 25, which rests on the same standards for preliminary relief that apply to all litigants, including the provisions of Federal Rule of Civil Procedure 65. The generally applicable standard typically requires the government to show "a reasonable likelihood of success on the merits" as well as a favorable "balance of equities": most courts do not separately require the government to make a separate showing of irreparable injury.[1002] By contrast, the FTC's power to seek a preliminary injunction is grounded in Section 13(b) of the FTC Act, as the district court explained in the FTC's (successful) effort to enjoin a New Jersey hospital merger:

> Pursuant to Section 13 of the FTC Act, the FTC can file suit in district court seeking a preliminary injunction to prevent a merger [or to restrain other conduct] pending a FTC administrative adjudication whenever the Commission has reason to believe that a corporation is violating, or is about to violate [the antitrust laws.] The standard for granting a preliminary injunction under the FTC Act is not the same as the standard used to grant injunctive relief under Federal Rule of Civil Procedure 65. Rather, a court should issue a preliminary injunction pursuant to Section [13(b)] "[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."
>
> Under Section 13(b), a court first considers the FTC's likelihood of success on the merits. Next, the court weighs the equities to determine whether a preliminary injunction is in the public interest. The question is whether the harm that the Defendants will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued. Ultimately, in deciding whether to preliminarily enjoin a merger[,] doubts are to be resolved against the transaction.

[1001] The remedial powers of the ALJ and Commission in administrative proceedings are limited to issuing a permanent cease-and-desist order. Interim or preliminary relief is not available. 15 U.S.C. § 45(b).

[1002] *See*, *e.g.*, United States v. Siemens Corp., 621 F.2d 499, 505 (2d Cir. 1980) ("The proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor. . . . [O]nce the Government demonstrates a reasonable probability that s 7 has been violated, irreparable harm to the public should be presumed.").

> The FTC must show that it has a likelihood of success of demonstrating, during the administrative proceeding, that the proposed merger [or conduct] violates [a relevant provision of law.] . . . [A]t the preliminary injunction stage, the FTC does not need to establish that the proposed [practice or transaction is unlawful]. Rather, the FTC need only show that there is a reasonable probability that the challenged [practice or] transaction will [be unlawful].[1003]

Courts have wide discretion in designing antitrust injunctive relief. The Supreme Court has stated that the touchstone is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct."[1004] This often includes what is known as "fencing-in" relief: that is, prohibitions on conduct that may not violate the antitrust laws in its own right, but which presents an unacceptable risk of illegality or harm given the circumstances following the violation. And when an antitrust agency is involved, courts exhibit considerable deference to the agency's judgment in designing an effective remedy.

National Lead exemplifies these principles. In that case, the FTC had determined that sellers of lead pigments had entered into an anticompetitive conspiracy that involved the use of "zone delivered pricing": that is, flat delivered pricing within particular geographic zones. The Commission issued an order requiring the participants to refrain from any conspiracy or agreement to use zone pricing, or any other system that resulted in identical prices to customers. The Commission also prohibited the participants from *unilaterally* using any pricing mechanism that resulted in identical prices with competitors as a result of zone delivered pricing. The participants objected to this latter limitation which, they argued, was an impermissible overreach. The Supreme Court thus faced the question: could the FTC ban a noncollusive and usually lawful pricing practice as part of a remedial order, when that same conduct could not be prohibited in its own right? The Court had no difficulty in saying yes.

FTC v. National Lead Co.

352 U.S. 419 (1957)

Justice Clark.

[1] The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Thereafter, in *FTC v. Cement Institute*, 333 U.S. 683 (1948), the Court pointed out that the Congress, in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation." In the light of this, the Court

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[1003] FTC v. Hackensack Meridian Health, Inc., No. CV 20-18140, 2021 WL 4145062, at *14 (D.N.J. Aug. 4, 2021), aff'd, 30 F.4th 160 (3d Cir. 2022). *See also*, *e.g.*, FTC v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008) ("[A] district court must not require the FTC to prove the merits, because, in a § 53(b) preliminary injunction proceeding, a court is not authorized to determine whether the antitrust laws are about to be violated. That responsibility lies with the FTC. Not that the court may simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must exercise independent judgment about the questions § 53(b) commits to it. Thus, the district court must evaluate the FTC's chance of success on the basis of all the evidence before it, from the defendants as well as from the FTC. The district court should bear in mind the FTC will be entitled to a presumption against the merger on the merits, and therefore does not need detailed evidence of anticompetitive effect at this preliminary phase. Nevertheless, the merging parties are entitled to oppose a § 53(b) preliminary injunction with their own evidence, and that evidence may force the FTC to respond with a more substantial showing."); FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000) ("The question before this Court is whether the FTC has made a showing that raises 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 Commission in the first instance and ultimately by the Court of Appeals. . . . [T]he Commission must show that there is a reasonable probability that the challenged acquisition will substantially lessen competition.") (internal quotation marks and citations omitted).

[1004] Nat'l Soc. of Prof. Engineers v. United States, 435 U.S. 679, 698 (1978). *See also* Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.").

reasoned, it should not "lightly modify" the orders of the Commission. Again, in *FTC v. Ruberoid Co.*, [343 U.S. 470, 473 (1952)] we said that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a reasonable relation to the unlawful practices found to exist? We believe that it does. . . .

[2] . . . [T]he Commission correctly considered the circumstances under which the illegal acts occurred. Those in utter disregard of law . . . call for repression by sterner measures than where the steps could reasonably have been thought permissible. Respondents made no appeal here from some of the findings as to their guilt. Having lost the battle on the facts, they hope to win the war on the type of decree. They fight for the right to continue to use individually the very same weapon with which they carried on their unlawful enterprise. The Commission concluded that this must not be permitted. It was not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than it requires. Although the zone plan might be used for some lawful purposes, decrees often suppress a lawful device when it is used to carry out an unlawful purpose. In such instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices.

* * *

Over the long life of the antitrust project, courts and agencies have developed a robust toolkit of remedial provisions for antitrust cases. As we saw in discussing merger remedies in Chapter VIII,[1005] these can crudely be divided into "structural" and "behavioral" remedies. Structural remedies work by severing the economic connections between businesses or business units; behavioral remedies work by establishing rules for what businesses must do (*i.e.*, affirmative duties) or must not do (*i.e.*, prohibitions). Structural remedies have the advantage that, if correctly designed, they eliminate the incentive for the relevant firm to engage in harmful conduct; behavioral remedies tend to leave that incentive intact, requiring ongoing interpretation, monitoring, and enforcement to guard against violations (and leaving open the possibility that the business will engage in behaviors that undermine the remedy without literally violating its terms).

1. Structural Remedies

"Divestiture" of all or part of a merger or acquisition target. As we have already seen, the most common and important remedy in a merger case is a requirement to divest (*i.e.*, sell off) the assets that would, if acquired or retained, constitute an antitrust violation. Sometimes the divestiture amounts to a complete block on the entire proposed transaction: on other occasions, it is enough to spin off the competitively-troubling business units, such that the rest of the transaction can proceed. As you may remember, a successful divestiture must satisfy a number of tests: it must include a "package" of assets—including facilities, employees, IP, brands, information, and so on—that is commercially viable (this may mean that the package includes more than simply the assets that literally give rise to the competitive problems), and it must be to a buyer that can credibly commit to operating the package as a competitive force. A buyer that will simply strip business and sell off the component parts, or just under-invest in the business and let it decline, may not represent much of a solution to the competitive problem.

Look back at Chapter VIII for more information about divestiture remedies in a merger case.

"Breakup." Sometimes a synonym for "divestiture," the concept of "breakup" as an antitrust remedy tends to connote something beyond just blocking all or part of a proposed or consummated acquisition. In particular, the term tends to be used in an informal sense to mean a divestiture as a remedy for something other than an acquisition of the relevant business units: for example, the "breakup" of a company in response to a conduct

[1005] *See supra* § VIII.E (merger remedies).

violation such as monopolization. The breakup of AT&T in 1982 remains the most prominent example of such a remedy in modern antitrust history.[1006]

Breakup of this kind remains very rare in conduct (*i.e.*, nonmerger) cases.[1007] It was originally ordered by the district court in *Microsoft*, only for this instruction to be vacated by the D.C. Circuit, and the parties to subsequently reach a settlement that left Microsoft intact.[1008] Nonetheless, while commenting on the possibility of divestiture in light of the district court's decision, the D.C. Circuit provided some helpful—and somewhat pointed—guidance on the role of the breakup remedy and the conditions under which it would be appropriate. What follows is, first, the district court's judgment on remedy—requiring that Microsoft's operating system business be separated from its applications business—followed by the D.C. Circuit's perspective on appeal.

Note: as you may remember from Chapter VII, the district court judge, Judge Thomas Penfield Jackson, had engaged in misconduct during the trial that gave rise to an appearance of impropriety and bias against Microsoft (although the circuit court concluded that there was no actual bias).

United States v. Microsoft Corp.

97 F. Supp. 2d 59 (D.D.C. June 7, 2000)

Judge Jackson.

[1] These cases are before the Court for disposition of the sole matter presently remaining for decision by the trial court, namely, entry of appropriate relief for the violations of the Sherman Act, §§ 1 and 2, and various state laws committed by the defendant Microsoft Corporation as found by Court in accordance with its Findings of Fact and Conclusions of Law. Final judgment will be entered contemporaneously herewith. No further proceedings will be required.

[2] The Court has been presented by plaintiffs with a proposed form of final judgment that would mandate both conduct modification and structural reorganization by the defendant when fully implemented. Microsoft has responded with a motion for summary rejection of structural reorganization and a request for months of additional time to oppose the relief sought in all other respects. Microsoft claims, in effect, to have been surprised by the "draconian" and "unprecedented" remedy the plaintiffs recommend. What it proposes is yet another round of discovery, to be followed by a second trial—in essence an ex post and de facto bifurcation of the case already considered and rejected by the Court.

[3] Microsoft's profession of surprise is not credible. From the inception of this case Microsoft knew, from well-established Supreme Court precedents dating from the beginning of the last century, that a mandated divestiture was a possibility, if not a probability, in the event of an adverse result at trial. . . . Its failure to anticipate and to prepare to meet such an eventuality gives no reason to afford it an opportunity to do so now.

[4] These cases have been before the Court, and have occupied much of its attention, for the past two years, not counting the antecedent proceedings. Following a full trial Microsoft has been found guilty of antitrust violations, notwithstanding its protests to this day that it has committed none. The Court is convinced for several reasons that a final—and appealable—judgment should be entered quickly. It has also reluctantly come to the conclusion, for the same reasons, that a structural remedy has become imperative: Microsoft as it is presently organized and led is unwilling to accept the notion that it broke the law or accede to an order amending its conduct.

[1006] *See* United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982) (accepting consent decree pursuant to the Tunney Act); Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, 50 Hastings L.J. 1395 (1999); Christopher S. Yoo, *The Enduring Lessons of the Breakup of AT&T: A Twenty-Five Year Retrospective,* 61 Fed. Commc'ns. L.J. (2008). *See also* Robert W. Crandall *The AT&T Divestiture: Was It Necessary? Was It A Success?* Presentation to DOJ (Mar. 28, 2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/04/10/222440.pdf.

[1007] *See generally*, *e.g.*, Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 Antitrust L.J. 11, 14–16 (2009); Robert Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 Or. L. Rev. 109 (2001); Neil W. Averitt, *Structural Remedies in Competition Cases under the Federal Trade Commission Act*, 40 Ohio St. L.J. 779 (1979).

[1008] Stipulation & Revised Proposed Final Judgment, United States v. Microsoft Corp., Case No. 98-1232 (Nov. 6, 2001).

[5] First, despite the Court's Findings of Fact and Conclusions of Law, Microsoft does not yet concede that any of its business practices violated the Sherman Act. Microsoft officials have recently been quoted publicly to the effect that the company has "done nothing wrong" and that it will be vindicated on appeal. The Court is well aware that there is a substantial body of public opinion, some of it rational, that holds to a similar view. It is time to put that assertion to the test. If true, then an appellate tribunal should be given early opportunity to confirm it as promptly as possible, and to abort any remedial measures before they have become irreversible as a practical matter.

[6] Second, there is credible evidence in the record to suggest that Microsoft, convinced of its innocence, continues to do business as it has in the past, and may yet do to other markets what it has already done in the PC operating system and browser markets. Microsoft has shown no disposition to voluntarily alter its business protocol in any significant respect. Indeed, it has announced its intention to appeal even the imposition of the modest conduct remedies it has itself proposed as an alternative to the non-structural remedies sought by the plaintiffs.

[7] Third, Microsoft has proved untrustworthy in the past. In earlier proceedings in which a preliminary injunction was entered, Microsoft's purported compliance with that injunction while it was on appeal was illusory and its explanation disingenuous. If it responds in similar fashion to an injunctive remedy in this case, the earlier the need for enforcement measures becomes apparent the more effective they are likely to be.

[8] Finally, the Court believes that extended proceedings on the form a remedy should take are unlikely to give any significantly greater assurance that it will be able to identify what might be generally regarded as an optimum remedy. As has been the case with regard to Microsoft's culpability, opinion as to an appropriate remedy is sharply divided. There is little chance that those divergent opinions will be reconciled by anything short of actual experience. The declarations (and the "offers of proof") from numerous potential witnesses now before the Court provide some insight as to how its various provisions might operate, but for the most part they are merely the predictions of purportedly knowledgeable people as to effects which may or may not ensue if the proposed final judgment is entered. In its experience the Court has found testimonial predictions of future events generally less reliable even than testimony as to historical fact, and cross-examination to be of little use in enhancing or detracting from their accuracy.

[9] In addition to its substantive objections, the proposed final judgment is also criticized by Microsoft as being vague and ambiguous. Plaintiffs respond that, to the extent it may be lacking in detail, it is purposely so to allow Microsoft itself to propose such detail as will be least disruptive of its business, failing which plaintiffs will ask the Court to supply it as the need appears.

[10] Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not. The proposed final judgment is represented to the Court as incorporating provisions employed successfully in the past, and it appears to the Court to address all the principal objectives of relief in such cases, namely, to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets. Microsoft's alternative decree is plainly inadequate in all three respects.

[11] The final judgment proposed by plaintiffs is perhaps more radical than might have resulted had mediation been successful and terminated in a consent decree. It is less so than that advocated by four disinterested amici curiae. It is designed, moreover, to take force in stages, so that the effects can be gauged while the appeal progresses and before it has been fully implemented. And, of course, the Court will retain jurisdiction following appeal, and can modify the judgment as necessary in accordance with instructions from an appellate court or to accommodate conditions changed with the passage of time. [. . .]

[12] Upon the record at trial and all prior and subsequent proceedings herein, it is this 7th day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Divestiture

a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. . . .

b. Following approval of a final plan of divestiture by the Court (the "Plan") . . . Microsoft shall implement such Plan.

c. The Plan shall provide for the completion . . . of the following steps:

i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products[.] [. . .]

d. Until Implementation of the Plan, Microsoft shall:

i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment; [. . .]

iii. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court[.] [. . .]

2. Provisions Implementing Divestiture

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

i. merging or otherwise recombining, or entering into any joint venture with one another;

ii. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;

iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

United States v. Microsoft Corp.

253 F.3d 34 (D.C. Cir. 2001) (en banc)

Per curiam.

[1] As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful. This is no less true in antitrust cases. And divestiture is a common form of relief in successful antitrust prosecutions: it is indeed the most important of antitrust remedies.

[2] On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company. By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and that complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.

[3] One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the court explained in *United States v. Alcoa*, 91 F. Supp. 333, 416 (S.D.N.Y. 1950), a "corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency." A corporation that has expanded by acquiring its competitors often has preexisting internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities preexisted to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in *United Shoe*:

> United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.

United States v. United Shoe Machine Corp., 110 F.Supp. 295, 348 (D.Mass. 1953).

[4] Depending upon the evidence, the District Court may find in a remedies proceeding that it would be no easier to split Microsoft in two than United Shoe in three. Microsoft's Offer of Proof in response to the court's denial of an evidentiary hearing included proffered testimony from its President and CEO Steve Ballmer that the company "is, and always has been, a unified company without free-standing business units. Microsoft is not the result of mergers or acquisitions." Microsoft further offered evidence that it is "not organized along product lines," but rather is housed in a single corporate headquarters and that it has only one sales and marketing organization which is responsible for selling all of the company's products, one basic research organization, one product support organization, one operations department, one information technology department, one facilities department, one purchasing department, one human resources department, one finance department, one legal department and one public relations department.

[5] If indeed Microsoft is a unitary company, division might very well require Microsoft to reproduce each of these departments in each new entity rather than simply allocate the differing departments among them.

[6] In devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market. Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition. Rather, structural relief, which is designed to eliminate the monopoly altogether requires a clearer indication of a significant causal connection between the conduct and

creation or maintenance of the market power. Absent such causation, the antitrust defendant's unlawful behavior should be remedied by an injunction against continuation of that conduct.

[7] [In this case,] we have found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference. Indeed, the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior. If the court on remand is unconvinced of the causal connection between Microsoft's exclusionary conduct and the company's position in the OS market, it may well conclude that divestiture is not an appropriate remedy.

[8] While we do not undertake to dictate to the District Court the precise form that relief should take on remand, we note again that it should be tailored to fit the wrong creating the occasion for the remedy.

* * *

Today, breakups are back on the menu of policy discussion. Tim Wu, for example, has argued that "[t]here is an unfortunate tendency within enforcement agencies to portray breakup and dissolutions as off the table or only for extremely rare cases. There is no legal reason for that presumption[.]"[1009] The next couple of extracts give two different perspectives on the breakup option.

Noah J. Phillips, We Need to Talk: Toward a Serious Conversation About Breakups

Remarks of Apr. 30, 2019

[1] Using antitrust to break up companies was never common practice in U.S. history, even in the law's early days. Of the single-firm monopolization cases brought by the government, fewer than 20% resulted in substantial divestiture, whether the sample runs from 1890 through 1939 or is extended through 1999. Focusing only on non-merger cases, the percentage drops below 10%. The most famous antitrust breakups are Standard Oil in 1911 and AT&T in 1984. The contrasts between the two are instructive, but neither experience should whet our appetite for breaking up companies without a good basis and the right conditions.

The Standard Oil Breakup (1911)

[2] You might be surprised to learn that the breakup of Standard Oil, the infamous Rockefeller oil trust, formally ended earlier this month [*i.e.*, April 2019], when the Department of Justice (DOJ) moved a court to end the 1911 decree, from 108 years ago. The government sued Standard Oil under Sections 1 and 2 of the Sherman Act. The complaint alleged that the Standard Oil Company of New Jersey, some 70 subsidiary corporations and partnerships, and seven individuals conspired to restrain trade in petroleum, refined oil, and other petroleum products, and attempted to and did monopolize those lines of commerce. The lower court held the defendants liable under Sections 1 and 2, and ordered the dissolution of Standard Oil. The Supreme Court affirmed the breakup ruling.

[3] [But *Standard Oil*] was not so much a case about anticompetitive conduct[:] the breakup remedy was really aimed at the combination it sought to undo. . . . [W]hile the Supreme Court affirmed Standard Oil's antitrust liability based on the combinations creating the trust and the trust's exclusionary conduct, the illegality of the trust's 1882 formation and subsequent reorganization was essential to the breakup order. [. .]

The AT&T Breakup (1984)

[4] The next breakup on which I want to focus is AT&T, in 1984, perhaps the other most significant use of Section 2 to split up a large American company. The DOJ filed its complaint against AT&T in 1974, alleging that the company, Western Electric, and Bell Telephone Laboratories had violated Section 2. The government claimed an unlawful combination and conspiracy between the defendants, the Bell Operating Companies (the

[1009] Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) 132–33.

"Baby Bells"), and others, which allegedly allowed AT&T to maintain control over the two other defendants and the Baby Bells, to limit competition from other telecomm providers, and to maintain a monopolistic manufacturing and purchasing relationship between Western Electric and the Bell System. The discovery process lasted seven years, with trial beginning in January 1981. Many months later, but still one month before the very long trial was scheduled to end, the parties agreed on settlement terms that were approved by the court, with modifications, in August of that year.

[5] The final decree was complex and multifaceted; so I will focus on the provisions relating to the divestiture of the Baby Bells and their impact on long-distance services. The purpose of the breakup was to boost competition in this market, not competition between the Baby Bells, which were to become regional monopolies. The government's theory was that owning the Baby Bells allowed AT&T to foreclose competition in long-distance services and telecomm equipment, by denying long-distance competitors the necessary local interconnections to the Baby Bells. So, in addition to splitting them up, the decree also required the Baby Bells to make their switching facilities equally accessible to long-distance providers.

[6] Judge Posner called the breakup of AT&T arguably the most successful structural remedy in U.S. antitrust history. He was speaking in relative terms, and I think he's probably right. There is strong evidence and broad consensus that that the telecommunication industry's competitiveness increased following the 1984 breakup. . . . Unlike *Standard Oil* . . . AT&T's high pre-divestiture share of the long-distance market had been stable, and fell significantly after the breakup, as competitors entered or expanded. That suggests the divestiture achieved gains that market forces and regulatory measures had failed to deliver, though the organization of the Baby Bells and the regulatory structure of the telecommunications industry played significant roles. [. . .]

[7] [A]gencies and courts are not, like politicians and pundits, champing at the bit to break up companies. While the law contemplates doing so—and doing so sometimes is warranted—enforcement experience and economic research show us that the treatment may be worse than the disease and, in some cases, simply not doable.

High Uncertainty

[8] Seeking a breakup remedy in an antitrust case requires a judgment that the resulting market structure will leave competition and consumers better off. Consider that for a moment: breaking up a company is, quite directly, the government using the force of law to substitute its vision of how an industry can and should be structured, for how the market has actually worked. That alone should make one pause and appreciate the gravity of the proposal. Antitrust enforcers are not industrial planners. As Judge Easterbrook wrote, we should "fall prey to the nirvana fallacy, the belief that if a cost or flaw in existing affairs can be identified, it must follow that some other state of affairs (the 'remedy') is better."

[9] When we seek a divestiture in a merger case, we know how competition looks. The remedy seeks to preserve competition as it is (or recently was), not an untested state of affairs that we regulators might believe superior. Although some uncertainty remains in merger cases, it is far less than the uncertainty of breakups in non-merger cases. In a non-merger case, if we wish to restructure a market, why do we presume our vision for how that market ought to work will, in fact, work, much less actually work better? These are tough questions. And antitrust requires that they be answered only by one agency and one (or a few) judges.

[10] My argument here rests on the small-c conservative principle that, the greater the proposed interference with the status quo of a complex system like a market, the less confident we should be of the desired outcome, both that it will be the outcome and, if so, that it will be desirable. This principle acknowledges the nirvana fallacy and counters with a sober assessment of our limited ability to control complexity and guard against unintended consequences.

Rory Van Loo, In Defense of Breakups: Administering A "Radical" Remedy

105 Cornell L. Rev. 1955 (2020)

Antitrust debates [about the breakup remedy] fail to consider the insights generated by routine private sector breakups. One-third of mergers and acquisitions (M&A)—more appropriately termed reorganizations—are

divestitures. These divestitures include some of the largest deals of the last decade, including Fox's sale of its 20th Century Fox production arm for $71 billion to Disney, eBay's spinoff of PayPal, and Hewlett-Packard's decision to split itself down the middle to create two of the one hundred largest U.S. companies. Despite meaningful differences, the prevalence of these deals alone is informative because what antitrust observers have come to view as drastic is commonplace in the business world.

Moreover, scholars in other fields—notably strategic management, finance, and organizational behavior—have studied voluntary private sector breakups extensively. They have shown how these voluntary divestitures add value and how better process design can improve their implementation. Of course, it is important to recognize that even if antitrust breakups are costly and lower the firm's value, they may be economically beneficial by deterring executives from pursuing anticompetitive deals. But by remaining disconnected from the extensive business scholarship on divestitures, the antitrust literature has exaggerated breakups' costs and governmental incompetence in administering them.

Regulatory scholarship can also improve the antitrust conceptualization of breakups. Antitrust scholars focus far more on ex post enforcement actions and legal cases, whereas scholars in environmental law and other regulatory fields extensively analyze the monitoring of firms and design of regulatory processes. In particular, the literature in those other fields is in dialogue with a prominent strand of research, associated with administrative law, arguing for collaborative governance.

Approaching breakup administration less as an adversarial law enforcement procedure and more as collaborative governance could streamline the process, which would speak to one of the biggest critiques of breakups: delay. Also, collaborative governance aims to leverage business sector expertise to compensate for administrative agency sophistication shortfalls and information asymmetries. Most concretely, this would mean not only leveraging the monopoly's resources, but also involving independent third-party M&A consultants. Thus, by drawing on the collaborative governance literature it becomes possible to see beyond the limitations that breakups faced decades ago and adopt a more realistic assessment of how they would work today.

The implications of a more informed view of breakup administrability are far-reaching. A misguided view of breakups may help explain what many observers see as decades of weak antitrust enforcement, leading to charges that the deck is stacked in favor of large powerful firms. Executives know that if they execute an anticompetitive merger by quickly integrating the companies, antitrust enforcers or courts will fear breaking up the resulting company. Ironically, unfounded fears of doing harm through breakups may lead to either harmful inaction or weaker remedies that are more likely to prove wasteful. If widespread and unfounded resistance to administering breakups has contributed substantially to the presence of monopolies, it has imposed considerable costs on society.

Once breakups are understood as a normal part of business affairs, and as capable of being co-administered with the private sector, courts and enforcers can deploy them more readily as an antitrust remedy. That shift helps to solve the antitrust problem of what to do after an anticompetitive merger has occurred. But it also informs debates about how to handle monopolies that achieved their dominance in other ways. At the very least, the intuitive resistance to breakups needs to end. Unless and until greater evidence is produced that breakups harm society, judges should be less hesitant to approve breakups, enforcers less tentative to pursue them, and policymakers less resistant to write laws that deploy them.

2. Behavioral Remedies

As we saw in the context of merger remedies, the toolkit of behavioral remedies is broad: we will meet just a handful of examples here.

Prohibitions on specific practices or contract terms. The most fundamental form of behavioral relief is an obligation to terminate the challenged practices, and to refrain from similar behavior in future. For example, in resolving allegations that the Alabama Board of Dental Examiners had unlawfully imposed an anticompetitive obligation on teeth-aligning providers to purchase the services of a licensed dentist, the remedial order required the Board to cut it out—to refrain from imposing that obligation, or a similar one, during the term of the order:

Decision and Order, In the matter of Board of Dental Examiners of Alabama

FTC Docket No. C-4757 (Dec. 20, 2021)

IT IS . . . ORDERED that Respondent, in connection with its activities in or affecting commerce . . . shall cease and desist from, directly or indirectly:

A. Requiring any Non-Dentist Provider affiliated with any Clear Aligner Platform to have on-site supervision by a Dentist when performing Intraoral Scanning; and

B. Prohibiting, restricting, impeding, or discouraging any (i) Clear Aligner Platform or (ii) Dentist or Non-Dentist Provider affiliated with any Clear Aligner Platform from providing or facilitating the provision of Clear Aligner Therapy through remote treatment;

Provided, however, nothing in this Order shall prohibit Respondent from filing, or causing to be filed, a court action against a Non-Dentist Provider, Dentist, or Clear Aligner Platform for an alleged violation of the Alabama Dental Practice Act;

For the avoidance of doubt, and other than as set out above in Paragraphs II.A. and II.B., this Order shall not be construed as preventing Respondent from pursuing any administrative remedies against a Dentist or Non-Dentist Provider pursuant to and in accordance with the Alabama Dental Practice Act and Chapter 270 of the Alabama Administrative Code.

* * *

Nondiscrimination. Where there is concern that a business subject to an antitrust remedy may suppress or exclude competition by foreclosing competitors' access to relevant inputs or distribution channels, a remedial order may require the business to make such inputs available on nondiscriminatory terms.

In the following extract, the FTC required Victrex, a supplier of polyetheretherketone (mercifully abbreviated to "PEEK") that had engaged in the unlawful use of exclusivity commitments, to refrain from discriminating against customers that dealt with a competing PEEK supplier.

Decision and Order, In the matter of Victrex PLC

FTC Docket No. C-4586 (July 13, 2016)

IT IS . . . ORDERED that [. . .]

B. Respondents shall cease and desist from discriminating against, penalizing, or otherwise retaliating against any Customer for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the research, development, testing, manufacture, production, distribution, purchase, marketing, promotion, or sale of any Customer Product using a Competing PEEK, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding, or other requirement that imposes Exclusivity. Examples of practices prohibited under this Paragraph include but are not limited to the following, when the result, in whole or in part, of prohibited discrimination or retaliation for use of Competing PEEK or refusal to accede to Exclusivity:

1. Terminating, suspending, delaying, or threatening or proposing thereto, sales of Respondents' PEEK to the Customer, either generally or with respect to particular forms or grades of PEEK;

2. Denying, or threatening or proposing to deny, the Customer access to Respondents' FDA Master File;

3. Auditing the Customer's purchases or sales of Competing PEEK;

4. Withdrawing or modifying, or threatening or proposing thereto, favorable Sales Terms or Product Support to the Customer;

5. Providing, or threatening or proposing thereto, less favorable Sales Terms or Product Support to the Customer;

6. Withholding from the Customer any form or grade of Respondents' PEEK;

7. Refusing to deal with the Customer on terms and conditions generally available to other Customers; and

8. Notwithstanding the existence or non-existence of any severability or other provisions in Respondents' agreement(s) or contract(s) with any Customer(s), terminating, suspending, or requiring renegotiation of any term of any agreement or contract for the purchase and sale of Respondents' PEEK, as a result of the Exclusivity terms or other terms inconsistent with this Order being waived, invalid, illegal, or unenforceable.

For the avoidance of doubt, it shall not constitute, in and of itself, a violation of this Order for Respondents to engage in the conduct described in Paragraph II.B(1-7) above, when such conduct results from independent and verifiable business reasons unrelated to a Customer's use of Competing PEEK or refusal to accede to Exclusivity

* * *

Compelled dealing (supply / interoperation / licensing). Under certain circumstances, a remedial order may require that a business make some kind of supply, infrastructure, interoperability, intellectual property, or other assets or facilities available to others. Such an order may go further and require that such access be on particular terms: for example, nondiscriminatory terms, for no more than a "fair and reasonable" rate or price, or on other terms and conditions that a court or agency may consider appropriate.

A well-known, if unusual, example of this kind of thing was the FTC's negotiated remedy in the Google / MMI case, entered to resolve concerns that Google might use a package of acquired patent rights in a manner harmful to competition and in violation of previous commitments that those patents would be licensed on FRAND (*i.e.*, fair, reasonable, and non-discriminatory) terms. The consent decree in that case obliged Google to negotiate in good faith toward a license with potential licensees.

In the matter of Motorola Mobility LLC

FTC Dkt. No. C-4410 (F.T.C. July 23, 2013)

IT IS . . . ORDERED that:

A. Respondents shall, within sixty (60) days of receiving a written request by a Potential Licensee for a license to Respondents' [relevant patents] ("Requested License"), provide a written response and begin negotiation with such Potential Licensee for the Requested License. Respondents' written response pursuant to this paragraph shall be in good faith compliance with their FRAND Commitments and all other provisions of this Order.

B. Respondents shall not sell or assign any FRAND Patent to any Third Party unless such Third Party agrees: (i) to become a successor to Respondents' FRAND Commitments to the extent the FRAND Patent is subject to such FRAND Commitments, (ii) not to seek Covered Injunctive Relief on the basis of Infringement of the FRAND Patent except to the extent Respondents would be permitted to seek such Covered Injunctive Relief by the terms of this Order, and (iii) to condition further assignment of the FRAND Patent on the assignee agreeing to the terms of this subparagraph V.B.

* * *

Prior approval / notification. In some cases, it may be appropriate to impose an obligation to provide advance notice, or even seek affirmative permission, before engaging in certain conduct. For example, in the Victrex case mentioned above, the FTC required Victrex to agree to give 60 days' notice before terminating a customer. The remedial language aimed to protect Victrex's right to terminate a customer in appropriate circumstances, while preserving the FTC's ability to monitor the company's conduct in exercising this right.

Decision and Order, In the matter of Victrex PLC

FTC Docket No. C-4586 (July 13, 2016)

Notwithstanding any other provision of this Order, if:

> 1. Respondents timely deliver the Order and [relevant exhibits] to a Customer with an applicable Legacy Contract as required by [the Order]; and
>
> 2. the Customer has not indicated that it will comply with the terms of [the Order] by counter-signing and delivering [the relevant exhibit] to Respondents,

it shall not constitute a violation of this Order for Respondents to (i) enforce existing Exclusivity terms in a Legacy Contract, but only as applied to [certain products], or (ii) enforce terms under a Legacy Contract . . . .

Provided, however, that as to any Customer that has counter-signed and delivered [the relevant exhibit to this Order] to Respondents, Respondents shall submit to the Commission written notice of any communication from any Respondent to the Customer that the Customer has breached the terms set forth in Exhibit C. Respondents shall submit any such notice to the Commission at least sixty (60) days prior to exercising any right of termination resulting from the alleged breach, during which time the Customer shall be given the opportunity to cure the alleged breach.

* * *

Equitable monetary relief. In principle, an antitrust remedy might require that a business found guilty of antitrust violations hand over the profits of the illegal conduct, or otherwise make redress or restitution to injured parties.[1010] The leading example of this remedy remains the FTC's consent decree in Cephalon, which contemplated total relief in excess of $1 billion.[1011] At the time of writing, however, following the decision in *AMG Capital*, neither federal agency has the power to seek such a remedy in court (although there is no reason why monetary relief could not be included in a negotiated consent decree).[1012] Legislative reform may re-open this avenue for consumer redress.

Other "fencing-in" relief. Remedial orders may also include a wide variety of provisions designed to "fence in" the risk of further violations, including be prohibiting conduct that would not itself be illegal or harmful.[1013]

Ian Conner, Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition

Remarks of Feb. 8, 2020

[1] Our remedial orders can (and do) do more than just repeat the antitrust laws by prohibiting conduct that is already unlawful and otherwise leaving the respondent free to go about its business. Commission remedial orders commonly include prohibitions that go beyond the complained of behavior and seek to, in the words of the Supreme Court, effectively to close all roads to the prohibited goal. This is obviously both necessary and appropriate because those caught violating the antitrust laws must expect some fencing in.

[2] Fencing-in relief is exemplified by our 2016 order in *Victrex*. In that case, the Commission alleged that Victrex, Inc., monopolized sales of a high-performance polymer by committing medical device companies to

[1010] Unlike damages, equitable monetary relief is generally measured by reference to the amount of an unjust gain, not an unjust injury. *See generally* Einer R. Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust L.J. (2009).

[1011] Stipulated Order for Permanent Injunction and Equitable Monetary Relief, FTC v. Cephalon, Inc., Case No. 2:08-CV-2141 (E.D. Pa. June 17, 2015) ("The Cephalon Parties shall pay One Billion and Two Hundred Million Dollars . . . as equitable monetary relief, which shall be used for a settlement fund . . . in accordance with the terms of this Order, including the Settlement Fund Disbursement Agreement, attached hereto as Exhibit A.").

[1012] *But see* Schonette Walker, Steve Scannell & Abigail Wood, *Bridging the Gorge: States Prevent Retention of Ill-Gotten Profits Through Disgorgement*, Comp. Pol'y Int'l (Aug. 2021) (states' powers to obtain EMR).

[1013] *See*, *e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 148 (1948) ("[E]quity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy.").

deal exclusively with Victrex. The Commission's order not only banned explicitly exclusive contracts, but also banned contract terms that would have an equivalent effect, such as market-share discounts or retroactive volume discounts that could result in de facto exclusivity. Even though Victrex had not used such pricing policies in the past, and even though such agreements are not automatically unlawful under the Sherman Act, the Commission's order simply took them off the table, to ensure that Victrex would stay away from conduct that would have an equivalent effect to its original violation of the law. [. . .]

[3] Other provisions in an order may require the respondent to mitigate the impact of its previous unlawful conduct in some way. For instance, the Commission may require respondents to notify customers who might have been affected by the illegal conduct, for example by giving them the option to terminate an existing contract without facing an action for breach by the respondent. In the *Victrex* order, for example, the Commission required respondents to notify all customers with existing contracts that required exclusivity and give them the opportunity to change the terms of their contracts. The Commission may also require notice to individuals who need to know that the Respondent's conduct will or may change in the future because of the order. The Commission can also prohibit the inclusion of certain similar terms in future agreements.

* * *

The potential scope of fencing-in relief is very broad. In 2022, for example, Judge Cote of the U.S. District Court for the Southern District of New York relied on both federal and state antitrust law to impose an unusual antitrust remedy for a particularly flagrant and harmful example of monopolization. In that case, infamous "Pharma Bro" Martin Shkreli had entered into a comprehensive (and highly successful) scheme to monopolize markets for the drug Daraprim, harming toxoplasmosis patients across the country. His ultimate reward: a lifetime ban from the pharmaceutical industry.

FTC v. Shkreli

581 F. Supp. 3d 579 (S.D.N.Y. 2022)

Judge Cote.

[1] The Plaintiffs [the FTC and a number of state AGs] seek a lifetime ban against Shkreli participating in the pharmaceutical industry. Banning an individual from an entire industry and limiting his future capacity to make a living in that field is a serious remedy and must be done with care and only if equity demands. Shkreli's egregious, deliberate, repetitive, long-running, and ultimately dangerous illegal conduct warrants imposition of an injunction of this scope.

[2] The Plaintiffs presented a wealth of evidence that Shkreli conducted a comprehensive scheme that violated the antitrust laws of the United States and the competition laws of the seven States. The FTC and the States are empowered by federal and State law to seek comprehensive equitable relief. The Plaintiffs have demonstrated that a lifetime ban against Shkreli's future participation in the pharmaceutical industry will protect the public from suffering a repetition of the unlawful schemes proven in this case.

[3] Without a lifetime ban, there is a real danger that Shkreli will engage in anticompetitive conduct within the pharmaceutical industry again. Shkreli established two companies, Retrophin and Vyera, with the same anticompetitive business model: Acquiring sole-source drugs for rare diseases so that he could profit from a monopolist scheme on the backs of a dependent population of pharmaceutical distributors, healthcare providers, and the patients who needed the drugs. The Daraprim scheme was particularly heartless and coercive. Daraprim must be administered within hours to those suffering from active toxoplasma encephalitis.

[4] Moreover, in the face of public opprobrium, Shkreli doubled down. He refused to change course and proclaimed that he should have raised Daraprim's price higher.

[5] The context in which Shkreli conducted his schemes cannot be ignored. He cynically took advantage of the requirements of a federal regulatory scheme designed to protect the health of a nation by ensuring that its population has access to drugs that are not only effective but also safe. He recklessly disregarded the health of a

particularly vulnerable population, those with compromised immune systems. His scheme burdened those patients, their loved ones, and their healthcare providers.

[6] A lifetime ban would not deprive Shkreli of the opportunity to practice a profession or to exercise a lawful skill for which he trained. In his trial testimony Shkreli does not even express a clear desire to return to the pharmaceutical industry. He reports that he is considering pursuing opportunities "within and outside" the pharmaceutical industry upon his release from prison.

[7] The risk of a recurrence here is real. Shkreli has not expressed remorse or any awareness that his actions violated the law. While he takes full responsibility in his direct testimony for the increase of Daraprim's price from $17.50 to $750 per pill, he denies responsibility for virtually anything else. He argues in his testimony that he is not responsible for Vyera's anticompetitive contracts because he did not negotiate or sign the exclusive supply agreements or the restrictive distribution agreements. He has also denied that what happened here was egregious, arguing that the Plaintiffs have not proven that any patient died due to the price he set for Daraprim. He chose to not even attend the trial.

[8] Shkreli presents several legal arguments against a lifetime industry ban. He contends that it amounts to a penalty beyond the proper scope of a court's power in equity. He argues that an industry ban is uncommon and reserved only for the most egregious cases and for cases of fraud. He argues that a ban of this scope is not narrowly tailored to match the challenged conduct. For the reasons laid out above, these arguments are unavailing. This is an egregious case; death is not the only relevant metric. If a court sitting in equity is powerless to impose a lifetime industry ban to protect the public against a repetition of the conduct proven at this trial, then the public could rightfully ask whether its wellbeing has been adequately weighed.

[9] Shkreli appears to suggest that any injunction could be limited to banning him from acquiring commercial assets or engaging in the "day-to-day affairs of commercializing medicine." There is no reason to believe that a narrowly crafted injunction will succeed in providing adequate protection against a repetition of illegal conduct. Shkreli has demonstrated that he can and will adapt to restrictions. With help at times from a contraband phone, Shkreli managed to control his company even from federal prison.

[10] Shkreli's anticompetitive conduct at the expense of the public health was flagrant and reckless. He is unrepentant. Barring him from the opportunity to repeat that conduct is nothing if not in the interest of justice. "If not now, when?" Mishnah, Pirkei Avot 1:14.

NOTES

1) Why do enforcers often prefer structural remedies? Under what circumstances should behavioral remedies be preferred?
2) In what ways do merger and conduct remedies differ? In what respects are they similar?
3) When and how, if at all, can agencies feasibly enforce nondiscrimination obligations?
4) Should agencies be able to require parties to give remedies that go beyond the termination or prohibition of likely violations of law? Why, or why not? In particular, should the agencies be able to negotiate a remedial obligation:
    a. to terminate and refrain from lawful conduct that may be harmful to competition but would not violate the antitrust laws?
    b. to terminate and refrain from lawful conduct that would not harm competition but may be undesirable for other reasons?
    c. to terminate individual executives?
    d. to pay money to the government or private parties that the agencies could not obtain in a court-ordered remedy?
5) What do you think makes a good divestiture buyer? How can the agencies feasibly (and swiftly) screen for those qualities? What kind of process would you design for this purpose?
6) In cases in which a narrow divestiture of a single business unit or product line would, in principle, eliminate competitive concerns, when if ever do you think that an agency should sue to block the whole transaction? On what legal basis could they do so? What if the parties sold off the troubling business unit first, fixing the problem before turning to the main transaction (this is called a "fix it first" remedy)?

7) Are there any advantages to a negotiated consent decree rather than a fix-it-first remedy?
8) What should be the result of a "failed" divestiture: that is, the sale or exit of a divested business unit some time after the remedy is imposed or accepted?