Classes 4-6

Unit 3: Sanford Health/Mid Dakota Clinic

Merger Antitrust Law

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HEALTH


MDC
MID DAKOTA CLINIC
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The Deal

What was the transaction?

- Sanford Health to acquire MidDakota Clinic, P.C. (MDC)
  - Purchase the stock and clinic assets of MDC P.C.
  - Purchase the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC
- Purchase price: Not given
  - But appears to be HSR reportable
    - Complaint alleges that "[a]bsent court action, Defendants will be free to close the Transaction after 11:59 pm EST on June 26, 2017"
- Term sheet dated August 22, 2016

Who was the buyer?

- Sanford Heath
  - North Dakota not-for-profit corporation
  - Vertically integrated healthcare delivery system
    - Headquartered in Sioux Falls, SD
    - Operates in nine states
      - More than 40 hospitals
      - More than 250 clinics
    - Sells health insurance in four states

Who was the buyer?

- Sanford Heath
  - Operates Sanford Bismarck
    - Wholly-owned subsidiary
    - Operates Sanford Bismarck Medical Center
      - 217-bed general acute care hospital and Level II trauma center
      - Employs 160 physicians who work in Bismarck or Mandan
      - Largest private employer in the Bismarck-Mandan area
    - Eight primary care clinics
    - Several specialty clinics

Who was the seller?

- Mid Dakota Clinic, P.C.
  - Not-for-profit, physician-owned professional corporation
  - Headquartered and operates in Bismarck, ND
  - Operates
    - Mid Dakota Clinic
    - Mid Dakota Center for Women
    - Ambulatory surgery center
  - Employs 61 physicians
    - 12th largest private employer in Bismarck

The Mechanics of Merger Antitrust Litigation

Antitrust merger litigation generally

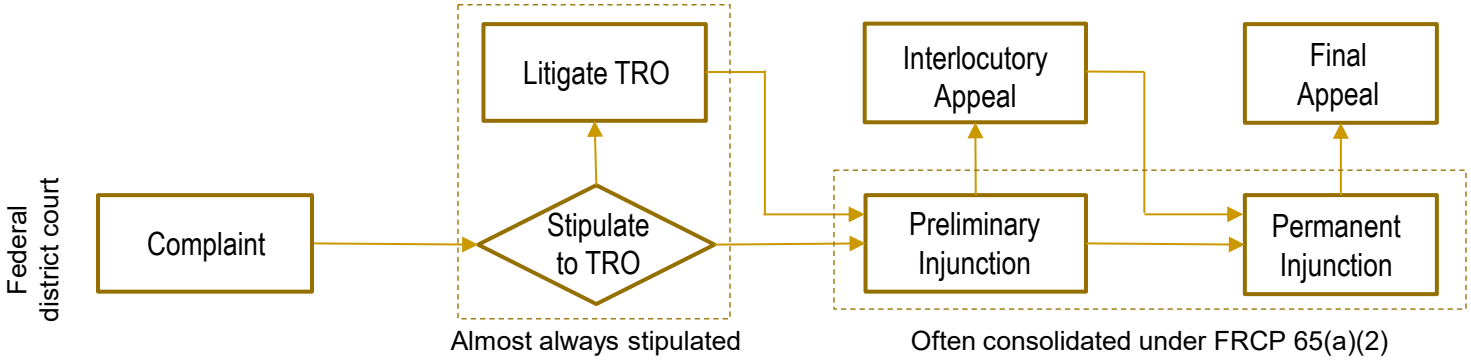
Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC		
–Preliminary inj.	Federal district court	Court of appeals
–Permanent inj.	FTC administrative trial	Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal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

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

- Incentive to litigate
  - *By far the strongest*: DOJ and FTC
  - *Weak, but still see some challenges*: State AGs
  - *Almost nonexistant*: Private parties

Typical litigation paradigms

DOJ preclosing challenge



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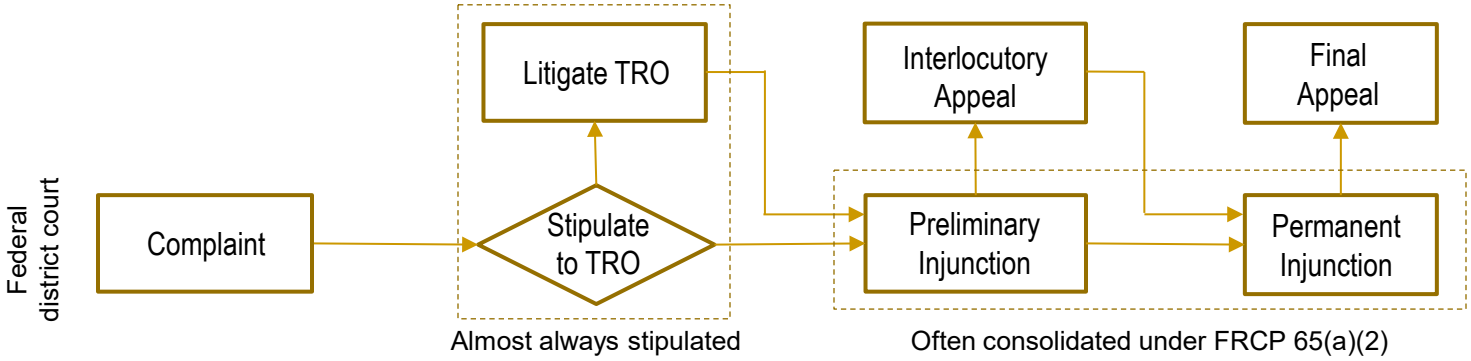
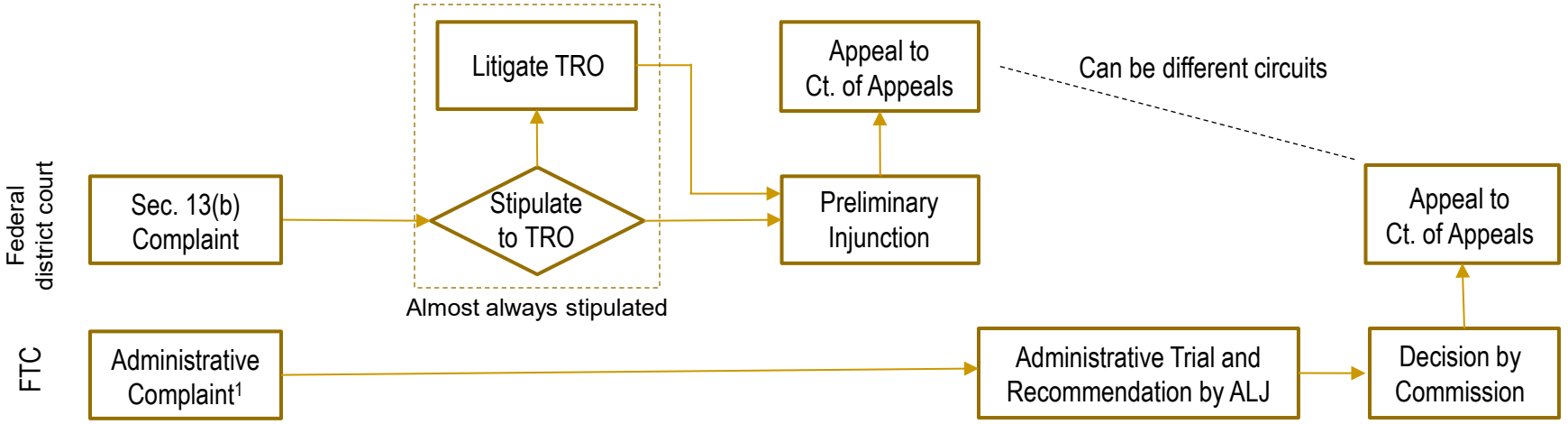


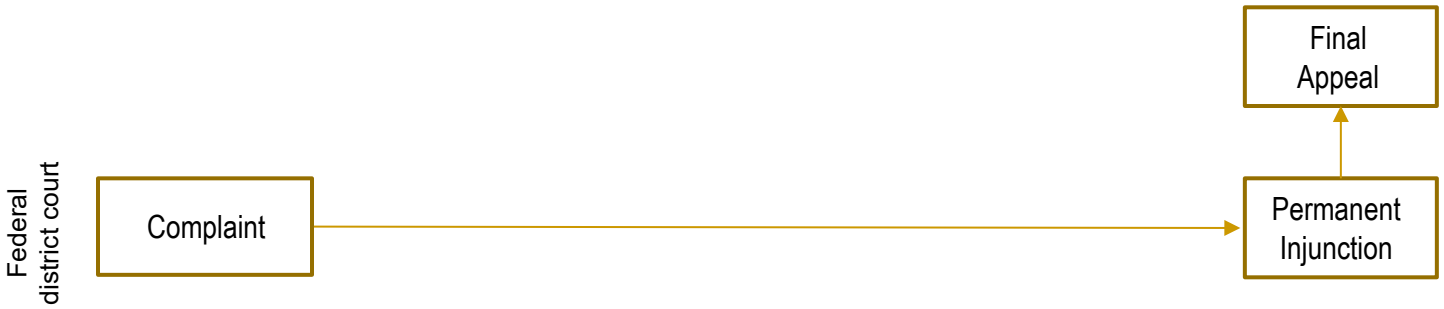
FTC preclosing challenge



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

Typical litigation paradigms

DOJ postclosing challenge



FTC postclosing challenge

Litigation timing

- WDC views on timing for preclosing challenges

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

This timing is critical to know in the negotiation of the termination date in the merger agreement

Types of injunctions in merger cases

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

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

Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15	FTC: FTC Act § 13(b)
"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute **proceedings in equity** to prevent and restrain such violations."	"Upon a proper showing that, [1] **weighing the equities** and [2] **considering the Commission's likelihood of ultimate success**, [3] 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"

Private parties: Clayton Act § 16
"Any person . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ., **when and under the same conditions** and principles as injunctive relief against threatened conduct that will cause loss or damage **is granted by courts of equity** . . . ."

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

- Seminal Supreme Court case on preliminary injunctions
- *Winter* test: "A [private] plaintiff seeking a preliminary injunction must establish
  - "[1] that he is likely to succeed on the merits,
  - "[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
  - "[3] that the balance of equities tips in his favor, and
  - "[4] that an injunction is in the public interest."[2]
- Applies to—
  - The DOJ under Clayton Act § 15
  - Private parties (including states) under Clayton Act § 16
- Does not apply to the FTC
  - FTC Act § 13(b) standard applies instead

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

Comparison of injunctive relief standards

For North Dakota	For the FTC
***Winter* standard**[1]	**Section 13(b) standard**
A [private] plaintiff seeking a preliminary injunction must establish	A court must find, after
[1] that he is likely to succeed on the merits,	[1] considering the Commission's likelihood of ultimate success
[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,	
[3] that the balance of equities tips in his favor, and	[2] weighing the equities
[4] that an injunction is in the public interest.	that entry of the preliminary injunction would be in the public interest

[1] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Antitrust preliminary injunction standard

- Debate over the Section 13(b) likelihood of success standard
  - The FTC often argues that Section 13(b) modifies the traditional equity standard for the entry of a preliminary injunction
  - Under this view, the FTC need only show—
    - "a fair and reasonable chance of ultimate success on the merits,"[1] *or*
    - more commonly cited by the courts, a "serious question":

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

  - Almost all modern Section 13(b) opinions cite the "serious question" standard
  - BUT the debate is almost academic
    - Except for the articulation of the different standards, the opinions in DOJ Section 15 cases on a permanent injunction and FTC Section 13(b) cases for a preliminary injunction are indistinguishable and all finding for the agency show a certain or almost certain Section 7 violation

[1] *See* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *urged in* FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232, at *7 (S.D.N.Y. Jan. 8, 2024).
[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984).

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

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

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

- *Query*: Can the *Winter* requirements be balanced on a sliding scale?

Temporary restraining orders (TROs)

- Emergency interim relief a court may enter to maintain the status quo pending a fuller hearing on a motion for a preliminary injunction
- Can be entered ex parte when circumstances require[1]
- Duration[2]
  - Not to exceed 14 calendar days
  - May be extended for good cause by the court for an additional 14 calendar days
  - Short duration is the safeguard against the lack of higher standards
    - Absent consent, if of a longer duration, the TRO will be treated as a preliminary injunction and must conform to the more rigorous preliminary injunction standards
  - The parties may agree on a longer extension (stipulated TRO)
- Standard
  - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction
  - BUT the respective harms to the parties and the public interest will be assessed in light of the very limited duration of the TRO (as opposed through the end of the trial on the merits for a preliminary injunction)

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

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

Temporary restraining orders (TROs)

- Rarely litigated in modern merger antitrust practice
  - Judges strongly dislike the timing pressures of an adjudicated TRO and believe that the litigating parties should be able to agree on a scheduling order that will—
    1. Permit the merging parties to take all necessary discovery on an expedited basis before the preliminary injunction hearing, *and*
    2. Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since the same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement on a stipulated TRO

Permanent injunctions

- Identical to the preliminary injunction standard applicable to the case
  - EXCEPT that a permanent injunction requires *actual* success on the merits[1]
  - Success on the merits requires proof by the preponderance of the admissible evidence
- The preliminary injunction record
  - In many non-merger cases, the record for a decision on a permanent injunction will be more developed if additional discovery and briefing have occurred since the preliminary injunction hearing
  - *Not the case in merger antitrust challenges*: Lay and expert discovery will be completed, a full trial record will be presented, and the court will hold a multiday evidentiary hearing with live witnesses
  - Although expedited, merger antitrust preliminary injunction hearings are indistinguishable from a full trial on the merits
- Factual findings in the preliminary injunction hearing
  - Not binding in the permanent injunction trial (or even entitled to deference)
  - BUT unlikely to be overturned in the absence of new evidence

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

FTC v. Sanford Health: The FTC's Case

The complaint

- Who were the plaintiffs?
  - FTC
  - State of North Dakota
- Who were the defendants?
  - Sanford Health (and its subsidiary Sanford Bismarck)
  - Mid Dakota Clinic, P.C.
- Where was the complaint filed?
  - United States District Court for the District of North Dakota
- When was it filed?
  - June 23, 2017
- Was the complaint filed pre- or post-closing?
  - Preclosing

The complaint

- What statutes did the plaintiffs allege would be violated?
  - Clayton Act § 7
  - FTC Act § 5
  - North Dakota antitrust law
    - This is a little confusing
    - The district court cited—
      - Section 7 as the only substantive statute that was violated
      - North Dakota law only for remedies
    - But the North Dakota state remedies law should not apply to a federal Section 7 claim
    - In the complaint, however, North Dakota did allege a violation of North Dakota Century Code § 5108.1, the state's analog to the Sherman Act
      - North Dakota does not have an analog to Clayton Act § 7
    - On the other hand, the complaint's prayer for relief did not seek any remedy beyond that provided in Clayton Act § 16, so the North Dakota remedies statute was superfluous
      - Except that the North Dakota law also provides for the award of attorneys' fees when the state prevails in its action

The complaint

- Clayton Act § 7 provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in **any line of commerce** or in any activity affecting commerce **in any section of the country**, **the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly**. [1]

- Essential elements of a Section 7 violation
  1. Acquisitions of stock or assets that,
  2. "in any line of commerce" (product market)
  3. "in any part of the country" (geographic market)
  4. The effect of the acquisition "may substantially lessen competition or tend to create a monopoly"[2]

Called the *relevant market*

Called the *anticompetitive effects test*

[1] 15 U.S.C. § 18 (emphasis added; remainder of section omitted).

[2] To be within federal subject matter jurisdiction, the parties and the transaction must have the requisite nexus to interstate commerce.

The complaint

- What was the gravamen of the complaint?
  - The acquisition by Sanford Heath of Mid Dakota Clinic would violate Clayton Act § 7 by threatening to lessen competition in physician services "sold and provided to [1] commercial payers and [2] their insured members" in four separate relevant markets—
    1. Adult primary care physician services
    2. Pediatric services
    3. OB/GYN services, and
    4. General surgery physician services

    } Relevant product markets

    in the Bismarck-Mandan area of North Dakota — Relevant geographic market

> The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Defendants consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 2, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- What did the plaintiffs perceive as the source of the problem?
  - The acquisition would significantly increase concentration in each of the alleged relevant markets (creating monopolies or near-monopolies)

Physicians in the Bismarck-Mandan Region

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

[1] PCPs are primary care providers.

The complaint

- What relief did the plaintiffs seek?
  - *FTC*: Preliminary injunction under FTC Act § 13(b) enjoining the consummation of the transaction until a decision by the FTC on the merits
  - North Dakota:
    - Preliminary injunction under Clayton Act § 16 enjoining the consummation of the transaction until a decision by the FTC on the merits
    - Retain jurisdiction and maintain the *status quo* until the administrative proceeding that the Commission has initiated concludes
      - *Query*: Why ask for this?
    - Attorneys' fees

The complaint

- As to the likelihood of success on the merits, what did the FTC allege it would show?

Prima facie case →

Preempt entry defense →

Preempt efficiencies defense →

68. The Commission has reason to believe that the Transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:

a. The Transaction would have anticompetitive effects in the adult PCP services, pediatric services, OB/GYN services, and general surgery physician services markets in the Bismarck-Mandan area;

b. Substantial and effective entry or expansion into the relevant service and geographic markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and

c. Any efficiencies that Defendants may assert as resulting from the Transaction are speculative, not merger-specific, and are, in any event, insufficient as a matter of law to justify the Transaction.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- As to the balance of the equities and the public interest, what did the FTC allege it would show?

Difficulties in obtaining effective post-trial divestiture relief →

69. Preliminary relief is warranted and necessary. The Commission voted unanimously to issue an administrative complaint. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the status quo ante of competition would be difficult, if not impossible, without preliminary injunctive relief from this Court. The integration of Sanford and MDC's operations, including the elimination or transfer of service lines, the implementation of higher prices, and potential staff reductions, would substantially impair any attempt to restore competition to pre-Transaction levels.

Interim harm from price increases and quality reductions →

70. Moreover, in the absence of relief from this Court, substantial harm to competition could occur immediately, including [1] an increase in the costs that employers and their employees in the Bismarck-Mandan area incur for their healthcare and [2] a reduction in the quality of healthcare administered. Because any potential pro-competitive benefits of the Transaction do not outweigh the significant interim harm to competition and consumers, and should still be available pending the outcome of the administrative trial, the public equities weigh strongly in favor of Plaintiffs' request for preliminary injunctive relief.

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

Proving the Prima Facie Case

Proving the prima facie case

- Three elements:
  1. *Product market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant product market—
     a. The "*Brown Shoe* factors"
     b. The "hypothetical monopolist test"
  2. *Geographic market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant geographic market—
     a. "The area of effective competition"
        i. The area where customers of the merging firms can practically turn to alternative suppliers (when customers travel to suppliers—think retail stores)
        ii. The area where alternative suppliers exist that can practically service the customers of the merging firm (when suppliers travel to customers—think plumbers)
     b. The "hypothetical monopolist test"
  3. *Gross anticompetitive effect*: Courts broadly look at two types of indicia in evaluating evidence on the relevant market
     a. The *Philadelphia National Bank* presumption
     b. Explicit theories and supporting direct and circumstantial evidence of likely anticompetitive harm resulting from the merger

Before turning to market definition, we need to examine the Philadelphia National Bank *presumption and* Baker Hughes *burden shifting*

The *PNB* presumption

- Establishes a rebuttable presumption of prima facie anticompetitive Section 7 harm:

> "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which **produces a firm controlling an undue percentage share of the relevant market**, and **results in a significant increase in the concentration of firms** in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[1]

  - Requires—
    - The combined firm to pass some (unspecified) threshold of *market share*, *and*
    - The transaction to result in a *significant increase in market concentration*

    NB: The opinion was careful to note that it was not setting a lower bound and that some commentators had suggested 20% as a threshold of "undue" market share
  - Supposed to reflect the latest in economic thinking in the then-prevailing *structure-conduct-performance paradigm*
    - "[T] the test is fully consonant with economic theory."[2]
    - "[C]ompetition is greatest when there are many sellers, none of which has any significant share."[3]

[1] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
[2] *Id*. (citing extensively to structure-conduct-performance literature).
[3] *Id*.

Baker-Hughes[1]

- Sets out a three-step burden-shifting approach:
  1. The plaintiff bears the burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation
     - More generally, this should be the burden of proving a prima facie case (whether or not the *PNB* presumption or other evidence is invoked to show anticompetitive effect)
     - You can think of the burden here as the *burden of production*, that is, the plaintiff must adduce sufficient evidence to allow the trier of fact to find each and every (contested) essential element of a Section 7 violation
     - Essential elements
       1. The relevant product market
       2. The relevant geographic market
       3. The requisite gross anticompetitive effect in the relevant market

Also need to satisfy the interstate commerce element, but this is rarely contested

[1] United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

Baker-Hughes

- Sets out a three-step burden-shifting approach:
  2. If the plaintiff satisfies its burden in Step 1, the *burden of production* shifts in Step 2 to the defendants to adduce evidence sufficient to rebut the plaintiff's prima facie case and create a genuine issue for the trier of fact
     a. Three avenues of rebuttal:
        i. Negate the plaintiff's market definition
        ii. Rebut the predicates of the *PNB* presumption and other evidence of (gross) prima facie anticompetitive effect
        iii. If applicable, provide evidence of one or more downward-pricing pressure defenses

Baker-Hughes

- Uses a three-step burden shifting approach:
  3. *The burden of persuasion* then returns to the plaintiff to prove, in light of all of the evidence in the record, that the merger is reasonably probable to have an anticompetitive effect in the relevant market
     - To the extent defendants have satisfied their burden in Step In Step 3 plaintiffs must prove by the preponderance of the evidence—
       - The relevant product market
       - The relevant geographic market, and
       - The merger will cause a cognizable *net* anticompetitive effect with reasonable probability