MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2025

Tuesdays and Thursdays, 3:30 pm – 5:30 pm

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CLASS 4 HOMEWORK ASSIGNMENT

Instructions

Submit by email no later than 3:30 pm on Thursday, September 4
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 4

Calls for a memorandum of law to the client

Assignment

You are an associate at a large law firm working with partner Margaret Chen representing Sanford Health, one of the largest rural health systems in the United States. Sarah MacKenzie, General Counsel of Sanford Health, has asked the firm to prepare a memorandum of law analyzing the legal standards that courts apply when determining whether to grant a preliminary injunction under Section 13(b) of the FTC Act to block an acquisition. Chen has asked you to draft the memorandum. Chen asks that the memo cover the legal standard under the statute, whether and how the Section 13(b) preliminary injunction standard differs from the preliminary injunction standard under *Winter*, how the FTC is likely to argue in court how the standard should apply, and what the court is likely to do as a practical matter if presented with a such a Section 13(b) complaint. Chen notes that this is a pure memorandum of law and not to be applied to any particular transaction.

If you have any questions, send me an email.

ABLE & BAKER LLP

TO: Margaret Chen, Partner
FROM:
DATE: September 2, 2025

Section 13(b) Preliminary Injunction Standards for Blocking Acquisitions

Section 13(b) of the FTC Act authorizes the Commission to seek preliminary injunctions against mergers when it has "reason to believe" that parties are "violating, or about to violate" antitrust laws, upon a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success," an injunction "would be in the public interest."[1]

This memorandum analyzes the legal framework governing preliminary injunctions under Section 13(b). It proceeds in six parts. Part I examines the statutory standard and its elements. Part II outlines the traditional preliminary injunction standard established by the Supreme Court in *Winter v. Natural Resources Defense Council*,[2] the leading case on preliminary injunction standards. Part III compares the two frameworks, highlighting both textual differences and their practical application. Part IV describes how the FTC typically frames its arguments under Section 13(b). Part V reviews how courts have applied the standard in practice, with particular emphasis on judicial trends in merger cases. Part VI concludes.

I. The Section 13(b) Statutory Framework

Section 13(b) establishes a standard for preliminary injunctions that departs in its articulation from the traditional equitable relief requirements. The statutory text creates specific elements the FTC must satisfy, imposes particular burdens of proof, and has been subject to recent Supreme Court limitations on available remedies.

Statutory text and basic requirements. Section 13(b) provides in pertinent part:

> (b) Temporary restraining orders; preliminary injunctions
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> 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—
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> 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

[1] 15 U.S.C. § 53(b).
[2] 555 U.S. 7 (2008).

> 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.[3]

Section 13(b) further provides that if an administrative complaint is not filed within a court-specified period not exceeding 20 days after issuance of the temporary restraining order or preliminary injunction, the order or injunction must be dissolved by the court. In practice, however, the Commission issues its administrative complaint within a few days of the filing of the Section 13(b) complaint and before any decision on the entry of a preliminary injunction.

Section 13(b) also authorizes permanent injunctions "in proper cases" following a merits determination in the Commission's favor. The Commission rarely exercises this authority, but when it does, it forgoes issuing an administrative complaint and conducts the entire litigation in federal court.

Elements required for preliminary relief. The statutory text establishes three distinct requirements that the FTC must satisfy to obtain preliminary injunctive relief under Section 13(b).

1. *"Reason to believe" standard*. The Commission must have "reason to believe" that the defendant is violating or is about to violate a provision of law enforced by the FTC. This threshold is lower than the probable cause standard and requires only that the Commission have a reasonable basis for its belief that antitrust violations are occurring or imminent. In the merger context, this element is typically satisfied by the Commission's investigation revealing potential competitive harms sufficient to warrant challenge under Section 7 of the Clayton Act.
2. *Public interest in injunctive relief*. The statute requires that enjoining the challenged conduct "pending the issuance of a complaint by the Commission" would be "in the interest of the public." This element focuses on whether temporary relief serves the public good by preserving competitive conditions during the administrative proceedings. Courts generally find this element satisfied when the FTC demonstrates that allowing a merger to proceed would create difficulties in providing effective relief if the Commission ultimately prevails in its administrative case.
3. *"Proper showing" requirement***.** The core substantive requirement mandates that the FTC make "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." Courts have interpreted this to require the FTC to "raise 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 [a] Court of Appeals."[4]

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[3] 15 U.S.C. § 53(b).

[4] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); id. at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Meta Platforms Inc., No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *8 (N.D. Cal. Feb. 3, 2023); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 290 (D.D.C. 2020); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d

This memorandum focuses primarily on the "proper showing" element, which has generated the most judicial interpretation and is central to understanding how Section 13(b) operates in practice. Before turning to that issue, however, it is necessary to examine the traditional preliminary injunction standard articulated by the Supreme Court in *Winter*.

II. The Traditional Equitable Preliminary Injunction Standard

The Supreme Court's decision in *Winter v. Natural Resources Defense Council* established the governing equitable standard for preliminary injunctions. The Court held that a plaintiff must demonstrate four elements:

1. *Likelihood of success on the merits*. The plaintiff must show that it is likely, not merely possible, to prevail on the underlying claim.
2. *Irreparable harm.* The plaintiff must demonstrate that, absent preliminary relief, it is likely to suffer harm that monetary damages cannot remedy.
3. *Balance of equities.* The court must determine that the hardships faced by the plaintiff outweigh those imposed on the defendant by granting the injunction.
4. *Public interest*. The injunction must advance, rather than disserve, broader public interests.[5]

The Court emphasized that "a preliminary injunction is an extraordinary remedy never awarded as of right"[6] and rejected the sliding-scale approaches that some circuits had permitted, which had allowed weak showings on one factor to be offset by strong showings on other factors. Instead, *Winter* requires that each element be independently satisfied.

This traditional equitable standard applies when the Department of Justice seeks preliminary injunctive relief to block a merger under Section 15 of the Clayton Act[7] Courts applying these provisions have modified the role of the *Winter* elements in public interest cases. For DOJ actions, courts generally presume irreparable harm from a showing of a likelihood of success on the merits or eliminate the requirement altogether.[8] Similarly, when the government demonstrates a likelihood of success on the merits, courts routinely find that the balance of

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27, 44 (D.D.C. 2018); FTC v. Sanford Health, No. 1:17-CV-133, 2017 WL 10810016, at *24 (D.N.D. Dec. 15, 2017), aff'd, 926 F.3d 959 (8th Cir. 2019); FTC v. Advocate Health Care, No. 15 C 11473, 2016 WL 3387163, at *2 (N.D. Ill. June 20, 2016), rev'd and remanded, 841 F.3d 460 (7th Cir. 2016); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 115 (D.D.C. 2016); FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 22 (D.D.C. 2015); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012); FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *53 (N.D. Ohio Mar. 29, 2011); FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG MLGX, 2011 WL 3100372, at *16 (C.D. Cal. Feb. 22, 2011); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

[5] *Winter*, 555 U.S. at 20.

[6] *Id*. at 24.

[7] 15 U.S.C. § 25 (authorizing the DOJ to "to institute proceedings in equity to prevent and restrain" antitrust violations and empowering courts in such actions to "make such temporary restraining order or prohibition as shall be deemed just in the premises"). The traditional equitable atandard also applies when private parties, including states, seek preliminary injunctive relief under Section 16. 15 U.S.C. § 26 (empowering courts in private actions to enter injunctive relief "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity").

[8] In private actions, by contrast, courts require a showing of immediate and irreparable harm that cannot be compensated by damages.

equities and the public interest favor the issuance of an injunction. As a result, in merger cases brought by the government, the decisive issue is almost always whether the plaintiff has shown a sufficient likelihood of success on the merits.

In government merger cases, the likelihood of success on the merits is the decisive factor. Once the plaintiff shows a reasonable probability of prevailing at trial, courts find that the balance of equities and the public interest favor an injunction. The remaining *Winter* factors receive lip service in court opinions but do not influence the outcome.

III. Comparison of Section 13(b) and *Winter*

Although Section 13(b) and *Winter* both govern preliminary injunctions, they differ in text and, at least arguably, in application. Two distinctions are most often identified in the case law and commentary: the formulation of the likelihood of success requirement and the treatment of the equitable factors.

A. Likelihood of success

Under *Winter*, a plaintiff must demonstrate that it is "likely to succeed on the merits." Section 13(b), by contrast, requires "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." Early Section 13(b) cases interpreted this language as more lenient, holding that the FTC need only "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation … by the FTC in the first instance and ultimately by [a] Court of Appeals." This "serious questions" formulation appeared to require less than *Winter's* probability of success, focusing instead on whether significant legal or factual issues warranted administrative adjudication. At the same time, it sits in tension with the statutory text, which directs courts to consider the Commission's "likelihood of ultimate success" rather than simply whether difficult questions exist.

B. "Sliding scale" versus independent elements

Winter requires that each of its four factors—likelihood of success, irreparable harm, balance of equities, and public interest—be independently established. It explicitly rejected sliding-scale approaches that allowed weak showings on some elements to be offset by stronger showings on others. Section 13(b), in contrast, directs courts to grant relief "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." This statutory phrasing arguably contemplates a more integrated balancing of factors rather than four independent requirements.

IV. FTC litigation strategy

In seeking preliminary injunctions under Section 13(b), the FTC advances several recurring themes. It emphasizes the "serious questions" standard as evidence that Section 13(b) imposes a lower burden than the traditional equitable standard. It underscores the Commission's role as an expert agency whose determinations deserve judicial deference. It argues that the public interest and the balance of equities invariably favor preserving competition until the Commission can complete its review. And it frames Section 13(b) proceedings as procedural safeguards designed to protect the administrative process, rather than as full trials on the merits.

A. Reliance on the "serious questions" standard

The FTC consistently invokes the "serious questions" formulation as long accepted by courts and noted in nearly every modern Section 13(b) opinion. The FTC argues that the "serious questions" standard, by its terms, requires only that the Commission demonstrate that the case presents substantial, difficult, and doubtful issues warranting administrative adjudication. On its face, the standard indicates that the bar for obtaining preliminary relief under Section 13(b) is lower than in cases governed by *Winter*. The FTC maintains that this lower threshold reflects Congress's design: Section 13(b) was intended to preserve the status quo so that the Commission can adjudicate the merits of merger challenges through its administrative process without the competitive landscape being irreversibly altered by consummation of the transaction.

B. Deference to the Commission as an expert agency

As part of its argument regarding congressional design, the FTC often highlights its role as an expert administrative competition agency. When, after a thorough investigation—usually an extensive second request investigation under the Hart-Scott-Rodino Premerger Notification Act— the Commission finds 'reason to believe' a transaction violates Section 7, the FTC argues that this determination should carry significant weight with the court. The FTC emphasizes that the court's role in a Section 13(b) proceeding is not to decide the merits of the antitrust issues in the first instance, but to preserve the Commission's ability to adjudicate them in an administrative proceeding and, where liability is established, order effective injunctive relief. On this reasoning, judicial deference is warranted both because of the Commission's specialized expertise and because Congress entrusted it with primary responsibility for merger enforcement.

C. The equities and the public interest

The FTC also consistently argues that the equities and the public interest strongly favor preliminary relief. First, the FTC stresses the substantial public interest in enforcing the nation's antitrust laws. Congress created the FTC to carry out that responsibility, and the public interest is furthered when the Commission, having "reason to believe" that a pending merger would violate Section 7, seeks the assistance of the courts to maintain the premerger status quo during its administrative adjudication of the merits.

Second, the FTC contends that interim relief serves the public interest by preserving the Commission's ability to order effective permanent injunctive relief if the Commission ultimately finds a Section 7 violation on the merits. Once consummated, mergers typically integrate operations so thoroughly that restoring premerger competition through divestiture or other relief becomes difficult, if not impossible.

Third, the FTC argues that preliminary injunctive relief serves the public interest by ensuring that there is no competitive harm during the period between closing and final judgment. The FTC argues that, absent a preliminary injunction, the merged firm may anticompetitively increase prices, reduce rivalry, and diminish innovation and so cause immediate consumer injury that post-trial remedies cannot undo. Against these public harms, the Commission emphasizes that, during the period the preliminary injunction is in effect, any private harms to the merging parties from delay or foregone efficiencies are comparatively minor, and that Congress's enactment of Section 13(b) reflects a legislative judgment that preserving competition during the administrative adjudication of the merits outweighs any private harms.

D. Strategic Framing of Section 13(b) Proceedings

In addition to its substantive arguments, the FTC advances a conceptually distinct procedural framing for Section 13(b) cases. The Commission emphasizes that Section 13(b) proceedings are not meant to be full trials on the merits, but temporary measures designed to preserve the FTC's ability to adjudicate the merits of merger challenges in the first instance. On this view, the court's role is limited to maintaining the status quo until the Commission has completed its administrative process and, if appropriate, ordered effective relief. By urging courts to view their task in this procedural light, the FTC reinforces its claim that a showing of likely success on the merits is unnecessary and that substantial antitrust concerns alone justify preliminary relief.

Part V. Judicial application and trends

Although Section 13(b) and *Winter* differ in text, courts in practice have treated the standards as functionally equivalent. Modern Section 13(b) opinions consistently demonstrate three key themes: courts require a rigorous analysis of the likelihood of success on the merits, Section 13(b) proceedings are effectively full trials on the merits, and the grant or denial of a preliminary injunction typically determines the outcome of the transaction and ends the litigation.

A. Rigorous likelihood-of-success analysis

Courts have consistently held that the likelihood of success on the merits is the determinative factor in government merger cases, whether brought by the DOJ under *Winter* or by the FTC under Section 13(b). While early decisions sometimes invoked the "serious questions" standard, no modern court has granted a preliminary injunction solely on that basis. Instead, courts conduct detailed merits analyses and require the FTC to demonstrate a probability of prevailing on its Section 7 claims. Section 13(b) slip opinions in recent cases—*Microsoft/Activision*,[9] *IQVIA/Propel*,[10] *Novant Health*,[11] *Tapestry/Capri,*[12] *Kroger/Albertsons*,[13] and *Tempur Sealy*[14]—span 60 to 170 pages and closely resemble trial opinions in DOJ merger cases. Judges view such rigor as necessary, given the extraordinary remedy of blocking a merger before a full trial and the practical effect that granting a preliminary injunction usually ends the transaction.

B. Section 13(b) proceedings as de facto trials on the merits

Although technically preliminary, Section 13(b) hearings in practice are conducted as if they were full trials on the merits. The trial record is extensive. It typically includes the results of the

[9] FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Calif. July 19, 2023) (53-page opinion denying preliminary injunction), aff'd, 136 F.4th 954 (9th Cir. May 7, 2025).

[10] FTC v. IQVIA, 710 F. Supp. 3d 329 (S.D.N.Y. Dec. 29, 2023) (103-page slip opinion granting preliminary injunction).

[11] FTC v. Novant Health, Inc., No. 5:24-cv-00028 (W.D.N.C. June 5, 2024) (55-page slip opinion denying preliminary injunction).

[12] FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. Oct. 24, 2024) (Tapestry/Capri) (169-page slip opinion in typescript granting preliminary injunction).

[13] FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024) (71-page slip opinion granting preliminary injunction).

[14] FTC v. Tempur Sealy Int'l, Inc., 768 F. Supp.3d 787 (S.D. Tex. Feb. 26, 2025) (115-page slip opinion denying preliminary injunction).

investigating agency's comprehensive second request investigation; months of postcomplaint civil discovery, including extensive third-party discovery from competitors and customers; multiple days of live testimony from fact and expert witnesses supplemented by admitted deposition testimony and hundreds, if not thousands, of exhibits; and full prehearing and posthearing briefing. Because the record often contains competitively sensitive business information from the parties and from third parties, proceedings are conducted under robust protective orders that allow its use while safeguarding confidentiality. Judges receive such information under seal and close the courtroom when witnesses address confidential matters. Judges also entertain Daubert (Rule 702) motions to limit or exclude expert evidence, often resolving those motions before or during the evidentiary hearing, and they have the opportunity to question witnesses to resolve outstanding issues and to assess each witness's credibility. Although hearsay may be considered at the preliminary injunction stage, the breadth of admissible evidence in Section 13(b) cases means that courts rarely rely on inadmissible hearsay. When such material is received, it is accorded little weight relative to live testimony, admitted deposition testimony, and business records. Courts conduct a thorough factual analysis of market definition, competitive effects, barriers to entry, claimed efficiencies, and other substantive defenses, effectively deciding the same issues on essentially the same record that would be adjudicated in the Commission's administrative proceeding. Section 13(b) opinions likewise tend to be far more extensive than typical preliminary injunction rulings, with detailed findings of fact and conclusions of law typically running between 60 and 170 pages.

While these judicial determinations are formally nonbinding on the administrative proceeding, they are outcome-determinative in practice. Because the administrative record would substantially mirror the district court record, the Commission recognizes that it is unlikely to reach a different outcome than the district court absent fundamental disagreements on legal standards or the resolution of key disputed factual issues that were not fully developed in the preliminary injunction proceeding.

When such disagreements do arise, the Commission typically pursues them through direct appeal to the court of appeals rather than duplicative administrative litigation. This approach allows the FTC to challenge adverse legal rulings or significant factual determinations without the delay and resource expenditure of a parallel administrative proceeding that would likely reach the same conclusion. I am aware of no merger antitrust case since 1995 where the FTC was denied a preliminary injunction in a Section 13(b) proceeding by both the district court (and affirmed by the court of appeals if appealed) and nonetheless continued to prosecute the administrative complaint on the merits.[15]

C. Practical consequences of preliminary injunction decisions

Courts also recognize the practical stakes. By the time a Section 13(b) decision is issued, the transaction has often been pending for 18 to 24 months. If a preliminary injunction is granted,

[15] The closest case is FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Calif. July 19, 2023) (Microsoft/Activision), *aff'd*, 136 F.4th 954 (9th Cir. May 7, 2025). The district court denied the Section 13(b) preliminary injunction. The Commission fundamentally disagreed on the law and the facts, appealed the district court's decision to the Ninth Circuit, and continued its administrative proceeding during the pendency of the appeal. The Ninth Circuit affirmed the denial of the preliminary injunction, and less than two weeks later the Commission discontinued the administrative proceeding and dismissed the administrative complaint. *See* Order Dismissing Complaint, *In re* Microsoft Corp., No. 9412 (F.T.C. May 22, 2025).

merging parties almost always abandon the deal rather than endure years of administrative and appellate litigation. Conversely, if an injunction is denied, the FTC typically dismisses its administrative complaint, allowing the merger to close. Judges understand that their rulings on preliminary relief effectively decide the fate of the transaction.

If a preliminary injunction is granted, merging parties invariably abandon the transaction rather than face the prospect of years of additional administrative litigation, followed by potential appellate review. This process could extend the time the deal remains open for two years or more after signing.[16] Most merger agreements contain outside termination dates of one year after the date of signing, with some agreements also providing for an extension of up to six months if the antitrust closing conditions have not been satisfied. Even when parties negotiate extension provisions, the ongoing regulatory uncertainty undermines the strategic rationale for many deals, disrupts business planning, and can trigger problems with customer/supplier relationships. Moreover, given the district court's extensive factual analysis—which can be overturned on appeal only if clearly erroneous under Federal Rule of Civil Procedure 52(a)—and the typical careful application of well-settled merger law, most merging parties recognize that their chances of success on appeal are slim. I am not aware of any merger in the last 30 years where the district court entered a preliminary injunction blocking the merger in a Section 13(b) proceeding and the merging parties pursued an appeal to a final decision. Multiple courts in Section 13(b) proceedings have expressly recognized that if they enter a preliminary injunction, the merging parties will abandon the transaction.[17]

D. Convergence of Section 13(b) and Winter

Taken together, these developments have eliminated any practical distinction between the Section 13(b) "serious questions" formulation and the *Winter* "likelihood of success" standard. Courts may acknowledge the statutory differences in language. Still, in applying the law, they require the FTC to demonstrate a likelihood of success on the merits comparable to the DOJ's burden in *Winter* cases. As then-Judge Kavanaugh observed in dissent in *FTC v. Whole Foods*, the "serious questions" standard is difficult to reconcile with Section 13(b)'s text, which requires consideration of the Commission's "likelihood of ultimate success."[18] Modern courts have effectively adopted that textual reading, ensuring convergence in practice between Section 13(b) merger cases and DOJ merger challenges.

E. Cautionary note

The convergence described in this Part reflects how judges have proceeded in practice in deciding Section 13(b) cases over the last thirty years. Over most of these years, the FTC and

[16] Like the Commission, the merging parties could appeal an adverse decision. Historically, however, this has been rare.

[17] *See, e.g.,* FTC v. IQVIA, 710 F. Supp. 3d 329 (S.D.N.Y. Dec. 29, 2023); FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021) (unpublished), *aff'd*, 30 F.4th 160 (3d Cir. 2022); FTC v. Peabody Energy Corp., No. 4:20-CV-00317-SEP, 2020 WL 5893806 (E.D. Mo. Oct. 5, 2020); FTC v. Sanford Health/Sanford Bismarck, No. 1:17-CV-133, 2017 WL 10810016 (D.N.D. Dec. 15, 2017), *aff'd,* No. 17-3783, 2019 WL 2454218 (8th Cir. June 13, 2019); FTC v. Wilh. Wilhelmsen Holding AS, No. 18-cv-00414-TSC, 2018 WL 4705816 (D.D.C. Oct. 1, 2018); FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016), *on remand*, 2017 WL 1022015 (N.D. Ill Mar. 16, 2017); FTC v. Staples Inc., 190 F. Supp. 3d 100 (D.D.C. 2016); FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).

[18] FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1059-60 & n.6 (D.C. Cir. 2008) (Kavanaugh, dissenting).

DOJ have filed their merger antitrust cases in the District of Columbia. Over the last several years, however, the agencies have filed fewer merger cases in the District of Columbia and have instead selected other districts, apparently to avoid D.C. precedents (and some judges) they regard as unfavorable. This policy has resulted in more cases being presented to courts and judges with limited merger experience. Most such judges have nonetheless followed the modern template: they study recent merger opinions, enter similar scheduling orders, conduct multi-day evidentiary hearings, and issue detailed opinions with extensive findings of fact and conclusions of law. Even so, there is no assurance that all future courts will do the same. A judge could conduct a more traditional, limited preliminary injunction proceeding and take more literally the FTC's position that Section 13(b) and the "serious questions" line of cases set a particularly low bar for interim relief. Accordingly, counsel should not assume convergence in every forum and should prepare for both possibilities, building a record that satisfies the traditional equitable standard while directly engaging the Commission's "serious questions" theory.

Part VI. Conclusion

Section 13(b) establishes a distinctive statutory standard for preliminary relief, directing courts to weigh the equities and consider the FTC's likelihood of ultimate success in determining whether an injunction serves the public interest. Early judicial interpretations gave rise to the "serious questions" formulation, suggesting that the Commission's burden may be lower than the traditional equitable standard articulated in *Winter*. The FTC continues to rely on that formulation, emphasizing its role as an expert agency, the strong public interest in preserving competition, and the need to maintain the status quo during administrative proceedings.

In practice, however, modern courts have required the FTC to satisfy a likelihood-of-success standard functionally identical to that applied to DOJ merger cases under *Winter*. Section 13(b) proceedings now resemble full trials on the merits, with extensive evidentiary records and lengthy written opinions. Courts recognize that their decisions effectively determine the fate of the transaction, and they conduct rigorous merits analyses accordingly.

The result is a convergence: whatever differences exist in statutory text or historical formulations, today's Section 13(b) cases are adjudicated under standards that mirror those applied in DOJ merger challenges. For clients evaluating merger risk, the practical takeaway is that an FTC action under Section 13(b) poses the same level of risk as a DOJ action for preliminary injunctive relief under the Clayton Act.

That said, this convergence reflects how courts have proceeded in practice rather than establishing a binding rule. Recent forum choices by the agencies have placed more cases before courts and judges with limited merger antitrust experience. Although almost all of those judges to date have followed the modern template, there is no assurance that all will do so in the future. Counsel should advocate application of the *Winter* "likelihood of success" standard in Section 13(b) cases while being prepared to confront the FTC's 'serious questions' formulation if the court elects to employ it.

If you have any questions or would like to discuss this matter further, please do not hesitate to contact us.