MERGER ANTITRUST LAW

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

CLASS 4 HOMEWORK ASSIGNMENT

Instructions

Submit by email no later than 3:30 pm on Thursday, September 3, 2026
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 that the standard should apply, and what the court is likely to do as a practical matter if presented with 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, please email me.

> This assignment was designed to examine the tension between the standards that ostensibly apply to the Department of Justice and the FTC in seeking preliminary injunctive relief in merger antitrust cases. By placing the memorandum in the context of *Sanford Health*, the assignment predates the new FTC policy under Chairman Ferguson to litigate FTC merger antitrust cases entirely in federal court and to forgo the dual-track approach the Commission had followed historically. The Ferguson approach, which subsequent Commissions may reject, effectively eliminates the tension in practice by removing the need to litigate preliminary injunctions and instead proceed directly to a litigation of the merits.

ABLE & BAKER LLP

Since this is a draft you are writing for a partner to send to a client, you should not fill in the To/From/Date information. You should also clearly label the document as a draft.

TO:

FROM:

DATE:

<u>Section 13(b) Preliminary Injunction Standards for Blocking Acquisitions</u>

Section 13(b) of the FTC Act authorizes the Commission to seek preliminary injunctions against mergers when it has "reason to believe" that a person is "violating, or is about to violate, any provision of law enforced by the Federal Trade Commission", 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 identifies predicates for the Commission to bring suit and separately prescribes the showing a court must require before granting preliminary relief. The relationship between that statutory standard and traditional equitable principles has long been disputed and has received renewed attention after the Supreme Court's recent decision in *Starbucks Corp. v. McKinney*.[3]

Starbucks did not involve Section 13(b). It arose under Section 10(j) of the National Labor Relations Act, which authorizes a district court to grant the National Labor Relations Board such temporary relief as the court "deems just and proper." The Sixth Circuit and several other courts of appeals had read that language to permit a two-part inquiry under which the Board needed to show only reasonable cause to believe that an unfair labor practice had occurred and that relief was just and proper. The Supreme Court rejected that approach. It held that when Congress empowers a court to grant equitable relief, a strong presumption applies that the court will exercise that authority consistently with traditional equitable principles, that the four *Winter* criteria supply those principles for preliminary injunctions, and that Section 10(j) bore no

[1] 15 U.S.C. § 53(b).
[2] 555 U.S. 7 (2008).
[3] 602 U.S. 339 (2024).

resemblance to the language Congress has used when it has displaced them. Absent a clear command from Congress, a court must therefore adhere to the traditional four-factor test.

What *Starbucks* means for Section 13(b) is contested. Section 13(b) is more specific than Section 10(j): it identifies the equities, the Commission's likelihood of ultimate success, and the public interest as the considerations governing preliminary relief, and the FTC can argue that this is the clear command *Starbucks* contemplated. Merging parties respond that naming considerations is not the same as displacing the traditional test, and that nothing in the text authorizes relief on a showing short of likely success. Part III below returns to that question.

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

(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—
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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 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.[4]

Under the first proviso, the Commission must file its administrative complaint within the period the court specifies, which may not exceed 20 days after issuance of the temporary restraining order or preliminary injunction, or the order or injunction dissolves. In practice, under the FTC's traditional dual-track merger model, the Commission ordinarily 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. Both tracks run simultaneously.

Under the second proviso, the Commission may seek a permanent injunction in federal court "in proper cases." Historically, the Commission rarely invoked this authority in merger cases, preferring the dual-track model. It did, however, use the permanent injunction proviso in

[4] 15 U.S.C. § 53(b).

occasional challenges to consummated acquisitions, including *Ovation/Lundbeck*[5] and *St. Luke's/Saltzer*,[6] where federal district courts adjudicated the Section 7 merits without parallel Part 3 proceedings. Beginning with *Henkel/Liquid Nails*[7] in December 2025, the Commission has used direct federal court merits litigation in a preclosing merger challenge without commencing a parallel administrative adjudication. Chairman Ferguson subsequently announced that the Commission will bring merger challenges exclusively in federal court, abandoning the dual-track model.[8]

The dual-track model described above is therefore the Commission's legacy practice rather than its current one. It nevertheless supplies nearly all of the judicial authority construing Section 13(b), and nothing prevents a later Commission from returning to it. This memorandum accordingly addresses both: it treats direct federal court litigation as the Commission's announced practice and the dual-track model as the framework in which the governing case law developed and against which that case law must be read.

Statutory predicates and the standard for preliminary relief. Section 13(b) first identifies two predicates for the Commission to bring suit and then separately states the judicial standard for granting preliminary relief.

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. In the merger context, the Commission ordinarily bases this determination on its investigation and its conclusion that the transaction warrants challenge under Section 7 of the Clayton Act. "Reason to believe" is a predicate to the Commission's filing of suit, not a merits determination.

2. *Public interest predicate*. The Commission must also have reason to believe that enjoining the challenged conduct pending the Commission's administrative process would be "in the interest of the public."[9] Under the traditional dual-track merger model, this predicate reflected the need to preserve the status quo while the Commission adjudicated the merits. Like the "reason to believe" determination, it is part of the Commission's statutory authority to bring suit.

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5 FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011) (Ovation/Lundbeck) (affirming judgment for the defendant after a federal bench trial of the FTC and Minnesota challenge to a consummated acquisition).

6 Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015) (St. Luke's/Saltzer) (affirming divestiture after a consolidated federal bench trial of the FTC, Idaho, and private plaintiffs' challenge to a consummated acquisition).

7 Complaint for Permanent Injunction ¶¶ 13-18, FTC v. Henkel AG & Co. KGaA, No. 1:25-cv-10371-KPF (S.D.N.Y. filed Dec. 15, 2025); Press Release, Fed. Trade Comm'n, FTC Sues to Stop Loctite, Liquid Nails Construction Adhesive Merger (Dec. 11, 2025). The Henkel complaint sought a permanent injunction directly in federal court; it did not request a temporary restraining order or a preliminary injunction. On August 14, 2026, after a seven-day bench trial, the district court granted the FTC a permanent injunction blocking the Henkel/Liquid Nails transaction, providing the first successful application of this new direct-federal-court merger litigation model. *See* Order, FTC v. Henkel AG & Co. KGaA, No. 1:25-cv-10371-KPF (S.D.N.Y. Aug. 14, 2026). The court's findings of fact and conclusions of law remain under seal as of September 3, 2026.

8 Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Remarks at the George Mason Law Review 29th Annual Antitrust Symposium (Feb. 20, 2026) (video on C-SPAN) (stating that the FTC should bring merger challenges directly in federal court).

9 15 U.S.C. § 53(b).

3. *"Proper showing" requirement***.** Once suit is filed, the district court may grant preliminary relief only 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."[10] A substantial line of Section 13(b) cases has interpreted this language 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."[11]

This memorandum focuses primarily on the judicial "proper showing" standard, 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 *Winter* decision 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 to succeed 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.[12]

The Court emphasized that "a preliminary injunction is an extraordinary remedy never awarded as of right" and held that a plaintiff must show that irreparable injury is likely, not merely

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[10] *Id*.

[11] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting cases); *see* FTC v. Microsoft Corp., 136 F.4th 954 (9th Cir. 2025) (reaffirming Warner's serious questions formulation); FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024) (applying the serious questions standard under Ninth Circuit precedent); cf. FTC v. Tempur Sealy Int'l, Inc., 768 F. Supp. 3d 787, 813-14 (S.D. Tex. 2025) (reading Starbucks to require a clear showing of likelihood of success); *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 27, 44 (D.D.C. 2018); 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) (reversing on geographic market definition and not disturbing the standard recited); 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).

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

possible.[13] *Winter* thus rejected the Ninth Circuit's rule permitting a sufficiently strong showing on the merits to compensate for only a possibility of irreparable harm. The Court emphasized the need to consider the balance of equities and the public interest, which it found strongly favored the defendant Navy. It therefore reversed the Ninth Circuit and vacated the preliminary injunction to the extent the Navy had challenged it. Although the Court stated the traditional four-factor test, including the requirement that the plaintiff be likely to succeed on the merits, it did not decide whether the plaintiffs had satisfied that element. In particular, *Winter* did not define the degree of probability required by "likely."

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.[14] Courts applying these provisions have modified the role of the *Winter* elements in public interest cases. For DOJ actions, courts generally presume irreparable harm once the government makes the requisite showing of likelihood of success on the merits.[15] Similarly, when the government demonstrates a likelihood of success on the merits, courts routinely find that the balance of equities and the public interest favor issuing an injunction.[16] 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.

Modern authority applying DOJ's standalone preliminary injunction standard is sparse because almost all merging parties today stipulate to interim relief preventing closing until the case is decided on the merits.[17] In the modern DOJ cases reviewed, consolidated merits trials generally began roughly four to six months after the complaint, although some cases proceeded faster and

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[13] *Id*. at 22, 24. *Winter* did not define the degree of probability required by "likely" and expressly declined to decide whether the plaintiffs had established likelihood of success on the merits. The courts of appeals have subsequently adopted differing formulations of the required merits showing.

[14] 15 U.S.C. § 25 (authorizing the DOJ 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 standard also applies when private plaintiffs and state attorneys general 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").

[15] *See, e.g.*, United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) ("[O]nce the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed."); *accord* United States v. Ivaco, Inc., 704 F. Supp. 1409, 1429 (W.D. Mich. 1989); United States v. Culbro Corp., 436 F. Supp. 746, 750 (S.D.N.Y. 1977); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 543-44 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963). *But see* United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035 (D. Md. Oct. 17, 2022) (relying on *eBay* and *Winter* to reject DOJ's asserted presumption and requiring an independent showing of actual and imminent irreparable harm). In private actions, by contrast, courts require a showing of immediate and irreparable harm that cannot be compensated by damages.

[16] *See Siemens*, 621 F.2d at 506 (explaining that once the government has shown a reasonable likelihood of success on the merits, "the equities will usually tip in its favor, since private interests must be subordinated to public ones"); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968) (treating the threatened antitrust violation itself as sufficient public injury); United States v. Pennzoil Co., 252 F. Supp. 962 (W.D. Pa. 1965) (giving paramount weight to the public interest over injury to the merging parties). Siemens emphasized, however, that a court must still balance the hardships and may deny or tailor interim relief where the harm to defendants is great and consummation would not jeopardize effective ultimate relief.

[17] *See* Fed. R. Civ. P. 65(a)(2). Standalone DOJ preliminary injunction decisions do exist, including United States v. UPM-Kymmene Oyj, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003), and *Booz Allen Hamilton*, 2022 WL 9976035.

others longer. When the merging parties stipulate to blocking interim relief, the court proceeds directly to the Section 7 merits rather than separately adjudicating the preliminary injunction factors. This practice helps explain why *Siemens* and other older decisions remain principal authorities on the standalone DOJ preliminary injunction standard.

In sum, in DOJ merger antitrust cases, the likelihood of success on the merits is the decisive factor. Once the plaintiff shows the requisite likelihood of success on the merits, courts find that the balance of equities and the public interest favor an injunction. Although courts must address the remaining *Winter* factors, those factors rarely determine the outcome independently of the merits.

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. 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." A substantial line of Section 13(b) cases interprets 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."[18] This "serious questions" formulation remains controlling in some circuits and, on its face, requires less than *Winter's* probability of success, focusing instead on whether significant legal or factual issues warrant further adjudication.

Recent decisions confirm that the dispute remains live and forum dependent. Some courts have reaffirmed the serious questions formulation,[19] while others, especially after the Supreme Court's decision in *Starbucks*, have required a clear showing of likelihood of success.[20] At the same time, the serious questions formulation 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.[21] But the contrast should not be overstated. *Winter* itself did not define the probability required for likelihood of success or categorically reject all sliding scale approaches, and several circuits continue to permit a reduced merits showing where other equitable considerations strongly favor relief.

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 highlights the Commission's institutional

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[18] *See* cases cited *supra* note 11.

[19] *See Microsoft*, 136 F.4th at 965; *Kroger*, 2024 WL 5053016, at *2. *Microsoft* expressly reaffirmed *Warner's* serious questions formulation, and *Kroger* applied it notwithstanding *Starbucks*.

[20] *See Tempur Sealy*, 768 F. Supp. 3d at 813-14. *Tempur Sealy* read *Starbucks* to require a showing of a clear likelihood of success.

[21] In his dissent in *Whole Foods*, then-Judge Kavanaugh stressed the inconsistency. *See* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1060 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("This 'serious questions' standard is inconsistent with the relevant statutory text. The statute unambiguously requires that courts consider 'the Commission's likelihood of ultimate success' when the FTC seeks to preliminarily enjoin a merger.").

expertise and Congress's creation of a specialized merger enforcement process. It argues that the public interest and the balance of equities strongly favor preserving the premerger status quo. Under the traditional dual-track model, it frames Section 13(b) proceedings as safeguards for the administrative process rather than full trials on the merits. That last rationale has less force when the Commission itself elects to litigate the merger merits directly in federal court.

Reliance on the "serious questions" standard. The FTC consistently invokes the "serious questions" formulation as a standard 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 has traditionally maintained that this lower threshold reflects Congress's dual-track design: Section 13(b) preserves the status quo so the Commission can adjudicate the merits of merger challenges administratively without the competitive landscape being irreversibly altered by consummation of the transaction. That rationale is strongest when the Commission is actually pursuing a parallel administrative adjudication.

The Commission's institutional role and expertise. As part of its argument regarding congressional design, the FTC often highlights its institutional expertise as a specialized competition agency. After a thorough investigation—usually an extensive second request investigation under the Hart-Scott-Rodino Antitrust Improvements Act of 1976—the Commission may argue that its decision to challenge the transaction supports treating the antitrust issues as sufficiently substantial to justify interim relief. But Section 13(b) assigns the district court an independent judicial role: the Commission's "reason to believe" determination does not substitute for the court's assessment of the Commission's likelihood of ultimate success and the equities. The better characterization, therefore, is an advocacy argument based on expertise and statutory structure, not a doctrine requiring judicial deference to the Commission's merits determination. That independent judicial role has an important consequence: the court must assess the FTC's likelihood of ultimate success based on the full record before it, including the merging parties' rebuttal evidence, rather than merely determine whether the Commission has established a prima facie case.[22]

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 Commission argues that the public interest is furthered when, having "reason to believe" that a pending merger would violate Section 7, it seeks the assistance of the courts to maintain the premerger status quo. Under the traditional dual-track model, that relief preserved the status quo during administrative adjudication; under direct federal court litigation, it preserves the status quo pending the court's merits determination.

Second, the FTC contends that interim relief serves the public interest by preserving the ability of the ultimate merits tribunal—traditionally the Commission, and under direct federal court

[22] *See Whole Foods*, 548 F.3d at 1035 (Brown, J.) (explaining that the district court must exercise independent judgment and evaluate the FTC's chance of success based on all of the evidence before it, including evidence offered by the defendants); *see also Heinz*, 246 F.3d at 714-15.

litigation the district court—to grant effective final relief if it finds a Section 7 violation. 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 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, causing 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 the public interest in preserving competition can outweigh private harms from delay.

Strategic framing of Section 13(b) proceedings. Under the traditional dual-track model, the FTC advances a conceptually distinct procedural framing for Section 13(b) cases. The Commission emphasizes that the federal proceeding is not meant to be a full trial on the merits, but a temporary measure designed to preserve the FTC's ability to adjudicate the merger challenge administratively in the first instance. By urging courts to view their task in this procedural light, the FTC reinforces its claim that a conventional showing of likely success on the merits is unnecessary. This framing is model dependent, however. When the FTC proceeds directly in federal court under Section 13(b)'s permanent injunction proviso, as in Henkel/Liquid Nails, the district court itself is the merits tribunal, so the Commission cannot justify a limited merits inquiry on the ground that the merits are reserved for the Commission. A further question then arises if the FTC seeks contested interim relief without filing or contemplating an administrative complaint under Part 3 of the Commission's Rules of Practice: whether the traditional Section 13(b) "proper showing" standard governs or whether ancillary relief must satisfy Rule 65 and Winter. Singer supports the latter view, while other cases under the permanent injunction proviso have applied the Section 13(b) standard without distinguishing between the two statutory routes. No appellate court appears to have resolved the issue after Starbucks, and the issue was not adjudicated in the earlier direct federal merger cases or in Henkel/Liquid Nails.[23]

V. Judicial application and trends in practice

Although Section 13(b) and *Winter* differ in text, the governing verbal standard remains unsettled and circuit dependent. Modern Section 13(b) merger litigation has nevertheless converged substantially with DOJ merger litigation in practice. Three themes recur: courts conduct rigorous analyses of the Section 7 merits, Section 13(b) proceedings often function as de

[23] *See* FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that preliminary relief ancillary to a second proviso permanent injunction action must be justified by the "usual equitable standards" and sought under Rule 65(a)); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020 (7th Cir. 1988) (applying the Section 13(b) public interest standard to preliminary relief in an action seeking permanent relief without administrative proceedings); *see also* AMG Cap. Mgmt., LLC v. FTC, 593 U.S. 67 (2021); *Starbucks*, 602 U.S. 339. Earlier merger cases in which the FTC proceeded directly to federal merits litigation—*Ovation/Lundbeck* and *St. Luke's/Saltzer*—involved consummated acquisitions and no contested FTC request for interim relief. In Henkel/Liquid Nails, the merging parties agreed to a standstill agreement not to consummate the transaction until a court decision on the merits, subject to a date limitation. As a result, the Commission neither sought a TRO nor required the parties to stipulate to one.

facto trials on the merits, and the grant or denial of a preliminary injunction typically determines the fate of the transaction.

Rigorous likelihood of success analysis. As noted above, ccourts have not converged on a single verbal standard. The Ninth Circuit reaffirmed the "serious questions" formulation in *Microsoft/Activision*,[24] and *Kroger/Albertsons*[25] applied that formulation under controlling Ninth Circuit precedent. *Tempur Sealy*,[26] by contrast, read *Starbucks* to require a clear showing of likelihood of success. Despite this doctrinal disagreement, modern courts applying either formulation conduct detailed merits analyses and make extensive findings concerning the Section 7 claims. Section 13(b) slip opinions in recent cases—*Microsoft/Activision*, *IQVIA/Propel*,[27] *Novant Health*,[28] *Tapestry/Capri*,[29] *Kroger/Albertsons*, and *Tempur Sealy*—typically run from 50 to 170 pages and closely resemble full 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 widespread judicial recognition that the practical effect that granting a preliminary injunction usually ends the transaction.[30]

The court's merits inquiry is not free-form. In FTC preliminary injunction merger antitrust cases, courts ordinarily use the *Baker Hughes* burden-shifting framework to assess the FTC's likelihood of ultimate success, just as they would in adjudicating the Section 7 merits in a DOJ full trial. Thus, after the FTC establishes its prima facie case, the court considers the merging parties' rebuttal evidence and then evaluates the record as a whole in determining the FTC's likelihood of ultimate success.[31]

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[24] *Microsoft*, 136 F.4th 954 (Microsoft/Activision) (reaffirming the serious questions formulation), *aff'g* 681 F. Supp. 3d 1069 (N.D. Cal. July 10, 2023) (53-page opinion denying preliminary injunction).

[25] *Kroger*, 2024 WL 5053016 (Kroger/Albertsons) (71-page slip opinion granting preliminary injunction).

[26] *Tempur Sealy*, 768 F. Supp. 3d 787 (115-page slip opinion denying preliminary injunction).

[27] FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329 (S.D.N.Y. 2024) (IQVIA/Propel) (103-page slip opinion granting preliminary injunction).

[28] FTC v. Novant Health, Inc., 736 F. Supp. 3d 335 (W.D.N.C. 2024) (55-page slip opinion denying preliminary injunction).

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

[30] Courts have long recognized this effect. *See, e.g.*, FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1087 (D.C. Cir. 1981) (a preliminary injunction may kill rather than suspend a proposed transaction); FTC v. Exxon Corp., 636 F.2d 1336, 1343 (D.C. Cir. 1980) (because most tender offers are short-lived, an injunction blocking an acquisition may prevent it from ever being consummated); *Tempur Sealy*, 768 F. Supp. 3d at 861 (noting the parties' joint recognition that the preliminary injunction decision is in most circumstances determinative of whether the acquisition will ever close, and the Commission's own administrative filing agreeing that a federal court injunction almost always obviates the need for further administrative proceedings); *IQVIA Holdings*, 710 F. Supp. 3d at 400-01; *Peabody Energy*, 492 F. Supp. 3d at 920; *Wilhelmsen*, 341 F. Supp. 3d at 74; *Staples*, 190 F. Supp. 3d at 110, 138; *Sysco*, 113 F. Supp. 3d at 87; FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 160 (D.D.C. 2004) (weighing the stated intention to abandon in the balance of the equities). Courts generally treat the prospect of abandonment as a private equity that cannot by itself defeat an injunction once the Commission has shown a likelihood of ultimate success. *Tapestry*, 755 F. Supp. 3d at 497 (collecting cases); *Penn State Hershey*, 838 F.3d at 353; *Heinz*, 246 F.3d at 727. *Tempur Sealy* is the outlier: the court held that the private equities affirmatively disfavored an injunction where the parties had forestalled closing for nearly two years and represented that further delay would kill the deal. 768 F. Supp. 3d at 862.

[31] *See Heinz*, 246 F.3d at 714-15 (although *Baker Hughes* was decided at the merits stage, using its analytical approach to evaluate the FTC's likelihood of success on a motion for preliminary injunction); FTC v. Penn State

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 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, as noted above, typically running between 50 and 170 pages. Accordingly, courts courts in FTC merger antitrust challenges routinely consider rebuttal evidence concerning matters such as entry, expansion, and efficiencies at the preliminary injunction stage rather than reserve them for a subsequent administrative merits proceeding.[32]

While these judicial determinations are formally nonbinding on the administrative proceeding, they are outcome-determinative in practice. Because the administrative record would often substantially mirror the district court record, continuing to a separate merits determination usually offers little practical prospect of changing the transaction's fate absent fundamental disagreements on legal standards or key disputed factual issues that were not fully developed in the preliminary injunction proceeding.

When such disagreements do arise, the Commission may appeal while keeping the administrative case pending, as it did in *Microsoft/Activision*. But if the FTC loses both in the district court and on appeal, the modern pattern is to discontinue rather than carry the administrative complaint through a separate merits decision. We are aware of no merger antitrust case since 1995 in which the FTC was denied a preliminary injunction in a Section 13(b) proceeding by the district court, with any appeal resulting in affirmance, and nonetheless continued to prosecute the administrative complaint on the merits.[33]

Hershey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218-19 (11th Cir. 1991).

[32] *See, e.g.*, *Peabody Energy*, 492 F. Supp. 3d at 911-13 (entry, expansion, and efficiencies); *Wilhelmsen*, 341 F. Supp. 3d at 66-72 (entry barriers and efficiencies); *Sysco*, 113 F. Supp. 3d at 80-81 (entry and efficiencies).

[33] The closest case is *Microsoft*, 681 F. Supp. 3d 1069, *aff'd*, 136 F.4th 954. The district court denied the Section 13(b) preliminary injunction. The Commission fundamentally disagreed on the law and the facts, appealed

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, merging parties almost always abandon the deal rather than endure years of administrative and appellate litigation.[34] Conversely, if an injunction is denied, the FTC typically dismisses its administrative complaint, allowing the merger to close.[35]

Some parties pursue an appeal before abandoning the transaction.[36] Continuing to litigate after the entry of a preliminary injunction can extend the time the deal remains open for two years or more after signing. 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 findings—which are reviewed only for clear error under Federal Rule of Civil Procedure 52(a)(6), with the grant of the injunction itself reviewed for abuse of discretion and legal conclusions reviewed de novo—and the typical careful application of well-settled merger law, most merging parties recognize that their chances of success on appeal are slim. Multiple courts in Section 13(b) proceedings have expressly recognized that entry of a preliminary injunction is likely to cause the merging parties to abandon the transaction.

Convergence of Section 13(b) and Winter. Taken together, these developments show substantial practical convergence in how merger preliminary injunction proceedings are litigated, but they have not eliminated the doctrinal distinction between the Section 13(b) "serious questions" formulation and the *Winter* "likelihood of success" standard. Courts may announce different verbal standards, and circuit precedent still matters. In practice, however, courts typically develop extensive records and conduct searching analyses of the Section 7 merits, much as they do 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."[37] *Tempur Sealy* adopted that

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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 just over 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).

[34] The hedge may be unnecessary. I am aware of no case in the last 50 years where merging parties have litigated the case to a decision on the merits when the court had entered a blocking preliminary injunction.

[35] Denial is not always the end of the matter, however. In *Novant Health*, the Fourth Circuit granted the FTC an injunction pending appeal after the district court denied relief, and the parties abandoned the transaction rather than await the appeal. *See* FTC v. Cmty. Health Sys., Inc., 736 F. Supp. 3d 335 (W.D.N.C. 2024) (denying preliminary injunction), *stay granted sub nom.* FTC v. Novant Health, Inc., No. 24-1526, 2024 WL 3042896 (4th Cir. June 18, 2024), *opinion vacated, appeal dismissed*, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024) (following abandonment of transaction).

[36] Like the Commission, the merging parties may appeal an adverse decision, although historically they have rarely done so. For an example of an interlocutory appeal after a preliminary injunction was granted, see 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). There the district court entered a preliminary injunction, the merging parties appealed, the court of appeals affirmed, and the transaction did not proceed.

[37] *Whole Foods*, 548 F.3d at 1059-60 & n.6 (Kavanaugh, J., dissenting).

textual reading after *Starbucks*, while *Microsoft* reaffirmed the more lenient Ninth Circuit formulation. The most defensible convergence is therefore procedural and practical, not a uniform legal standard.

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. The District of Columbia historically was a particularly important forum for federal merger litigation and produced many of the precedents that shaped modern merger practice. Beginning late in the first Trump administration, however, the agencies have brought major merger cases in a wider range of districts, apparently in some instances to avoid D.C. precedents (and 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 multiday 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.

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. A substantial line of judicial decisions gave rise to the "serious questions" formulation, which remains controlling in some circuits and suggests 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 institutional expertise and the strong public interest in preserving competition. Under the dual-track model, it also emphasizes the need to maintain the status quo during administrative adjudication. When the Commission proceeds directly in federal court under the permanent injunction proviso, however, the district court itself adjudicates the merits and, as discussed above, the standard governing contested ancillary interim relief remains unresolved.

In practice, however, modern courts generally conduct a rigorous assessment of the Section 7 merits even when governing precedent uses the "serious questions" formulation rather than the conventional likelihood of success standard 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 proceed accordingly.

The result is a practical convergence in litigation process and transaction risk, not a uniform convergence in doctrinal standard. For clients evaluating merger risk, the practical takeaway is that an FTC action under Section 13(b) can pose risks comparable to a DOJ action for preliminary injunctive relief under the Clayton Act, even though the governing verbal standard may differ by forum.

For the reasons given in Part V.E, however, that convergence describes how courts have proceeded rather than a rule they are bound to follow, and it should not be assumed in every forum. Counsel should advocate application of the *Winter* "likelihood of success" standard in traditional dual-track Section 13(b) cases while recognizing that controlling circuit precedent may prescribe the FTC's "serious questions" formulation. If the FTC instead proceeds solely under the permanent injunction proviso and seeks contested interim relief, counsel has an additional argument that *Singer*, *AMG*, and *Starbucks* require the ordinary Rule 65/*Winter* standard, although that issue remains unresolved.[38] In every forum, counsel should build a record capable of satisfying the stricter likelihood of success inquiry while directly engaging the Commission's alternative theory.

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

[38] *See* sources cited *supra* note 23. *AMG* bears directly on the question: the Court held that Section 13(b) does not authorize court-ordered monetary relief, construing the section according to its text and structure rather than its remedial purpose—reasoning that supports reading the provision's grant of interim relief no more broadly than its terms require.