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## The Elephant in the Courtroom: Litigating the Premerger Fix in Arch Coal and Beyond

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# NOTES

## THE ELEPHANT IN THE COURTROOM: LITIGATING THE PREMERGER FIX IN *ARCH COAL* AND BEYOND

### INTRODUCTION

In *FTC v. Arch Coal, Inc.*,<sup>1</sup> Judge Bates described the proposed remedy<sup>2</sup> to an allegedly anticompetitive acquisition as the “elephant in the room.”<sup>3</sup> When the Federal Trade Commission (FTC) sought in district court to enjoin Arch Coal, Inc.’s (Arch Coal) acquisition of Triton Coal Co. (Triton) in 2004,<sup>4</sup> Arch Coal attempted to introduce evidence of its intent to sell a coal mine to a third party to resolve FTC antitrust concerns.<sup>5</sup> The FTC, however, and not the

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1. 329 F. Supp. 2d 109 (D.D.C. 2004).

2. For practical purposes, this Note uses the term “remedy” to refer to a sale or license of assets, structured after a company signed a merger agreement, responding to and attempting to resolve antitrust concerns raised by the FTC or DOJ. Courts and parties avoid calling these fixes “remedies”; such terminology arguably brings the transaction within the FTC’s purview. In a legal sense, such proposals may not be properly termed “remedies” in preliminary injunctions because the antitrust violation has not yet occurred. But certainly, in a practical sense, parties structure a divestiture or licensing agreement for remedial purposes—to rescue their transaction from antitrust action. See *infra* Part III for a discussion of how courts have distinguished between a “remedy” and a proposed divestiture that is merely part of the initial transaction.

3. Memorandum Opinion at 8, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534) [hereinafter Memorandum Opinion].

4. See *Arch Coal*, 329 F. Supp. 2d at 114; see also Complaint for Preliminary Injunction Pursuant to FTC Act § 13(b) at 4, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534) [hereinafter FTC Complaint], available at <http://www.ftc.gov/os/2004/04/archcoalcmp.pdf>.

5. See Memorandum in Support of Plaintiff Federal Trade Commission’s Motion in Limine at 1, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534) [hereinafter FTC Memorandum].

courts, traditionally possessed authority for evaluating and ordering remedies in administrative trials.<sup>6</sup>

The U.S. District Court for the District of Columbia, which was jurisdictionally authorized to decide whether a preliminary injunction should be granted, was left with a dilemma. By denying evidence of the proposed divestiture, the court would analyze the case without hearing critical aspects of the transaction. By choosing to admit evidence of the proposed divestiture, the court would strip the FTC of powerful tools in antitrust enforcement.<sup>7</sup>

Prior to *Arch Coal*, some courts considered evidence of proposed remedies but concluded that the transactions should still be enjoined. After one such decision, an antitrust attorney observed prophetically: "[F]or years, parties have contemplated presenting the court with a different deal. There is going to be a case where the parties are going to offer a deal that the FTC rejects and a court accepts."<sup>8</sup> *Arch Coal* was such a case.

District courts must balance their duty to examine the actual transaction with preserving the authority carved out for the FTC in statutes and case law. Courts can achieve this balance by admitting evidence of a proposed fix only when parties construct FTC-enforceable divestitures, demonstrate good-faith efforts to negotiate

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6. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) ("It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found ...."); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) ("[T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress ...."); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."); *FTC v. Cement Inst.*, 333 U.S. 683, 726 (1948) ("[T]he Commission has a wide discretion generally in the choice of remedies to cope with trade problems entrusted to it ...."); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 704 (3d Cir. 1982) ("Primary responsibility for fashioning orders rests with the Commission.").

7. See, e.g., David Marcus & Jaret Seiberg, *Walton Approves Fix-It-First, Nixes Deal*, DAILY DEAL, May 28, 2002 (noting that structural changes to acquisitions may "frustrate the agency's ability to evaluate the transaction because the facts would constantly be changing"); Neal R. Stoll & Shepard Goldfein, "FTC v. Libbey": A Pyrrhic Victory?, 227 N.Y.L.J. 3 (2002) ("Allowing the parties to amend their merger agreement and seek the court's approval of the modified transaction would deprive the FTC of ... inordinate leverage ....").

8. Marcus & Seiberg, *supra* note 7 (quoting Steve Newborn, partner at Weil, Gotshal & Manges LLP and former FTC litigation director).

with the FTC, and present viable, effective divestitures. This Note will discuss the *Arch Coal* transaction, the standards used by courts to determine whether they ought to examine proposed sales of assets, and the policy considerations for considering such evidence.

Part I will examine the FTC's review of Arch Coal's Triton acquisition, including the FTC's motion in limine to exclude evidence of the proposed Buckskin sale. Part II will discuss jurisdictional aspects of enforcement; specifically, it will explore from where the FTC derives authority to challenge mergers and how the FTC's burden under the Clayton Act differs from the burdens of the Department of Justice (DOJ) or of private plaintiffs. This Part will argue that although the legislature affords the FTC special enforcement and adjudicative measures, the practical implications of FTC suits for preliminary injunctions are often identical to the implications of other public and private suits. Part III will analyze the substantive differences involved when courts decide whether to consider evidence of a proposed fix, and it will argue that a strict standard of good faith and proven closeness to the initial transaction should be employed. Finally, Part IV will discuss policy implications for those impacted by antitrust enforcement: the general public, which benefits from an efficient economy; the FTC and the DOJ; private parties; and consumers. This Part will argue that courts should afford significant deference to the FTC's expertise within the law's confines.

## I. THE INITIAL TRANSACTION AND PROPOSED BUCKSKIN MINE SALE

### A. Background

Arch Coal announced a definitive agreement to purchase Vulcan Coal Holdings, the parent of Triton Coal, on May 29, 2003, for \$364 million.<sup>9</sup> Six weeks later, on July 11, 2003, Arch Coal and Triton submitted pre-merger notification filings to the FTC and the DOJ,<sup>10</sup>

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9. Press Release, Arch Coal, Inc., Arch Coal Signs Definitive Agreement To Acquire Triton Coal Company (May 29, 2003), available at <http://www.shareholder.com/archcoal/ReleaseDetail.cfm?ReleaseID=110216>.

10. FTC Memorandum, *supra* note 5, at 3.

pursuant to the Hart-Scott-Rodino Act.<sup>11</sup> The FTC requested additional information (a "second request") from the parties in August 2003.<sup>12</sup> In December, Arch Coal informed the FTC of its plans to sell the Buckskin mine (which Arch Coal was acquiring from Triton) to Kiewit Mining (Kiewit).<sup>13</sup> On January 30, 2004, Arch Coal signed an agreement with Kiewit solidifying the sale.<sup>14</sup> On March 30, 2004, the FTC determined that the Buckskin sale failed to resolve its antitrust concerns, and the agency filed for a preliminary injunction to enjoin the Arch-Triton merger.<sup>15</sup>

The FTC's complaint alleged that the Arch-Triton deal would result in a four-to-three reduction of coal producers in Wyoming's Southern Powder River Basin (SPRB)<sup>16</sup> (the FTC's alleged geo-

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11. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2000). The Act mandates that every person acquiring more than \$53.1 million worth of voting securities or assets and every person divesting themselves of securities in that same value range file with the FTC and DOJ prior to closing the transaction. The FTC and the DOJ review the filings and must determine within thirty days if any possible antitrust harm exists. If concerns persist, one agency may submit a request for more information from the companies with the potential to move for a preliminary injunction to stop the transaction. See *id.* § 18a(a)-(k); Revised Jurisdictional Thresholds for section 7A of the Clayton Act, 70 Fed. Reg. 5020 (Jan. 31, 2005).

12. FTC Memorandum, *supra* note 5, at 3.

13. *Id.* at 1, 3.

14. ARCH COAL, INC., 2003 ANNUAL REPORT II-11 (2004). Arch Coal's annual report merely noted that "[t]he completion of the sale of the Buckskin mine is contingent, among other things, on the completion of our acquisition of Triton," *id.*, whereas the FTC described it as a "self-help permanent remedy," FTC Memorandum, *supra* note 5, at 3.

15. See FTC Complaint, *supra* note 4, at 4. The FTC has authority to challenge mergers that are potentially anticompetitive as defined in section 7 of the Clayton Act. Section 7 decrees that no person, subject to the FTC, shall acquire stock or capital if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2000).

16. See FTC Complaint, *supra* note 4, at 7. According to the FTC, Arch Coal, Peabody, and Kennecott would be the three remaining postmerger competitors in the relevant market. See *id.*

graphic market)<sup>17</sup> that produce “8800 BTU SPRB coal”<sup>18</sup> (the FTC’s alleged product market).<sup>19</sup> The complaint asserted that the Arch-Triton transaction would “eliminate the existing substantial competition” between Arch Coal and Triton and would facilitate coordinated interaction among the remaining three firms.<sup>20</sup> The FTC further argued that the sale of Buckskin to Kiewit would not resolve antitrust concerns.<sup>21</sup>

### *B. FTC’s Motion in Limine To Exclude Evidence of the Buckskin Sale*

On June 3, 2004, the FTC filed a motion in limine in the district court to exclude evidence of Arch Coal’s proposed sale of Buckskin.<sup>22</sup>

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17. The 1992 Horizontal Merger Guidelines, which provide “an analytical road map for the evaluation of mergers,” state that a merger analysis should determine product market, geographic market, competitive effects, entry, and efficiencies. FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (1992) [hereinafter FTC MERGER GUIDELINES], available at <http://www.ftc.gov/bc/docs/horizmer.htm>. The Merger Guidelines define geographic market as “a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a ‘small but significant and nontransitory’ increase in price.” *Id.* § 1.21.

18. See FTC Complaint, *supra* note 4, at 5, 19. “The SPRB is a source of low sulphur coal that has an energy content of between approximately 8300 and 8800 British Thermal Units [BTUs] per pound.” *Id.* SPRB coal has physical properties that give it a “strong economic advantage” over coal produced elsewhere in the United States. *Id.* at 5.

19. The Merger Guidelines define product market as “a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (‘monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price.” FTC MERGER GUIDELINES, *supra* note 17, § 1.11.

20. FTC Complaint, *supra* note 4, at 19. Arch Coal denied many of the FTC’s assertions, including those regarding geographic market, product market, anticompetitive effects, and the effect of the Buckskin sale. See Answer of Defendant Arch Coal Inc. to the Federal Trade Commission’s Administrative Complaint at 2, 4, 6, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534), available at <http://www.ftc.gov/os/caselist/0310191/040428archcoalanswertocomplnt.pdf>. Arch Coal conceded that the SPRB region generates coal with low ash and sodium levels. *Id.* at 3. Ultimately, the Arch Coal court decided that the SPRB constituted the relevant geographic market but that the relevant product market included both 8800 and 8400 BTU coal. Arch Coal, 329 F. Supp. 2d at 122-23.

21. FTC Complaint, *supra* note 4, at 20 (“The transfer by Arch of Triton’s Tier 3 Buckskin mine to Kiewit does not remedy the potential anticompetitive effects of the Acquisition in the SPRB or in 8800 coal. Buckskin and R.A.G. would be unable to constrain a coordinated price increase in the SPRB.”).

22. See Motion in Limine by Plaintiff Federal Trade Commission To Exclude All Evidence and Argument on the Issue of Remedy at 1-2, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534).

The FTC asserted that the Buckskin sale constituted “permanent relief”—a structural remedy that the FTC alone should construct if necessary.<sup>23</sup> If the district court approved Buckskin’s sale, that measure could damage the market’s status quo during an administrative trial.<sup>24</sup> Arch Coal countered that the district court must consider the Buckskin sale; to do otherwise would result in “a purely hypothetical transaction of the Commission’s making—that none of the parties are proposing.”<sup>25</sup> The court denied the motion in limine, noting that the district court, not the FTC, bears responsibility for defining the transaction.<sup>26</sup> The court suggested that the Buckskin sale was not merely a remedy, and that the relevant dispute was “the set of two transactions involving the acquisition of Triton by Arch and the immediate divestiture of the Buckskin mine to Kiewit.”<sup>27</sup>

The court’s decision to include the Buckskin sale as part of the transaction seriously impaired the FTC’s ability to secure a preliminary injunction.<sup>28</sup> The court included Kiewit as one of the five remaining competitors in the SPRB and therefore changed the analysis from a five-to-four reduction in market participants to no reduction at all.<sup>29</sup> The court’s decision to consider Kiewit as the new owner of Buckskin also lowered the Herfindahl-Hirschman Index (HHI) value—a tool used to determine market concentration by adding together the squared market shares of the companies

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23. See FTC Memorandum, *supra* note 5, at 6-8.

24. See *id.* at 2. “Consideration by this Court of what remedy would be necessary and appropriate would preempt the Commission’s ability to carry out its responsibilities under the Acts and, should the Commission find the Acquisition to be illegal, order the necessary and appropriate relief.” *Id.*

25. Defendants’ Memorandum in Opposition to Plaintiffs’ Motion in Limine Regarding Kiewit’s Purchase of the Buckskin Mine at 2, FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534) [hereinafter Defendants’ Memorandum] (on file with author).

26. See Memorandum Opinion, *supra* note 3, at 6-7.

27. *Id.* at 5.

28. See, e.g., Janet L. McDavid & Gretchen Fritz, ‘Arch’ and ‘Oracle’ Cases, NAT’L L. J., Nov. 1, 2004, at 10. (“[The court] denied a preliminary injunction in large part because it found that Arch Coal’s plan to sell the mine to Kiewit resolved the competitive concerns resulting from the merger.”).

29. See *Arch Coal*, 329 F. Supp. 2d at 124 (“There are currently five significant producers of SPRB coal .... Post-merger, there will still be five significant producers of SPRB coal, with Kiewit replacing Triton as an SPRB producing entity.”). The court included R.A.G. American as a competitor in its analysis because the court’s market definition included 8800 and 8400 BTU mines. *Id.* at 121-24.

participating in the market.<sup>30</sup> The court also seemed persuaded by evidence that Kiewit intended to increase production in the newly acquired Buckskin mine by “several million tons” each year.<sup>31</sup> Although it is impossible to determine definitively whether the district court would have denied the injunction without considering Kiewit’s participation, the Buckskin sale was a significant factor in the court’s analysis and conclusion. The next Part will examine whether the district court’s jurisdiction permitted it to admit evidence of the proposed sale.

## II. STATUTORY AUTHORITY IN ANTITRUST ENFORCEMENT

### A. *FTC Enforcement*

The FTC asserted that federal statutes and case law holdings granted the agency sole power to consider evidence of the Buckskin sale, but the *Arch Coal* court disagreed.<sup>32</sup> This conflict resulted, in part, from different standards established in the Clayton Act and in the FTC Act. In section 11 of the Clayton Act, Congress outlined specific adjudicative mechanisms for the FTC, as compared to prosecutorial or other legal mechanisms for the DOJ or private plaintiffs.<sup>33</sup> Statutory language vests the FTC with authority to enforce elements of both the Clayton Act and the FTC Act through administrative trials,<sup>34</sup> whereas the DOJ must bring claims in district court.

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30. See *id.* at 124. Although conceding that the HHI was sufficiently high to meet the FTC’s prima facie burden, the court determined that the HHI was not sufficiently high to make a “strong” prima facie case. *Id.* at 129.

31. See *id.* at 148.

32. See Memorandum Opinion, *supra* note 3, at 7. “Even under Section 13(b), this Court’s task in determining the likelihood of the FTC’s success ... requires the Court to review the entire transaction in question.” *Id.*

33. 15 U.S.C. § 21(b) (2000).

34. See, e.g., *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976).

The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under § 13 is to preserve the *status quo* until FTC can perform its function.

*Id.*



Although the Clayton Act states that the FTC determines whether an antitrust violation has occurred or will occur, a district court ultimately decides whether to grant a preliminary injunction.<sup>35</sup> Before granting an injunction, a district court must assess whether the FTC will prevail at the administrative proceeding. The court grants a preliminary injunction if it finds the action "would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits."<sup>36</sup> District courts can only determine the public interest impact after carefully analyzing the relevant transaction.

Section 11 of the Clayton Act grants special adjudicatory provisions for enforcement actions brought by the FTC that are not available to the DOJ or to private plaintiffs. The Clayton Act decrees that the FTC will serve a complaint on a party, hear testimony in the FTC's office, "make a report in writing," and that the accused company must "cease and desist from such violations."<sup>37</sup> After this proceeding, a court of appeals may "affirm, enforce, modify, or set aside" the FTC's decision.<sup>38</sup>

In *Arch Coal*, the FTC filed a motion in limine to narrow the district court's scope of review and to preserve evidence of the remedy for its administrative trial. In most cases, the district court interacts with the FTC only to grant or deny preliminary injunctions before the FTC conducts a trial on the merits. Under section 13(b) of the FTC Act, the FTC may sue in district court to enjoin a party that "is violating, or is about to violate" an FTC-enforced law, so long as enjoining the transaction promotes the "interest of the public" while the FTC administrative trial occurs.<sup>39</sup>

The FTC may still proceed with an administrative trial if the district court denies the preliminary injunction, but its task becomes much more difficult. Prior to 1973, when Congress granted to the FTC the ability to obtain preliminary injunctions, the FTC

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35. 15 U.S.C. § 53(b) (2000).

36. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (discussing 15 U.S.C. § 53(b)).

37. 15 U.S.C. § 21(b).

38. *Id.* § 21(d).

39. *Id.* § 53(b)(1)-(2).

could merely issue cease-and-desist orders after antitrust violations occurred.<sup>40</sup> In a letter to the chairman of the Senate Committee on Interior and Insular Affairs, the FTC's general counsel advocated for congressional authorization of a preliminary injunction.<sup>41</sup> General Counsel Ronald Dietrich emphasized that the FTC's ability to enforce the antitrust laws was limited due to "its inability to obtain preliminary relief once the problem has been fully discovered."<sup>42</sup> The FTC's ability to secure a preliminary injunction often functions critically in preventing anticompetitive mergers.<sup>43</sup> The injunction prevents "scrambling the eggs"—a term used to describe two companies' functional, postmerger integration—if the administrative court finds a violation of either the Clayton Act or the FTC Act.<sup>44</sup>

### B. DOJ Enforcement

In *Arch Coal*, the FTC argued that case law regarding DOJ antitrust enforcement did not apply because DOJ trials on the merits occur at the district court level, whereas FTC trials on the merits occur at the administrative level.<sup>45</sup> The DOJ has no ability to adjudicate cases it brings under section 7 of the Clayton Act. The Clayton Act requires that U.S. attorneys must prove section 7 violations in district court, which maintains "jurisdiction to prevent

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40. 6 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4949 (Earl W. Kintner ed., 1983) [hereinafter ANTITRUST LEGISLATIVE HISTORY]; see also David M. Stryker, Note, *The Federal Trade Commission, Injunctive Relief, and Allegedly Anticompetitive Mergers: Preliminary Relief Under the Federal Trade Commission Act*, 58 IND. L.J. 293, 294-95 (1982). Stryker argues that although "[t]he FTC undeniably needed a procedure by which it could intervene more easily into the early stages of possible anticompetitive behavior," section 13(b) does not suggest that "obtaining the injunction should be substantively easier than [the] prior procedure." *Id.* at 297.

41. See Letter from Ronald M. Dietrich, FTC Gen. Counsel, to Senator Henry M. Jackson, Chairman, U.S. Senate Comm. on Interior & Insular Affairs (June 15, 1973), in ANTITRUST LEGISLATIVE HISTORY, *supra* note 40, at 4962.

42. *Id.*

43. *Id.* Dietrich further explained that the FTC had attempted "for a long time to have ... statutory authority to seek directly in the federal district courts preliminary injunctions against the continuance of anticompetitive conduct." *Id.*

44. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 159 (D.D.C. 2004). In *Arch Coal*, the court believed only a modest level of integration would occur before the FTC concluded its administrative proceeding. See *id.* at 160.

45. See Memorandum Opinion, *supra* note 3, at 7.

and restrain violations.”<sup>46</sup> This procedural difference arguably changes the DOJ’s and the FTC’s respective burdens of proof in merger litigation.<sup>47</sup> As the ultimate decision maker of whether a merger will substantially lessen competition, the FTC meets a lower burden than does the DOJ in district court.<sup>48</sup> Most DOJ suits are brought immediately on the merits in motions for permanent injunctions, as opposed to motions for preliminary injunctions.<sup>49</sup> Whereas the FTC must prove that the transaction raises “serious and substantial questions,” the DOJ must demonstrate a section 7 violation in district court.<sup>50</sup>

*C. Preliminary or Permanent? Statutory Differences and the Reality of Preliminary Injunctions*

Due to the importance of the preliminary injunction trial, statutory differences establishing separate standards for the FTC and the DOJ are insufficient to bar evidence like that of the Bucksin sale. A district court’s decision to grant or deny an injunction may determine a transaction’s very existence to such an extent that ignoring divestiture evidence becomes impractical. If

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46. 15 U.S.C. § 25 (2000).

47. See, e.g., Thomas B. Leary, *An Inside Look at the Heinz Case*, ANTITRUST, Spring 2002, at 32, 34 (2002) (discussing how FTC standards authorizing a preliminary injunction may differ from DOJ standards). Leary notes that “the alternative of full deference to the Commission’s ‘reason to believe’ determination could create an awkward dichotomy between the standards applied to Commission actions and similar actions by the [DOJ’s] Antitrust Division.”

48. See Robert A. Skitol, *How the Agencies’ Clearance Agreement Can Affect Merger Review Outcomes*, FTC WATCH, May 22, 2002, available at <http://www.antitrustinstitute.org/recent2/187.cfm>.

The FTC is better positioned than [the] DOJ to obtain a preliminary injunction .... This is because the FTC has the benefit of Section 13(b) of the FTC Act, which prescribes a standard for preliminary relief in FTC cases that is considerably more deferential to the agency than the counterpart standard applicable to DOJ cases.

*Id.*; see also Robert N. Cook & Robert A. Skitol, *Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision*, ANTITRUST SOURCE, July 2002, at 1, 6, <http://www.abanet.org/antitrust/source/07-02/cookskitol.pdf> (“Section 13(b) of the FTC Act ... provides a considerably more deferential standard than that confronting the DOJ under general equity principles ....”).

49. See Skitol, *supra* note 48.

50. See David Balto, *Should There Be Differences Between the FTC and DOJ?*, FTC WATCH, May 22, 2002, available at <http://www.antitrustinstitute.org/recent2/187.cfm>.

the court grants the preliminary injunction, most parties abandon their deals altogether.<sup>51</sup> If the court denies the preliminary injunction, the FTC may proceed to an administrative trial but often decides against such action. In *Arch Coal*, the FTC staff dropped the complaint against Arch Coal and no administrative adjudication occurred.<sup>52</sup>

Although the FTC is afforded discretion in fashioning permanent relief, a district court must still evaluate the transaction under Section 13(b) of the FTC Act.<sup>53</sup> Section 13(b) authorizes district courts to form conclusions regarding how the transaction affects public and private equities.<sup>54</sup> The district court, although not conducting a trial on the merits, must still determine if questions were raised “going to the merits [that were] so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation” by the FTC and the court of appeals.<sup>55</sup> In this task, the court should consider carefully all factors that could impact the transaction’s anticompetitive effects.

An inherent problem exists in preliminary injunction proceedings. The FTC can still adjudicate cases without obtaining a

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51. See David Balto, *The Efficiency Defense in Merger Review: Progress or Stagnation?*, ANTITRUST, Fall 2001, at 74, 79 (“The reality is that, with one exception, no firm has ever continued to litigate a merger in administrative litigation with the FTC after losing the preliminary injunction motion.”); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 642 (2005) (“As a practical matter, because of the extraordinary time and expense involved in pursuing a full hearing at the Commission, mergers challenged by the FTC are almost always won or lost at the preliminary injunction stage.”). In *White Consolidated Industries, Inc. v. Whirlpool Corp.*, the plaintiffs claimed that “if an injunction were denied, divestiture later would be impossible” and the defendants countered that “if an injunction were granted, the deal was likely to fall apart long before a hearing on the merits could take place.” 612 F. Supp. 1009, 1012-13 (N.D. Ohio 1985), *vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff’d*, 781 F.2d 1224 (6th Cir. 1986).

52. See *In re Arch Coal, Inc.*, No. 9316, 2004 FTC LEXIS 147 (Fed. Trade Comm’n Sept. 10, 2004), available at <http://www.ftc.gov/os/adjpro/d9316/040910orderwithdrawmatterfromadjudi.pdf> (order withdrawing matter from adjudication).

53. See 15 U.S.C. § 53(b) (2000).

54. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 727 n.25 (D.C. Cir. 2001) (noting that the primary public equity is the “effective enforcement of the antitrust laws”).

55. *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978). As former FTC Commissioner Leary has noted, district court opinions certainly appear to discuss a case’s merits in detail. See Leary, *supra* note 47, at 34. These opinions presumably incorporate such close analysis to determine the FTC’s likelihood of success on the merits, rather than deciding whether a violation occurred or will occur.

preliminary injunction, but its powers are substantially lessened without this tool.<sup>56</sup> With the preliminary injunction, however, the parties will likely abandon their transaction and will not proceed to the administrative trial. The costs of proceeding to an administrative trial while maintaining a merger agreement are, parties argue, prohibitively high.<sup>57</sup> The FTC cannot effectuate meaningful merger review without obtaining a preliminary injunction. The preliminary injunction becomes, however, the ultimate trial on the merits despite different statutory requirements.

In *Arch Coal*, an administrative trial likely would not have ensued if the court granted the preliminary injunction. Most parties abandon preliminarily enjoined transactions.<sup>58</sup> The *Arch Coal* court noted this dilemma in its memorandum opinion: "If not enjoined preliminarily but later found to violate the law, can pre-merger competition really be recreated; and if enjoined preliminarily, would the merger be abandoned and thus no longer possible even if ultimately found lawful?"<sup>59</sup>

While weighing the equities, the *Arch Coal* court was persuaded that the parties would abandon the acquisition if the preliminary injunction were granted. The opinion noted that "Arch and Triton will abandon the transaction rather than undergo an administrative proceeding, and any cost savings and output enhancements that the transactions will create will be lost."<sup>60</sup> To support this finding, the court cited the testimony of Triton CEO James Hake, who claimed that "Triton [would] abandon" the acquisition, and the testimony of Arch Coal CEO Steven Leer, who stated that it was "very likely" that Arch [would] abandon" the transaction.<sup>61</sup>

The *Arch Coal* court also believed that the relative cost of granting a preliminary injunction exceeded the relative benefit. The opinion noted the FTC could "[un]scrambl[e] the eggs" due to the expedient nature of the administrative trial and the discrete nature of the transaction.<sup>62</sup> The FTC usually conducts its trials within one

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56. See *supra* notes 39-42 and accompanying text.

57. See *supra* note 51 and accompanying text.

58. See *id.*

59. Memorandum Opinion, *supra* note 3, at 6 n.2 (citing *Heinz*, 246 F.3d at 726).

60. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 160 (D.D.C. 2004).

61. *Id.*

62. *Id.* at 159-60.

year; thus, the court concluded that granting the preliminary injunction and ultimately dismantling the merger would create more harm to public and private equities<sup>63</sup> than the harm created by denying the preliminary injunction.<sup>64</sup>

Although section 11 of the Clayton Act authorizes an administrative trial when the FTC seeks to permanently enjoin a merger, district court judges realize that they may be making the final decision. Judges are aware of parties' routine abandonment of their transactions after courts grant preliminary injunctions,<sup>65</sup> and they appear to consider this factor despite instruction from the Court of Appeals for the District of Columbia Circuit.

In *FTC v. H.J. Heinz Co.*, the district court denied a preliminary injunction based, in large part, on its determination that the parties would abandon the acquisition if enjoined.<sup>66</sup> The court noted: "It is undisputed that a preliminary injunction would kill this merger.... [I]t is a factor that tips the balance of the equities slightly in favor of denying the motion."<sup>67</sup> The appellate court criticized the district court's assessment that the parties would abandon the merger, noting that the one sentence indicating that the injunction would

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63. Courts afford public equities more importance than private equities. See, e.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991) ("[W]e must afford [private equities] little weight, lest we undermine section 13(b)'s purpose of protecting the public-at-large, rather than the individual private competitors." (internal quotation marks omitted)). In *Arch Coal*, the court determined that both public and private equities would arise from the transaction's completion, including "pro-competitive savings, efficiencies, and a new strong competitor." *Arch Coal*, 329 F. Supp. 2d at 160.

64. It should be noted that the *Arch Coal* court had already decided that the FTC was unlikely to prevail on the merits in an administrative trial. Public and private equities alone are insufficient to overcome a strong prima facie case. "Absent a likelihood of success on the merits, however, equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 159 (citing *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986)).

65. See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 622 (1966) ("Preliminary' here usually means final."); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) ("[A]s a result of the short life-span of most tender offers, the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated."); *United States v. Culbro Corp.*, 436 F. Supp. 746, 757-58 (S.D.N.Y. 1977) ("[T]he Court concludes that there is a serious risk that granting the injunction would abort the financing, which would put an end to the transaction.... These 'factors to which defendants refer cannot be ignored and are entitled to serious consideration.'" (quoting *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969))).

66. *FTC v. H.J. Heinz, Co.*, 116 F. Supp. 2d 190, 201 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).

67. *Id.*

"kill" the merger was insufficient to constitute a "factual finding."<sup>68</sup> The appellate court decided that this consideration should be accorded little or no weight,<sup>69</sup> insisting that the administrative trial was an effective means of merger enforcement: "[I]f the merger is found not to lessen competition substantially, the efficiencies that the appellees urge can be reclaimed by a renewed transaction."<sup>70</sup>

Operating under the D.C. Circuit's authority, the *Arch Coal* court perhaps ought not have accorded any significance to the parties' intent to abandon the Arch-Triton transaction. As a legal matter, if the dual system of a preliminary injunction trial followed by an administrative trial ultimately harms consumers and companies by eliminating procompetitive transactions, Congress remains the proper place for reform. David Balto notes that Congress and the agencies are appropriate venues for leveling differences in FTC and DOJ enforcement: "[B]oth Congress and the agencies have an important job in assuring consistent procedures and legal standards between the two agencies."<sup>71</sup> In the interim, the practical reality of preliminary injunctions obliges courts to take the proceedings' often-final nature into account.<sup>72</sup>

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68. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). The court distinguished transactions with tender offers held open for short durations from the *Heinz* tender offer, which was sufficiently long so as to withstand administrative proceedings. The court also left open the possibility that a well-developed factual record could suffice to demonstrate termination of a deal. *See id.*

69. *Id.*

70. *Id.* at 727. The appellate court asserted: "If the merger makes economic sense now, the appellees have offered no reason why it would not do so later." *Id.* at 726. The court rejected the district court's assertion that "the issuance of a preliminary injunction blocking an acquisition or merger will in all likelihood prevent the transaction from ever being consummated." *Heinz*, 116 F. Supp. 2d at 201 (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)). Accordingly, the court of appeals reversed the district court and enjoined the transaction. *Heinz*, 246 F.3d at 727.

71. Balto, *supra* note 50 (arguing that a difference in the FTC's and DOJ's standards should be leveled by "reform"). "It is highly unlikely that Congress intended or even considered this disparate result .... Or perhaps they believed a lesser standard for the FTC was appropriate because the merits would be resolved in an administrative trial. But they were wrong." *Id.*

72. The district court in *Heinz* was ultimately vindicated in its assertion that the parties would abandon the transaction. "Notwithstanding the skepticism of the Court of Appeals that an injunction would 'kill this merger,' H.J. Heinz, Co. announced publicly within hours of the Court of Appeals' decision that it had abandoned its plans to acquire Beech-Nut Foods." *FTC v. H.J. Heinz, Co.*, 164 F. Supp. 2d 659, 659 (D.D.C. 2001) (mem.) (citation omitted).

*D. Deference to the FTC's Interpretation: The Chevron Doctrine*

The *Chevron* doctrine generally supports the theory that the district court should defer to the FTC's statutory interpretation of section 13(b) of the FTC Act and the Clayton Act; the FTC, however, has not codified its interpretation.<sup>73</sup> The *Chevron* doctrine instructs federal courts to defer to an agency's understanding of a statute if Congressional intent is unclear.<sup>74</sup> The Supreme Court held that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."<sup>75</sup> The Supreme Court reasoned that an agency can better formulate policy matters than can federal courts because agencies are part of the executive branch and thus are, in a sense, subject to a constituency.<sup>76</sup>

The *Chevron* doctrine has limited applicability to *Arch Coal*, however, because the FTC's position on permanent remedies is not articulated expressly in its regulations. In 2000, the Supreme Court clarified the *Chevron* doctrine in *Christensen v. Harris County*<sup>77</sup> by noting that the relevant agency interpretation must appear in "regulation[s]," and not simply in "policy statements, agency manuals, and enforcement guidelines."<sup>78</sup> In best-practice guides and legal memoranda, the FTC asserts complete authority to structure divestitures in merger investigations. Yet the FTC's regulations do not expressly maintain sole province over fashioning remedies. The *Code of Federal Regulations* describes detailed procedures for filing a consent order with the FTC.<sup>79</sup> Although chapter 16, parts 2 and

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73. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 739 (1996).

74. See *Chevron*, 467 U.S. at 866.

75. *Id.*

76. See *id.* at 865-66.

77. 529 U.S. at 576 (2000).

78. *Id.* at 587. But see *id.* at 589-90 (Scalia, J., concurring) ("While *Chevron* in fact involved an interpretive regulation, the rationale of the case was not limited to that context .... Quite appropriately, therefore, we have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats.").

79. See FTC Nonadjudicative Procedures, 16 C.F.R. §§ 2.31-.34 (2005) (discussing consent order procedure).



3, outline specific procedures for structuring remedial measures subject to agency approval, the regulations do not establish authority for such matters with respect to preliminary injunctions.<sup>80</sup>

If such a regulation existed, the *Chevron* doctrine arguably covers the FTC's discretionary interpretation.<sup>81</sup> Although *Christensen* limited the scope of *Chevron*, other avenues still exist to preserve deference to agencies.<sup>82</sup> For example, current case law affords the FTC broad discretion in the interpretation of its own regulations. In *Thomas Jefferson University v. Shalala*, the Supreme Court held that the Department of Health and Human Services Secretary's regulatory interpretation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"<sup>83</sup> This contemporary endorsement of a traditional principle provides the FTC with tools to establish authority under certain—albeit limited—circumstances.

### III. REMEDY VS. TRANSACTION: SUBSTANTIVE DIFFERENCES

District courts' willingness to evaluate proposed solutions may turn on the seemingly ephemeral distinction between a remedy and a part of the initial transaction. Although section 11 of the Clayton Act establishes the FTC's right to adjudicate "violations," and courts have afforded the FTC deference in fashioning remedies,<sup>84</sup> the *Arch Coal* court asserted that the Buckskin sale was part of the transaction and, thus, properly considered by the court.<sup>85</sup> The *Arch Coal* court denied that, by hearing evidence of the Buckskin sale, it was granting a remedy for a potential antitrust violation. Rather, the

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80. If the FTC drafted a regulation establishing sole authority for evaluating any proffered asset sale or license in response to antitrust concerns, it might resolve the jurisdictional tension between the agency and district courts. A discussion of the viability of passing such a regulation lies beyond the scope of this Note.

81. See Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 321-23 (2001), for a discussion of the application of *Chevron* deference under certain circumstances.

82. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

83. *Id.* at 512 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

84. See *supra* note 6 and accompanying text.

85. See Memorandum Opinion, *supra* note 3, at 5.

court proposed that it bore responsibility for “defining the transaction ... being challenged by the FTC.”<sup>86</sup>

Courts struggle over defining transactions correctly. In a preliminary injunction adjudication, because the antitrust violation has not yet occurred, a remedy may look exactly like part of the transaction.<sup>87</sup> When courts have substantively decided to admit evidence of a proposed fix, two factors exist: formulaic closeness of the proposal to the transaction and good faith toward developing and executing a divestiture. The proposal’s closeness will often demonstrate the parties’ good faith in implementing a viable, effective divestiture or licensing agreement.

#### *A. Closeness: Amended Agreements and Enforcement*

In *FTC v. Libbey, Inc.*,<sup>88</sup> the FTC sued Libbey, Inc. (Libbey), a food service glass manufacturer, to obtain a preliminary injunction to halt Libbey’s acquisition of Newall Rubbermaid Inc.’s (Newall) wholly owned subsidiary, Anchor Hocking Corp. (Anchor).<sup>89</sup> One month after the FTC voted to enjoin the acquisition,<sup>90</sup> Libbey amended the merger agreement to eliminate the purchase of the food service business and to provide that a different Newall division would operate the food service glassware business.<sup>91</sup> In this case, the FTC objected to evidence of the amended agreement in large part because they viewed the sale as a “sham.”<sup>92</sup>

The court rejected the FTC’s argument. On a procedural level, the court “construe[d]” the FTC as implicitly “challenging the amended agreement” because the FTC voted to enjoin the merger after

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86. *Id.* at 3.

87. The *Arch Coal* defendants argued that the divestiture was not proposed “for remedial purposes, but instead as an intrinsic part of the overall transaction .... [It] is proposed as part of the underlying acquisition to insure, once consummated, that no violation is likely to occur.” Defendants’ Memorandum, *supra* note 25, at 5. Under this theory, it is difficult to see how a remedy could ever exist in a preliminary injunction context and not simply be considered part of the initial transaction.

88. 211 F. Supp. 2d 34 (D.D.C. 2002).

89. *Id.* at 37-38.

90. *Id.* at 38.

91. *Id.* at 41.

92. *Id.* at 42.

learning of Libbey's restructured agreement.<sup>93</sup> On a substantive level, the court noted that

parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under *circumstances as occurred in this case*, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.<sup>94</sup>

The court determined that despite the delayed nature of Libbey's proposal, the amendment to the merger agreement should be considered as an inseparable part of the transaction for preliminary injunction purposes.

*Libbey's* importance lies in its similarities to *Arch Coal*, but also in its differences. In both cases, the parties presented proposed divestitures after Hart-Scott-Rodino filings and in response to impending litigation. The FTC determined that neither restructured transaction resolved concerns about allegedly anticompetitive mergers.<sup>95</sup> The FTC evaluated Newall's maintenance of certain product lines and determined that the transaction remained anticompetitive;<sup>96</sup> likewise, the FTC evaluated the sale of Buckskin to Kiewit and determined that the transaction remained anticompetitive.

Important differences exist between the two cases, however. Unlike in *Arch Coal*, the FTC in *Libbey* relied almost entirely on an argument that the "fix" was an attempt to evade judicial review. Even more significantly, Libbey amended its merger agreement,

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93. *Id.* at 46.

94. *Id.* (emphasis added); see also Memorandum Opinion, *supra* note 3, at 3-4 (quoting *Libbey*, 211 F. Supp. 2d at 46). But see Casey R. Triggs, *Shielding Consumers from Risk: FTC Divestiture Policy*, ANTITRUST, Fall 2002, at 75, 77 (arguing that the district court also considered the first merger agreement: "[T]he Commission successfully obtained a preliminary injunction ... by convincing the district court that both the original merger agreement and a restructured transaction would lead to anticompetitive effects."). Because the FTC ultimately prevailed, the court vindicated the FTC's argument that the proposed remedy was not sufficient. Triggs further notes that "threats by the merging parties to take their 'fix' to a judge are unlikely to influence a Commission resolved to accept only rigorous merger consents." *Id.*

95. See *Libbey*, 211 F. Supp. 2d at 38; see also FTC Complaint, *supra* note 4, at 20.

96. See *Libbey*, 211 F. Supp. 2d at 38.

whereas Arch Coal did not<sup>97</sup>—a technical element to which *Libbey* repeatedly referred.<sup>98</sup> The *Libbey* court mused that no precedent existed for how to treat an “amended merger agreement” as opposed to an “original agreement.”<sup>99</sup> The court added that the parties proposed the amended agreement to mollify the FTC, and the FTC reviewed the amended agreement; the amended agreement, therefore, was properly before the court.<sup>100</sup> The court also accepted the defendant’s argument that the court must consider “whether the amended agreement raises sufficient anti-trust concerns.”<sup>101</sup>

The *Arch Coal* court did not require any formal amendment or revision to the initial acquisition agreement. Drawing heavily on *Libbey*, the court admitted evidence of the Buckskin sale, partly because the FTC had the opportunity to review the restructured transactions in both cases.<sup>102</sup> The *Arch Coal* court reasoned that the FTC similarly considered the sale of Buckskin to Kiewit, so that sale could also be considered part of the transaction.<sup>103</sup> The *Arch Coal* court nonetheless decided that even though Arch Coal had not amended its May 29, 2003, merger agreement, it would consider the Buckskin sale as part of the Triton acquisition: “[T]he Court does not find this structural choice to be dispositive on the issue [of] whether the Kiewit transaction should be considered in the preliminary injunction proceeding.”<sup>104</sup>

Although seemingly a mere technical distinction, the construction of the merger agreement can be important for enforcement. Section 13(b) accords the district court authority to grant or deny a preliminary injunction, as well as to issue hold-separate orders or to issue other limited forms of equitable relief.<sup>105</sup> No statutory

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97. FTC Memorandum, *supra* note 5, at 4; *see also* Defendants’ Memorandum, *supra* note 25, at 3 (describing the Kiewit sale as a “new supplemental agreement”).

98. *Libbey*, 211 F. Supp. 2d at 46.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* Memorandum Opinion, *supra* note 3, at 4-5, 7-8.

103. *Id.* at 4-5.

104. *Id.* at 4.

105. *See, e.g.,* FTC v. Elders Grain, Inc., 868 F.2d 901, 907 (7th Cir. 1989) (“[T]he statutory grant of the power to issue a preliminary injunction carries with it the power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power.”); FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (“Congress ... also gave the district court authority to grant any ancillary relief necessary to accomplish

provision, however, affirmatively permits the district court to deny the injunction but order the collateral sale.<sup>106</sup> Although the FTC may issue a consent order<sup>107</sup> constructed from private negotiations with parties, district courts have not attempted to issue such a remedial order. Although the *Arch Coal* court would be predictably maddened if the parties abandoned the Buckskin sale, no precedent exists to prevent breaking a separate contractual agreement in an FTC Act or Clayton Act action in district court.<sup>108</sup> The FTC must initiate administrative action, find a violation, issue a cease-and-desist order, and negotiate a consent decree.<sup>109</sup>

The agreement between Arch Coal and Kiewit provided that after May 17, 2004, either Arch Coal or Kiewit could abandon the Buckskin sale if Arch Coal's acquisition of Triton had not closed.<sup>110</sup> The FTC argued that "Arch's proposed 'remedy' may never occur because the agreement to sell Buckskin is a separate agreement ... and nothing precludes the parties from voluntarily agreeing to renegotiate or modify the agreement after the Acquisition is consummated."<sup>111</sup> Arch Coal contended, however, that this option changed nothing; the walk-away portion in the supplemental agreement also existed in the original agreement between Arch Coal and Triton.<sup>112</sup>

Although the court conceded that "theoretically the parties could renegotiate the Kiewit deal," it ultimately relied on the perceived intent of Arch Coal's and Kiewit's senior executives to consummate the transaction.<sup>113</sup> Indeed, Kiewit COO Bruce Grewcock stated in his deposition that Kiewit would sue Arch Coal if the Buckskin sale

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complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.").

106. See Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 43, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004) (No. 04-0534) [hereinafter Plaintiffs' Memorandum], available at <http://www.ftc.gov/os/2004/04/archcoalmemo.pdf> ("Moreover, the court would maintain no continuing jurisdiction under § 13(b) to oversee the Buckskin sale.").

107. See *supra* note 79.

108. See Plaintiffs' Memorandum, *supra* note 106, at 42-44.

109. See *supra* notes 37-38 and accompanying text.

110. See FTC Memorandum, *supra* note 5, at 4 n.8 (referencing article XII, section 12.1(d) of the Asset Purchase Agreement between Arch Coal and Kiewit).

111. *Id.* at 2.

112. See Defendants' Memorandum, *supra* note 25, at 10 n.7.

113. Memorandum Opinion, *supra* note 3, at 5.

were not completed.<sup>114</sup> This testimony develops a record of good-faith commitment; such reliance on independent decisions between private parties alone, however, ignores the FTC's obligations to enforce the Clayton Act and FTC Act. The agency should not have to rely on Kiewit, a nonparty, to sue Arch Coal in order to effectuate meaningful antitrust enforcement.

The court considered the two transactions as one for the purposes of antitrust analysis, yet it did not issue an order for the Buckskin sale.<sup>115</sup> When a court relies so heavily on a proposed remedy in denying a preliminary injunction, as it did in *Arch Coal*,<sup>116</sup> it ought to strictly analyze whether that proposed divestiture is an enforceable part of the transaction.

By amending merger agreements, companies demonstrate that a proposed sale exists as an inextricable part of an initial transaction. The testimony of executives at trial, which is useful for discerning intent, is only one method of measuring good faith in completing both transactions. The court should require private parties to amend their merger agreements, order a consent decree reached, or order the divestiture; all such actions would demonstrate commitment to the divestiture and provide the FTC with the necessary means of enforcement.

### *B. Good-Faith Effort*

When evaluating proposed divestitures, courts should also weigh the parties' good faith in three areas: the parties' willingness to carry out the proposed remedy, their efforts in negotiating a remedy with the FTC,<sup>117</sup> and creation of a viable remedy that restores pre-merger competition. These three factors will help to ensure that the parties' solutions are only considered when they are procedurally safeguarded. A district court should not arbitrate remedies by selectively picking and structuring divestitures.<sup>118</sup> Rather, when a

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114. Defendants' Memorandum, *supra* note 25, at 10 n.6.

115. Memorandum Opinion, *supra* note 3, at 5, 8.

116. See *supra* note 28 and accompanying text.

117. See *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 n.27 (D.D.C. 2002) (noting that good faith may be shown by structuring a divestiture that addresses the FTC's concern with the transaction). *Libbey's* good-faith requirement, however, defines parties' obligations too narrowly.

118. See *supra* note 7; *infra* Part IV.

district court analyzes the relevant transaction, it should require the defendant to demonstrate affirmatively that the proffered divestiture was an inseparable and viable part of the transaction.

In *United States v. Franklin Electric Co.*,<sup>119</sup> the court also considered the parties' divestiture but ultimately concluded that it was insufficient to restore premerger competition.<sup>120</sup> In *Franklin Electric*, the DOJ sued a manufacturer of submersible turbine pumps to obtain a permanent injunction preventing the manufacturer from acquiring United Dominion, the only other company making those pumps.<sup>121</sup> Franklin Electric amended the joint venture one day before the DOJ filed the complaint in district court.<sup>122</sup> The amended agreement contained a licensing clause that assigned certain intellectual property rights, products, and brand names from United Dominion to Environ, a company that supplied petroleum equipment.<sup>123</sup> As in *Libbey*, the DOJ filed a motion in limine to exclude evidence of the licensing arrangement, but the court denied the motion.<sup>124</sup> Also as in *Libbey*, the court ultimately granted the preliminary injunction after determining that the proposed license would not resolve competition concerns.<sup>125</sup>

The *Franklin Electric* court seemed unconvinced of the parties' good-faith intent in drafting the amendment. In fact, the court appeared to find the complete absence of Franklin Electric's good faith dispositive in granting the preliminary injunction.<sup>126</sup> Regarding structuring an effective remedy, the court rejected the parties' contention that licenses for Environ would preserve competition; instead, the court concluded that Environ would operate with significant disadvantages compared to the lone remaining competitor in the market for submersible pumps.<sup>127</sup>

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119. 130 F. Supp. 2d 1025 (W.D. Wis. 2000).

120. *Id.* at 1035-36.

121. *Id.* at 1026.

122. See Willie L. Hudgins, *Handling Evidence of Settlement/Divestiture Offers in Litigation*, in ALI-ABA COURSE OF STUDY: TRYING AND WINNING A CIVIL ANTITRUST CASE 179, 183 (2001).

123. See *Franklin Elec.*, 130 F. Supp. 2d at 1026, 1030.

124. See Hudgins, *supra* note 122, at 185-87.

125. *Franklin Elec.*, 130 F. Supp. 2d at 1035-36.

126. See *id.*

127. *Id.* at 1033-35.

In analyzing the proposed licensing agreement, the court looked at a variety of factors, including Environ's knowledge of the industry, the company's business plan, its due diligence, and the transaction's structure.<sup>128</sup> The court noted that Environ did not manufacture submersible pumps, that Environ had no business plan for the new technology, and that Environ failed to complete due diligence when it signed the agreement.<sup>129</sup> The court also found that Environ's sales efforts would fall short—Environ already prioritized another investment in a major, unrelated project.<sup>130</sup> The court also determined that, under the licensing agreement, profits from the submersible pumps might be so low as to drive Environ out of the market.<sup>131</sup>

The timing of Environ's licensing agreement hints at the parties' reluctance to negotiate this issue with the government. The process by which government attorneys and private parties conduct merger reviews can be cooperative or adversarial; the FTC was not created as a prosecutorial agency, but "as an aid to business."<sup>132</sup> To facilitate expediency, judicial efficiency, and compliance with antitrust laws, parties are encouraged to present their arguments informally and to discuss possible divestitures with both the FTC and the DOJ.<sup>133</sup>

In *Franklin Electric*, the parties approached the DOJ with the proposed solution of licensing certain rights to Environ. The government rejected the restructured agreement, in part, because the parties merely signed a letter of intent, and "no definitive agreement had been reached."<sup>134</sup> Furthermore, the parties decided to move forward with the licensing agreement only one day before

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128. See *id.* at 1030-31.

129. See *id.*

130. *Id.* at 1033.

131. *Id.* at 1034.

132. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 53 (2003).

133. See FED. TRADE COMM'N, STATEMENT OF THE FTC'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm> (Apr. 2, 2003) ("The parties will likely negotiate the terms of the proposed decision and order with the staff at the same time they are negotiating terms of the purchase agreement with the proposed up-front buyer.").

134. See Hudgins, *supra* note 122, at 182-83. The DOJ also rejected the agreement because it believed that the licensing agreement did not resolve concerns about the transaction, as the FTC believed in *Libbey and Arch Coal*. See *id.* at 183.



the DOJ filed its complaint in district court.<sup>135</sup> Franklin Electric and United Dominion amended their joint venture on May 30, 2000, although they still had no actual licensing agreement.<sup>136</sup> The parties finally produced the agreement and all necessary residual agreements on June 23, 2000.<sup>137</sup>

The court did not discuss the parties' delay in amending the joint venture; this maneuver, however, cannot have assisted the parties' demonstration that the licensing agreement was produced in good faith. The court not only dismissed the proposed fix, but it ridiculed the arrangement as "nothing more than insubstantial window dressing to conceal [Franklin Electric's] monopolistic motives."<sup>138</sup>

Courts are skeptical of parties who restructure business transactions after the parties realize that they cannot escape litigation.<sup>139</sup> In *Hospital Corp. of America v. FTC*, Hospital Corporation appealed from an FTC administrative decision that found that the acquisition of two hospitals violated section 7 of the Clayton Act.<sup>140</sup> Judge Posner spoke harshly on whether to include evidence that one of the acquired hospitals was now managed by a different company: "[The FTC] was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position."<sup>141</sup>

The *Hospital Corp.* court emphasized that merging parties can make this evidence "subject to manipulation," and thus, the evidence should be "entitled to little or no weight."<sup>142</sup> In addition to evidence manipulation, the court decided that value exists in excluding proposed fixes because such action will "simplify the adjudication of merger cases."<sup>143</sup> *Hospital Corp.*, however, contained a brief substantive analysis, noting that the FTC also need not consider such evidence because the loss of one hospital would not alter the decision.<sup>144</sup>

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135. *See id.*

136. *See id.*

137. *See id.*

138. *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1034 (W.D. Wis. 2000).

139. *See, e.g., Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986).

140. *See id.* at 1383.

141. *Id.* at 1384.

142. *Id.*

143. *Id.*

144. *Id.*

*Hospital Corp.* differs substantively from *Arch Coal*, *Franklin Electric*, and *Libbey* because in *Hospital Corp.* the FTC brought suit after the acquisition had already closed and an administrative trial occurred.<sup>145</sup> Yet Judge Posner's underlying critique of the parties nonetheless applies to private parties in Section 7 cases even before they close their transactions. After all, after being notified of antitrust concerns, parties can restructure a transaction solely to avoid litigation either prior to or after closing the initial deal. The parties' inherent motivation in both instances remains the same.

To ameliorate these concerns, courts should require a high standard of good faith when determining whether to include the parties' remedy as part of the transaction. The merger agreement should be amended as a pledge of commitment to the transaction itself, or judicially enforceable mechanisms should be implemented to ensure that the FTC can enforce the sale. Courts should also evaluate good faith in the parties' willingness to carry out the proposed remedy, the parties' willingness to negotiate in good faith with the FTC, and whether the parties have structured a viable remedy to ensure that frivolous or ineffective divestitures do not deflect attention from possible antitrust violations.

#### IV. POLICY IMPLICATIONS

A district court's level of consideration of proposed divestiture evidence, ranging from completely dismissing the evidence to relying heavily on the evidence, has many important consequences for the public, the government, and private parties. In 1914, President Woodrow Wilson spearheaded the effort to establish the FTC's predecessor, the Bureau of Corporations.<sup>146</sup> Wilson wanted to create a commission that operated as "the instrument of a free government, a government free to serve the interests of the people and quickly responsive to the opinions of the people, with no intermediaries to interpret the interests of business."<sup>147</sup> Currently, the FTC describes its task as "ensur[ing] that free markets work—that competition among producers and accurate information

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145. *See id.*

146. *See generally* Winerman, *supra* note 132 (discussing the origins of the FTC and President Wilson's role in creating the agency).

147. *Id.* at 46-47 (quoting a speech given by President Woodrow Wilson).

in the hands of consumers create the incentives to generate the best products at the lowest prices, spur efficiency and innovation, strengthen the economy, and produce benefits for consumers.”<sup>148</sup> Invested with responsibility for safeguarding public welfare, the FTC should be afforded deference to complete its task effectively within established legal parameters.<sup>149</sup>

Courts, practitioners, legal scholars, and the government concede that including evidence of proposed remedies in a trial for preliminary relief often hinders the government’s ability to prepare and present its case.<sup>150</sup> Due to the relative dearth of case law on this particular issue, district courts are not bound by an extensive body of appellate or Supreme Court rulings. Courts should therefore require parties to meet stringent good-faith standards, as outlined in the previous Part, because the policy implications for antitrust enforcement, which are crucial to consumer welfare and market efficiency, are significant.

In *Arch Coal*, the FTC argued that evidence of the proposed sale of Buckskin to Kiewit would prejudice the integrity and effectiveness of its administrative trial.<sup>151</sup> First, the FTC claimed that if the court allowed the merger to proceed, the Buckskin sale would alter market dynamics so as to “compromise” the FTC’s authority to “impose an appropriate remedy” in an administrative trial.<sup>152</sup> Second, the FTC claimed that if the district court denied the preliminary injunction without an order on the Buckskin sale, the FTC could not “restore competition to the pre-merger *status quo*” because, in the interim, Arch Coal would be permitted to “dismantle

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148. 2004 FTC PERFORMANCE AND ACCOUNTABILITY REPORT 8, available at <http://www.ftc.gov/opp/gpra/2004parreport.pdf>.

149. For a discussion of the ability of agencies (as opposed to courts) to implement and execute policy, see Shuren, *supra* note 81, at 328. “Because of their specialization and expertise, agencies provide the legislative and executive branches with a mechanism for anticipating future economic and social needs and for responding rapidly and effectively to changing conditions without sacrificing political accountability.” *Id.*

150. See, e.g., *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 n.27 (D.D.C. 2002); see also Hudgins, *supra* note 122, at 181 (“The Government has much to lose and little to gain when the defense shifts the focus of the litigation to its proposed fix.”); Jaret Seiberg, *The Problem of Preemptive Divestiture*, DAILY DEAL, Dec. 23, 2003 (“Such moves to fix a deal with a judge’s consent can hamper the government’s ability to prove that the deal violates the law.”); *supra* note 7 and accompanying text (noting some difficulties with including evidence of remedies).

151. See FTC Memorandum, *supra* note 5, at 2.

152. *Id.*

Triton.”<sup>153</sup> Finally, the FTC argued that without an amended merger agreement, “no means” existed by which the district court could grant “ultimate, permanent relief” and this would prejudice the FTC’s administrative trial.<sup>154</sup>

In addition to creating difficulties during the FTC’s administrative adjudication, evidence of proposed remedies also impacts FTC strategy during negotiations with parties and during the trial for a preliminary injunction. Willie Hudgins, former DOJ deputy chief of litigation, noted three policy and procedural reasons why the government may wish to exclude evidence of a remedy:

1) it distracts the Government from presenting, and the court from focusing, on the most powerful evidence of anticompetitive effects from the transaction as initially proposed; 2) it allows evidence of the remedy to be considered before liability has been established; and 3) it adds to the Government’s burden by requiring evidence on some future transaction.<sup>155</sup>

In a short time period, Franklin Electric forced the DOJ to change a complex merger analysis of anticompetitive effects to include a proposed licensing agreement.

Even if the FTC spends months contemplating a divestiture, it must prepare a multifaceted litigation strategy with econometric data for a variety of transactions. After a court determines that evidence of a proposed fix will be included, the FTC must prove that the initial agreement will likely be anticompetitive and must also argue against any and all remedies offered by the parties.<sup>156</sup> The private parties, however, have often been contemplating their

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153. *Id.*

154. *Id.*

155. Hudgins, *supra* note 122, at 181 (footnote omitted).

156. Attorneys acknowledge the practical difficulty that accompanies litigating against proposed remedies: “You have, at least hypothetically, a moving target problem, especially with divestitures.” Marcus & Seiberg, *supra* note 7, at 15 (quoting Molly Boast, partner at Debevoise & Plimpton and former director of the FTC Bureau of Competition); *see also* Seiberg, *supra* note 150 (“Much of the evidence and analysis used to attack the original deal may be irrelevant or require updating in the weeks before the preliminary injunction hearing.”).

changed position for a longer duration and have more time to prepare.<sup>157</sup>

In *Libbey*, the court recognized policy concerns that might result from admitting evidence of proposed remedies. The *Libbey* court's opinion conceded that it was "not unsympathetic to the FTC's argument that parties to an agreement might, in some cases, unscrupulously attempt to avoid judicial and FTC review of an agreement by continuously amending it."<sup>158</sup> The court noted that a fact-specific inquiry must be undertaken in every case to determine whether the parties have constructed a remedy for improper purposes, such as a mere litigation tactic.<sup>159</sup>

The antitrust community recognized the impact of *Libbey* and *Franklin Electric*, and practitioners wondered if inclusion of proposed fixes would give private parties a stronger negotiating position in the merger review process.<sup>160</sup> Some antitrust lawyers for the defense bar became emboldened by these decisions, musing that "[r]ecent history has shown that private parties have become particularly fearful of litigating against the government.... Now ... perhaps parties will be a bit more aggressive."<sup>161</sup> The government may find that a private party will litigate if not satisfied by the merger review outcome, thus decreasing the government's bargaining power with respect to fashioning divestitures.<sup>162</sup> Negotiation, however, is a policy that the courts should strive to encourage. As discussed in Part III, open communication between the government and private parties during the review often creates solutions that preserve premerger competition without the expense of litigation.

In pursuit of efficiency, parties may now decide to save time and money by negotiating less and proceeding immediately to court in

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157. Stoll & Goldfein, *supra* note 7, at 3 (noting that, in *Libbey*, "[t]he FTC was suddenly forced to pursue its [section] 7 claims under materially different facts, while the defendants had time to prepare their case before presenting their sanitized transaction to the court"). Private parties, in addition, arguably possess more resources to mount multiple defenses for the transaction than the FTC or the DOJ possess to litigate against them.

158. *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 n.27 (D.D.C. 2002).

159. *See id.* ("However, based upon the facts of this case, the Court is not convinced that defendants were in fact purposely attempting to avoid judicial and FTC review of their agreement.").

160. *See supra* notes 7-8 and accompanying text.

161. Sean F. Boland & Virginia R. Metallo, *Hear Our Divestitures: We Must Consider Parties' Own Proposed Remedies, Says District Court*, *LEGAL TIMES*, Nov. 6, 2000, at 41.

162. *See id.*

an attempt to complete their transactions more quickly and as originally structured.<sup>163</sup> Court consideration of proposed solutions has proven to be a positive development toward achieving that result.<sup>164</sup> Furthermore, as Part II demonstrated, a court's consideration of proposed remedies can often mean the difference between completing transactions and abandoning them.<sup>165</sup> If the parties' opportunity for litigating against a possible antitrust violation only occurs in district court, a court's evaluation of a proposed remedy can potentially save the transaction.<sup>166</sup>

Other groups worry that these decisions will deprive the government of enforcement mechanisms necessary to complete its charge of consumer protection and market oversight: "If merging parties are sanctioned by the courts to effectuate 11th-hour merger modifications that handicap the FTC's litigation efforts and negotiating curative transactions with a judge, denying the FTC settlement oversight and review, the rule of FTC designed preclosing merger settlements may soon become the exception."<sup>167</sup> The FTC's administrative knowledge in resolving section 7 and FTC Act violations then becomes irrelevant, as district courts subsume the FTC's responsibility.<sup>168</sup> The transition of authority from the FTC to the judiciary thwarts congressional intent and detracts from effective and informed antitrust enforcement.<sup>169</sup> In a study conducted on divestitures, the FTC found that sellers historically distort elements of their asset sales to potential buyers.<sup>170</sup> If the FTC maintains jurisdiction in this arena, its expertise will help to minimize these occurrences.<sup>171</sup> A district court, however, does

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163. See *id.*

164. Jaret Seiberg, *Coal Merger Is a Pit for FTC*, DAILY DEAL, Oct. 23, 2004 ("[M]ost companies are willing to divest assets as part of a settlement to avoid a fight. [Judge] Bates may have changed that calculus.").

165. See *supra* note 51 and accompanying text.

166. See *supra* note 65 and accompanying text.

167. Stoll & Goldfein, *supra* note 7, at 3.

168. See *id.*

169. See *id.*

170. STAFF OF THE BUREAU OF COMPETITION OF THE FTC, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 8 (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf> ("[R]espondents ... may engage in strategic conduct to impede the success of the buyer; and ... most buyers of divested assets do not have access to sufficient information to prevent mistakes in the course of their acquisitions.").

171. See Stoll & Goldfein, *supra* note 7, at 3.

not possess the same experience to aid in determining viable divestitures.<sup>172</sup>

## CONCLUSION

The FTC's specialized knowledge and developed expertise in antitrust and consumer protection should be afforded deference.<sup>173</sup> Based on statutory instruction, case law, and policy considerations, a district court should listen to parties' evidence of a proposed fix under narrow circumstances. Section 13(b) of the FTC Act still vests the FTC in the first instance with authority to conduct trials on the merits to determine violations of antitrust laws. Unless Congress changes the law, the FTC's burden differs from that of the DOJ or private plaintiffs under section 13(b). District courts, aware of the practical importance of their decisions, need not only analyze a "hypothetical transaction"<sup>174</sup> that will not, in fact, occur. Courts must determine whether an injunction serves the public interest, and the courts therefore have a duty to evaluate the whole transaction.

Yet the policy concerns arising from admitting such evidence, such as ensuring procompetitive mergers, encouraging negotiation between the government and the parties, and enabling the FTC to complete its charge to effectively oversee and enforce antitrust laws,

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172. See *id.*

173. This would include, although beyond the scope of this Note, deference to the FTC's theory of market definition and coordinated effects. The FTC staff and administrative law judges' experiences with certain economic matters surpass that of the district court. See Balto, *supra* note 50 (noting that "[a]dministrative litigation is also a critical forum for development of complex legal and economic issues that require extensive expert testimony and the deliberation of an expert body such as the Commission"). Historically, antitrust jurisprudence recognized the importance of administrative expertise in enforcing antitrust laws, from structuring orders to determining market power. In *FTC v. Cement Inst.*, 333 U.S. 683 (1948), the Court noted that Congress passed the FTC Act to provide courts with "assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation," *id.* at 726. Scholars and practitioners have widely debated whether the FTC tribunal actually possesses increased ability to understand and evaluate complex economic issues. For an argument that FTC processes must be reworked to "realize the potential for success in antitrust decision making," see William E. Kovacic, *Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 GEO. MASON L. REV. 313, 320 (1997).

174. Memorandum Opinion, *supra* note 3, at 3 (citing Defendants' Memorandum, *supra* note 25, at 2).

are significant. For these reasons, a district court should require defendants to amend their merger agreements or create FTC-enforceable consent orders, as well as demonstrate good-faith efforts to structure viable divestitures that will maximize public equities, carry out the proposed divestiture, and negotiate a sale or licensing agreement with the FTC prior to trial.

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